

Discussion Paper 70

Sentencing of Federal Offenders

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Making a submission

Any public contribution to an inquiry is called a submission and these are actively sought by the ALRC from a broad cross-section of the community, as well as those with a special interest in the inquiry.

Submissions are usually written, but there is no set format and they need not be formal documents. Where possible, submissions in electronic format are preferred.

It would be helpful if comments addressed specific proposals or numbered paragraphs in this paper.

Open inquiry policy

In the interests of informed public debate, the ALRC is committed to open access to information. As submissions provide important evidence to each inquiry, it is common for the ALRC to draw upon the contents of submissions and quote from them or refer to them in publications. As part of ALRC policy, non-confidential submissions are made available to any person or organisation upon request after completion of an inquiry, and also may be published on the ALRC website. For the purposes of this policy, an inquiry is considered to have been completed when the final report has been tabled in Parliament.

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In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as non-confidential.

Submissions should be sent to:

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Submissions may also be made using the on-line form on the ALRC's homepage:

[<www.alrc.gov.au>.](http://www.alrc.gov.au)

The closing date for submissions in response to DP 70 is 10 February 2006.

Terms of Reference

TERMS OF REFERENCE

REVIEW OF PART IB OF THE *CRIMES ACT 1914*

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

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

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

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

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

Dated: 12th July 2004

Philip Ruddock
Attorney-General

Participants

Australian Law Reform Commission

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

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Professor Kate Warner, Law School, University of Tasmania
Mr George Zdenkowski, Magistrate, New South Wales Local Court

List of Proposals

Part A Introduction

2. A Federal Sentencing Act

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

- (g) to promote flexibility in the sentencing, administration and release of federal offenders;
- (h) to provide fair and efficient procedures for the sentencing, administration and release of federal offenders; and
- (i) to recognise the interests of victims of federal offences.

3. Equality in the Treatment of Federal Offenders

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

- (a) The same legislative purposes, principles and factors should apply in sentencing adult federal offenders in every state and territory. Inter-jurisdictional consistency in determining the sentence of federal offenders should be encouraged and supported.
- (b) Every state and territory should provide adequate facilities to support a minimum range of sentencing options in relation to federal offenders. This must include (i) the sentencing options specified in federal offence provisions (such as fines and imprisonment); (ii) the sentencing options specified in federal sentencing legislation (such as dismissing the charge and discharging without conviction); and (iii) additional state or territory-based sentencing options that include, at a minimum, community based orders.
- (c) The proposed Office for the Management of Federal Offenders should work with the states and territories in relation to the administration of the sentences of federal offenders to: (i) promote the fulfilment of the *Standard Guidelines for Corrections in Australia*; and (ii) ensure compliance with the *Standards for Juvenile Custodial Facilities*.
- (d) The proposed Federal Parole Board should make decisions in relation to the release of federal offenders on parole to ensure broad inter-jurisdictional equality in decision making. The Board should have regard to the proposed federal legislative purposes of parole and factors relevant to the grant of parole.

Part B Determining the Sentence

4. Purposes of Sentencing

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

- (a) to ensure that the offender is punished appropriately for the offence;

- (b) to deter the offender or others from committing the same or similar offences;
- (c) to promote the rehabilitation of the offender;
- (d) to protect the community;
- (e) to denounce the conduct of the offender; and
- (f) to promote the restoration of relations between the community, the offender and the victim.

5. Principles of Sentencing

5–1 Federal sentencing legislation should state the fundamental principles that are to be applied in sentencing a federal offender, namely:

- (a) a sentence should be proportionate to the objective seriousness of the offence (proportionality);
- (b) a sentence should be no more severe than is necessary to achieve the purpose or purposes of the sentence (parsimony);
- (c) where an offender is being sentenced for more than one offence, or is already serving a sentence and is being sentenced for a further offence, the aggregate of the sentences should be just and appropriate in all the circumstances (totality);
- (d) a sentence should be similar to sentences imposed on like offenders for like offences (consistency); and
- (e) a sentence should take into consideration all circumstances of the individual case, in so far as they are relevant and known to the court (individualised justice).

6. Sentencing Factors

6–1 Federal sentencing legislation should state that a court, when sentencing a federal offender, must consider any factor that is relevant to sentencing and known to the court. These factors may include, but are not limited to, any of the following matters to the extent that they are applicable:

- (a) the nature, seriousness and circumstances of the offence;
- (b) the maximum penalty for the offence;
- (c) the offender's culpability and degree of responsibility for the offence;
- (d) other offences (if any) that are required or permitted to be taken into account;
- (e) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character—that course of conduct;

- (f) the personal circumstances of any victim of the offence and the impact of the offence on any victim;
 - (g) any injury, loss or damage resulting directly from the offence; including effects beyond any immediate victim (such as effects on the environment or the market);
 - (h) the degree to which the person has shown contrition for the offence;
 - (i) the character, antecedent criminal history, cultural background, history and circumstances of the offender, including age, financial circumstances, physical and mental condition;
 - (j) if a sentence is imposed other than a term of imprisonment—time spent in pre-sentence custody or detention in relation to the offence;
 - (k) time spent in a rehabilitation program or other form of quasi-custody where the offender has been subjected to restrictions, except where full credit must be given for pre-sentence custody or detention;
 - (l) subject to Proposal 6–4, the nature and extent of any forfeiture of property that is to be imposed as a result of the commission of the offence;
 - (m) the probable effect on the offender of a particular sentencing option, including that the offender’s circumstances may result in imprisonment having an unusually severe impact on him or her;
 - (n) the probable civil and administrative consequences of being found guilty of the offence;
 - (o) the prospect of rehabilitation of the offender;
 - (p) the probable effect that any sentencing option or order under consideration would have on any of the offender’s family or dependants, whether or not the circumstances are exceptional; and
 - (q) other factors relevant to special categories of offenders.
- 6–2 Subject to Proposals 6–3 and 6–4, the list of factors relevant to sentencing a federal offender should not distinguish between factors that aggravate and those that mitigate the sentence.
- 6–3 Federal sentencing legislation should provide that the following matters are not to aggravate the sentence of a federal offender:
- (a) the fact that the offender has not pleaded guilty to the offence;
 - (b) the mere fact that the offender has an antecedent criminal history;
 - (c) the fact that the offender declined to take part in any restorative justice initiative or program; and
 - (d) the fact that the offence for which the offender is being sentenced forms part of a course of conduct consisting of criminal acts of the same or similar character.

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- 6-4 Federal sentencing legislation should provide that any forfeiture order or other court order that merely neutralises a benefit that has been obtained by the commission of a federal offence should not mitigate the sentence.
- 6-5 Federal sentencing legislation should separately specify that when sentencing a federal offender a court must consider the following factors that pertain to the administration of the federal criminal justice system, where relevant and known to the court:
- (a) the fact that the offender has pleaded guilty and the circumstances in which the plea of guilty was made (see Proposal 11-2); and
 - (b) the degree to which the offender has cooperated or promised to cooperate with law enforcement authorities regarding the prevention, detection and investigation of, or proceedings relating to, the offence or any other offence. (See Proposal 11-3).
- 6-6 Federal sentencing legislation should provide that the procedures by which another offence may be taken into account in sentencing a federal offender are available only where the conduct that constitutes the other offence is of a like nature and of similar or lesser seriousness to the principal offence.
- 6-7 The Commonwealth Director of Public Prosecutions should amend its prosecution policy to provide guidance about the circumstances in which it is appropriate to take into account other offences in respect of which a federal offender has admitted guilt. The factors to be considered should include:
- (a) the degree of similarity between the principal offence and the other offences;
 - (b) the number, seriousness and nature of the other offences;
 - (c) whether the other offences were the subject of investigation or a charge; and
 - (d) whether the offender was legally represented.
- 6-8 Federal sentencing legislation should specify factors to which the court should not have regard in sentencing a federal offender. The irrelevant factors should include:
- (a) the possibility that time spent in custody may be affected by executive action of any kind;
 - (b) the offender's election not to give evidence on oath or by affirmation;
 - (c) the legislative intent underpinning a law that has been enacted but has not yet commenced;
 - (d) the demeanour of the offender in court, except to the extent that it shows contrition or lack of contrition;

- (e) matters that would establish an offence separate from the offence for which the person has been convicted (other than matters that might technically constitute an incidental separate offence);
- (f) matters that would establish a more serious offence than the offence for which the person has been convicted; and
- (g) a circumstance of aggravation that has not been proved at trial but that renders the person being sentenced liable to a greater maximum penalty.

7. Sentencing Options

- 7-1 Federal sentencing legislation should enable a court, when imposing a fine on a federal offender, to order that the fine be paid:
 - (a) in a lump sum by a specified future date that the court considers appropriate in all the circumstances; or
 - (b) by instalments over a specified period of time that the court considers appropriate in all the circumstances.
- 7-2 Federal sentencing legislation should enable a federal offender to apply to the court that imposed a fine, whether differently constituted or not, for an order varying the time or manner of payment of a fine at any time within the period allowed for payment of the fine.
- 7-3 Federal sentencing legislation should repeal s 19B(1) of the *Crimes Act 1914* (Cth). When dismissing a charge or discharging a federal offender without conviction, the court must have regard to the purposes, principles and factors relevant to sentencing, and to the factors relevant to the administration of the criminal justice system.
- 7-4 Federal sentencing legislation should expressly abolish the power of a court sentencing a federal offender to order that the offender be released on a common law bond.
- 7-5 Federal sentencing legislation should provide that a court may make a deferred sentencing order in relation to a federal offender. In particular, the legislation should:
 - (a) abolish the power of a court at common law to impose a ‘Griffiths bond’ when making orders in relation to a federal offender; and
 - (b) authorise a court to:
 - (i) defer sentencing a federal offender for a period up to 12 months; and
 - (ii) release the offender in accordance with the applicable bail legislation for the purpose of assessing the offender’s prospects of rehabilitation or for any other purpose the court thinks fit.

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- 7-6 Federal sentencing legislation should repeal the provision requiring the court to set a 'recognizance release order' for sentences of imprisonment between six months and three years, and should grant the court a discretion to suspend a federal offender's sentence of imprisonment either wholly or partially, regardless of the length of the sentence.
- 7-7 Sentences of imprisonment of less than six months should continue to be available in the sentencing of federal offenders.
- 7-8 Federal sentencing legislation should grant a court a broad discretion to determine the conditions that may be imposed on a federal offender when it discharges an offender without recording a conviction, releases an offender after recording a conviction, or wholly or partially suspends a sentence of imprisonment. In addition to the mandatory condition that the offender be of good behaviour for a specified period of time, a court should be able to impose any of the following conditions:
- (a) that the offender undertake a rehabilitation program;
 - (b) that the offender undergo specified medical or psychiatric treatment; or
 - (c) that the offender be subject to the supervision of a probation officer and obey all reasonable directions of that officer
- 7-9 Federal sentencing legislation should prohibit a court from making any of the following conditions when it discharges an offender without recording a conviction, releases an offender after recording a conviction, or wholly or partially suspends a sentence of imprisonment:
- (a) a condition that is an independent sentencing option;
 - (b) a condition that the offender pay a monetary penalty; and
 - (c) a condition that the offender make restitution, pay compensation or comply with any other ancillary order.
- 7-10 Federal sentencing legislation should repeal the provision that allows a court to require a federal offender to give security by way of recognizance when he or she is discharged without conviction, released after conviction or sentenced to a wholly or partially suspended sentence of imprisonment.
- 7-11 Federal sentencing legislation should retain the mechanism by which federal legislation and regulations specify which of the sentencing options available to a court in sentencing a state or territory offender may be picked up and applied in sentencing a federal offender. Federal sentencing legislation or regulations should also specify which state or territory sentencing options, if any, cannot be picked up and applied in sentencing a federal offender.

- 7–12 The proposed Office for the Management of Federal Offenders (OMFO) should monitor the effectiveness and suitability of state and territory sentencing options for federal offenders and should provide advice to the Australian Government regarding the state and territory sentencing options that should be made available for federal offenders.
- 7–13 In monitoring state and territory sentencing options in accordance with Proposal 7–12, the OMFO should:
- (a) review the maximum number of hours of community service and the maximum time within which such service must be completed in each state and territory; and
 - (b) advise the Australian Government about appropriate national limits in relation to community based orders and other sentencing options available under state and territory law.
- 7–14 Federal sentencing legislation should prohibit the following sentencing options in relation to federal offenders:
- (a) capital punishment;
 - (b) corporal punishment;
 - (c) imprisonment with hard labour; and
 - (d) any other form of cruel, inhuman or degrading punishment.
- 7–15 Federal sentencing legislation should facilitate access by federal offenders to state or territory restorative justice initiatives in appropriate circumstances. Where a court refers a federal offender to a restorative justice initiative, the outcome of the process must be reported back to the court and the court must finalise the matter after taking into consideration the outcome of the process.

8. Ancillary Orders

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

Part C Particular Issues in Sentencing**9. Determining the Non-Parole Period**

- 9–1 Federal sentencing legislation should provide that, in fixing a non-parole period or in declining to fix a non-parole period, the court must have regard to the purposes, principles and factors relevant to sentencing, and to the factors relevant to the administration of the criminal justice system. (See Proposals 4–1; 5–1; 6–1; 6–5).
- 9–2 Federal sentencing legislation should provide that, when sentencing a federal offender to a term of imprisonment, a court must set a non-parole period unless it is satisfied that it is not appropriate to set a non-parole period and expressly declines to do so. However, a court must not set a non-parole period if:
- (a) the term of imprisonment is less than 12 months; or
 - (b) the court has made an order to suspend the sentence.
- 9–3 In order to strike an appropriate balance between promoting consistency in sentencing and allowing individualisation of sentencing in particular cases, federal sentencing legislation should establish a benchmark for the relative non-parole period of a federal sentence at two-thirds of the head sentence. However, a court may impose a different non-parole period whenever it is warranted in the circumstances, taking into account the purposes, principles and factors relevant to sentencing, and the factors relevant to the administration of the criminal justice system.

10. Commencement and Pre-sentence Custody

- 10–1 Federal sentencing legislation should provide that, where a court sentences an offender to a term of imprisonment in relation to a federal offence, the sentence commences on the day the sentence is imposed, subject to any court order directed to the consecutive service of sentences.
- 10–2 Federal sentencing legislation should provide that, where a court sentences an offender to a term of imprisonment in relation to a federal offence, the court must give credit for time spent in pre-sentence custody or detention in connection with the offence by declaring the time as time already served under the term of imprisonment.
- 10–3 In calculating the credit to be granted to a federal offender for pre-sentence custody or detention under Proposal 10–2:
- (a) one day's credit must be given for each full day of pre-sentence custody or detention;

- (b) credit must be given whether or not the custody or detention was continuous; and
- (c) credit must be given irrespective of the fact that the custody or detention may not relate exclusively to the offence for which the offender is being sentenced, provided that credit is not given more than once for the same period of custody or detention.

11. Discounts and Remissions

- 11-1 Federal sentencing legislation should provide that, where a court discounts the sentence of a federal offender for pleading guilty or for past or promised future cooperation, the court must specify the discount given, whether by way of reducing the quantum of the sentence or by imposing a less severe sentencing option. The amount of the discount, if any, should be left to the court's discretion.
- 11-2 Federal sentencing legislation should provide that in determining whether to discount the sentence of a federal offender for pleading guilty, and the extent of any discount, the court must consider the following matters:
 - (a) the degree to which the plea of guilty objectively facilitates the administration of the federal criminal justice system; and
 - (b) the objective circumstances in which the plea of guilty was made, including:
 - (i) whether the offender pleaded guilty at the first reasonable opportunity to do so;
 - (ii) whether the offender had legal representation; and
 - (iii) whether, as a result of negotiations between the prosecution and the defence, the offender was charged with a less serious offence because of the guilty plea.
- 11-3 Federal sentencing legislation should provide that in determining whether to discount the sentence of a federal offender for past or promised cooperation, and the extent of any discount, the court must consider the following matters:
 - (a) the significance and usefulness of the offender's assistance to law enforcement authorities;
 - (b) the truthfulness, completeness and reliability of any information or evidence provided by the offender;
 - (c) the nature and extent of the offender's assistance or promised assistance;
 - (d) the timeliness of the assistance or the undertaking to assist;

- (e) any benefits that the offender has gained or may gain because of the assistance or the undertaking to assist; and
 - (f) any injury suffered by the offender or the offender's family or any danger or risk of injury to the offender or the offender's family because of the assistance or undertaking to assist.
- 11-4 Federal sentencing legislation should provide that, in sentencing a federal offender who undertakes to provide future cooperation with law enforcement authorities:
 - (a) in addition to imposing a reduced head sentence or non-parole period, a court may impose a less severe sentencing option, in which case it must state what sentencing option it would have imposed but for the undertaking to cooperate;
 - (b) the court has the power, on application of any party to the proceedings or on its own motion, to close the court and to make orders to protect confidential information or evidence in relation to the undertaking or to protect the safety of any person; and
 - (c) the undertaking must provide details of the promised cooperation and, must be in writing or reduced to writing and signed or otherwise acknowledged by the offender.
- 11-5 Federal sentencing legislation should expressly pick up and apply to federal non-parole periods a law of a state or territory that provides for the remission of a non-parole period because of an emergency within the prison or other unforeseen and special circumstances. The same principle should apply to remission of pre-release periods in respect of suspended sentences.

12. Sentencing for Multiple Offences

- 12-1 Federal sentencing legislation should expressly empower a court, when sentencing a federal offender for more than one offence, to order the sentences to be served concurrently, consecutively or partly consecutively.
- 12-2 Federal sentencing legislation should provide that, when a court sentences a federal offender for more than one offence, there is a presumption that the sentences are to be served concurrently.
- 12-3 Section 4K of the *Crimes Act 1914* (Cth), which allows charges for a number of federal offences to be joined in the same information, complaint or summons, and permits aggregate sentencing of summary matters in certain circumstances, should be amended as follows:
 - (a) the scope of the provision should be extended beyond summary matters to indictable matters; and

- (b) the provision should be extended to allow the joining of charges against more than one provision of Commonwealth law.
- 12-4 The Commonwealth Director of Public Prosecutions should develop guidelines in relation to when it is appropriate for a prosecutor to seek an aggregate sentence for multiple summary or indictable offences.
- 12-5 Federal sentencing legislation should require a court that chooses to impose one sentence in relation to more than one federal offence to address, in its reasons for sentence, the weight it has attached to individual counts in a manner that would assist an appellate court in making appropriate orders in the event of a successful appeal.

Part D Procedural and Evidential Issues in Sentencing

13. The Sentencing Hearing

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

Federal legislation may specify limited exceptions to this rule, such as:

- (i) where the presence of the offender may jeopardise the safety of any person or the orderly conduct of the proceedings;
- (ii) where the proceedings involve the correction of slip errors; or
- (iii) where the proceedings involve the correction of substantive sentencing errors, provided the offender has been given an opportunity to be present, has consented to the correction being made in his or her absence and the court has given its permission.
- 13-2 Federal sentencing legislation should provide that, where a federal offender is not legally represented in a sentencing proceeding, the court should generally adjourn the proceeding to allow the offender a reasonable opportunity to obtain representation. However, the court may proceed without adjournment and may impose a sentence despite the absence of representation where:
 - (a) the offender has refused or failed to exercise the right to legal representation in circumstances where the offender fully understands the right and the consequences of not exercising it; or
 - (b) the court does not intend to impose, and does not impose, a sentence that would deprive the offender of his or her liberty or place the offender in jeopardy of being deprived of his or her liberty.

- 13–3 Federal sentencing legislation should provide that, when sentencing a federal offender who is present at the sentencing proceedings, the court must itself give to the offender: (a) an oral explanation of the sentence at the time of sentencing; and (b) a written record of the explanation within a period specified by law.
- When a federal offender is not present at the sentencing proceedings, the court may delegate the function of explaining the sentence and should consider whether it needs to make any order (for example, an order requiring an affidavit of compliance) to satisfy itself that the explanation has been given.
- 13–4 Federal sentencing legislation should provide that in giving an explanation of sentence, the court or the court’s delegate must address the following matters in language likely to be readily understood by the offender, in so far as they are relevant:
- (a) how the sentence will operate in practice, the consequences of the sentencing order, and whether the order may be varied or revoked;
 - (b) any conditions attached to the sentencing order and the consequences of breach; and
 - (c) where a sentence of imprisonment has been imposed:
 - (i) the date when the sentence starts and ends;
 - (ii) any time declared to have been served as credit for pre-sentence custody or detention;
 - (iii) whether the sentence is to be served concurrently, consecutively, or partially consecutively to any other sentence of imprisonment;
 - (iv) if a non-parole period is set—the non-parole period, when it starts and ends, whether release on parole will be subject to a decision of the Federal Parole Board, the fact that any release on parole will be subject to conditions, and the fact that the parole order may be amended or revoked;
 - (v) if a partly suspended sentence is imposed—when the suspended part of the sentence starts and ends; and
 - (vi) the earliest date the offender will become entitled to be released from custody or will be eligible to be released on parole.
- 13–5 Federal sentencing legislation should provide that, as soon as practicable after a court makes an order sentencing a federal offender to a term of imprisonment, the court must provide the offender with a copy of the order. The order must set out the relevant matters listed in Proposal 13–4(c).

- 13–6 Federal sentencing legislation should restate the common law rules in relation to the standard of proof in sentencing. In particular, in sentencing a federal offender:
- (a) a court is not to take into account a fact that is adverse to the interests of the offender unless it is satisfied that the fact has been proved beyond reasonable doubt; and
 - (b) a court may take into account a fact that is favourable to the interests of the offender if it is satisfied that the fact has been proved on the balance of probabilities.
- 13–7 Federal sentencing legislation should provide that in deciding matters in connection with the making of an ancillary order for restitution or compensation, the standard of proof is the balance of probabilities.

14. Victim Impact Statements and Pre-Sentence Reports

- 14–1 Federal sentencing legislation should make comprehensive provision for the use of victim impact statements in the sentencing of federal offenders. Those provisions should, among other things:
- (a) allow a victim impact statement to be made in relation to summary and indictable offences;
 - (b) allow a victim (whether an individual or corporation) to present particulars of any injury, loss or damage suffered as a result of the commission of a federal offence, including particulars of economic loss;
 - (c) preclude a victim from expressing an opinion about the sentence that should be imposed on a federal offender;
 - (d) allow any facts stated in a victim impact statement to be verified where they are likely to be material to the determination of sentence;
 - (e) preclude a court from drawing any inference about the harm suffered by a victim from the fact that a victim impact statement has not been made; and
 - (f) provide that, a victim impact statement may be given orally or in writing, but where it is in writing: (i) it must be signed or otherwise acknowledged by the victim; and (ii) a copy of the statement must be provided to the prosecution and to the offender or the offender's legal representative a reasonable time before the sentencing hearing, on such terms as the court thinks fit.

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

- 14–2 Federal sentencing legislation should make comprehensive provision for the use of pre-sentence reports in the sentencing of federal offenders. Those provisions should, among other things:
- (a) authorise a court to request a pre-sentence report prior to the imposition of any sentence, where the court considers it appropriate to do so;
 - (b) authorise a court to specify any matter that it wishes to have addressed in the pre-sentence report;
 - (c) require the pre-sentence report to be prepared by a suitably qualified person within a reasonable time;
 - (d) preclude the author of the pre-sentence report from expressing an opinion about the offender's propensity to commit further offences, unless the author is suitably qualified to give such an opinion;
 - (e) allow the content of the pre-sentence report to be contested, for example by cross-examination of any person other than the offender; and
 - (f) provide that a pre-sentence report may be given orally or in writing, but where it is in writing, a copy of the report must be provided to the prosecution and to the offender or the offender's legal representative a reasonable time before the sentencing hearing, on such terms as the court thinks fit.

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

15. A Sentence Indication Scheme

- 15–1 Federal sentencing legislation should make provision for a defendant in a federal criminal matter to obtain an indication of sentence prior to final determination of the matter. The essential elements of such a scheme should include the following:
- (a) an indication should be given only at the defendant's request, with judicial discretion to refuse an indication;
 - (b) the indication must be sought well before the hearing or trial;
 - (c) the defendant should be entitled to one sentence indication only;
 - (d) the court should issue standard advice before any indication is given, to the effect that the indication does not derogate from the defendant's

- right to require the prosecution to prove its case beyond reasonable doubt;
- (e) the indication should occur in the presence of the defendant and in open court, subject to express powers of the court to make suppression orders;
- (f) the proceedings of the sentence indication hearing must be transcribed or otherwise placed on the court record;
- (g) the indication must be based on the same purposes, principles and factors relevant to sentencing and the same factors relevant to the administration of the criminal justice system that would apply in the absence of the indication;
- (h) the indication should be limited to the choice of sentencing option and a general indication of severity or sentencing range;
- (i) the indication should be given only if there is adequate information before the court, and should not be given if the choice of sentencing option is likely to be materially affected by the contents of a pre-sentence report;
- (j) in giving the indication, the court must take into account, but must not state, any discount that would be given to the defendant for pleading guilty at that stage of the proceedings;
- (k) the defendant should be given a short time in which to decide whether to enter a guilty plea on the basis of the indicative sentence;
- (l) where the defendant accepts the indicative sentence, the judicial officer who gave the indication should be the one who passes sentence;
- (m) where the defendant rejects the indicative sentence, the matter should be set for hearing or trial before another judicial officer and the indicative sentence should not be binding on that judicial officer; and
- (n) the rights of the prosecution and the defence to appeal against sentence should be retained but, where a prosecution appeal against sentence is upheld, the defendant should be given the opportunity to withdraw the guilty plea.

Part E Issues Arising after Sentencing

16. Reconsideration of Sentence

- 16–1 Federal sentencing legislation should empower a court that imposes a federal sentence, whether differently constituted or not, to reconsider the sentence where:

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

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

17. Breach of Sentencing Orders

- 17–1 Federal sentencing legislation should empower a court to deal with all breaches of a sentencing order, regardless of whether the offender has a reasonable cause or excuse for the breach.

- 17-2 Federal sentencing legislation should provide that, in addition to its existing powers, a court dealing with a breach of a sentencing order may vary the order if satisfied of the breach. In particular, the court should be given the power to order that a federal offender who has breached a wholly or partially suspended sentence of imprisonment be imprisoned for a lesser period than that originally imposed.
- 17-3 Federal sentencing legislation should be amended to ensure that any order imposing a monetary penalty for breach of a recognizance release order is enforceable.
- 17-4 The proposed Office for the Management of Federal Offenders, in consultation with the Commonwealth Director of Public Prosecutions and state and territory corrective services authorities, should develop a protocol outlining the procedures to be followed by state and territory correctional authorities and prosecutors when a federal offender breaches a sentencing order.
- 17-5 Federal sentencing legislation should provide that, where a fine has been imposed on a federal offender, the offender may not be imprisoned for failure to pay the fine until such time as he or she has been given a reasonable opportunity to pay.
- 17-6 Federal sentencing legislation should provide that the maximum period of imprisonment to be served by a federal offender for failing to pay a fine is 12 months.

Part F Promoting Better Sentencing

18. Judicial Specialisation

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

19. Other Measures to Promote Better Sentencing

- 19-1 Federal sentencing legislation should require a court to state its reasons for decision when sentencing a federal offender for an indictable or summary offence. The reasons may be given in writing or read into the records of the

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- court but in either case should be adequate to explain the choice of sentencing option and the severity of the sentence imposed.
- 19-2 The Commonwealth Director of Public Prosecutions should continue its practice of providing courts with detailed information with respect to the sentencing of federal offenders.
- 19-3 The National Judicial College of Australia, in consultation with other judicial education bodies, should provide regular training to judicial officers in relation to the sentencing of federal offenders.
- 19-4 The National Judicial College of Australia, in consultation with other judicial education bodies, should develop a bench book providing general guidance for judicial officers on federal sentencing law. The bench book should indicate how federal sentencing law interacts with relevant state and territory law in each jurisdiction, and should include commentary on equal treatment and the sentencing of Aboriginal and Torres Strait Islander peoples.
- 19-5 The Commonwealth Director of Public Prosecutions and other Commonwealth prosecuting authorities should develop and enhance their programs to train prosecutors in relation to the federal criminal justice system, including the sentencing of federal offenders and the role of prosecutors in sentencing. This training should indicate how federal sentencing legislation interacts with relevant state or territory law in each jurisdiction.
- 19-6 Providers of continuing legal education and practical legal training in each state and territory should offer training to legal practitioners in relation to the federal criminal justice system. This training should indicate how federal sentencing legislation interacts with relevant state or territory law in each jurisdiction.
- 19-7 State and territory courts should provide training to court services officers in relation to issues relevant to special categories of federal offenders.
- 19-8 University law schools in Australia should place greater emphasis on the federal criminal justice system and federal sentencing law in their undergraduate and postgraduate programs.

20. Consistency and the Appellate Process

- 20-1 The Australian Parliament should confer general appellate jurisdiction on the Federal Court of Australia in federal criminal matters in respect of both appeals against conviction and appeals against sentence. This appellate jurisdiction should be exclusive of that of state and territory courts.

21. Other Measures to Promote Consistent Sentencing

- 21-1 In order to promote consistency in the sentencing of federal offenders, the Australian Government, in consultation with the Australian Institute of Criminology and the Australian Bureau of Statistics, should continue to develop a comprehensive national database on the sentences imposed on all federal offenders. The database should include information on the type and quantum of sentences imposed and the characteristics of the offence and the offender that have been taken into account in imposing the sentence. The data should be made widely available for use by judicial officers, prosecutors and defence lawyers in federal criminal matters.
- 21-2 The Australian Government should review federal criminal offence provisions and seek appropriate amendments to ensure that no mandatory minimum term of imprisonment is prescribed for any federal offence.

Part G Administration and Release of Federal Offenders**22. Administration of Federal Offenders**

- 22-1 The Australian Government should take a more active role in monitoring federal offenders in order to:
- (a) enhance policy development in relation to the federal criminal justice system;
 - (b) assist the states and territories to administer sentences imposed on federal offenders more effectively; and
 - (c) ensure that federal offenders are treated in conformity with Australia's international obligations and relevant standard minimum guidelines.
- 22-2 The Australian Government should negotiate with the states and territories to ensure that the relevant Australian Government minister is made a participating member of the Corrective Services Ministers' Conference and that the Australian Government becomes a participating member of the Corrective Services Administrators' Conference.
- 22-3 The Australian Government should establish an Office for the Management of Federal Offenders (OMFO) within the Attorney-General's Department to monitor and report on all federal offenders, regardless of the sentence imposed. The OMFO should report to the Minister for Justice and Customs.
- 22-4 The functions and powers of the OMFO should be negotiated with the states and territories, and should include the following:
- (a) maintaining an up-to-date case management database in relation to all federal offenders;
 - (b) providing secretariat support to the proposed Federal Parole Board;

- (c) liaising with the states and territories in relation to federal offenders, including special categories of offenders;
- (d) participating as a full member of the Corrective Services Administrators' Conference and the Australasian Juvenile Justice Administrators and providing support for the relevant federal minister in relation to active participation in the Corrective Services Ministers' Conference;
- (e) monitoring progress towards compliance with the *Standard Guidelines for Corrections in Australia* and the *Standards for Juvenile Custodial Facilities* in relation to federal offenders, and liaising with the states and territories in relation to those standards;
- (f) ensuring that the treatment of federal offenders complies with Australia's international obligations;
- (g) providing advice to the states and territories in relation to the sentencing, administration and release of federal offenders, in particular in relation to joint offenders;
- (h) providing advice to federal offenders about the administration of their individual sentences, including information about interstate and international transfer;
- (i) providing advice to the Australian Government on the interstate and international transfer of federal offenders in individual cases;
- (j) providing general policy advice to the Australian Government in relation to federal offenders and relevant aspects of the federal criminal justice system;
- (k) providing advice to the Australian Government about funding, including priorities for special programs for federal offenders;
- (l) providing advice to the Australian Government about state and territory compliance with federal minimum standards in relation to victim impact statements and pre-sentence reports;
- (m) providing advice to the Australian Government in relation to state and territory sentencing options and pre-release schemes, including whether they should be picked up and applied in relation to federal offenders; and
- (n) performing all of the above in relation to young federal offenders and federal offenders with a mental illness or intellectual disability.

22–5 The proposed OMFO should develop memoranda of understanding with the states and territories to improve the sharing of information, and the coordination and provision of corrective services in relation to federal offenders.

- 22–6 The OMFO should provide advice to the Australian Government on federal–state funding arrangements in relation to federal offenders. The OMFO should have the capacity to fund special programs with respect to federal offenders, as the need arises.
- 22–7 The OMFO should develop key performance indicators to monitor the administration and release of federal offenders. The OMFO should report publicly against these indicators on an annual basis.
- 22–8 The OMFO should develop a comprehensive national database for the case management of all federal offenders and for collecting data to inform policy advice in relation to the federal criminal justice system. The database should be developed in consultation with the Australian Institute of Criminology, the Australian Bureau of Statistics, the National Judicial College of Australia and the states and territories, and should include information relevant to the offender, the offence and sentence, sentence administration, and parole and release.
- 22–9 The Australian Bureau of Statistics should disaggregate the data contained in its *Prisoners in Australia*, *Criminal Courts* and *Corrective Services* publications in order to distinguish between federal offenders, state and territory offenders, and joint offenders.

23. Release on Parole or Licence

- 23–1 The Australian Government should establish a Federal Parole Board as an independent statutory authority to make decisions in relation to parole and to provide advice to the responsible minister in relation to release on licence of federal offenders. Members of the Board should be appointed for fixed terms and should include a legally qualified chair and deputy chair and members with relevant expertise, for example, in the areas of psychology, psychiatry and social work. Men and women should be represented and there should be at least one Aboriginal or Torres Strait Islander member. Members should be empanelled to form a quorum of at least five to hear and determine parole matters. The proposed Office for the Management of Federal Offenders (OMFO) should provide secretariat support to the Board but should not be represented on the Board.
- 23–2 Federal sentencing legislation should provide that:
- (a) federal offenders have an opportunity to appear before the proposed Federal Parole Board where the Board is of the opinion that the information currently before it does not justify releasing the person on parole or licence;
 - (b) federal offenders are allowed legal or other representation before the Board;

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- (c) federal offenders have the benefit of an appropriately qualified interpreter where necessary;
 - (d) the Board has access to the same information and reports currently considered by state and territory parole boards and that it has power to require the production of such information;
 - (e) the Board has power to require persons to appear before it for the purpose of carrying out its functions;
 - (f) the Board publish reasons for its decisions; and
 - (g) the Board publish an annual report on its operations, which must be tabled in the Australian Parliament.
- 23–3 Decisions of the proposed Federal Parole Board should be subject to the rules of natural justice and to review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). These decisions should not be subject to merits review but where the Board makes a decision to refuse release on parole, the federal offender should have the right to have the decision reconsidered by the Board periodically.
- 23–4 Federal sentencing legislation should repeal the provisions granting automatic parole to federal offenders.
- 23–5 Federal sentencing legislation should state that the purposes of parole are:
- (a) the reintegration of the offender into the community;
 - (b) the rehabilitation of the offender; and
 - (c) the protection of the community.
- 23–6 Federal sentencing legislation should specify a non-exhaustive list of factors that the Federal Parole Board must consider when determining a parole matter, where the factors are relevant and known to the Board. In particular, the factors should include:
- (a) whether releasing the offender on parole is likely to assist the offender to adjust to lawful community life;
 - (b) the likelihood that the offender will comply with the conditions of the parole order;
 - (c) the offender's conduct while serving his or her sentence;
 - (d) the risk to the community of releasing the offender on parole;
 - (e) the likely effect on the victim, or victim's family, of releasing the offender on parole;
 - (f) that the parole period be of sufficient length to achieve the purposes of parole; and

- (g) any special circumstances of the case, including the likelihood that the offender will be subject to removal or deportation upon release.
- 23-7 Federal sentencing legislation should provide that the fact that an offender is likely to be subject to removal or deportation upon release is one of the factors to be considered by the proposed Federal Parole Board in deciding whether or not to grant a parole order to a federal offender. [See Proposal 23-6]
- 23-8 The proposed OMFO should liaise with the Department of Immigration and Multicultural and Indigenous Affairs to ensure that the Office holds accurate information on the immigration status of non-citizen federal offenders.
- 23-9 Federal sentencing legislation should provide that:
 - (a) except in relation to an offender sentenced to life imprisonment, a parole or licence period should commence on the day the offender is released on parole or licence and end on the day the offender's sentence expires; and
 - (b) in relation to an offender sentenced to life imprisonment:
 - (i) a parole period should commence on the day the offender is released on parole and end on a day determined by the Federal Parole Board; and
 - (ii) a licence period should commence on the day the offender is released on licence and end on a day determined by the relevant minister.
- 23-10 Federal sentencing legislation should set out the standard conditions imposed on federal offenders released on parole or licence. The proposed Federal Parole Board should have the discretion to impose any other conditions considered reasonably necessary to achieve the purposes of parole.
- 23-11 Federal sentencing legislation should enable the proposed Federal Parole Board to impose a supervision period limited only by the length of the parole or licence period.

24. Breach of Parole or Licence

- 24-1 Federal sentencing legislation should provide that, where the proposed Federal Parole Board is satisfied that an offender has breached his or her obligations under a parole order or licence, the Board may:
 - (a) take no further action;
 - (b) issue a warning to the offender;
 - (c) amend the order or licence by adding, revoking or varying the conditions attached to the order or licence; or
 - (d) revoke the order or licence.

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- 24–2 Federal sentencing legislation should provide that the proposed Federal Parole Board must not revoke a parole order or licence without giving the federal offender an opportunity to provide reasons why the order should not be revoked unless the Board considers it to be impracticable or undesirable to do so. Where the federal offender has not had the opportunity to provide reasons before the order or licence is revoked, the offender should be given that opportunity as soon as possible after the order or licence is revoked.
- 24–3 Federal sentencing legislation should provide that a parole order or licence is automatically revoked where an offender:
- (a) commits any offence during the parole or licence period and is sentenced to a term of imprisonment that is not completely suspended; or
 - (b) is removed or deported from Australia during the parole or licence period.
- 24–4 Federal sentencing legislation should provide that ‘clean street time’ is to be deducted from the balance of the period to be served following revocation of parole or licence. ‘Clean street time’ should be calculated from the date of release on parole or licence to:
- (a) in the case of automatic revocation upon conviction—the date the offence was committed; or
 - (b) in any other case—the date on which it is shown to the Federal Parole Board’s satisfaction that the offender first failed to comply with his or her obligations under the parole order or licence.
- 24–5 The proposed OMFO should ensure that, where necessary, a request is made under the *Australian Passports Act 2005* (Cth) or the *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth) to:
- (a) cancel the Australian passport or travel document of a federal offender;
 - (b) prevent an Australian passport or travel document being issued to a federal offender; or
 - (c) surrender a foreign passport or travel document of a federal offender.
- 24–6 The proposed Federal Parole Board should ensure that, when considering the grant of a parole order or licence, where necessary, a refusal/cancellation request is in place under the *Australian Passports Act 2005* (Cth) or that a surrender request has been made under the *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth).
- 24–7 The Federal Parole Board should have responsibility for considering requests from federal offenders who have been released on parole or licence for leave to travel overseas.

25. Other Methods of Release from Custody

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

26. Transfer of Federal Offenders

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

- (b) countries that have a significant number of their nationals serving custodial sentences in Australia.

Part H Special Categories of Federal Offenders

27. Young Federal Offenders

- 27-1 Young federal offenders should continue to be dealt with within the juvenile justice system of the relevant state or territory but federal sentencing legislation should establish minimum standards for the sentencing, administration and release of young federal offenders. These standards should include the following:
- (a) ‘young person’ should be defined as a person who is at least 10 years but not yet 18 years old at the time the offence was committed;
 - (b) when determining the sentence of a young federal offender who is being sentenced as a young person, the court is to apply the purposes, principles and factors stated in the juvenile justice legislation of the relevant state or territory, together with the following principles, which should be set out in federal sentencing legislation:
 - (i) the best interests of the young person shall be a primary consideration; and
 - (ii) detention should be used as a measure of last resort, and only for the shortest appropriate period;
 - (c) subject to paragraph (d), where a young person is accused of a federal offence, the matter must be heard and determined in a children’s court and the young person must be sentenced as a young person if found guilty of the offence, in accordance with the relevant state or territory juvenile justice legislation;
 - (d) where a young person is accused of a federal offence, and subject to s 80 of the *Australian Constitution*, the matter may be heard and determined in a children’s court or in an adult court, in accordance with the laws of the relevant state or territory, in the following cases:
 - (i) where state or territory law allows a young person to elect to have an offence heard by a jury in circumstances that would require committal to an adult court; or
 - (ii) where state or territory law requires a young person charged jointly with an adult to be tried in an adult court; or
 - (iii) where the young person is accused of a federal offence that is punishable by imprisonment of 14 years or more (a ‘serious federal offence’).

However, where the matter is heard in an adult court, the young person must be sentenced as a young person if found guilty of the offence, in accordance with the relevant state or territory juvenile justice legislation;

- (e) a young federal offender should have the opportunity for legal representation in all sentencing proceedings. In the absence of legal representation, the court should adjourn the proceedings unless the offender has refused or failed to exercise the right to legal representation in circumstances where the offender fully understands the right and the consequences of not exercising it;
- (f) the publication of a report of proceedings involving a young person who is charged with, found guilty of, or has pleaded guilty to, a federal offence should be prohibited where the details would lead to identification of the young person;
- (g) the sentence imposed on a young federal offender should be no more severe than the sentence that would have been imposed if he or she were an adult;
- (h) where a court, exercising powers conferred by state or territory legislation, refers to a diversionary process any young person who is charged with, found guilty of, or has pleaded guilty to, a federal offence, the outcome of the process must be reported back to the court and the court is to finalise the matter after taking into consideration the outcome of the diversionary process;
- (i) a young federal offender sentenced to detention in a juvenile facility must not be transferred to an adult prison until he or she is at least 18 years of age, unless a court determines that it is in the best interests of the young person to do so; and
- (j) where a federal offence is committed by a person who was not yet 18 years old at the time of the commission of the offence but is 18 years or more at the time of sentencing, the court must proceed to sentence the person as a young person in accordance with the relevant state or territory juvenile justice legislation, except that any sentence imposing a term of detention shall be served as a term of imprisonment.

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

- (a) prohibiting certain sentencing options, including capital punishment, corporal punishment, imprisonment with hard labour, and any other form of cruel, inhuman or degrading punishment (see Proposal 7–14);
- (b) requiring the court to take into account time spent in pre-sentence custody or detention (see Proposals 10–2 and 10–3);
- (c) requiring attendance of the offender during sentencing proceedings (see Proposal 13–1);

- (d) requiring the court to give an explanation of the sentence and a copy of the sentencing order to the offender (see Proposals 13–3, 13–4 and 13–5);
 - (e) governing the use of victim impact statements and pre-sentence reports (see Proposals 14–1 and 14–2);
 - (f) requiring the court to state its reasons for the sentence (see Proposal 19–1);
 - (g) dealing with an accused with a mental illness or intellectual disability (see Proposals 28–1, 28–2, and 28–4 to 28–15);
 - (h) requiring a suitably qualified interpreter, where necessary, in all proceedings related to sentencing (see Proposal 29–3); and
 - (i) facilitating access to drug courts, where they are available for young offenders (see Proposal 29–4).
- 27–3 Until such time as a federal Office for Children is established, the Australasian Juvenile Justice Administrators, in consultation with the proposed Office for the Management of Federal Offenders, should develop national best practice guidelines for juvenile justice, including guidelines relating to the sentencing of young people.
- 27–4 The proposed Office for the Management of Federal Offenders should monitor and report on young federal offenders. The functions of the Office should include:
- (a) maintaining information on young federal offenders as part of an up-to-date case management database in relation to all federal offenders;
 - (b) monitoring compliance with the *Standards for Juvenile Custodial Facilities* in relation to young federal offenders, and liaising with the states and territories in relation to those Standards;
 - (c) providing policy advice to the Australian Government in relation to young federal offenders and relevant aspects of the federal criminal justice system;
 - (d) participating as a full member of the Australasian Juvenile Justice Administrators; and
 - (e) liaising with the states and territories, including the relevant juvenile justice departments, in relation to young federal offenders.

28. Federal Offenders with a Mental Illness and Intellectual Disability

- 28–1 The Australian Government should initiate an inquiry into issues concerning the mentally ill and the intellectually disabled in the federal criminal justice system.

- 28–2 Federal sentencing legislation should define the terms ‘mental illness’ and ‘intellectual disability’. In defining these terms, account should be taken of:
- (a) the different contexts in which the terms are used;
 - (b) the interaction between federal law and state and territory laws dealing with such persons;
 - (c) the possibility that mental illness, intellectual disability and substance abuse may co-exist;
 - (d) the potential difference between criteria used for clinical diagnosis and those appropriate for forensic purposes; and
 - (e) the difference between the appropriate definitions in civil and criminal contexts.
- 28–3 Provisions relating to fitness to be tried, acquittal due to mental illness, and summary disposition of persons suffering from a mental illness or intellectual disability should remain in the *Crimes Act 1914* (Cth). Provisions relating to sentencing alternatives for persons suffering from a mental illness or intellectual disability should be relocated to federal sentencing legislation.
- 28–4 Federal sentencing legislation should be amended to provide that the factors to be considered in sentencing a federal offender include:
- (a) ‘mental illness’ and ‘intellectual disability’ in addition to ‘mental condition’; and
 - (b) that the offender is voluntarily seeking treatment or is undertaking a behaviour intervention program to address any physical condition, mental illness, intellectual disability or mental condition that may have contributed to the commission of the offence.
- 28–5 Federal sentencing legislation should provide that:
- (a) hospital orders are available as a sentencing option when a person with a mental illness is convicted of either a summary federal offence punishable by imprisonment or an indictable federal offence;
 - (b) decisions in relation to the release from detention of persons subject to a hospital order are to be made by the proposed Federal Parole Board. The Board should consider the reports of two duly qualified psychiatrists in determining whether to release the person from detention, and on what conditions; and
 - (c) the reforms identified in Proposals 9–1, 9–2 and 9–3 also apply in relation to hospital orders.
- 28–6 Federal sentencing legislation should:
- (a) empower a court to deal with all breaches of a psychiatric probation order or program probation order, regardless of whether the offender has a reasonable excuse for the breach; and

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- (b) provide that, in addition to its existing powers, a court dealing with a breach of a psychiatric probation order or program probation order may vary the order if satisfied of the breach.
- 28-7 Federal sentencing legislation should provide that, in jurisdictions where justice plans are available, participation in the services specified in the plan may be attached as a condition of a community based order, discharge, conditional release, deferred sentence, program probation order and the proposed compulsory care and rehabilitation order.
- 28-8 The proposed Office for the Management of Federal Offenders should collaborate with state and territory authorities to promote the adoption of justice plans throughout Australia. These plans should specify the services that are recommended for a person with an intellectual disability for the purpose of reducing the likelihood of the person committing further offences.
- 28-9 Federal sentencing legislation should provide that a court may make an order for the long-term care and rehabilitation of a federal offender with an intellectual disability. The provision should be modelled on s 20BS of the *Crimes Act* and provide that the court may, in lieu of imposing a sentence of imprisonment, make an order that the person be detained in secure accommodation for a period specified in the order, and require compliance with any condition that the court considers appropriate in the circumstances.
- 28-10 Federal sentencing legislation should provide that a court must request a pre-sentence report when:
- (a) an offender has a mental illness or intellectual disability, or such a condition is suspected; and
- (b) there is a reasonable prospect that the court will impose a sentence that deprives the offender of his or her liberty or places the offender in jeopardy of being deprived of his or her liberty.
- 28-11 Federal sentencing legislation should provide that a court must request that the state or territory department with responsibility for the provision of services to persons with a mental illness or intellectual disability provide the court with a 'certificate of available services' if the court is considering imposing an order that a federal offender receive treatment or participate in a rehabilitation program.
- 28-12 State and territory departments of corrective services should ensure that appropriate advice and support is provided to federal offenders with a mental illness or intellectual disability who are required to give consent to participate in a rehabilitation program or give an undertaking to participate in a pre-release scheme.

- 28–13 The Australian Government and state and territory governments should work together to improve service provision to federal offenders with a mental illness or intellectual disability.
- 28–14 The Corrective Services Administrators' Conference should develop and promote compliance with national standards for the assessment, detention, treatment and care of persons with a mental illness or intellectual disability who come into contact with the criminal justice system. These standards should comply with relevant international instruments.
- 28–15 The Office for the Management of Federal Offenders should monitor persons with a mental illness or intellectual disability who have been accused of a federal offence and are subject to continuing obligations under a court order in connection with the offence.

29. Other Special Categories of Offenders

- 29–1 The ALRC affirms its commitment to the recommendations made in ALRC 31, *The Recognition of Aboriginal Customary Laws* (1986) in so far as they relate to the sentencing of federal Aboriginal or Torres Strait Islander (ATSI) offenders. In particular, the ALRC affirms its commitment to the recommendations that:
 - (a) legislation should endorse the practice of considering traditional laws and customs, where relevant, in sentencing an ATSI offender; and
 - (b) in ascertaining traditional laws and customs or relevant community opinions, oral or written submissions may be made by a member of the community of an ATSI offender or victim.
- 29–2 The ALRC supports the recommendations made by the *Royal Commission into Aboriginal Deaths in Custody* (1991) in so far as they relate to the sentencing of federal ATSI offenders. In particular, the ALRC supports the following recommendations:
 - (a) sentencing and correctional authorities should accept that community service can be performed in many ways, and approval should be given, where appropriate, for ATSI offenders to perform community service work by pursuing personal development courses (Rec 94);
 - (b) judicial officers and other participants in the criminal justice system whose duties bring them into contact with ATSI people should be encouraged to participate in appropriate cross-cultural training programs developed after consultation with appropriate ATSI organisations (Recs 96, 97);
 - (c) governments should take more positive steps to recruit and train ATSI people as court staff and interpreters in locations where a significant number of ATSI people appear before the courts (Rec 100);

- (d) an appropriate range of properly funded sentencing options should be available, and ATSI communities should participate in the development, planning and implementation of these programs (Recs 109, 111, 112, 113);
 - (e) departments and agencies responsible for non-custodial sentencing programs for ATSI offenders should employ and train ATSI people to take particular responsibility for implementing such programs and educating the community about them (Rec 114); and
 - (f) corrective services authorities should ensure that ATSI offenders are not denied opportunities for probation and parole because of the lack of infrastructure or staff to monitor such orders (Rec 119).
- 29–3 Federal sentencing legislation should require a suitably qualified interpreter to be provided to a federal offender in all proceedings related to sentencing unless the court is satisfied that the offender can understand and speak the English language sufficiently to enable the offender to follow and participate in those proceedings. The costs of the interpreter should be borne by the Commonwealth.
- 29–4 Federal sentencing legislation should facilitate access by federal offenders to state or territory drug courts in appropriate circumstances. In particular, federal sentencing legislation should:
- (a) provide that the orders that can be made by a drug court are prescribed ‘additional sentencing alternatives’ for federal offenders; and
 - (b) specify any federal offences or categories of federal offences for which such orders cannot be made.

30. Corporations

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

- 30-2 Federal sentencing legislation should state that a court, when sentencing a corporation, must consider any factor that is relevant to sentencing and known to the court. These factors may include any of the following matters to the extent that they are applicable:
- (a) the type, size, financial circumstances and internal culture of the corporation;
 - (b) the existence or absence of an effective compliance program designed to prevent and detect criminal conduct;
 - (c) whether the corporation ceased the unlawful conduct voluntarily and promptly upon discovery of the offence;
 - (d) the extent to which the offence or its consequences could be foreseen; and
 - (e) the effect of the sentence on third parties.
- 30-3 Federal sentencing legislation should empower a court, in sentencing a corporation for a federal offence, to require the attendance of any officer of the corporation at any stage of the sentencing proceedings.

1. Introduction to the Inquiry

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Background to the Inquiry

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

1.2 The ALRC previously conducted an inquiry into the sentencing of federal offenders. That inquiry commenced in 1978 and resulted in a number of papers and interim reports, culminating in 1988 with the final report, *Sentencing* (ALRC 44).¹

1.3 ALRC 44 was tabled in Parliament in August 1988. Following consideration of the report, the Australian Government introduced the Crimes Legislation Amendment Bill (No 2) 1989 (Cth) which, once passed, inserted Part IB into the *Crimes Act*. The Bill—which was the first major reform of federal sentencing legislation in over 20 years—was intended to ensure that federal sentencing legislation was fair and effective, and gave the community confidence in the criminal justice system.² It implemented selected parts of ALRC 44, but in a number of respects diverged from or failed to implement the ALRC’s recommendations.

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

1.5 Part IB has been the focus of a number of criticisms. At a general level it has been said that Part IB: is unclear about whether it intends to achieve greater equality of treatment between federal offenders serving sentences in different states and territories; is complex and ambiguous; and omits any detailed reference to the aims and purposes of sentencing. Specific provisions have been variously criticised for their complexity, poor drafting, inflexibility, lack of sufficient scope or because they lead to undesirable practical outcomes.³ In 1991, the Gibbs Committee, which reviewed aspects of federal criminal law, made several recommendations concerning Part IB, including that it be reviewed within three years of its commencement.⁴

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

Scope of the Inquiry

Terms of Reference

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

- the changing nature and scope of federal offences;
- whether equality in sentencing of federal offenders should be maintained between federal offenders serving sentences in different states and territories, or between offenders within the same state and territory, regardless of whether they are state, territory or federal offenders;
- the relatively small number of federal offenders compared with the number of state and territory offenders; and

- whether there are effective sentencing and administrative regimes in Australia or overseas, including alternative sentencing options, that would be appropriate for adoption or adaptation by the Commonwealth.

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

Matters outside the Inquiry

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

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

- reform of substantive federal criminal law;
- the penalty established by Parliament as the maximum penalty for an offence;
- law enforcement and criminal trial process;
- imposition of civil or administrative penalties or infringement notice schemes;⁵
- the discipline and punishment of defence force personnel;⁶ and
- administrative detention for migration or other purposes.⁷

1.11 The exclusion of pre-sentence matters from the Inquiry extends to the issue of fitness to be tried, acquittal and summary disposition on the grounds of mental illness or intellectual disability. Although these matters are currently addressed in Divisions 6–8 of Part IB, the ALRC is of the view that it would not be appropriate to make recommendations about these preliminary issues of criminal procedure and criminal liability in the context of an inquiry about sentencing. However, the

importance of these issues is not in doubt. In Chapter 28 of this Discussion Paper the ALRC proposes that these issues be addressed as part of an independent inquiry into mental illness and intellectual disability in the federal criminal justice system.

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

Process of reform

Advisory Committee

1.13 It is standard operating procedure for the ALRC to establish an expert Advisory Committee to assist with the development of its inquiries. In this Inquiry, the Advisory Committee includes prosecutors and criminal defence lawyers, judicial officers from federal and state courts, academics with expertise in the area, and government officers from state and federal agencies with responsibilities for justice and corrections.⁸

1.14 The Advisory Committee met on 21 September 2004 and 2 August 2005, and will meet again during the course of the Inquiry to provide advice and assistance to the ALRC. The Committee has particular value in helping the Inquiry to identify the key issues and determine priorities, as well as in providing quality assurance in the research and consultation effort. The Advisory Committee will also assist with the development of recommendations as the Inquiry progresses. However, ultimate responsibility for the Report and its recommendations remains with the Commissioners of the ALRC.

Community consultation

1.15 Under the terms of its constituting Act, the ALRC ‘may inform itself in any way it thinks fit’ for the purposes of reviewing or considering anything that is the subject of an inquiry.⁹ One of the most important features of ALRC inquiries is the commitment to widespread community consultation.¹⁰ The nature and extent of this engagement are normally determined by the subject matter of the reference.

1.16 The ALRC has developed a broad consultation strategy for this Inquiry, which has encouraged participation from a wide spectrum of stakeholders. To date, the ALRC has held more than 60 consultations involving many hundreds of people and spanning diverse stakeholders: prosecution agencies; criminal defence lawyers; judicial officers; government regulators; legal professional associations; legal aid bodies; prisoners’ rights groups; victims’ rights groups; mental health organisations; data collection agencies; judicial education bodies; corrections authorities; independent corrections inspectorates; parole boards and academics. A full list of consultations is set out in Appendix 3.

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

Written submissions

1.18 The Inquiry has strongly encouraged interested persons and organisations to make written submissions to help advance the policy-making process. Nearly all submissions received to date have been in response to Issues Paper 29, *Sentencing of Federal Offenders* (IP 29), addressing the issues and questions specifically raised in that paper.

1.19 To date, 52 written submissions have been received. The submissions vary substantially in size and style, ranging from short notes written by individuals providing personal views, to large, well-researched documents prepared by government departments and agencies, professional associations and individual researchers. From the outset, the Inquiry was aware that some of the information in submissions might have personal sensitivity and the ALRC left open the possibility of receiving submissions in confidence. Of the 52 submissions received, only four have been designated as confidential, all from past or current prisoners or their families.

1.20 With the release of this Discussion Paper, the ALRC once again invites individuals and organisations to make submissions to the Inquiry prior to the release of the final Report. There is no specified format for submissions. The Inquiry will gratefully accept anything from handwritten notes and emailed dot-points, to detailed commentary on federal sentencing issues. Details about making a submission may be found at the front of this Discussion Paper.

In order to be considered for use in the final Report, **submissions addressing the proposals in this Discussion Paper must reach the ALRC no later than Tuesday, 20 December 2005**. Details about how to make a submission are set out at the front of this publication.

Timeframe

1.21 Under the Terms of Reference, the ALRC is required to report to the Attorney-General by 31 January 2006.¹¹ The ALRC's usual operating procedure is to produce two community consultation papers—an Issues Paper and a Discussion Paper—prior to producing the final Report.

1.22 IP 29 was released in January 2005 and sought to identify the main issues relevant to the Inquiry, provide background information, and encourage informed public participation.

1.23 This Discussion Paper differs from the Issues Paper in that it contains a more detailed treatment of the subject matter, as well as specific proposals for reform. The Discussion Paper is available free of charge in hard copy from the ALRC, and may be downloaded free of charge from the ALRC's website.

1.24 It is important to note that these proposals do not represent the final recommendations of the Inquiry. It is not uncommon in ALRC inquiries for there to be significant changes of approach between the Discussion Paper and the final Report. If there are passages in this paper that appear to imply that definitive conclusions have already been drawn about the final recommendations, this is unintended and not meant to inhibit full and open discussion of policy choices before the Inquiry's program of research and consultation is completed.

1.25 As mentioned above, the ALRC's final Report is due to be presented to the Attorney-General by 31 January 2006. Once tabled in Parliament, the Report becomes a public document.¹² The final Report will not be a self-executing document—the Inquiry provides recommendations about the best way to proceed but implementation is a matter for others.¹³

1.26 In recent reports, the ALRC's approach to law reform has involved a mix of strategies including: legislation and subordinate regulations, official standards and codes of practice, industry and professional guidelines, education and training programs, and so on. Although the final Report will be presented to the Attorney-General, it is likely that some of its recommendations will be directed to other government and non-government agencies.

Special features of the Inquiry

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

Collaboration with other agencies

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

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

1.30 The Australian Institute of Criminology (AIC) analysed snapshot data on the 695 federal prisoners held in custody on 13 December 2004. The information was made available by the AGD in de-identified form from its case management database on the sentences of federal prisoners. That database relates to prisoners, not offenders, and does not record a large number of variables. Yet interesting trends emerged when those data were compared with data on state and territory prisoners published by the Australian Bureau of Statistics. The results of the AIC's analysis are reproduced in Appendix 1 and are incorporated elsewhere in this Discussion Paper when relevant. The ALRC would like to record its special thanks to the Director of the AIC, Dr Toni Makkai, and research analyst, Matthew Willis, for their substantial efforts in undertaking this work.

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

1.32 In May 2005, the CDPP agreed to provide the ALRC with de-identified information from its database in relation to federal drug offences and fraud offences prosecuted by the CDPP over the five-year period 2000–2004. The AIC has agreed to analyse this much richer data set for the final Report. In the meantime, the CDPP has responded to numerous requests from the ALRC for specific data in relation to appeals, joint matters, young offenders and mental health, and these data are also referred to in this Discussion Paper where relevant. The ALRC would like to thank James Carter, Anthony Henry, Karen Twigg, Damien Sturgeon and Maggie McEwan for their generosity in sharing and analysing the CDPP's data.

Involvement of federal offenders

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

1.34 The process of distributing the brochure was as revealing about the nature of the federal criminal justice system as any consultation or submission. In the absence of a

centralised agency with ready access to federal offenders, the ALRC was required to write to the Department of Corrective Services in each jurisdiction, seeking its cooperation in distributing the brochure. Since the AGD does not hold information about federal offenders other than prisoners, it was also necessary to ask each state and territory for an estimate of the number of federal offenders serving non-custodial sentences, such as community service orders, in its jurisdiction. In many jurisdictions precise figures were not available, and even estimates required a bit of spadework. In the result, the brochures were distributed by the various departments to nearly 2,000 federal offenders, but the process took over four months, with one state being particularly tardy.

1.35 The response to the brochure was encouraging. The ALRC received 214 reply-paid forms, the large majority from prisoners. Many forms identified concerns about the lack of information about parole, transfer to another jurisdiction, and even the content of relevant federal legislation. All who responded were sent a hard copy of the Issues Paper and were invited again to make a submission. The ALRC subsequently received 11 submissions from federal offenders, some of which are confidential. These submissions provide unique insights into the way some federal offenders experience the sentencing process, and they are cited in this Discussion Paper when relevant.

The context of federal sentencing

1.36 The federal criminal justice system has many features that distinguish it from the criminal justice systems of the states and territories. In IP 29, the ALRC gave considerable attention to these features and their implications for the sentencing and administration of federal offenders.¹⁵ It is worth recalling the principal features of the federal system here because they have significant bearing on the ALRC's task in reviewing Part IB of the *Crimes Act*.

- Federal criminal law is closely allied to areas of federal constitutional responsibility. Its subject matter—social security fraud, tax fraud, illegal drug importation, illegal fishing and migration matters, to name a few—is often quite different from state and territory criminal law.
- Federal offences are sometimes described as ‘victimless’ in the sense that the injury is often directed not to an identifiable individual but to the Commonwealth as a polity. However, the type of conduct that attracts federal criminal penalties is expanding to include areas that affect individuals very directly—such as terrorism, people smuggling, child sex tourism and sexual slavery.
- Federal offence provisions overwhelmingly provide for just two types of sentencing option—fines and imprisonment. However, many other sentencing options available in the states and territories—such as community service orders, periodic detention and home detention—are picked up by the *Crimes Act*

and applied to the sentencing of federal offenders. One consequence is that the options available for sentencing federal offenders vary across Australia.

- Federal prosecutions are undertaken predominantly by the CDPP (over 9,000 charges in 2003–04), but other federal agencies such as the Australian Securities and Investments Commission and the Australian Taxation Office conduct their own prosecutions for minor offences. State and territory authorities occasionally prosecute federal offences in connection with more substantial charges in relation to state or territory law.
- The vast bulk of federal prosecution activity relates to less serious criminal offences and is dealt with summarily (91 per cent). A high proportion of federal offenders plead guilty: in 2003–04, 97 per cent of those convicted of summary offences did so, as did 86 per cent of those convicted of indictable offences.
- The number of federal prisoners is relatively small—there were only 695 federal prisoners in custody on 13 December 2004, or less than three per cent of the total Australian prison population. Of these, 87 per cent were male and 13 per cent were female. The majority (54 per cent) were located in New South Wales.
- There is wide variation in the number of federal prisoners by type of offence. The bulk of federal prisoners (67 per cent in 2004) are convicted of drug importation offences, and a significant proportion of the remainder are convicted of various fraud and dishonesty offences. There are also important local variations in federal crime: fisheries and migration offences are highly localised in Western Australia and the Northern Territory, while social security offenders serving prison terms are over-represented in Queensland.

1.37 Finally, in addition to these special federal features, the ALRC has been cognisant of the extensive reforms of sentencing law and policy that have taken place in the states and territories over the past 15 years. These changes, which were discussed in IP 29 in more detail,¹⁶ include:

- shifts in community attitudes about the objectives of criminal law and the value of punishment;
- the increasing media focus on law and order, with its frequent focus on escalating the severity of penalties;
- the impact of victims' groups on sentencing reforms, including greater use of victim impact statements and more options for ordering offenders to make reparation;

- attempts to seek greater consistency in sentencing through mandatory sentencing, grid sentencing and guideline judgments;
- the development of restorative justice initiatives, with their emphasis on repairing the harms and ruptured social bonds caused by crime; and
- the development of specialist courts with a focus on the rehabilitation of offenders, particularly in relation to Indigenous offenders and offenders with a drug addiction.

1.38 The impact of these and other developments can be seen throughout this Discussion Paper both in the accounts given of state and territory sentencing practices and in the proposals put forward for reform of federal sentencing law.

Organisation of this Discussion Paper

1.39 The Discussion Paper is organised into eight Parts. The introductory part outlines the main criticisms of Part IB of the *Crimes Act* and proposes a new federal sentencing Act that is distinct from both the federal provisions dealing with criminal procedure and those dealing with substantive criminal law. Part A also addresses issues of equality in the treatment of federal offenders. The ALRC believes that equality is a worthy goal for the federal criminal justice system to pursue, but it is not an absolute. Accordingly, a ‘one size fits all’ approach is neither desirable nor achievable. Chapter 3 outlines the ways in which equality is best pursued at different stages of the federal sentencing process, and the details are found in later chapters.

1.40 Part B examines the manner in which a federal sentence is determined, and seeks to provide greater clarity for prosecutors, defence lawyers and judicial officers. The ALRC concludes that federal sentencing legislation should expressly state the purposes for which a sentence may be imposed; the principles that should be applied in determining a sentence; and the factors a court must consider in determining a sentence. Those factors include both traditional sentencing factors (namely, those related to the individual circumstances of the offence, the offender, and the victim) and factors that promote the administration of the federal criminal justice system. Part B also examines the sentencing options available in sentencing federal offenders, and ancillary orders for restitution or compensation of victims.

1.41 Part C considers a range of issues that may arise in the sentencing of federal offenders. These include the manner in which the non-parole period is set, the date on which a federal sentence commences, and the credit to be given for pre-sentence custody or detention in connection with the offence. Other issues addressed in this Part include: the discount that may be given to an offender for pleading guilty to the offence or for cooperating with law enforcement authorities, the circumstances in which a federal offender may receive remissions on his or her sentence, and sentencing for multiple offences.

1.42 Part D moves into different territory by examining a range of procedural and evidential issues in sentencing. The ALRC makes a number of proposals designed to improve the fairness of a sentencing hearing, addressing issues such as the offender's presence during sentencing, the court's explanation of sentence, and the provision of legal representation. The ALRC considers that the manner in which a court is informed about matters relevant to passing a sentence could be improved, especially in relation to pre-sentence reports and victim impact statements. The ALRC also proposes a new sentence indication scheme, which, with appropriate safeguards, is designed to encourage guilty defendants to plead guilty by indicating the likely sentencing outcome prior to the plea.

1.43 Part E considers the circumstances in which a sentence may need to be reconsidered after it has been imposed. The ALRC rejects a broad power to re-sentence an offender because of changes in circumstance arising after sentencing, since this would jeopardise the finality of the sentencing process. However, the ALRC believes that there should be an express power to re-sentence an offender who promised to cooperate with authorities and failed to do so, and a power to correct 'slip errors' in sentencing, which surprisingly is absent from Part IB of the *Crimes Act*. This Part also considers breach of federal sentencing orders and seeks to ameliorate the difficulties faced by state and territory authorities in dealing with breaches by federal offenders—difficulties not faced in relation to state and territory offenders.

1.44 Part F proposes a number of important reforms to promote better sentencing of federal offenders across Australia. Because the number of federal prosecutions is small in comparison with the number of state and territory prosecutions, state and territory judicial officers have less opportunity to gain experience in applying the unique regime for sentencing federal offenders. The ALRC proposes that state and territory courts promote specialisation in the hearing and determination of federal criminal matters, to the extent practicable. Significantly, it is also proposed that the original jurisdiction of the Federal Court of Australia be expanded to include concurrent jurisdiction in relation to nominated federal offences whose subject matter is closely allied to the existing civil jurisdiction of the Court, such as in the areas of taxation, trade practices and corporations law. Part F proposes a number of other measures to promote better sentencing, including: the giving of reasons for federal sentencing decisions; the provision by prosecutors of practical assistance to the courts; and the further education and training of judicial officers and others involved in the federal criminal justice system.

1.45 Promoting consistency in the sentencing of federal offenders across jurisdictions is a key feature of the Inquiry. Having considered the available evidence of inconsistency, the ALRC believes that there is a significant structural weakness in the channels of appeal in federal criminal matters. At present, federal criminal appeals go to state and territory courts of appeal or courts of criminal appeal, but no court other

than the High Court has the overarching function of developing federal sentencing law for the whole of Australia. Part F proposes that the Federal Court be given exclusive appellate jurisdiction in federal criminal matters. At a more prosaic level, Part F also proposes the development of a database on federal sentences for use by judicial officers as a practical tool in promoting consistency in federal sentencing.

1.46 Part G considers the administration of federal sentences and the release of federal offenders into the community on parole, which are formal responsibilities of the AGD. Yet, because federal offenders serve custodial sentences in state and territory correctional facilities, they have little federal visibility until such time as they become eligible for release. The ALRC believes that the Australian Government should play a more active role in relation to the administration of the sentences of federal offenders, whether they are serving custodial or non-custodial sentences. Part G proposes the establishment of an Office for the Management of Federal Offenders, with a broad range of responsibilities to monitor, advise and liaise. In addition, the ALRC proposes the establishment of a Federal Parole Board to make parole decisions about federal offenders. Federal offenders are unique in Australia in having their parole decisions determined by a ministerial delegate within a government department rather than by an independent board with broad-based expert and community membership.

1.47 Finally, Part H addresses the concerns of special categories of federal offenders who are often the most vulnerable and disadvantaged in the federal criminal justice system: young offenders; those with a mental illness or intellectual disability; women; offenders from culturally or linguistically diverse backgrounds; and those with drug or gambling addictions. It has been difficult to address the broad concerns that have been raised in relation to these categories of offenders within this Inquiry. For example, the intersection between the criminal justice system and the mental health system has been an enduring problem that involves issues far broader than sentencing, including the adequacy of service provision and the interaction between federal and state regimes.¹⁷ Part H addresses a range of concerns with respect to these special categories of federal offenders but there is clearly scope for further review and reform.

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

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

3 See further Ch 2.

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

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

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

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

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- 8 The members of the Advisory Committee are listed in the front of this Discussion Paper.
9 *Australian Law Reform Commission Act 1996* (Cth) s 38.
10 B Opeskin, 'Engaging the Public: Community Participation in the Genetic Information Inquiry' (2002) 80
11 *Reform* 53.
12 As originally conceived, the project was expected to take a little over two years. However, the Terms of
13 Reference stipulate a reporting date that is eight months less than this.
14 The Attorney-General must table the Report within 15 sitting days of receiving it: *Australian Law Reform*
15 *Commission Act 1996* (Cth) s 23.
16 However, the ALRC has a strong record of having its advice followed. About 59 per cent of the ALRC's
17 previous reports have been substantially implemented, 27 per cent have been partially implemented, three
per cent are under consideration, and 11 per cent have had no implementation to date.
14 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [5].
15 Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), Ch 2.
16 Ibid, [1.14]–[1.32].
17 See, eg, New South Wales Law Reform Commission, *People with an Intellectual Disability and the*
Criminal Justice System, Report 80 (1996).

2. A Federal Sentencing Act

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Location of federal sentencing provisions

Should legislative provisions for the sentencing, administration and release of federal offenders be relocated to a separate federal sentencing Act? If the provisions are to remain in the *Crimes Act 1914* (Cth) should they be consolidated and relocated to reflect better the chronology of investigation, prosecution, adjudication and sentencing of federal offenders? [IP 29, Q6–3]

Background

2.1 Federal sentencing provisions are currently dispersed throughout the *Crimes Act 1914* (Cth) rather than being consolidated. While federal sentencing provisions are located primarily in Part IB of the *Crimes Act*, there are sections relevant to sentencing in Part IA of the Act—dealing with penalty units, conversion of penalties, punishment for offences under two or more laws, the sentencing consequences of proceeding summarily on certain indictable offences, and imposing sentences for multiple offences.¹⁸ There are also sections in other parts of the *Crimes Act* that are relevant to the administration and release of federal offenders.¹⁹

2.2 The *Crimes Act* deals with a wide range of subjects including search warrants, powers of arrest, controlled operations, assumed identities, the investigation of Commonwealth offences, forensic procedures, and the protection of children in proceedings for sexual offences. A portion of the *Crimes Act* also sets out a number of federal criminal offences, including offences against the government, offences against the administration of justice, offences relating to postal services and telecommunications, unauthorised disclosure of official secrets, child sex tourism and piracy. The structure of the *Crimes Act* does not reflect the chronology of investigation, prosecution, adjudication and sentencing of federal offenders. For example, Part IB, which deals with sentencing, precedes Part IC, which deals with the investigation of Commonwealth offences.

2.3 By contrast, the sentencing laws of most states and territories are contained in a separate sentencing Act.²⁰ The Australian Capital Territory (ACT), whose sentencing provisions are currently contained in the *Crimes Act 1900* (ACT), is also moving towards enacting a separate sentencing Act.²¹ There is also precedent in overseas jurisdictions for having a separate sentencing Act.²² Most states and territories have separate legislation dealing with sentencing and the administration of sentences, respectively.²³

Options for reform

2.4 The ALRC has identified three options for reform. The first is to consolidate the sentencing provisions within the *Crimes Act*, and relocate them within the *Crimes Act* so that the Act better reflects the chronology of investigation, prosecution, adjudication and sentencing of federal offenders. The second option is to enact a separate federal sentencing Act that deals with the sentencing, administration and release of federal offenders. The third option is to enact two new pieces of legislation—a federal sentencing Act and a separate Act dealing with the administration and release of federal offenders.

2.5 The enactment of a separate federal sentencing Act received widespread support from a variety of stakeholders in consultations and submissions. These stakeholders included academics, judicial officers, prosecutors, defence lawyers, government departments and federal offenders.²⁴ There was less support expressed in consultations and submissions for the consolidation of sentencing provisions within the framework of the *Crimes Act*. The Attorney-General's Department submitted that it was broadly supportive of a restructure of Part IB, whether within the confines of the *Crimes Act* or a new sentencing law.²⁵

2.6 The Commonwealth Director of Public Prosecutions (CDPP) submitted that there was a need for a new sentencing regime for federal offenders and this would be best achieved by the enactment of provisions in a federal sentencing Act. It expressed

the view that it would be very difficult to address the problems with Part IB of the *Crimes Act* by amending existing provisions.²⁶

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

would give effect to the reality that sentencing has become a complex process and has created its own jurisprudence. The sentencing of offenders is a highly important process in the criminal justice system. Accordingly the legislation that impacts on this process should give recognition to the importance of that process.²⁷

2.8 In its view, the fact that many provisions relating to substantive offences have been moved from the *Crimes Act* to the *Criminal Code 1995* (Cth) creates a logical and timely opportunity for federal sentencing provisions to be moved from the *Crimes Act*. The Criminal Bar Association of Victoria submitted that the *Criminal Code* will develop its own jurisprudence and litigation, and that the enactment of separate legislation for the sentencing of federal offenders would assist in ensuring that issues relating to federal sentencing do not become enmeshed within *Criminal Code* litigation.²⁸

2.9 Associate Professor John Willis supported the relocation of those provisions of Part IA of the *Crimes Act* that are relevant to sentencing to a new federal sentencing Act. He expressed the view that even if this led to some repetition of legislative provisions, such as the meaning of a penalty unit, that posed no real problem.²⁹

2.10 Other reasons given in support of a separate Act were that it would make federal sentencing provisions more accessible,³⁰ and would hopefully lead to a clearer and more logical set of provisions.³¹

2.11 The Legal Aid Commission of New South Wales expressly supported the enactment of two pieces of federal legislation, dealing separately with sentencing and the administration of federal sentences,³² while Queensland Legal Aid expressed the view that it was desirable to have provisions about sentencing and administration of sentences in one Act, and that the location of such provisions in different Acts in Queensland causes difficulties.³³

ALRC's views

2.12 In 1980 the ALRC recommended that all general provisions on sentencing and punishment should be consolidated in a single Commonwealth statute.³⁴ The ALRC remains of this view, having regard to the considerable support in consultations and submissions for the enactment of a new federal sentencing Act; and the fact that this approach is consistent with the approach taken, or soon to be taken, in all states and territories. The ALRC considers that consolidating and relocating the legislative provisions for the sentencing, administration and release of federal offenders to a separate federal sentencing Act would give those provisions a heightened profile, increase the transparency and potential accessibility of the provisions, and emphasise

to state and territory judicial officers that a separate sentencing regime applies to federal offenders.

2.13 At this stage, the ALRC is not convinced of the need for a separate federal Act dealing exclusively with the administration of federal sentences. The case for separate state and territory legislation dealing with administration of sentences is more compelling than the case for separate federal legislation in this area because states and territories provide a range of corrective services and facilities to federal, state and territory offenders, including accommodating all offenders sentenced to imprisonment and supervising all offenders sentenced to alternative sentencing options. Many of the issues covered in such state and territory legislation—including correctional centre discipline, segregated and protected custody, and administration of periodic and home detention orders—would not be the subject of federal legislation. However, the ALRC would be interested in hearing any further views on whether there should be a separate federal Act dealing with the administration and release of federal offenders.

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

General criticisms of Part IB

Should Part IB of the *Crimes Act* be redrafted to make the structure clearer and more logical, and the language simpler and more consistent? If so, how should this be achieved? [IP 29, Q6–1].

Background

Drafting complexity

2.14 The drafting, structure, and language of Part IB of the *Crimes Act* has been the subject of much judicial criticism.³⁵ The drafting of Part IB has been described as too complex. The legislation has been criticised for its lack of clarity and its ambiguity.³⁶ Its provisions have been criticised as ‘internally inconsistent’,³⁷ ‘convoluted’ and ‘confusing’,³⁸ ‘opaque’ and ‘unnecessarily time consuming’,³⁹ ‘complicated’ and ‘unnecessarily detailed’,⁴⁰ ‘a legislative jungle’ and ‘labyrinthine’.⁴¹

2.15 In *R v Paull* Hunt J stated:

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

This unnecessarily complicated and opaque legislation [has created difficulties]. ... At the present time, the question of sentence will take longer to deal with in the average trial than the question of guilt itself.⁴²

Illogical structure

2.16 In addition to the fact that sections relating to sentencing are dispersed throughout the *Crimes Act*, subjects within Part IB are dealt with in a disjointed manner. The order of provisions in Part IB does not reflect the chronology of sentencing, administration and release of federal offenders. The positioning of Divisions 6 to 8—which deal with issues of mental illness unrelated to sentencing—appears to disrupt the flow of provisions in relation to sentencing generally. There is no chronological grouping of provisions that are to be considered by a court at the time of sentencing, nor of those that are relevant after sentencing.⁴³ For example, the sentencing options of discharging an offender without proceeding to conviction, or conditionally releasing an offender after conviction, appear in Part IB after provisions dealing with the release of an offender on parole or licence. However, the latter issues are clearly post-sentencing issues. Other provisions are housed in Divisions to which they bear no obvious connection. For example, the provisions dealing with alternative sentencing options available under state and territory law⁴⁴ and the consequences of breaching such an alternative sentencing option⁴⁵ are oddly placed within Division 5, which is headed ‘Conditional release on parole or licence’.

Archaic language and inconsistent terminology

2.17 Criticisms have also been made of the language in Part IB. Specifically, use of the terminology ‘hard labour’,⁴⁶ ‘recognizance’,⁴⁷ and ‘recognizance release order’⁴⁸ has been criticised on the basis that they are archaic terms.

2.18 Some terminology in the Act is not used in a consistent manner. One example is the use of the phrase ‘the court’ in the provisions dealing with mental illness and fitness to be tried. The High Court has noted that some of the references in the Act to ‘the court’ relate to the jury, while others relate to the judge.⁴⁹

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

2.20 Some provisions in Part IB do not make use of defined terms consistently. For example, even though ‘federal offence’ is defined for the purpose of Part IB, s 20C refers to a child or young person charged with or convicted of ‘an offence against a law

of the Commonwealth'. The drafting could be simplified if the section referred to 'a child or young person charged with or convicted of a federal offence'. There are other examples of this.⁵⁰

Issues and problems

2.21 In practice, Part IB has caused considerable difficulties in sentencing federal offenders.⁵¹ Views expressed in consultations and submissions endorsed the criticisms of the drafting, structure and language of Part IB⁵² and supported a redrafting of federal sentencing provisions with a clearer and more logical structure, simpler language, and internally consistent terminology.⁵³ There was support for using plain English in the drafting of federal sentencing provisions⁵⁴ and for discarding archaic terminology.⁵⁵ The Criminal Bar Association of Victoria submitted that the term 'non-parole period' should be replaced with the simpler language of a 'minimum term'.⁵⁶ Defence practitioners and federal offenders stated that many people, including offenders and their lawyers, did not understand what a recognizance release order was.⁵⁷

2.22 It was submitted that the federal sentencing provisions should show clarity, order and flexibility.⁵⁸ The sentencing Acts of other jurisdictions, especially Victoria, were suggested as appropriate models for federal sentencing provisions.⁵⁹ The view was also expressed in consultations and submissions that there was a need to simplify the complex numbering of federal sentencing provisions by labelling sections with simple integers, rather than with integers followed by one or more letters of the alphabet.⁶⁰

2.23 A problem area that was identified in consultations and submissions was the unnecessary divergence of language between federal sentencing provisions and state and territory sentencing provisions.⁶¹ The Criminal Bar Association of Victoria submitted that the terminology of federal sentencing provisions should be, as far as possible, consistent with that used in state provisions. It submitted, for example, that federal sentencing provisions should adopt the terms 'suspended sentence' and 'concurrent' and 'cumulative' sentences, as used in state sentencing legislation.⁶² *Frost v The Queen*⁶³ demonstrated the difficulty caused by inconsistent terminology in interpreting a state provision in relation to remissions to see if it was picked up and applied under Part IB of the *Crimes Act*. The difficulty arose because Tasmanian sentencing legislation used the term 'suspended sentence' while Part IB used the term 'recognizance release order'.

ALRC's views

2.24 Having regard to the strident judicial criticisms of Part IB and the difficulties experienced by legal practitioners and offenders in using and understanding it, the ALRC is of the view that federal sentencing legislation should be redrafted to make its

structure clearer and more logical, and the language and numbering simpler and internally consistent.

2.25 Clearly structured legislation enhances accessibility for users of the legislation. As far as possible, legislative provisions that are concerned with similar subject matter should be located in close proximity. Provisions of general application, such as sentencing guidance, should precede specific provisions, and all provisions relating to each sentencing option should be grouped together. These principles were utilised in the drafting of the *Sentencing Act 1991* (Vic).⁶⁴ The order of provisions should also reflect the chronology of sentencing, administration and release.

2.26 The ALRC agrees with the views expressed in consultations and submissions that the terminology used in federal sentencing legislation should, as far as possible, be consistent with terminology commonly used in state and territory sentencing legislation. State and territory judicial officers are generally less familiar with federal sentencing legislation than with the sentencing legislation of their own jurisdiction. Using consistent terminology across sentencing legislation would assist judicial officers and practitioners in applying and understanding federal sentencing legislation, and would minimise the potential for confusion and error.

2.27 With this goal in mind, the ALRC proposes that federal sentencing terminology should, as far as possible, be consistent with terminology used in state and territory sentencing legislation. It also makes a specific proposal that the federal sentencing Act adopt the state and territory sentencing terminology of concurrent and consecutive sentences in relation to sentencing for multiple offences.⁶⁵ The ALRC is also of the view that the term ‘recognizance release order’ should be replaced with terminology that properly reflects the nature of the order, namely, a conditional suspended sentence. Most state and territory sentencing Acts use the term ‘suspended sentence’⁶⁶ rather than the term ‘recognizance release order’. The ALRC notes that if the term ‘non-parole period’ were to be changed to ‘minimum term’ this would not be consistent with the position in most jurisdictions. The term ‘non-parole period’ is commonly used and understood in state and territory sentencing.⁶⁷ Further, the phrase ‘minimum term’ has potential to be confused with the concept of a minimum penalty.

2.28 The archaic language of ‘recognizance’ has been replaced in some state sentencing legislation with the term ‘bond’,⁶⁸ and the adoption of this terminology was suggested in consultations and submissions.⁶⁹ However, in light of the ALRC’s proposal to repeal the provision that allows a court to require a person to give security by way of recognizance when sentenced to a suspended sentence of imprisonment or when discharged without proceeding to conviction or conditionally released after conviction, there is no need to propose that the term ‘recognizance’ be replaced with ‘bond’.⁷⁰ Similarly, as the ALRC proposes that imprisonment with hard labour be abolished as a sentencing option, there is no need to propose specifically that the archaic language of ‘hard labour’ be discarded.⁷¹

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

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

General principles or detailed code?

Should legislative provisions for the sentencing of federal offenders be detailed and prescriptive, or should they provide a broad framework supported by general principles? [IP 29, Q6–2].

Background

2.29 At one end of the spectrum, Part IB contains some provisions that are quite lengthy and detailed. At the other end of the spectrum, Part IB is silent on a number of matters, including procedural and evidential issues in relation to the sentencing hearing.

2.30 Legislation that provides a broad framework supported by general principles may have the benefit of allowing greater flexibility in the exercise of judicial discretion in individual matters, thereby increasing the scope for individualised justice. However, its application could result in wider divergences in the treatment of federal offenders compared with the application of legislation that sets out detailed factors to be considered. Detailed provisions can promote consistency in application, but if the provisions are exhaustive they can lead to a lack of flexibility.⁷²

Issues and problems

2.31 Some support was expressed for federal sentencing provisions to set out a broad framework supported by general principles.⁷³ The importance of maintaining judicial discretion in the sentencing process was emphasised and there was some resistance to prescriptive legislation.⁷⁴ However, certain areas of sentencing law involving the mechanics of sentencing, such as determining the commencement date of a sentence,

were identified as appropriate subject matter of prescriptive provisions.⁷⁵ The CDPP expressed the view that, where possible, examples were better than exhaustive lists, and that over-prescription could lead to ancillary litigation.⁷⁶ The view was also expressed that a broad framework without more would provide insufficient guidance to judicial officers, and that a measure of detail was necessary and desirable, especially if federal jurisdiction were to be expanded.⁷⁷

ALRC's views

2.32 The ALRC is of the view that federal legislative provisions should, at a minimum, provide a broad framework of general principles. The ALRC has made specific proposals in this Discussion Paper that reflect this underlying principle. These include proposals setting out the objects of the federal sentencing Act,⁷⁸ the purposes and principles of sentencing,⁷⁹ and the purposes of parole.⁸⁰

2.33 The ALRC is also of the view that the federal sentencing Act should contain enough detail to provide guidance to judicial officers without being overly prescriptive or inflexible. This approach is consistent with one of the proposed objects of the federal sentencing Act, which is to promote flexibility in the sentencing, administration and release of federal offenders.⁸¹ It is also consistent with one of the principles of sentencing, which is to provide for individualised justice.⁸² In some cases, the ALRC has made proposals to introduce greater flexibility into the sentencing process.⁸³ Where possible, the ALRC prefers a drafting style that favours the use of examples over exhaustive lists. However, in some limited situations, policy reasons favour the enactment of an exhaustive list.⁸⁴ Further, in some areas of sentencing it is appropriate for legislation to be prescriptive because, for example, there may be a need for certainty and consistency of approach.⁸⁵

2.34 The ALRC is of the view that it is not necessary to formulate a specific proposal to address the question posed in IP 29 as to whether federal sentencing legislation should be prescriptive or provide a broad framework supported by general principles. As the preceding discussion shows, the ALRC's views are reflected in its specific proposals dealing with the content of the proposed federal sentencing Act.

An objects clause

Background

2.35 An issue that was not raised in IP 29 but has arisen in the course of the ALRC's inquiry is whether or not the proposed federal sentencing Act should contain an objects clause.

2.36 An objects clause is a provision located at the beginning of a piece of legislation that outlines the underlying purposes or objects of the legislation. An objects clause can also be positioned at the beginning of a part, division, subdivision or section of an Act. Objects clauses have been described as a modern day variant of the preamble⁸⁶ and several pieces of Commonwealth legislation include them.⁸⁷ In addition, the

sentencing Acts of Victoria, Queensland, Tasmania and New Zealand contain objects clauses,⁸⁸ as does the Crimes (Sentencing) Bill 2005 (ACT).⁸⁹

2.37 Objects clauses have several functions. First, they assist in the construction of legislation.⁹⁰ A high proportion of matters heard by courts require the court to rule on the meaning of a legislative provision.⁹¹ This meaning is often ascertained by reference to legislative intention.⁹² Section 15AA of the *Acts Interpretation Act 1901* (Cth) provides that:

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

2.38 The interpretation Acts of the states and territories contain similar, or identical, provisions.⁹³ An objects clause enables the ‘purpose or object underlying the Act’ to be readily ascertained.

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

ALRC’s views

2.40 The ALRC is of the view that an objects clause should be included in the proposed federal sentencing Act. This approach is consistent with the sentencing legislation of a number of jurisdictions.

2.41 The ALRC has reviewed the objects clauses in the sentencing legislation of Victoria, Queensland, Tasmania and New Zealand, as well as the objects clause in the Crimes (Sentencing) Bill 2005 (ACT), with a view to identifying commonly-cited objects that could be used as a model for the objects in the proposed federal sentencing Act. The objects of these legislative instruments vary in nature and detail. Some are expressed quite broadly,⁹⁴ while others are comparatively specific.⁹⁵

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

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

2.43 In addition to the above objects, the ALRC considers that one of the objects of the proposed federal sentencing Act should be to ‘set out the factors relevant to the administration of the criminal justice system, so far as they bear on the sentencing process’.⁹⁶ Sentencing law and practice often takes into account specific factors that are designed to promote the efficacy of the criminal justice system. As discussed elsewhere in this Discussion Paper, these factors are: (a) the fact that the offender has pleaded guilty; and (b) the fact that the offender has cooperated with law enforcement authorities.⁹⁷ Unlike traditional sentencing factors, these factors do not focus on the individual circumstances of the offence, the offender or the victim; and unlike sentencing factors, they do not on their own promote the traditional purposes of sentencing.⁹⁸ Rather, allowing courts to take these factors into account when sentencing promotes the goal of facilitating the administration of the criminal justice system.⁹⁹ The difference in the character and purpose of these factors justifies their being separately identified from the factors relevant to sentencing.

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

- (a) to preserve the authority of the federal criminal law and promote respect for the federal criminal law;
- (b) to promote a just and safe society;
- (c) to promote public understanding of the laws and procedures for the sentencing, administration and release of federal offenders;
- (d) to have within the one Act all general provisions dealing with the sentencing, administration and release of federal offenders, and to indicate when state and territory laws apply to the sentencing, administration and release of federal offenders;
- (e) to provide the courts with the purposes and principles of sentencing federal offenders;
- (f) to set out the factors relevant to the administration of the criminal justice system so far as they bear on the sentencing process;
- (g) to promote flexibility in the sentencing, administration and release of federal offenders;
- (h) to provide fair and efficient procedures for the sentencing, administration and release of federal offenders; and
- (i) to recognise the interests of victims of federal offences.

18 These provisions include *Crimes Act 1914* (Cth) ss 4AA, 4AB, 4B, 4C, 4J, 4K. This issue is discussed in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [6.18].

19 For example, s 3B in Part I of the *Crimes Act 1914* (Cth) provides for arrangements with the states and territories for the performance of functions by state and territory officers and provision of facilities; s 15A in Part IA deals with the enforcement of Commonwealth fines; s 48A in Part III provides that a sentence ceases to run while an escaped prisoner is at large; and Part VIIC provides for pardons, quashed convictions and spent convictions which impact on the release of federal offenders.

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

21 See *Crimes (Sentencing) Bill 2005* (ACT).

22 See *Sentencing Act 2002* (NZ).

23 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW); *Crimes (Administration of Sentences) Act 1999* (NSW); *Sentencing Act 1995* (WA); *Sentence Administration Act 2003* (WA). See also *Crimes (Sentencing) Bill 2005* (ACT); *Crimes (Sentence Administration) Bill 2005* (ACT).

- 24 J Willis, *Submission SFO 20*, 9 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; K Warner, *Consultation*, Hobart, 13 April 2005; Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005; Confidential, *Consultation*, Melbourne, 31 March 2005; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005; T Glynn SC, *Consultation*, Brisbane, 2 March 2005; Department of Justice Northern Territory, *Consultation*, Darwin, 27 April 2005; Northern Territory Legal Aid Commission, *Consultation*, Darwin, 27 April 2005; LD, *Submission SFO 9*, 10 March 2005.
- 25 Attorney-General's Department, *Submission SFO 52*, 7 July 2005.
- 26 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 27 Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005.
- 28 Ibid.
- 29 J Willis, *Submission SFO 20*, 9 April 2005.
- 30 Northern Territory Legal Aid Commission, *Consultation*, Darwin, 27 April 2005.
- 31 J Willis, *Submission SFO 20*, 9 April 2005.
- 32 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.
- 33 Queensland Legal Aid, *Consultation*, Brisbane, 2 March 2005.
- 34 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), Rec 9.
- 35 The criticisms of Part IB are discussed in more detail in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [6.9]–[6.25].
- 36 *Director of Public Prosecutions (Cth) v El Karhani* (1990) 21 NSWLR 370.
- 37 *R v Ng Yun Choi* (Unreported, Supreme Court of New South Wales, Sully J, 4 September 1990), 2–3.
- 38 *R v Bibaoui* (1997) 2 VR 600, 600.
- 39 *R v Muanchukingkan* (1990) 52 A Crim R 354, 358.
- 40 *Edwards v Pregnell* (1994) 74 A Crim R 509, 513.
- 41 *R v Carroll* [1991] 2 VR 509, 514.
- 42 *R v Paull* (1990) 100 FLR 311, 318, 321. These comments were endorsed in subsequent cases. See *R v Carroll* [1991] 2 VR 509, 514; *Selimoski v Picknoll* (Unreported, Supreme Court of Western Australia, Full Court, 6 August 1992), 7.
- 43 This issue is discussed in more detail in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [6.19]–[6.21].
- 44 *Crimes Act 1914* (Cth) s 20AB.
- 45 Ibid s 20AC.
- 46 Ibid s 18.
- 47 See Ibid ss 19B(1)(d), 20(1)(a).
- 48 See Ibid ss 16, 20(1)(b).
- 49 *Kesavarajah v The Queen* (1994) 181 CLR 230, 242–243.
- 50 *Crimes Act 1914* (Cth) ss 18, 20A(9).
- 51 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 52 New South Wales Bar Association, *Consultation*, Sydney, 2 September 2004; Confidential, *Consultation*, Melbourne, 31 March 2005; Queensland Legal Aid, *Consultation*, Brisbane, 2 March 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005; Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 53 Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005; T Glynn SC, *Consultation*, Brisbane, 2 March 2005; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005.
- 54 Attorney-General's Department, *Submission SFO 52*, 7 July 2005.
- 55 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.
- 56 Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005.
- 57 New South Wales Legal Aid Commission—Criminal Law Division, *Consultation*, Sydney, 22 September 2004; PS, *Submission SFO 21*, 8 April 2005.
- 58 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 59 A Freiberg, *Consultation*, Melbourne, 30 March 2005; Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005. The *Sentencing Act 1991* (Vic) was used as a model for some other state sentencing legislation, such as *Penalties and Sentences Act 1992* (Qld); *Sentencing Act 1995* (WA); *Sentencing Act 1995* (NT).

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- 60 J Willis, *Submission SFO 20*, 9 April 2005. See also Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.
- 61 Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005; Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005.
- 62 Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005.
- 63 *Frost v The Queen* (2003) 11 Tas R 460. This case is discussed in more detail in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [9.59].
- 64 A Freiberg, 'Sentencing Reform in Victoria' in C Clarkson and R Morgan (eds), *The Politics of Sentencing Reform* (1995) 51.
- 65 See Proposal 12–1 and accompanying text.
- 66 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 12(1); *Sentencing Act 1991* (Vic) s 27; *Penalties and Sentences Act 1992* (Qld) s 144; *Sentencing Act 1995* (WA) s 76; *Criminal Law (Sentencing) Act 1988* (SA) s 38; *Sentencing Act 1997* (Tas) s 7; *Sentencing Act 1995* (NT). See also *Crimes (Sentencing) Bill 2005* (ACT) cl 12.
- 67 See, eg, *Sentencing Act 1991* (Vic) ss 11–14; *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 44, 54A; *Criminal Law (Sentencing) Act 1988* (SA) s 32; *Sentencing Act 1995* (NT) ss 53A, 54–57. See also *Crimes (Sentencing) Bill 2005* (ACT) pt 5.2.
- 68 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 9, 95.
- 69 Northern Territory Legal Aid Commission, *Consultation*, Darwin, 27 April 2005; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.
- 70 See Ch 7.
- 71 See Ch 7.
- 72 This issue is discussed in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [6.26]–[6.29].
- 73 Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.
- 74 Northern Territory Legal Aid Commission, *Consultation*, Darwin, 27 April 2005; M Johnson, *Consultation*, Darwin, 27 April 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005. Compare LD, *Submission SFO 9*, 10 March 2005, which supported prescriptive legislation.
- 75 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 76 Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005.
- 77 A Freiberg, *Submission SFO 12*, 4 April 2005.
- 78 See Proposal 2–4.
- 79 See Proposals 4–1; 5–1.
- 80 See Proposal 23–5.
- 81 See Proposal 2–4.
- 82 See Proposal 5–1.
- 83 See, eg, Proposal 17–2 in relation to dealing with a breach of a condition of a suspended sentence.
- 84 See, eg, Proposal 4–1 and the discussion of purposes of sentencing in Ch 4.
- 85 For example, the ALRC has proposed a prescriptive rather than a flexible approach in determining the treatment of pre-sentence custody and detention. See Proposals 10–2 and 10–3.
- 86 D Pearce and R Geddes, *Statutory Interpretation in Australia* (5th ed, 2001), 122.
- 87 See, eg, *Freedom of Information Act 1982* (Cth) s 3; *Sex Discrimination Act 1984* (Cth) s 3; *Radiocommunications Act 1992* (Cth) s 3; *Migration Act 1958* (Cth) s 4; *Trade Practices Act 1974* (Cth) s 2.
- 88 *Sentencing Act 1991* (Vic) s 1; *Penalties and Sentences Act 1992* (Qld) s 3; *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 2002* (NZ) s 3.
- 89 *Crimes (Sentencing) Bill 2005* (ACT) cl 6.
- 90 See, eg, *Tickner v Bropho* (1993) 114 ALR 409.
- 91 D Pearce and R Geddes, *Statutory Interpretation in Australia* (5th ed, 2001), 1.
- 92 *Singh v Commonwealth of Australia* (2004) 209 ALR 355, 362.

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

94 For example, some Acts have the broadly expressed objects of promoting consistency of approach in sentencing offenders, and providing the sentencing principles to be applied by courts.

95 For example, *Penalties and Sentences Act 1992* (Qld) s 3(f) (non-payment of fines); *Sentencing Act 1991* (Vic) s 1(i) (compensation and restitution for victims).

96 The proposed federal sentencing Act does not have the object of promoting the efficient administration of the criminal justice system in general because some stages of the criminal justice process (including investigation, prosecution and adjudication) are generally beyond the scope of the Act.

97 See Proposal 6–5.

98 The purposes of sentencing are discussed in Ch 4.

99 This is discussed further in Chs 6, 11.

3. Equality in the Treatment of Federal Offenders

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Introduction

Should federal law relating to the sentencing, imprisonment, administration and release of federal offenders aim for equality between federal offenders serving sentences in different states and territories, or between all offenders within the same state or territory? What principles or values should inform this choice? Should the choice be expressed in federal legislation? Should different approaches be taken to different issues in sentencing? [IP 29, Q 5–1]

If it is desirable to have greater equality between federal offenders serving sentences in different states and territories, would this best be achieved through:

- (a) a comprehensive federal sentencing regime for federal offenders;
- (b) model sentencing laws for all federal, state and territory offenders; or
- (c) a separate federal criminal justice system covering investigation, prosecution, adjudication, sentencing, imprisonment, administration and release? [IP 29, Q 5–2]

If it is desirable to have greater equality between all offenders within the same state or territory, how should this be achieved? What would be the consequences of relying wholly on the state and territory systems of criminal justice with respect to the sentencing, imprisonment, administration and release of federal offenders? [IP 29, Q 5–3]

Where an offender has been tried or sentenced jointly for federal offences and state or territory offences, what are the implications for equality in the sentencing, imprisonment, administration and release of that offender vis à vis other offenders? [IP 29, Q 5–4]

3.1 The Terms of Reference ask the ALRC to examine whether equality in sentencing federal offenders should be maintained between federal offenders serving sentences in different states and territories—inter-jurisdictional equality—or between offenders within the same state or territory, regardless of whether they are state, territory or federal offenders—intra-jurisdictional equality.¹⁰⁰

3.2 Federal law applies throughout Australia and offenders sentenced for the same federal offence in similar circumstances might generally expect to receive similar sentences. However, federal offenders are nearly always tried and sentenced in state and territory courts, applying state and territory laws in relation to procedure and, in some jurisdictions, picking up alternative sentencing options available under state and territory law.¹⁰¹ This creates the potential for federal offenders to receive different sentences for the same offence, depending on the jurisdiction in which they are sentenced.

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

The Commonwealth relies on State criminal justice institutions to handle offenders against laws of the Commonwealth. The policy fosters parity in treatment between Federal and State prisoners within the State and Territory jurisdictions. It enjoys practical advantages, especially cost saving. Nevertheless, the arrangement is a source of disparity in the treatment of Federal offenders sentenced to imprisonment because conditions in prisons vary considerably in different parts of Australia.¹⁰²

3.4 Issues of uniformity and equality of treatment have been considered in a number of High Court cases.¹⁰³ While the Court has often been divided on the issue, it appears that a majority of the Court will allow some scope for the differential treatment of federal offenders under the laws of the states and territories.

The policy choice

Previous consideration by the ALRC

3.5 ALRC 15 considered the threshold question of whether greater efforts should be made to ensure that federal offenders are treated as uniformly as possible throughout Australia for like offences. The Report noted that the existing policy placed emphasis on integrating federal offenders into the local state and territory criminal justice systems, notwithstanding that this inevitably resulted in inequality in their treatment throughout Australia.¹⁰⁴ The ALRC recommended a change to this policy and adopted the principle that federal offenders should be treated uniformly, wherever they are convicted in Australia.¹⁰⁵ The ALRC considered two options for achieving better inter-jurisdictional uniformity in the treatment of federal offenders: the adoption of a series of federal interventions in the handling of federal criminal matters by state and territory courts and officers; and the establishment of an entirely separate federal criminal justice system.¹⁰⁶

3.6 The majority of ALRC commissioners recommended the adoption of a series of federal interventions in the handling of federal criminal matters by state and territory courts and officers.¹⁰⁷ In their view, while the existing arrangements had a number of problems that affected the treatment of federal offenders, they had generally ‘withstood the tests of time, convenience and economics’, and suited the geographical distribution of the Australian population. Accordingly, the existing system ‘should not be abandoned before an attempt to make it work more justly has been made’.¹⁰⁸

3.7 However, one commissioner was of the view that the only effective way to ensure that federal offenders were treated uniformly was to establish a completely separate federal criminal justice system with separate policies, prosecution, courts and correctional personnel and facilities to deal with federal offenders. He recommended that such a system should be introduced and the use of state institutions and personnel should be gradually phased out.¹⁰⁹

In the past, Federal Governments have successively largely waived their responsibilities for the handling of Federal criminal matters. This situation should not continue. The Commonwealth should assume control over the administration of its own criminal laws in a manner which makes it accountable for them to the citizens of Australia.¹¹⁰

3.8 In its 1988 report, *Sentencing* (ALRC 44), the ALRC accepted that the policy of intra-jurisdictional equality of treatment for federal prisoners was the only practical approach while such prisoners continued to be housed in state and territory prisons.¹¹¹ ALRC 44 noted that:

Responses to ALRC 15, especially from corrections administrators, showed particular concern at the proposal that federal prisoners ... be differentiated in some way within a prison from local prisoners. The secure management of a prison demands as few

sources of conflict as possible. A clearly identifiable group of prisoners who receive different and preferential treatment would be a constant source of friction and conflict within the prison, causing prison administrators considerable difficulty.¹¹²

3.9 This recommendation was subject to a number of qualifications intended to ensure that certain minimum standards applied in relation to federal prisoners, including the appointment of a federal prison coordinator to monitor conditions under which federal prisoners were held and to report to the Australian Government.¹¹³

Current arrangements under Part IB

3.10 Following these two reports, Part IB of the *Crimes Act 1914* (Cth) introduced a number of changes intended to create greater uniformity in the sentencing and administration of federal offenders across Australia, including in relation to the fixing of non-parole periods and the application of remissions. In his second reading speech for the Crimes Legislation Amendment Bill (No 2) 1989 (Cth), which introduced Part IB into the *Crimes Act*, the Hon Robert Brown MP, stated that:

Because of the close association of Federal and State/Territory prisoners it has been the policy of successive Commonwealth governments to maintain intrastate parity of treatment for Federal offenders. The current Commonwealth legislation applies State and Territory laws relating to the fixing of non-parole periods to Federal sentences. However, the increasing divergence of, and frequent changes, both administrative and statutory, to State and Territory legislation have resulted in increasing use of administrative measures to ensure that Federal offenders are not disadvantaged.¹¹⁴

3.11 Part IB now provides a separate regime for fixing federal non-parole periods, rather than relying on applied state and territory law.¹¹⁵ Part IB also provides that remissions available under state and territory law that reduce the non-parole period, or pre-release period, do not apply to federal sentences.¹¹⁶

3.12 The Explanatory Memorandum to the Crimes Legislation Amendment Bill (No 2) 1989 sets out 13 main purposes of the Bill, including to review and consolidate the legislation relating to the sentencing and release on parole of federal offenders. In *Putland v The Queen*, the High Court commented that a notable exception to this list was ‘any reference to an overriding or general purpose of providing complete uniformity of treatment as between federal offenders’.¹¹⁷

3.13 In *DPP v El Karhani*, the New South Wales Court of Criminal Appeal (NSWCCA) stated that the purpose of the new legislation was not clear.¹¹⁸ It said that Part IB glossed over, and left unresolved, conflicting policy choices. One such choice was whether federal offenders should be treated equally with one another, irrespective of where their offence was committed, or whether

out of recognition that they are housed side by side with State offenders in State prisons (and often also upon sentences following conviction of connected State offences) ... their punishment [should] be assimilated, approximately, with that of State prisoners.¹¹⁹

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

The only workable policy is that federal offenders should be subject to State sentencing laws in their entirety, save where it is necessary to make special provision by reason of the fact that they are federal offenders—for example, in the procedures for release on parole. The Commonwealth could then direct its energies in the direction of encouraging the States and Territories to adopt uniform sentencing laws.¹²⁰

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

Reconsidering the policy choice

Background

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

Issues and problems

3.17 In consultations and submissions, a distinction became evident between the views of stakeholders on the issue of equality in the sentencing of federal offenders and equality in the administration of those sentences. Support was expressed for the proposition that a different approach to different issues in the sentencing, administration and release of federal offenders was acceptable given the current federal arrangements.¹²¹

Sentencing

3.18 In relation to the sentencing of federal offenders, the majority of stakeholders expressed the view that equality between federal offenders was important.¹²² The Australian Securities and Investments Commission (ASIC) commented that, from the perspective of a national regulator, the advantages of inter-jurisdictional equality in sentencing were clear. Both ASIC and the Australian Taxation Office (ATO) cited the importance of national consistency in regulating and enforcing national schemes, such as those established under corporations and taxation laws.¹²³ The Law Society of South Australia expressed the view that it was illogical that sentences imposed on federal offenders convicted of the same offence in the same circumstances might depend on the geographic location of the trial.¹²⁴ Courts have certainly asserted that a fundamental principle of sentencing law is that like cases should be treated in a like, or consistent, manner.¹²⁵

3.19 The Inspector of Custodial Services in Western Australia, Richard Harding, expressed the view that it would be possible to achieve broad equality in the sentencing of federal offenders by relying on state and territory law. He suggested the establishment of a model federal statute that would only come into play if state and territory legislation failed to conform to standards set out in the federal statute.¹²⁶

3.20 By contrast, Victoria Legal Aid submitted that it is more important to achieve sentencing consistency for similar offences committed in the same state than for federal offences committed in different states.¹²⁷ Justice Roslyn Atkinson expressed the view that federal offenders would be dealt with more fairly if they were sentenced under state legislation.¹²⁸ Associate Professor John Willis expressed support for the position put by Michael Rozenes, namely, that federal offenders should generally be subject to state sentencing laws but that the states and territories should be encouraged to adopt uniform sentencing laws.¹²⁹ Correctional Services Northern Territory, while expressing a preference for a uniform scheme applying to all offenders, asked why judicial officers should be required to apply two different systems.¹³⁰

3.21 The idea of uniform national sentencing laws proved attractive to quite a few stakeholders, although most of these recognised the difficulty of achieving it.¹³¹ ASIC was of the view that a model sentencing law for all federal, state and territory offenders was the ideal but may not be realistic in the short to medium term.¹³² In consultations, the Law Society of South Australia expressed support for a model sentencing code and for bringing federal, state and territory sentencing closer together.¹³³

Administration and release

3.22 While the majority of stakeholders expressed support for inter-jurisdictional equality in relation to the sentencing of federal offenders, there was general acknowledgement that in relation to the administration of sentences imposed on federal offenders—and particularly in relation to the imprisonment of federal offenders—intra-jurisdictional equality became more important. Corrections Victoria, while supporting inter-jurisdictional equality in relation to sentencing, noted that there was less scope for

uniformity between jurisdictions in relation to the administration of the sentences imposed. This is because federal offenders are accommodated in state facilities, and the administrative and correctional regimes vary from state to state. Corrections Victoria did, however, express support for developing greater uniformity of approach between jurisdictions and noted that the Australian Government could play an active role in this process.¹³⁴

3.23 The New South Wales Department of Corrective Services commented that federal offenders in New South Wales did not form a distinct population but were simply part of the general prison population. The Department was emphatically of the view that intra-jurisdictional equality in this context was more important than inter-jurisdictional equality. The Department pointed out that federal offenders make up only four per cent of the prisoner population in New South Wales and that it was essential that policies and principles had equal application to all inmates. The Department noted that the *Standard Guidelines for Corrections in Australia*¹³⁵ have been adopted by all the states and territories and apply to all prisoners, including federal prisoners.¹³⁶

3.24 Sisters Inside expressed the view that it was important to pursue both intra-jurisdictional and inter-jurisdictional equality for all offenders—federal, state and territory. This equality should be based on the standards set out in relevant international human rights instruments and international standards, as well as the *Standard Guidelines for Corrections in Australia*.¹³⁷

ALRC's views

3.25 In a number of previous reports, the ALRC considered whether, in pursuit of inter-jurisdictional equality, it was appropriate and viable to establish a completely separate federal criminal justice system, including federal criminal courts, federal corrective services agencies and a federal prison.¹³⁸ The issue has been considered again in the context of this Inquiry and the ALRC's views remain essentially unchanged. Given existing state and territory infrastructure (including courts and corrective services agencies and facilities), the relatively small number of federal offenders, and the geographic dispersal of offenders across Australia, it is not viable to establish a completely separate federal criminal justice system.¹³⁹ This means that the overwhelming majority of federal offenders will continue to be sentenced in state and territory courts and that the sentences imposed will continue to be administered by state and territory corrective services agencies for the foreseeable future. On this basis, it is the ALRC's view that it is not possible to achieve complete inter-jurisdictional equality for federal offenders.

3.26 However, the ALRC believes that a breach of federal criminal law by a person anywhere in Australia should attract generally similar consequences and that this principle is fundamental to a just criminal law system.¹⁴⁰ The ALRC has attempted, in

each section of this Discussion Paper, to balance the need for like cases to be treated alike with the necessity of working within a federal system in which the Australian Government relies heavily on the states and territories to administer federal criminal law. Achieving broad equality within the federal system is possible, in the ALRC's view, because treating like cases alike does not mean treating them identically. Broad equality can be achieved while accepting certain differences that arise from Australia's federal system of government.

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

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

Sentencing

3.29 The ALRC agrees with the majority of stakeholders that, in relation to the law governing the determination of a federal offender's sentence, a high degree of inter-jurisdictional equality is possible and desirable. Relying on state and territory legislation in this area would introduce an unacceptable level of inconsistency in the sentencing of federal offenders. The High Court has made clear that consistency in punishment is a fundamental element in a rational and fair system of criminal justice.¹⁴¹ State and territory courts are already required to apply a distinct sentencing regime to the sentencing of federal offenders under Part IB of the *Crimes Act*. The ALRC believes that, if the proposals in this Discussion Paper are implemented, the problems identified with Part IB will be eliminated and that the federal sentencing regime will be simpler and clearer and therefore easier for the state and territory courts to work with.

3.30 In Chapter 2 the ALRC proposes the development of federal sentencing legislation and in the following chapters the ALRC proposes the development of legislative purposes, principles and factors to apply in sentencing federal offenders.¹⁴² Together, these proposals will establish a legislative framework within which federal offenders are sentenced and will help to ensure a greater degree of inter-jurisdictional equality and consistency. Other proposals in this Discussion Paper are also intended to encourage and support inter-jurisdictional equality in the sentencing of federal

offenders, including the establishment of a national sentencing database,¹⁴³ the development of a federal sentencing benchbook, and further education of those involved in sentencing federal offenders.¹⁴⁴

3.31 The ALRC proposes one major structural change to the court system to ensure greater inter-jurisdictional equality in the sentencing of federal offenders, that is, the conferral on the Federal Court of Australia of exclusive jurisdiction to hear and determine appeals in federal criminal matters. Currently, there is no appellate court, other than the High Court, ensuring consistency in the sentencing of federal offenders nationally. Given the special leave requirements and the breadth of the High Court's workload, it is unlikely that there will ever be a sufficient number or variety of High Court decisions on the sentencing of federal offenders to promote national consistency to the extent desirable. The state and territory courts of appeal and courts of criminal appeal do not have the requisite jurisdiction to perform this role.

3.32 In relation to sentencing options for federal offenders, the ALRC is of the view that broad equality can be achieved even though different sentencing options may be available in different jurisdictions. The ALRC proposes that certain minimum standard options should be available in relation to all federal offenders.¹⁴⁵ In relation to other sentencing options available under state and territory law, the ALRC proposes that the Office for the Management of Federal Offenders (OMFO) be given the task of examining those options and recommending to the Australian Government whether they should be made available for federal offenders.¹⁴⁶ The OMFO will be required to consider the issue of equality when making recommendations on state and territory sentencing options. Finally, the ALRC proposes that certain sentencing options should be prohibited in relation to all federal offenders, for example, corporal punishment and imprisonment with hard labour.¹⁴⁷

Administration and release

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

3.34 A number of the proposals in this Discussion Paper—for example, the abolition of automatic parole for federal offenders—will bring the administration of federal sentences more into line with state and territory sentences. In addition, the

establishment of the OMFO and the increased involvement of that Office with state and territory corrective services agencies are intended to assist the states and territories in administering the sentences imposed on federal offenders on behalf of the Australian Government. It is proposed that the OMFO will have a role in promoting the fulfilment of the *Standard Guidelines for Corrections in Australia* and ensuring compliance with the *Standards for Juvenile Custodial Facilities* in relation to young federal offenders. As all states and territories have adopted these standards, the ALRC is of the view that this should not result in the creation of a privileged class of federal offenders. The OMFO will be working with the states and territories to ensure that these standards apply in relation to all offenders.

3.35 Finally, the ALRC considers that responsibility for release of federal offenders into the community should reside at the federal level. The ALRC has therefore proposed that the Australian Government establish a Federal Parole Board to make decisions in relation to parole of federal offenders in order to ensure broad inter-jurisdictional equality in decision making.¹⁴⁸

3.36 The following proposal seeks to capture the essential attributes of the ALRC's approach to the issue of equality. Each of the matters addressed in the proposal is explored in detail in later chapters of this Discussion Paper.

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

- (a) The same legislative purposes, principles and factors should apply in sentencing adult federal offenders in every state and territory. Inter-jurisdictional consistency in determining the sentence of federal offenders should be encouraged and supported.
- (b) Every state and territory should provide adequate facilities to support a minimum range of sentencing options in relation to federal offenders. This must include (i) the sentencing options specified in federal offence provisions (such as fines and imprisonment); (ii) the sentencing options specified in federal sentencing legislation (such as dismissing the charge and discharging without conviction); and (iii) additional state or territory-based sentencing options that include, at a minimum, community based orders.
- (c) The proposed Office for the Management of Federal Offenders should work with the states and territories in relation to the administration of the sentences of federal offenders to: (i) promote the fulfilment of the *Standard Guidelines for Corrections in Australia*; and (ii) ensure compliance with the *Standards for Juvenile Custodial Facilities*.

- (d) The proposed Federal Parole Board should make decisions in relation to the release of federal offenders on parole to ensure broad inter-jurisdictional equality in decision making. The Board should have regard to the proposed federal legislative purposes of parole and factors relevant to the grant of parole.

- 100 See Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), Ch 5 for further
background.
- 101 The sentencing options available in the states and territories are discussed in Ch 7.
- 102 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [201].
- 103 See, eg, *Leeth v Commonwealth* (1991) 174 CLR 455; *Kruger v Commonwealth* (1997) 190 CLR 1;
Cameron v The Queen (2002) 209 CLR 339; *R v Gee* (2003) 212 CLR 230; *Putland v The Queen* (2004)
218 CLR 174.
- 104 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), xxiv.
- 105 *Ibid*, Rec 16.
- 106 *Ibid*, Ch 5.
- 107 *Ibid*, Rec 18.
- 108 *Ibid*, [153].
- 109 *Ibid*, Rec 20.
- 110 *Ibid*, [157].
- 111 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 158.
- 112 *Ibid*, 128.
- 113 *Ibid*, Rec 162.
- 114 Commonwealth, *Parliamentary Debates*, House of Representatives, 5 October 1989, 1602 (R Brown—
Minister for Land Transport and Shipping Support).
- 115 See Ch 9.
- 116 The only exception to this is remissions for industrial action by prison warders, in those jurisdictions
where such remissions are available: *Crimes Act 1914* (Cth) s 19AA(4). See Ch 11.
- 117 *Putland v The Queen* (2004) 218 CLR 174, [22].
- 118 *Director of Public Prosecutions (Cth) v El Karhani* (1990) 21 NSWLR 370, 387.
- 119 *Ibid*, 375.
- 120 M Rozenes, ‘Sentencing for Commonwealth Offenders’ (Paper presented at Law Council of Australia
Criminal Law Seminar, Hobart, 7 March 1992).
- 121 A Freiberg, *Submission SFO 12*, 4 April 2005; Australian Securities and Investments Commission,
Submission SFO 39, 28 April 2005; Corrections Victoria, *Submission SFO 48*, 2 May 2005.
- 122 A Freiberg, *Submission SFO 12*, 4 April 2005; Australian Taxation Office, *Submission SFO 18*, 8 April
2005; PS, *Submission SFO 21*, 8 April 2005; JC, *Submission SFO 25*, 13 April 2005; Department of
Corrective Services Queensland, *Submission SFO 27*, 14 April 2005; New South Wales Legal Aid
Commission, *Submission SFO 36*, 22 April 2005; Law Society of South Australia, *Submission SFO 37*,
22 April 2005; Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005;
Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005; Corrections Victoria,
Submission SFO 48, 2 May 2005; Commonwealth Director of Public Prosecutions, *Submission SFO 51*,
17 June 2005; Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005; New South Wales
Bar Association, *Consultation*, Sydney, 2 September 2004.
- 123 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; Australian
Taxation Office, *Submission SFO 18*, 8 April 2005.
- 124 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
- 125 See, eg, *Lowe v The Queen* (1984) 154 CLR 606, 610–611. Consistency in sentencing federal offenders is
discussed further in Chs 20 and 21.
- 126 Inspector of Custodial Services Western Australia, *Consultation*, Perth, 19 April 2005.

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- 127 Victoria Legal Aid, *Submission SFO 31*, 18 April 2005.
128 Justice R Atkinson, *Consultation*, Brisbane, 2 March 2005.
129 J Willis, *Submission SFO 20*, 9 April 2005.
130 Correctional Services Northern Territory, *Submission SFO 14*, 5 April 2005.
131 Ibid; Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Victoria Legal Aid, *Submission SFO 31*, 18 April 2005; J Willis, *Submission SFO 20*, 9 April 2005.
132 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.
133 Law Society of South Australia, *Consultation*, Adelaide, 21 April 2005.
134 Corrections Victoria, *Submission SFO 48*, 2 May 2005.
135 Corrective Services Ministers' Conference and Conference of Correctional Administrators, *Standard Guidelines for Corrections in Australia* (2004).
136 Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005.
137 Sisters Inside Inc, *Submission SFO 40*, 28 April 2005.
138 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980); Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988).
139 See Ch 18 in relation to the establishment of a separate federal criminal court system and Ch 22 in relation to corrective services agencies and facilities.
140 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [151].
141 *Lowe v The Queen* (1984) 154 CLR 606, 610–611.
142 See Chs 4, 5 and 6.
143 See Ch 21.
144 See Ch 19.
145 See Ch 7.
146 See Ch 22 on the establishment and role of the OMFO.
147 See Ch 7.
148 See Ch 23.

4. Purposes of Sentencing

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Purposes of sentencing

What are the objectives or purposes of sentencing federal offenders? [IP 29, Q7-1, part]

4.1 Punishment is an essential component of any criminal justice system. Those suspected of engaging in criminal activity are investigated and prosecuted on the understanding that they will be punished—or will at least face the threat of punishment—if found guilty of a criminal offence. While most people agree there is a need to punish those found guilty of criminal offences, there is an on-going debate about the underlying justification for this punishment. This debate has generated a prodigious amount of academic literature and has been largely dominated by two different theories of punishment.¹⁴⁹

4.2 The utilitarian theory of punishment states that punishment is justified because its beneficial effects outweigh its detrimental effects.¹⁵⁰ Proponents of the utilitarian

theory of punishment consider that punishment has the potential to reduce crime.¹⁵¹ On the other hand, the retributive theory of punishment states that punishment is an appropriate moral response to the voluntary commission of an offence and should be imposed regardless of its effects.

4.3 While sentencing and punishment are not synonymous, many of the accepted purposes of sentencing have been derived from theories of punishment. The commonly cited purposes of sentencing are retribution, deterrence, rehabilitation, incapacitation and denunciation. Retribution—often referred to as ‘punishment’ in legislation and case law—is derived from the retributive theory of punishment. Deterrence, rehabilitation and incapacitation are derived from the utilitarian theory of punishment.¹⁵² Denunciation is often associated with retributivism, although it has also been linked to utilitarianism. Another purpose of sentencing that has gained prominence in recent years is restoration. These purposes, outlined briefly in Issues Paper 29 (IP 29),¹⁵³ will be considered in turn.

Retribution

4.4 Retribution is based on the belief that those who engage in criminal activity deserve to suffer.¹⁵⁴ One of the oldest versions of retributivism—*lex talionis* or ‘law of retaliation’—is found in the Bible in the ‘eye for an eye’ principle. Retributivists disagree about why offenders deserve to be punished. Some argue it is to satisfy a debt owed to society, while others argue it is to eliminate the unfair advantage the offender gained by committing the offence in question.¹⁵⁵

4.5 Retribution was a popular purpose of sentencing in colonial Australia.¹⁵⁶ However, by the mid-1970s it had been virtually abandoned in favour of utilitarian purposes such as deterrence and rehabilitation.¹⁵⁷ Nevertheless, in the last quarter of the twentieth century, retribution enjoyed a renaissance under the guise of ‘just deserts’.¹⁵⁸ Proponents of just deserts consider that offenders deserve to be punished, but that the punishment should be proportionate to the gravity of the offending conduct. Some commentators have argued that the notion of just deserts has led to an increase in the severity of punishment because it has enabled politicians to introduce more punitive sentencing policies.¹⁵⁹ Others have argued that there is no causal connection between just deserts and increased sentencing severity.¹⁶⁰

Deterrence

4.6 It is widely accepted that the mere existence of a criminal justice system that punishes offenders has a deterrent effect on would-be criminals.¹⁶¹ This type of deterrence is known as ‘absolute deterrence’. Another form of deterrence is ‘marginal deterrence’, which assumes that the severity of the punishment imposed on an offender can lead to a decrease in crime.¹⁶² The term marginal deterrence is often used interchangeably with the more widely used term ‘general deterrence’. Two forms of deterrence—general and specific—are particularly relevant to the purposes of sentencing.

General deterrence

4.7 The notion of general deterrence assumes that offenders are rational beings who will desist from criminal activity if the consequences of their actions are perceived to be sufficiently severe.¹⁶³ In *R v Radich*, a New Zealand case that has significantly influenced Australian sentencing jurisprudence,¹⁶⁴ general deterrence was described as follows:

[O]ne of the main purposes of punishment ... is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilised countries, in all ages, that has been the main purpose of punishment, and it still continues so.¹⁶⁵

4.8 However, general deterrence is a controversial purpose of sentencing. In the ALRC's 1988 report on sentencing (ALRC 44), the ALRC objected to general deterrence on the ground that it was unfair to punish one person by reference to a hypothetical crime of another.¹⁶⁶ Another objection to general deterrence is that it is ineffective because some crimes are committed by offenders who do not engage in a rational analysis of their actions prior to offending.¹⁶⁷ Further, some crimes are committed by offenders who cannot be deterred because they believe they will never be caught, are unaware of the punishment for their crime,¹⁶⁸ or do not have the mental capacity to understand they may be punished for their crime.

4.9 Australian courts have demonstrated a 'peculiar fondness' for deterrence in sentencing jurisprudence.¹⁶⁹ The omission of general deterrence from the list of sentencing factors in s 16A(2) of the *Crimes Act 1914* (Cth) has caused considerable judicial disquiet.¹⁷⁰ In *Director of Public Prosecutions (Cth) v El Karhani*, the New South Wales Court of Criminal Appeal concluded that the absence of general deterrence from s 16A(2) was the result of a legislative oversight, and held that it remained an important consideration when sentencing federal offenders because it was a fundamental sentencing purpose 'inherited from the ages'.¹⁷¹ General deterrence has been identified as a significant purpose of sentencing for offences involving fraud or dishonesty,¹⁷² which represent the vast bulk of federal offences.¹⁷³ It has also been held to be a significant sentencing purpose for other major categories of federal offences.¹⁷⁴

4.10 In consultations and submissions support was expressed for the inclusion of general deterrence in federal sentencing legislation.¹⁷⁵ However, there was also opposition to the inclusion of general deterrence in federal sentencing legislation.¹⁷⁶ One federal offender made the following submission:

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

I have great difficulty with the concept of making someone the ‘scapegoat’ with the objective of modifying the future behaviour of others. The offender should be charged with the offence they committed without reference to the sentence’s potential deterrent effect on others. There is little, if any, evidence of the effectiveness of deterrence and it merely becomes some form of social experimentation by a judge in an obtuse attempt at altering the general behaviour of others.¹⁷⁷

4.11 Professor Mirko Bagaric expressed the opinion that absolute deterrence, as opposed to marginal deterrence, was the only legitimate purpose of sentencing.¹⁷⁸

Specific deterrence

4.12 Specific deterrence aims to prevent offenders from committing further offences by demonstrating to them the adverse consequences of criminal activity. Specific deterrence may be given more weight when sentencing an offender who has committed offences in the past because it is assumed that the previous sentence was not of sufficient severity to deter him or her from crime.¹⁷⁹ On the other hand, specific deterrence may be less important in circumstances where an offender is considered unlikely to re-offend in the future, such as where he or she demonstrated significant remorse by voluntarily disclosing the criminal behaviour to authorities.¹⁸⁰ It has been noted that it is difficult to determine the effectiveness of specific deterrence given the numerous factors that contribute to the decision whether or not to offend, such as age, socio-economic status, gender, and education.¹⁸¹

Rehabilitation

4.13 The notion of rehabilitation is based on the belief that offenders are driven to engage in criminal behaviour by psychiatric, psychological or social forces beyond their control. Proponents of rehabilitation argue that the criminal tendencies of any offender can be addressed by first identifying and eliminating the underlying causes of the offender’s criminal behaviour.¹⁸² Accordingly, rehabilitation involves altering an offender’s personality, attitudes, habits, beliefs, outlooks or skills in order to restore him or her as a law-abiding member of society.

4.14 Rehabilitation was a prominent purpose of sentencing in the mid-twentieth century, particularly in the United States.¹⁸³ However, in the 1960s the results of several evaluations of the effectiveness of rehabilitative programs were published.¹⁸⁴ The conclusions contained in these evaluations were disappointing and led to widespread disillusionment in rehabilitation.¹⁸⁵ Currently, it is generally accepted that rehabilitation is sometimes, but not always, possible.¹⁸⁶

Incapacitation

4.15 Incapacitation aims to impose some form of restraint on an offender in order to render him or her incapable of re-offending.¹⁸⁷ The most extreme form of incapacitation is capital punishment. However, capital punishment is not available in Australia, nor in the ALRC’s view should it be.¹⁸⁸ The most heavily used form of incapacitation is imprisonment, but other sentencing options that involve the

curtailment of an offender's freedom—such as disqualification from driving, curfews, or the use of electronic surveillance—could also be classified as forms of incapacitation.

4.16 Collective incapacitation is the strategy of attempting to reduce crime by incapacitating more offenders, or incapacitating offenders for longer.¹⁸⁹ Most overseas studies that have examined the effect of collective incapacitation policies demonstrate that they have a very limited effect on crime rates.¹⁹⁰

4.17 Selective incapacitation is the strategy of attempting to identify, and then incapacitate particular offenders who are likely to re-offend.¹⁹¹ As such, it is a policy that relies on predictions of future criminality. It has often been argued that predictions of future criminality are inherently unreliable¹⁹² and more often than not result in erroneous predictions that an offender is likely to re-offend.¹⁹³ Legislation in a number of Australian states and territories provides for the selective incapacitation of certain offenders.¹⁹⁴ For example, additional punishment may be imposed on offenders in New South Wales who, by virtue of their criminal records, are deemed to be 'habitual criminals'.¹⁹⁵ It has been argued that selective incapacitation policies invariably result in 'avoidance techniques', such as charge bargaining, by which participants in the criminal justice system attempt to avoid the consequences of harsh sentencing laws.¹⁹⁶

4.18 ALRC 44 concluded that incapacitation was not a legitimate purpose of sentencing because it required punishment to be imposed by reference to the future conduct of an offender and, in doing so, did not link the punishment to the crime.¹⁹⁷

Denunciation

4.19 Denunciation is based on the theory that a sentence can be used to communicate to the offender and to the community the message that the law should not be flouted.¹⁹⁸ By denouncing the conduct of an offender, courts seek to educate both the offender and the public about correct moral values and to express society's disapproval of the criminal behaviour.¹⁹⁹ However, there are limits to the manner in which courts can take into account and express the opinion of the public when sentencing. First, the public opinion to be taken into account is not actual public opinion but 'informed public opinion'.²⁰⁰ In *Inkson v The Queen*, Underwood J commented that:

the community delegates to the Court the task of identifying, assessing and weighing the outrage and revulsion that an informed and responsible public would have to criminal conduct.²⁰¹

4.20 Secondly, the influence of informed public opinion cannot lead to the imposition of a sentence that is contrary to law.²⁰²

Restoration

4.21 Restorative justice has become a ‘global phenomenon’ in criminal justice systems in the past 25 years.²⁰³ It is estimated that between 80 and 100 countries use some form of restorative justice process to address crime.²⁰⁴ There is no universally accepted definition of restorative justice, but it can be described as an approach to crime that focuses on repairing the harm caused by criminal activity and addressing the underlying causes of criminal behaviour. Accordingly, restoration includes elements of rehabilitation. Restorative initiatives use inclusive decision-making processes that involve bringing the offender, the victim, and sometimes members of the wider community, together to determine collectively the approach to be taken to a crime.²⁰⁵ Restorative initiatives are based on the rationale that those involved in, and affected by, criminal activity should be given a real opportunity to participate in the process by which the response to the crime is decided.²⁰⁶

4.22 Restorative initiatives have the potential to increase the satisfaction of participants in the criminal justice system; encourage offenders to accept responsibility for their conduct; reduce recidivism by addressing the causes of criminal behaviour; and provide insight into the causes of crime.²⁰⁷

4.23 Restorative justice initiatives in Australia are diverse and are employed at different stages of the criminal justice process, including at the sentencing stage.²⁰⁸ They include victim-offender mediation, conferencing and circle sentencing. While many of these initiatives were initially applied to young offenders, they are increasingly being made available to adult offenders.²⁰⁹ Participants in restorative justice initiatives generally report high levels of satisfaction with the process but studies of the effect of restorative justice initiatives on recidivism rates have produced mixed results.²¹⁰

Other sentencing purposes

4.24 Some overseas and state and territory sentencing Acts refer to other purposes of sentencing. Some of these purposes are concerned with changing an offender’s attitudes and perceptions. For example, the New South Wales sentencing Act provides that a purpose of sentencing is to make the offender accountable for his or her actions,²¹¹ while Canadian legislation provides that a purpose of sentencing is to promote a sense of responsibility in offenders and to acknowledge the harm done to victims and the community.²¹² Other purposes are concerned with recognising victims of offences.²¹³ For example, the New Zealand sentencing Act provides that a purpose of sentencing is ‘to provide for the interests of the victim of the offence’²¹⁴ and legislation in the United Kingdom provides that a purpose of sentencing is ‘the making of reparation by offenders to persons affected by their offences’.²¹⁵

ALRC’s views

4.25 The ALRC has formed the view that the legitimate purposes of sentencing are retribution, deterrence, rehabilitation, protection of the community (incapacitation),

denunciation and restoration. Restoration aside, these purposes are well established at common law and are regularly applied by courts in all Australian jurisdictions. They are the only purposes that should be considered when sentencing federal offenders.

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

4.27 Having regard to judicial pronouncements on the importance of general deterrence, the purposes of sentencing articulated in other jurisdictions, and opinions expressed in submissions and consultations, the ALRC agrees that general deterrence is an established and legitimate purpose in sentencing law. However, general deterrence may be applied too readily when sentencing federal offenders. The ALRC considers it important that judicial officers do not assume that general deterrence is always an effective purpose of sentencing.²¹⁶ Further, it is desirable that courts do not use the language of deterrence as a means of expression when different, more accurate, terminology may be used to express the views sought to be conveyed.²¹⁷ In Chapter 19, the ALRC proposes that judicial officers receive further education and training in the sentencing of federal offenders and that a bench book on federal sentencing law be developed. These proposals will help to ensure that judicial officers understand the purposes of sentencing and pursue those purposes through the imposition of appropriate sentences.

4.28 The ALRC recognises that the purposes of sentencing may sometimes conflict. However, some purposes of sentencing, such as retribution and deterrence, can be pursued simultaneously. When sentencing federal offenders, judicial officers should consider and balance the various purposes of sentencing and decide which purpose, or purposes, can and should be pursued in any particular matter. It will often be possible for multiple purposes of sentencing to be pursued in any given matter.

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

Specifying the purposes of sentencing

Should [the purposes of sentencing federal offenders] be specified in federal legislation either generally or in specific classes of federal offences? [IP 29, Q7-1, part].

Background

4.30 As noted in IP 29, many state and territory sentencing Acts now expressly refer to the purposes of sentencing.²¹⁸ The Council of Europe has recommended that legislators should declare the rationales for sentencing.²¹⁹ Part IB of the *Crimes Act* does not contain a provision outlining the purposes of sentencing. However, specific deterrence is included in the list of sentencing factors in s 16A(2)(j) of the Act. In addition, s 16A(2)(k) of the Act refers to the need to ensure that an offender is ‘adequately punished for the offence’, a statement that could be interpreted as a reference to retribution.

Issues and problems

4.31 Different views were expressed in consultations and submissions as to whether the purposes of sentencing should be specified in federal sentencing legislation. There was considerable support for the proposition that they should be specified.²²⁰ The Commonwealth Director of Public Prosecutions submitted that identifying the purposes of sentencing would promote transparency in the sentencing process.²²¹ Professor Arie Freiberg noted that it is currently standard practice to specify the purposes of sentencing and that doing so provides a useful means of communicating with the public about sentencing.²²² Professor Kate Warner commented that it was preferable to specify the purposes of sentencing in a specific provision of the Act, rather than in an objects clause, so as to establish a direct link between the purposes of sentencing and the imposition of punishment.²²³

4.32 However, it was also submitted that there was no need to specify the purposes of sentencing in federal sentencing legislation because these purposes were well established at common law.²²⁴

ALRC’s views

4.33 The ALRC considers that federal sentencing legislation should contain a provision specifying the purposes of sentencing. Listing the purposes of sentencing in federal sentencing legislation will provide greater consistency in the content and structure of sentencing legislation in Australia. It will also encourage consistency of approach in sentencing federal offenders, and will eliminate any confusion about the purposes of sentencing federal offenders, given the disparate provisions regarding the purposes of sentencing in the states and territories. Clearly specifying the purposes of sentencing in federal legislation will also enhance their visibility and highlight the need

for judicial officers to give careful consideration to the appropriate purpose or purposes to be pursued in any given matter.

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

Ranking the purposes of sentencing

Should the purposes [of sentencing federal offenders] be ranked? [IP 29, Q7–1, part].

Background

4.35 In IP 29, the ALRC asked whether the purposes of sentencing should be ranked.²²⁵ Ranking the purposes of sentencing necessarily involves identifying one primary purpose of sentencing and then listing the other purposes in the order in which they should be applied.

Issues and problems

4.36 It has been argued that a failure to identify a primary purpose of sentencing, or to specify the relationship between various purposes of sentencing, results in unwarranted sentencing disparity.²²⁶ By not identifying a primary rationale for sentencing, sentencing decisions are made in a ‘cafeteria system’ in which judicial officers are free to pick and choose the sentencing rationale to be applied in the circumstances of the case.²²⁷ It has also been argued that a sentencing system that enables a judicial officer to select freely from various sentencing options is open to abuse. For example, it enables a judicial officer to decide the sentence to be imposed, and then work backwards to justify it.²²⁸ Finally, it has been contended that the simultaneous pursuit of conflicting sentencing purposes, such as retribution and rehabilitation, can result in a sentence that achieves no purpose.²²⁹

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

no social institution as important or complex as the criminal law can afford the luxury of picking just one purpose—intellectually simple and satisfying though that selection might be.²³⁰

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

sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.²³¹

4.39 The Canadian Sentencing Commission, the Irish Law Reform Commission, the Victorian Sentencing Committee and the New South Wales Law Reform Commission have all noted that there is no simple answer to the question of why we impose sentences on offenders, and have accepted that any sentencing system must invariably contain multiple purposes of punishment.²³²

4.40 Submissions and consultations largely supported the proposition that the purposes of sentencing should not be ranked.²³³ The New South Wales Law Society submitted:

There should not be a ranking of the purposes of sentencing as these differ in individual cases. The ranking of the purposes of sentencing may involve policy choices, which may be tied to political ideology and short-term community trends. Such a ranking would place further fetters on judicial discretion and could undermine individualised justice.²³⁴

4.41 It was also submitted that it would be difficult to rank the purposes of sentencing.²³⁵ However, there was limited support for ranking the purposes of sentencing.²³⁶ Professor Freiberg submitted that the purposes of sentencing should be ranked only if the primary purpose preserved the proportionality principle.²³⁷

ALRC's views

4.42 The ALRC is not persuaded that it is necessary or desirable to identify a primary purpose of sentencing or to rank the various purposes of sentencing. Identifying a primary purpose of sentencing is not necessarily an effective means of promoting consistency in sentencing. Many factors contribute to inconsistency in sentencing, and there are many ways in which inconsistency can be addressed.²³⁸ Identifying a primary purpose of sentencing, or ranking the purposes of sentencing, would not necessarily result in more consistent sentencing practices because judicial officers could seek to achieve the same purpose or purposes of sentencing in different ways.

4.43 The purposes of sentencing must ultimately depend on both the offender and the offence. For example, it is well established at common law that general deterrence will be of less weight when sentencing an offender with a mental illness or intellectual disability, and that rehabilitation will be of more importance when sentencing a young offender.²³⁹ The ALRC is currently of the view that nominating one purpose of

sentencing, or mandating the order in which the purposes should be considered, is an unnecessary intrusion into judicial discretion, for limited gain, if any.

4.44 Even if it were accepted that there is a need to identify a primary purpose of sentencing, or to rank the various purposes of sentencing, there is no agreement as to the purpose that should be chosen, or the order in which the purposes should be ranked. Various sentencing purposes have dominated the sentencing landscape at different times in the development of the criminal justice system. Restorative notions of justice were popular in the middle ages; incapacitation (in the form of transportation of convicts) was popular in industrial Britain; retribution and deterrence were popular in colonial Australia; rehabilitation was an important purpose in many countries in the mid-twentieth century; ‘just deserts’ gained prominence in the 1970s; and the notion of ‘just deserts’ is currently being challenged by both the theories of incapacitation and restorative justice. For these reasons, the ALRC considers that federal sentencing legislation should contain an exhaustive list of the purposes of sentencing that can be pursued legitimately when sentencing federal offenders.

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

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

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

150 Ibid, 7.

151 Ibid, 7.

152 Ibid, 7–8.

153 Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [7.4]–[7.16], [8.21]–[8.25].

- 154 M Bagaric, 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?' (2000) 24 *Criminal Law Journal* 21, 22.
- 155 N Walker, *Why Punish?* (1991), 73–75.
- 156 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [38].
- 157 See, eg, *R v Williscroft* [1975] VR 292, 303–304.
- 158 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [41].
- 159 A Von Hirsch and A Ashworth, *Proportionate Sentencing* (2005), 75, 78.
- 160 *Ibid.*, 80.
- 161 See, eg, P Robinson and J Darley, 'Does Criminal Law Deter? A Behavioural Science Investigation' (2004) 24 *Oxford Journal of Legal Studies* 173, 173; N Demleitner and others, *Sentencing Law and Policy: Cases, Statutes and Guidelines* (2003), 10; N Walker, *Why Punish?* (1991), 15; P Robinson and J Darley, 'The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best' (2003) 91 *Georgetown Law Journal* 949, 951.
- 162 N Demleitner and others, *Sentencing Law and Policy: Cases, Statutes and Guidelines* (2003), 10.
- 163 This issue is discussed further in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [8.21]–[8.25].
- 164 J McGuire, 'Deterrence in Sentencing: Handle With Care' (2005) 79 *Australian Law Journal* 448, 448, 449; M Bagaric, 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?' (2000) 24 *Criminal Law Journal* 21, 32.
- 165 *R v Radich* [1954] NZLR 86, 87.
- 166 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [37].
- 167 See, eg, D Anderson, 'The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging' (2002) 4 *American Law and Economics Review* 295; P Robinson and J Darley, 'The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best' (2003) 91 *Georgetown Law Journal* 949.
- 168 D Anderson, 'The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging' (2002) 4 *American Law and Economics Review* 295, 306.
- 169 M Bagaric, 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?' (2000) 24 *Criminal Law Journal* 21, 33.
- 170 This is discussed in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [8.20]–[8.25].
- 171 *Director of Public Prosecutions (Cth) v El Karhani* (1990) 21 NSWLR 370, 378.
- 172 See, eg, *Director of Public Prosecutions (Cth) v Milne* [2001] VSCA 93, [12]–[13] (fraud); *Chugg v Stanford* (2000) 113 A Crim R 127 (social security); *R v Cappadona* (2001) 122 A Crim R 52 (tax fraud).
- 173 See Appendix 1.
- 174 *R v Wong* (1999) 48 NSWLR 340 and *R v Cassar* [2005] VSCA 164 (offences against the *Customs Act 1901* (Cth)); *Stevenson v Dix* (1995) 81 A Crim R 167 and *R v Zainudin* [2005] NTSC 14 (offences against the *Fisheries Management Act 1991* (Cth)); *R v Cassidy* [2005] NSWSC 410 (offence against the *Corporations Act 2001* (Cth)); *R v Disun* (2003) 27 WAR 146 (offence against the *Migration Act 1958* (Cth)).
- 175 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Victoria Legal Aid, *Submission SFO 31*, 18 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005; LD, *Submission SFO 9*, 10 March 2005.
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- 185 American Law Institute, *Model Penal Code: Sentencing Report* (2003), 28.
- 186 Ibid, 29–31.
- 187 M Bagaric, ‘Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?’ (2000) 24 *Criminal Law Journal* 21, 24; A von Hirsch and A Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* (2nd ed, 1998), 88.
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- 190 Ibid, 125.
- 191 Ibid, 125.
- 192 N Demleitner and others, *Sentencing Law and Policy: Cases, Statutes and Guidelines* (2003), 11; American Law Institute, *Model Penal Code: Sentencing Report* (2003), 32.
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- 194 See B McSherry, ‘Indefinite and Preventative Detention Legislation: From Caution to an Open Door’ (2005) 29 *Criminal Law Journal* 94.
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- 199 Ibid, 31.
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- 214 *Sentencing Act 2002* (NZ) s 7(1)(c).
- 215 *Criminal Justice Act 2003* (UK) s 142(1)(e). See also *Criminal Code* (RS 1985, c C–46) (Canada) s 718(e).
- 216 P Robinson and J Darley, ‘The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best’ (2003) 91 *Georgetown Law Journal* 949, 951.
- 217 For a discussion of ‘deterrence speak’, see Ibid, 971–974.
- 218 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1991* (Vic) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 3; *Sentencing Act 1997* (Tas) s 3(e); *Sentencing Act 1995* (NT) s 5. See also Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [7.14]–[7.16].
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- 226 Ireland Law Reform Commission, *Consultation Paper on Sentencing* (1996), [2.9]; Council of Europe, *Consistency in Sentencing* (1993) Council of Europe Press, Rec no R (92) 17.
- 227 A Ashworth, *Sentencing and Criminal Justice* (2nd ed, 1995), 331, cited in M Bagaric, 'Sentencing: The Road to Nowhere' (1999) 21 *Sydney Law Review* 597, 597.
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- 229 Ireland Law Reform Commission, *Consultation Paper on Sentencing* (1996), [2.17].
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- 231 *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476–477.
- 232 Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987), 144; Ireland Law Reform Commission, *Report on Sentencing* (1996), ch 2; Victorian Sentencing Committee, *Sentencing* (1988), 122; New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), [14.13].
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- 234 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.
- 235 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 236 LD, *Submission SFO 9*, 10 March 2005; A Freiberg, *Submission SFO 12*, 4 April 2005.
- 237 A Freiberg, *Submission SFO 12*, 4 April 2005.
- 238 See Chs 20, 21.
- 239 K Warner, *Sentencing in Tasmania* (2nd ed, 2002), 67, 72.

5. Principles of Sentencing

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Introduction

5.1 An issue that was not raised in Issues Paper 29, *Sentencing of Federal Offenders* (IP 29) but has arisen during the course of the Inquiry is whether the principles of sentencing should be included in federal sentencing legislation. Principles of sentencing are overarching legal rules that should be applied when sentencing all federal offenders. They are to be distinguished from sentencing factors, which identify the specific matters that the court must consider, where relevant and known, when sentencing an offender.²⁴⁰ The common law principles of sentencing apply when sentencing federal offenders so far as they are not inconsistent with the provisions of Part IB of the *Crimes Act 1914* (Cth).²⁴¹

5.2 Sentencing legislation in Canada and New Zealand sets out the principles to be applied when sentencing an offender. Some state and territory Acts refer to certain principles of sentencing and not to others.²⁴² In 1996, the New South Wales Law Reform Commission recommended against listing the common law principles of sentencing in sentencing legislation, arguing that such an approach had the potential, among other things, to cause confusion and stultify the development of the law.²⁴³ The following sections consider the main principles of sentencing, before considering whether such principles should be specified in legislation.

Proportionality

5.3 The principle of proportionality requires courts to impose sentences that bear a reasonable, or proportionate, relationship to the criminal conduct in question. The principle of proportionality imposes an obligation on judicial officers to ensure that sentences imposed on offenders are of a severity that reflects the objective seriousness of the offence.²⁴⁴ The objective seriousness of the offence is determined by reference to

the maximum statutory penalty for the offence, the degree of harm caused by the offence, and the degree of culpability of the offender.²⁴⁵

5.4 It has been argued that proportionality is linked to retributivism.²⁴⁶ However, proportionality has also been relied upon to support utilitarian goals of punishment, such as deterrence. For example, it has been argued that a system of justice that distributes proportional punishments can encourage offenders to commit crimes of a lesser severity in order to receive a lesser punishment if caught.²⁴⁷

5.5 The principle of proportionality is the primary mechanism for ensuring that sentences imposed on offenders are just and fair. It is of paramount importance to sentencing law and is a principle that is ‘rooted in respect for the basic human rights of those before the court’. It operates to ‘restrain excessive, arbitrary and capricious punishment’.²⁴⁸ It reflects common sense and intuitive notions of justice, preserves the legitimacy of the sentencing system, and gives practical guidance to sentencers.²⁴⁹

5.6 On a number of occasions the High Court has declared the principle of proportionality to be a fundamental sentencing principle at common law.²⁵⁰ Proportionality is a limiting principle that operates to prevent the imposition of sentences that are manifestly excessive or manifestly lenient, in light of the objective circumstances of the offence.²⁵¹ It also allows the sentencer to pursue any of the established purposes of sentencing within the parameters of the proportionate sentence.²⁵²

5.7 A number of overseas and state and territory Acts contain reference to notions of proportionality in sentencing.²⁵³ In the United States, proportionality has featured in discussions about sentencing reform,²⁵⁴ and in the United Kingdom it has played a significant role in sentencing jurisprudence.²⁵⁵ In Australia, s 16A(1) of the *Crimes Act*, which requires a sentence imposed on a federal offender to be of a ‘severity appropriate in all the circumstances of the offence’ has been interpreted as a reference to the principle of proportionality.²⁵⁶ In addition, s 16A(2)(k) of the *Crimes Act*, in making reference to ‘adequate’ punishment, could also be seen as a reflection of the principle of proportionality.²⁵⁷ Several state sentencing Acts contain provisions that reflect the principle of proportionality,²⁵⁸ and the Western Australian sentencing Act specifically provides that the sentence imposed on an offender must be commensurate with the seriousness of the offence.²⁵⁹

Parsimony

5.8 The principle of parsimony operates to prevent the imposition of a sentence that is more severe than is necessary to achieve the purpose or purposes of the sentence. In *Webb v O’Sullivan*, Napier CJ described the operation of the principle in the following terms:

Our first concern is the protection of the public, but, subject to that, the court should lean towards mercy. We ought not to award the maximum which the offence will

warrant, but rather the minimum which is consistent with a due regard for public interest.²⁶⁰

5.9 The principle of parsimony recognises the inherent dignity and worth of offenders by mandating concern for their welfare.²⁶¹ It acknowledges that some sentences can have devastating consequences for both the individual offender and the wider community, and it operates to ensure that judicial officers exercise restraint when wielding the formidable power of the state to punish those who violate its laws.

5.10 The Victorian sentencing Act and some overseas sentencing legislation explicitly state the principle of parsimony.²⁶² The *Crimes Act* currently recognises limited forms of the principle of parsimony. For example, s 17A provides that the court is not to impose a sentence of imprisonment unless it is satisfied that no other sentence is appropriate in all of the circumstances of the offence. In addition, s 17B provides that the court is not to impose a sentence of imprisonment on an offender for certain offences relating to property or money of a total value of \$2,000 or less unless the court is satisfied that there are exceptional circumstances to warrant such a sentence.

Totality

5.11 The principle of totality is relevant to the sentencing of offenders for multiple offences. It has been described as a ‘limitation on excess’²⁶³ and ensures that an offender who is sentenced for multiple offences receives an appropriate sentence overall and does not receive a ‘crushing sentence’.²⁶⁴ In *Mill v The Queen* the High Court affirmed the following expression of the principle from a well-regarded text:²⁶⁵

The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is ‘just and appropriate’.²⁶⁶

5.12 If the sum of the individual sentences is excessive, the court can make adjustments to the manner in which the sentences are structured in order to reduce the overall head sentence, or, less desirably, reduce each of the individual sentences below that which would otherwise be appropriate.²⁶⁷

5.13 The principle of totality also applies when a court sentences an offender who is already serving a sentence.²⁶⁸ It has also been held to apply to an offender who has completed a sentence in one jurisdiction and is being sentenced in another jurisdiction for an offence that is closely related in time and nature to the initial offence.²⁶⁹ The principle of totality also applies where the court imposes a single, global, sentence on an offender for a number of offences.²⁷⁰ The ALRC considers that the principle of totality should continue to apply in these circumstances.

5.14 The *Crimes Act* currently contains two provisions that give some effect to the principle of totality.²⁷¹ Section 16B requires a court sentencing a federal offender to have regard to any other sentence yet to be served by that offender. Section 19AD requires a court sentencing a federal offender who is serving a sentence with a non-parole period to consider what new non-parole period should be fixed after considering the existing non-parole period, the nature and circumstances of the offence or offences concerned, and the offender's antecedents.

Consistency

5.15 Consistency in sentencing is fundamental to maintaining a just and equitable criminal justice system.²⁷² In the context of sentencing, consistency essentially means that like cases should be treated alike.²⁷³ Gleeson CJ described the principle succinctly in *Wong v The Queen*:

All discretionary decision-making carries with it the probability of some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in a like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.²⁷⁴

5.16 Inconsistency in sentencing has the potential to erode public confidence in the criminal justice system.²⁷⁵ In addition, it has been argued that inconsistent sentencing practices reduce the deterrent effect of the criminal justice system by detracting from the perception that appropriate punishment for criminal behaviour is certain.²⁷⁶

5.17 It is generally recognised that given the vast range of factors to be considered when sentencing an offender, it is unlikely, if not impossible, that any two cases will be identical. The literature has drawn a distinction between consistency in approach to sentencing and consistency in sentencing outcome.²⁷⁷ Consistency of approach requires courts to apply the same purposes and principles of sentencing, and to consider the same types of factors when sentencing. Consistency in outcome is concerned with the type and quantum of the sentences imposed in similar cases. Consistency in approach and consistency in outcome are related to each other because sentencers are more likely to achieve consistent outcomes if they adopt a similar approach to sentencing. Conversely, substantially different outcomes in similar cases may indicate differences of approach.

5.18 In the ALRC's view, the principle of consistency requires courts both to adopt a similar approach to the task of sentencing and to impose sentences that fall within an appropriate range in light of the objective seriousness of the offence and the subjective circumstances of the offender. Judicial officers are required to have regard to the collective wisdom of other judicial officers when considering whether a proposed

sentence is within the appropriate range.²⁷⁸ Consistency is discussed further in Chapters 20 and 21.

5.19 The principle of parity between co-offenders is essentially a subset of the principle of consistency, although it is often referred to as a sentencing principle in its own right. Parity requires that offenders who have jointly engaged in the same type of criminal conduct should ordinarily receive similar sentences. However, courts are able to have regard to any relevant differences in the level of culpability of each offender, and to take into account differences in the subjective circumstances of the offenders. Differences in sentences imposed on co-offenders should not be so marked as to give rise to a justifiable sense of grievance on the part of the offender with the heavier sentence.²⁷⁹ Parity is best achieved when the same judicial officer hears and determines the sentences of all co-offenders.²⁸⁰

Individualised justice

5.20 The principle of individualised justice requires the court to impose a sentence that is just and appropriate in all of the circumstances of the particular case. Courts have consistently recognised the importance of this sentencing principle. For example, in *Kable v Director of Public Prosecutions*, Mahoney ACJ stated that ‘if justice is not individual, it is nothing’.²⁸¹ Individualised justice can be attained only if a sentencer possesses a broad sentencing discretion that enables him or her to consider and balance multiple facts and circumstances when sentencing an offender. This broad discretion is required because sentencing is ultimately ‘a synthesis of competing features which attempts to translate the complexity of the human condition and human behaviour to the mathematics of units of punishment’.²⁸²

ALRC’s views

5.21 The ALRC is of the view that federal sentencing legislation should specify the fundamental principles of sentencing, namely, proportionality, parsimony, totality, consistency and individualised justice. This approach is consistent with that adopted in Canada and New Zealand. The *Crimes Act* already contains references to three of the established principles of sentencing, namely, proportionality, parsimony and totality. The ALRC considers that the inclusion of all five principles in federal sentencing legislation will emphasise their importance to judicial officers and practitioners. The common law will, of course, continue to provide useful guidance as to the manner in which the principles are to be applied.

5.22 The ALRC notes that Canadian sentencing legislation specifically identifies proportionality as the fundamental sentencing principle and lists other sentencing principles in a separate provision. The ALRC is interested in hearing any views as to whether a similar approach should be adopted in Australia.

5.23 After considering judicial statements regarding the principles of sentencing, and after surveying the terminology used in Acts setting out the principles of sentencing, the ALRC has formed the preliminary view that the principles of sentencing should be expressed as set out in the proposal below.

Proposal 5-1 Federal sentencing legislation should state the fundamental principles that are to be applied in sentencing a federal offender, namely:

- (a) a sentence should be proportionate to the objective seriousness of the offence (proportionality);
- (b) a sentence should be no more severe than is necessary to achieve the purpose or purposes of the sentence (parsimony);
- (c) where an offender is being sentenced for more than one offence, or is already serving a sentence and is being sentenced for a further offence, the aggregate of the sentences should be just and appropriate in all the circumstances (totality);
- (d) a sentence should be similar to sentences imposed on like offenders for like offences (consistency); and
- (e) a sentence should take into consideration all circumstances of the individual case, in so far as they are relevant and known to the court (individualised justice).

240 Sentencing factors are discussed in Ch 6.
 241 *Johnson v The Queen* (2004) 205 ALR 346, 353.
 242 See, eg, *Sentencing Act 1995* (WA) s 6(1) (proportionality).
 243 New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), [14.15]–[14.16].
 244 *Hoare v The Queen* (1989) 167 CLR 348, 354.
 245 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), 225; R Fox, ‘The Meaning of Proportionality in Sentencing’ (1994) 19 *Melbourne University Law Review* 489, 498.
 246 N Demleitner and others, *Sentencing Law and Policy: Cases, Statutes and Guidelines* (2003), 40.
 247 A Von Hirsch and A Ashworth, *Proportionate Sentencing* (2005), 132.
 248 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), 492.
 249 *Ibid*, 4–5.
 250 *Veen v The Queen [No 1]* (1979) 143 CLR 458; *Veen v The Queen [No 2]* (1988) 164 CLR 465; *Hoare v The Queen* (1989) 167 CLR 348.
 251 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), 221.
 252 R Fox, ‘The Meaning of Proportionality in Sentencing’ (1994) 19 *Melbourne University Law Review* 489, 495.
 253 *Penal Code* (Finland) Ch 6, s 1(1); *Penal Code* (Sweden) Ch 29, s 1; *Criminal Code* (RS 1985, c C–46) (Canada) s 718.1; *Sentencing Act 2002* (NZ) s 8(h).
 254 See, American Law Institute, *Model Penal Code: Sentencing Report* (2003).
 255 A Von Hirsch and A Ashworth, *Proportionate Sentencing* (2005), 1.
 256 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [3.503].

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- 257 Ibid.
- 258 *Sentencing Act 1991* (Vic) s 5(1)(a), (2)(c) and (2)(d); *Criminal Law (Sentencing) Act 1988* (SA) s 10(k).
- 259 *Sentencing Act 1995* (WA) s 6(1).
- 260 *Webb v O'Sullivan* [1952] SASR 65, 66.
- 261 A von Hirsch, 'The Project of Sentencing Reform' in M Tonry and R Frase (eds), *Sentencing and Sanctions in Western Countries* (2001) 405, 406.
- 262 *Sentencing Act 1991* (Vic) s 5(3), (4); *Sentencing Act 2002* (NZ) s 8(g); *Criminal Code (RS 1985, c C-46)* (Canada) s 718.2(d).
- 263 *R v Patison* (2003) 143 A Crim R 118, 133.
- 264 D Thomas, *Principles of Sentencing* (2nd ed, 1979), 57–58, cited in *Postiglione v The Queen* (1997) 189 CLR 295, 413; *Johnson v The Queen* (2004) 205 ALR 346, 355.
- 265 D Thomas, *Principles of Sentencing* (2nd ed, 1979), 56–57.
- 266 *Mill v The Queen* (1988) 166 CLR 59, 63.
- 267 Ibid, 63; *Director of Public Prosecutions v Grabovac* [1998] 1 VR 664, 680; *Johnson v The Queen* (2004) 205 ALR 346, 356.
- 268 *Director of Public Prosecutions v Farmer* [2005] TASSC 15, [24].
- 269 *Mill v The Queen* (1988) 166 CLR 59, 64.
- 270 *Director of Public Prosecutions v Farmer* [2005] TASSC 15, [24].
- 271 *Crimes Act 1914* (Cth) ss 16B, 19AD; K Warner, *Sentencing in Tasmania* (2nd ed, 2002), 242.
- 272 See Chs 20–21 for further discussion of consistency.
- 273 *Lowe v The Queen* (1984) 154 CLR 606.
- 274 *Wong v The Queen* (2001) 207 CLR 584, 591.
- 275 *Lowe v The Queen* (1984) 154 CLR 606, 611.
- 276 *Griffiths v The Queen* (1977) 137 CLR 293, 327.
- 277 New South Wales Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court* (2005), 12.
- 278 See, eg, *Ellis v The Queen* (1993) 68 A Crim R 449, 460.
- 279 *Lowe v The Queen* (1984) 154 CLR 606; *Postiglione v The Queen* (1997) 189 CLR 295.
- 280 *R v Christianos* (1983) 34 SASR 316.
- 281 *Kable v Director of Public Prosecutions* (1995) 36 NSWLR 374, 394.
- 282 *Weininger v The Queen* (2003) 212 CLR 629, 638.

6. Sentencing Factors

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6.1 This chapter considers: factors that are relevant to the determination of sentence and how they should be treated; factors that are relevant to the administration of the criminal justice system, which should be considered in sentencing; and factors that are irrelevant to sentencing. Many of the proposals in this chapter are directed towards providing legislative guidance to judicial officers in the exercise of the sentencing discretion.

Listing of mandatory or discretionary factors

Should federal legislation specify factors that are relevant to the choice of sentencing options or the quantum of sentence to be imposed? If so, what should these factors be? Should these factors include general deterrence? Should some or all of these factors be mandatory or discretionary? [IP 29, Q8–2, part]

Background

6.2 Section 16A(2) of the *Crimes Act 1914* (Cth) sets out a non-exhaustive list of 13 matters that a court must take into account in sentencing an offender, to the extent that they are relevant and known to the court.²⁸³ Sentencing legislation in most states and territories sets out a list of mandatory factors, which the court must either take into account²⁸⁴ or to which it must have regard.²⁸⁵ Of these jurisdictions, Victoria and the Northern Territory distinguish between mandatory and discretionary factors.²⁸⁶ In contrast, the sentencing legislation of Tasmania does not set out any factors to be generally considered in sentencing.²⁸⁷ Sentencing legislation in Western Australia states that a sentence imposed on an offender must be commensurate with the seriousness of the offence and sets out four factors that must be taken into account in determining seriousness, including 'any aggravating factors' and 'any mitigating factors'.²⁸⁸

6.3 Most state and territory sentencing legislation expressly requires the court to have regard to any relevant circumstances or any relevant matter;²⁸⁹ and other state and territory legislation requires the court to take into account or consider certain specified factors to the extent that they are relevant and known to the court.²⁹⁰

Issues and problems

6.4 Issues Paper 29 (IP 29) sets out some of the drawbacks of listing sentencing factors, including the risk that a list will be treated as a de facto codification, especially by less experienced judicial officers.²⁹¹ A range of stakeholders—including prosecutors, defence lawyers, federal offenders and academics—expressed support in consultations and submissions for federal legislation to set out factors to be considered in sentencing.²⁹² Professor Arie Freiberg submitted that courts were used to handling and balancing lists of factors.²⁹³ The Commonwealth Director of Public Prosecutions (CDPP) submitted that including a list of factors relevant to sentencing provides useful guidance.²⁹⁴ There was some support expressed for a checklist of factors.²⁹⁵

6.5 However, the New South Wales Legal Aid Commission submitted that:

the specification of particular factors relevant to choices of sentencing options, or quantum of sentence, should not be undertaken, as this imposes fetters on the discretion of the courts and would introduce rigidity in relation to the sentencing exercise.²⁹⁶

6.6 The CDPP expressed support for the current approach by which listed factors are to be taken into account by a court where they are relevant and known.²⁹⁷ Some submissions favoured factors being discretionary rather than mandatory²⁹⁸ or expressed opposition to mandatory factors.²⁹⁹ However, one federal offender supported the idea of having some mandatory factors in order to promote consistency of approach, and having some discretionary factors to allow for ‘fairness on a case-by-case basis’.³⁰⁰ Other stakeholders stated that they were against legislation identifying factors as either mandatory or discretionary.³⁰¹ The Law Society of South Australia submitted that:

The identification of factors as relevant to sentencing and their expression in legislation serves as a guide and is no more than an effective codification of the common law approach. To then legislate for those factors to be identified as either mandatory or discretionary runs counter to the development of sentencing by the courts over time, the development of the common law approach as to sentencing and serves to lead to greater potential for inconsistency rather than consistency. ...

The risk is that to make such factors mandatory or discretionary would change the weighting that has already been accepted in approaches to sentencing ...³⁰²

6.7 The Attorney-General’s Department submitted that:

flexibility and the discretion of the court to take account of the fullest range of factors in considering an appropriate sentence should remain a keystone. Sentencing is not a precise science and caution should be exercised in considering any move to prescription which would carry with it the dangers of a check-list approach by the courts.³⁰³

Options for reform

6.8 One option for reform is for federal sentencing legislation to refrain from setting out any factors relevant to sentencing, as is the position in Tasmania. A variation of this option is for legislation to require the courts to have regard to any factor that is relevant and known to the court, but leave the description of particular factors at large. This option would be the least prescriptive and would promote maximum flexibility in the exercise of judicial discretion. However, this option provides no guidance to judicial officers, nor does it assist in promoting consistency in determining sentences.

6.9 A second option is to set out a short list of ‘core’ factors to which the court *must* have regard, and a list of ‘non-core’ factors to which the court *may* have regard in sentencing. If there were many core factors, issues may arise on appeal if a judicial officer referred to some of the factors but not others.³⁰⁴ Of those jurisdictions that set out factors relevant to sentencing, Victoria is the only one that sets out what could potentially be described as nine core factors.³⁰⁵ However, as one of those factors is described broadly as ‘the presence of any aggravating or mitigating factor or any other relevant circumstance’ the legislation somewhat blurs the issue of what is core and what is non-core. While the Northern Territory legislation distinguishes between mandatory and discretionary factors, it cannot be said that it sets out a short list of core factors because its list of mandatory factors includes 17 separate items.³⁰⁶

6.10 A third option is for federal sentencing legislation to set out a comprehensive list of factors that are relevant to sentencing generally. This list could be mandatory or discretionary; and exhaustive or non-exhaustive. A variation of this option is for federal sentencing legislation to express the general principle that a sentencing court must consider any factor that is relevant to sentencing so far as it is known to the court, and to set out a non-exhaustive list of relevant factors that may be applicable in the circumstances of a case.

6.11 A final option is for federal sentencing legislation to set out separate lists of factors relevant to the imposition of each of the sentencing options available to a court.

ALRC’s views

6.12 Federal sentencing legislation should express the primary principle that a court must consider any factor that is relevant to sentencing and known to the court. There is some ambiguity about what makes a particular factor ‘relevant’ to sentencing. One possibility is for federal sentencing legislation to state that the factor must be relevant to either a purpose or a principle of sentencing.³⁰⁷ The ALRC is interested in stakeholders’ views on this issue.

6.13 In addition, federal sentencing legislation should set out a non-exhaustive list of factors that are relevant to sentencing and that may be applicable in a particular case,

depending on the circumstances. If any listed factor is applicable to the case and known to the court, it must be considered; but if the factor has no application to the case it will not need to be considered. An exhaustive list of factors would be problematic because it is not possible to specify in advance every factor that might conceivably be relevant to sentencing, given the diversity of facts in individual matters. A non-exhaustive list provides for flexibility in sentencing—which is one of the objects of the proposed federal sentencing Act—and allows courts to develop jurisprudence in relation to additional relevant sentencing factors.³⁰⁸ The approach of specifying an extensive but non-exhaustive list of factors is consistent with the position in most states and territories.³⁰⁹

6.14 Some consultations and submissions opposed the specification of mandatory sentencing factors. However, this is the approach adopted in most Australian jurisdictions, presumably because identification of mandatory factors provides guidance to courts and promotes consistency in sentencing. In the federal context, the need for guidance is greater than within a single jurisdiction because consistency must be sought in relation to sentences imposed by federal, state and territory judicial officers. Legislative specification of sentencing factors also promotes clarity where there is conflicting case law about the relevance of a particular factor or the circumstances in which the factor is to be applied.

6.15 The ALRC does not consider the approach of listing a small number of mandatory core factors and a larger number of discretionary non-core factors to be workable. Delineating between core and non-core factors would be difficult and somewhat arbitrary because what is core may depend on the circumstances of a case.

6.16 The ALRC does not support a separate list of factors relevant to the imposition of each of the sentencing options available to a court. Such an approach would introduce undue complexity into the sentencing process; would result in the duplication of many relevant factors; and would be fraught with difficulty because it may require a court to ignore some relevant factors when imposing a particular sentencing option.³¹⁰

Existing sentencing factors

6.17 As noted above, s 16A(2) of the *Crimes Act* sets out a non-exhaustive list of 13 matters that a court must take into account to the extent that they are relevant and known to the court. These include factors relevant to the circumstances of the offence, the circumstances of the offender, and the personal circumstances of any victim.³¹¹ The section also lists matters that might properly be regarded as purposes of sentencing, including specific deterrence and punishment,³¹² although it excludes any reference to general deterrence.³¹³

6.18 Section 16A(2) provides as follows:

In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court:

- (a) the nature and circumstances of the offence;
- (b) other offences (if any) that are required or permitted to be taken into account;
- (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character—that course of conduct;
- (d) the personal circumstances of any victim of the offence;
- (e) any injury, loss or damage resulting from the offence;
- (f) the degree to which the person had shown contrition for the offence:
 - (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or
 - (ii) in any other manner;
- (g) if the person has pleaded guilty to the charge in respect of the offence—that fact;
- (h) the degree to which the person has cooperated with law enforcement agencies in the investigation of the offence or of other offences;
- (j) the deterrent effect that any sentence or order under consideration may have on the person;
- (k) the need to ensure that the person is adequately punished for the offence;
- (m) the character, antecedents, cultural background, age, means and physical or mental condition of the person;
- (n) the prospect of rehabilitation of the person;
- (p) the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.

6.19 The discussion below considers the manner in which the current list of factors in s 16A(2) of the *Crimes Act* should be amended. The discussion addresses factors that should be removed from the list; factors that should be retained; factors that should be added; and factors that should be modified. Proposal 6–1 below sets out on an inclusive basis those factors the ALRC considers relevant to sentencing a federal offender.

Items to be removed

Purposes of sentencing

6.20 The ALRC considers that the list of sentencing factors to be included in a new federal sentencing Act should be distinct from, but consistent with, the stated purposes of sentencing. As a result, those items in s 16A(2) of the *Crimes Act* that are actually purposes of sentencing—that is, specific deterrence and punishment³¹⁴—should be removed from the list, as they are dealt with in a separate proposal dedicated to the purposes of sentencing.³¹⁵

6.21 One of the proposed purposes of sentencing is ‘to promote the rehabilitation of the offender’. On this basis it might be thought that s 16A(2)(n), which refers to the ‘prospect of rehabilitation’, should also be removed from the list of sentencing factors. However, the ‘prospect of rehabilitation’ can be properly categorised as a factor that is consistent with, and relevant to, the rehabilitative purpose of sentencing.³¹⁶ For this reason the ALRC does not propose removing this factor from the list. However, the ALRC is interested in hearing from stakeholders about whether the prospect of promoting other sentencing purposes should be expressly included in the list.

6.22 As discussed in Chapter 4, the ALRC has concluded that general deterrence is a legitimate sentencing purpose. Given that general deterrence is properly categorised as a purpose of sentencing, rather than as a factor to be considered in sentencing, the proposed list of factors should not contain a reference to general deterrence.

Factors relevant to the administration of the criminal justice system

6.23 For the reasons discussed separately below, the ALRC proposes that factors relevant to the administration of the criminal justice system—namely the fact that a person has pleaded guilty or has cooperated with the authorities—be removed from the list of factors relevant to sentencing, and be dealt with in a separate provision.

Factors to be retained

6.24 Some stakeholders expressed general support for the types of factors listed in s 16A(2).³¹⁷ However, views were expressed in consultations that some of those factors were irrelevant and should be removed. Professor Mirko Bagaric expressed the view that prior convictions and the personal circumstances of an offender were irrelevant factors in sentencing. He stated, for example, that intellectual disability should be taken into account in determining guilt but was not relevant to sentencing.³¹⁸ Professor Bagaric has also argued that contrition, which is currently a factor in s 16A(2), is irrelevant.³¹⁹

6.25 The ALRC proposes to retain some factors listed in s 16A(2) in their current form. These include the factors that allow the court to take into account other offences, and a course of criminal conduct.³²⁰ They also include factors relating to the personal circumstances of the offender, such as character, cultural background and age.

6.26 The ALRC does not agree with the view that factors relating to the personal circumstances of the offender are irrelevant. Allowing the court to take into account factors relating to the personal circumstances of an offender facilitates individualised justice, which is one of the key sentencing principles.³²¹ The ALRC also disagrees with the view that contrition is an irrelevant factor in sentencing. The ‘degree to which the person has shown contrition’ may be relevant to the prospect of rehabilitation of the offender, which in turn is relevant to the sentencing purpose of promoting the rehabilitation of the offender. It is also a factor relevant to the sentencing purposes that underlie restorative justice, as well as to the purposes of specific deterrence and

protection of the community.³²² The ALRC proposes to retain the broad description of this factor as expressed in s 16A(2)(f) but is presently of the view that legislation need not specify ‘taking action to make reparation’ as an example of how contrition may be demonstrated. An offender may show contrition in other ways, such as by demonstrating a willingness to facilitate the administration of justice by pleading guilty or cooperating with the authorities.³²³

Factors to be added

Pre-sentence detention or custody

6.27 It is generally accepted that a court is to take into account any time spent in pre-sentence custody where a sentence of imprisonment is imposed.³²⁴ However, an issue arises in relation to the treatment of pre-sentence detention or custody where a sentence other than imprisonment is ultimately imposed by the court. This issue has arisen in the sentencing of unlawful non-citizens for fisheries-related offences, although it is also relevant in other contexts, such as pre-sentence detention of the mentally ill.³²⁵

6.28 The *United Nations Convention on the Law of the Sea* prohibits imprisonment as a penalty for violations of certain fisheries laws, in the absence of agreements to the contrary by the States concerned.³²⁶ Consequently, certain offences against the *Fisheries Management Act 1991* (Cth) are not punishable by imprisonment but are punishable by the imposition of other sentencing options, including fines. Unlawful non-citizens can be detained by the authorities for the purpose of determining whether or not to charge or prosecute them with certain offences, including fisheries offences. They can either be detained under the *Fisheries Management Act* for a maximum period of 168 hours,³²⁷ or they can be detained under the *Migration Act 1958* (Cth).³²⁸ In the latter case there is no limit on the time that a person may be held in immigration detention and there is no requirement to bring a charge against a detainee within any particular time.³²⁹

6.29 Different judicial opinions have been expressed about whether pre-sentence immigration detention is a relevant factor in sentencing. In *R v Yusup*, Angel J, when imposing a fine for a fisheries offence, refused to take into account the period of time spent by the offender in immigration detention pending disposition of the matter. He stated that it was not a relevant sentencing factor, and referred to the fact that it was not mentioned in s 16A(2) of the *Crimes Act*. He expressed the view that the period of immigration detention was not punishment but was attributable to the offender’s unlawful presence in Australia.³³⁰ However, in *R v Zainudin*, Mildren J concluded that considerations of justice required that pre-sentence detention be taken into account. He distinguished pre-charge immigration detention from the type of immigration detention used to hold illegal immigrants, and stated that from an offender’s perspective, pre-charge immigration detention was, for all practical purposes, the same as being held on remand.³³¹

6.30 The Northern Territory Legal Aid Commission expressed the view that immigration detention connected to an offence should be taken into account in sentencing. It noted that offenders in immigration detention were prejudiced by the fact that they were not brought promptly before the courts.³³²

6.31 The ALRC notes the differing judicial views in relation to the treatment of pre-sentence immigration detention. The ALRC considers that in imposing a sentence other than imprisonment³³³ a court should have regard to any time spent by the offender in pre-sentence custody or detention in relation to the offence. In the case of immigration detention, the need for fairness is highlighted by the fact that there is no limit to the amount of time that an unlawful non-citizen can be kept in immigration detention in relation to a suspected offence before a charge is laid. In addition, alternative sentencing options imposed on an offender may be substantial. For example, the maximum fines for certain fisheries offences are significant,³³⁴ and when imposed on impecunious offenders may result in imprisonment for non-payment of the fine.³³⁵

Pre-sentence quasi-custody

6.32 Another issue that arises is the treatment of time spent by an offender in pre-sentence residential rehabilitation programs, or other forms of quasi-custody involving significant restrictions on the offender. While it may not be appropriate to give full credit for the time spent in quasi-custody (in the sense of reducing any sentence of imprisonment by the full number of days spent in quasi-custody), a number of decisions recognise that periods in quasi-custody should be taken into account by a court in sentencing.³³⁶

6.33 The ALRC considers that an additional factor should be added to the list of sentencing factors in s 16A(2) of the *Crimes Act*, namely, time spent by an offender in a rehabilitation program or other form of quasi-custody where the offender has been subjected to restrictions, except where full credit must be given for pre-sentence custody or detention.

Impact on victim

6.34 The Victim Support Service Inc stated that additional factors relating to victims should be included in the list of sentencing factors, and noted that there was little in the current list that would cover the impact of the offence on the victim.³³⁷ The proposed sentencing legislation of the Australian Capital Territory (ACT) includes the effect of an offence on a victim as a relevant sentencing factor.³³⁸

6.35 The ALRC is of the view that the impact of an offence on any victim is a relevant sentencing factor, and that it is a factor of increasing relevance in sentencing federal offenders. New federal offences such as sexual servitude, child sex tourism and terrorism offences depart from the traditional subject matter of federal offences (such as social security fraud and tax fraud), which have generally been considered to be victimless in the sense that the injury is often not directed to an identifiable individual but to the Commonwealth as a polity.³³⁹ It is desirable that the impact of an offence on

any victim be added to the list of sentencing factors given the proposal elsewhere in this Discussion Paper to regulate the use of victim impact statements in sentencing,³⁴⁰ and given that one of the objects of the proposed federal sentencing Act is to recognise the interests of victims.³⁴¹

Additional factors in relation to offence and offender's culpability

6.36 A review of state and territory sentencing legislation reveals a number of additional factors in relation to an offence and an offender's culpability for an offence that could appropriately be adopted in federal sentencing legislation. These factors include the maximum penalty for the offence;³⁴² the seriousness or the gravity of the offence;³⁴³ and the offender's culpability and degree of responsibility for the offence.³⁴⁴

6.37 Having regard to state and territory sentencing legislation and to particular criticisms made of s 16A(2) of the *Crimes Act*,³⁴⁵ the ALRC considers that the following new factors should be added to the list of sentencing factors in s 16A(2):

- the maximum penalty for the offence;
- the seriousness of the offence (which would include whether the commission of the offence involved a breach of trust, and whether a weapon was used); and
- the offender's culpability and degree of responsibility for the offence (which would encompass the degree of premeditation and degree of participation in the offence).

Forfeiture orders

6.38 A federal offender who is being sentenced for an offence may separately be subject to orders for the forfeiture of property in relation to that offence. The forfeiture orders may relate either to property that was used in the commission of the offence or to property that is the proceeds of crime. In some states and territories courts are required to have regard to forfeiture of property orders when sentencing an offender.³⁴⁶

6.39 The ALRC considers that the nature and extent of any forfeiture of property order that is to be imposed as a result of the commission of the offence should be added to the list of sentencing factors in s 16A(2). However, for the reasons discussed more fully below, this proposal is subject to the qualification that any forfeiture order that merely neutralises a benefit that has been obtained by the commission of a federal offence—that is, a forfeiture order directed to the proceeds of crime—should not mitigate the sentence.³⁴⁷

Effect of sentencing option on the offender

6.40 The Law Society of South Australia expressed the view that when sentencing a federal offender a court should be able to take into account sufficiently adverse prison conditions or the fact that someone would be subject to protective custody.³⁴⁸

6.41 ALRC 44 recommended that relevant sentencing factors should include: whether a particular type of sanction would cause hardship to the offender; and the indirect effects on the offender of a particular sanction.³⁴⁹ The sentencing legislation of the ACT includes as a sentencing factor whether the imposition of a particular penalty is likely to cause particular hardship to an offender.³⁵⁰

6.42 In *R v Sellen*, the New South Wales Court of Criminal Appeal stated that:

If it is shown that imprisonment will cause particular hardship (either because of a pre-existing physical or mental disability of the prisoner or because of the circumstances in which the prisoner must be kept for protection) this is a circumstance to be taken into account in determining the duration of the imprisonment.³⁵¹

6.43 In *York v The Queen*, the High Court held that it was appropriate for a judicial officer to take into account the grave risk that an offender could be killed in prison, and that the weight to be given to this factor depends on the circumstances of the case, including the likelihood of the occurrence.³⁵²

6.44 Having regard to the views expressed in consultations, the recommendation made in ALRC 44, and relevant state and territory law, the ALRC is of the view that a new factor should be added to the list of sentencing factors in s 16A(2), namely, the probable effects on the offender of a particular sentencing option, including that the offender's circumstances may result in imprisonment having an unusually severe impact on him or her.

Civil consequences of being found guilty

6.45 The civil and administrative consequences of being found guilty of an offence often reach far beyond the immediate sentence imposed by the court. Long after a sentence has been completed an offender may face restrictions in gaining access to employment, housing, or goods and services by reason of his or her criminal history. For example, one federal offender submitted that, due to deregistration from his professional body, there was no potential for him to earn income from his profession in the future.³⁵³

6.46 ALRC 44 recommended that relevant sentencing factors should include the indirect effects on the offender of conviction, such as loss of, or inability to continue in or obtain, suitable employment.³⁵⁴ The sentencing legislation of the ACT includes as a sentencing factor whether the recording of a conviction is likely to cause particular hardship to an offender.³⁵⁵

6.47 The ALRC considers that federal sentencing legislation should add to the list of sentencing factors the probable civil and administrative consequences of being found guilty of the offence. The consequences may vary according to an offender's socio-economic background. For example, offenders from relatively advantaged backgrounds might face loss of directorship of a corporation or deregistration from a professional body, while other offenders may face loss of opportunity for employment. Judicial officers should be careful not to apply this factor in a manner that privileges offenders from advantaged backgrounds.

Other factors relevant to special categories of offenders

6.48 The ALRC considers that the list of sentencing factors should also include a number of additional factors that are relevant to special categories of offenders. These factors are discussed in Chapters 27 to 30.

Factors to be modified

Injury, loss or damage

6.49 Section 16A(2)(e) requires a court to take into account 'any injury, loss or damage resulting from the offence'. Traditionally the subject matter of federal offences has differed from that of state and territory offences in the sense that the injury flowing from federal offences is not always directed to identifiable individuals but to the Commonwealth as a polity. This trend may be changing with the advent of new offences such as terrorism and sexual servitude, which impact on individual victims.³⁵⁶ However, it remains the case that the damage or injury resulting from certain federal offences (such as corporations law offences and fisheries offences) does not always impact on individual victims, or may have an impact beyond individual victims (such as impact on the market or the environment).

6.50 The Australian Securities and Investments Commission (ASIC) submitted that:

ASIC matters can be prosecuted in a wide range of courts and jurisdictions, and not all courts have understood the levels of damage that corporate offences can cause. ... General provisions could refer to factors such as impact of the offences on market integrity, market confidence and consumer confidence in the financial sector.³⁵⁷

6.51 Having regard to these concerns, the ALRC proposes that the existing factor in s 16A(2) dealing with injury, loss or damage be modified to include effects beyond any immediate victim, such as effects on the environment or the market. To assist in resolving the potentially difficult issues relating to causation or the foreseeability of such injury, loss or damage, the ALRC proposes that the injury, loss or damage which the court must consider should be limited to that which results directly from the offence. This is consistent with the approach taken in Victorian sentencing

legislation,³⁵⁸ although the sentencing Acts in the other states and territories do not adopt this limitation.

Effect on family

6.52 The New South Wales Public Defenders Office expressed the view that a court should always be able to take into account the probable effect that any sentence or order under consideration would have on an offender's family or dependants.³⁵⁹

6.53 The effect of incarceration on family was emphasised by one federal offender who submitted that his custodial sentence caused severe financial hardship to his family members, resulting in their becoming welfare beneficiaries; and caused psychological damage to his son.³⁶⁰ The probable effect on family or dependants is currently included as a factor in s 16A(2)(p) of the *Crimes Act*, but some courts have read this paragraph down to allow consideration of this factor only in exceptional circumstances.³⁶¹

6.54 The ALRC proposes that the existing factor that requires a court to take into account 'the probable effect that any sentencing option or order under consideration would have on any of the person's family or dependants' should be modified to make it clear that a court should have regard to this factor whether or not the circumstances are exceptional. The weight to be given to this factor would be a matter for the court's discretion. For example, it may be that certain effects on family and dependants would not warrant a modification in the sentence or order imposed. On the other hand, other effects may be sufficiently serious—even if not strictly exceptional—to warrant a modification in the sentence or order imposed when considered in the light of other relevant factors. The effect on dependants should include financial, social, and psychological effects.

6.55 The ALRC is interested in hearing stakeholders' views as to whether federal sentencing legislation should specify as a relevant factor the effect of the offender's sentence on the offender's community—for example, where the offender has an important role in a small regional or remote community.

Antecedent criminal history

6.56 Section 16A(2) of the *Crimes Act* includes as a relevant factor 'antecedents'. This broad term encompasses relevant facts and circumstances in the background or past history of the offender as well as an offender's antecedent criminal history.³⁶²

6.57 The *Crimes Act* does not set out what constitutes 'antecedent criminal history'. Criminal records kept by police services in each jurisdiction generally include court appearances, prior convictions, findings of guilt with no conviction, charges and matters currently under investigation.³⁶³ However, not everything that is included in a criminal record is relevant to sentencing. The CDPP submitted that all prior convictions, including spent convictions, should be available to a court in sentencing.³⁶⁴ In consultations, the Offenders Aid and Rehabilitation Services South

Australia expressed the view that spent convictions and unrelated and juvenile history should not be able to be considered in sentencing.³⁶⁵

6.58 The ALRC considers that there is some utility in reformulating the existing factor of ‘antecedents’ so that separate reference is made to ‘antecedent criminal history’ and to the history and circumstances of the offender. ‘Antecedent criminal history’ is a term often used by the courts.³⁶⁶ It should be defined to mean a record of all prior convictions,³⁶⁷ offences in respect of which an offender was found guilty but was released without conviction, and other offences admitted in accordance with the usual procedures for taking other offences into account,³⁶⁸ up to the time of sentence.³⁶⁹ Charges and matters under current investigation should not be encompassed within ‘antecedent criminal history’.

6.59 While there are legitimate reasons for restricting the disclosure of spent convictions in certain areas, such as employment and insurance, the ALRC is of the view that a court should be able to consider spent convictions when sentencing federal offenders. Older convictions may carry less weight but nevertheless may be relevant to sentencing. Allowing spent convictions to be considered in sentencing is consistent with the current position³⁷⁰ and the recommendation made in ALRC 37.³⁷¹

Drafting modifications

6.60 Some particular issues arise from the terms in which s 16A(2) of the *Crimes Act* is drafted. Having regard to the desirability of accuracy, clarity and consistency in language, the ALRC proposes that:

- the existing reference to ‘means’ in s 16A(2)(m) should be replaced with the wider term ‘financial circumstances’, which is currently used in s 16C of the *Crimes Act*;³⁷² and
- the reference to ‘physical or mental condition’ in s 16A(2)(m) should be replaced with ‘physical and mental condition’ to make it clear that a court can have regard to both of these factors.

Proposal 6–1 Federal sentencing legislation should state that a court, when sentencing a federal offender, must consider any factor that is relevant to sentencing and known to the court. These factors may include, but are not limited to, any of the following matters to the extent that they are applicable:

- (a) the nature, seriousness and circumstances of the offence;
- (b) the maximum penalty for the offence;

- (c) the offender's culpability and degree of responsibility for the offence;
- (d) other offences (if any) that are required or permitted to be taken into account;
- (e) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character—that course of conduct;
- (f) the personal circumstances of any victim of the offence and the impact of the offence on any victim;
- (g) any injury, loss or damage resulting directly from the offence; including effects beyond any immediate victim (such as effects on the environment or the market);
- (h) the degree to which the person has shown contrition for the offence;
- (i) the character, antecedent criminal history, cultural background, history and circumstances of the offender, including age, financial circumstances, physical and mental condition;
- (j) if a sentence is imposed other than a term of imprisonment—time spent in pre-sentence custody or detention in relation to the offence;
- (k) time spent in a rehabilitation program or other form of quasi-custody where the offender has been subjected to restrictions, except where full credit must be given for pre-sentence custody or detention;
- (l) subject to Proposal 6–4, the nature and extent of any forfeiture of property that is to be imposed as a result of the commission of the offence;
- (m) the probable effect on the offender of a particular sentencing option, including that the offender's circumstances may result in imprisonment having an unusually severe impact on him or her;
- (n) the probable civil and administrative consequences of being found guilty of the offence;
- (o) the prospect of rehabilitation of the offender;
- (p) the probable effect that any sentencing option or order under consideration would have on any of the offender's family or dependants, whether or not the circumstances are exceptional; and

- (q) other factors relevant to special categories of offenders.

Aggravating or mitigating factors

Should legislation indicate whether [the factors relevant to the choice of sentencing option or the quantum of sentence] aggravate or mitigate the sentence? [IP 29, Q8–2, part]

Background

6.61 One question that arises is whether federal sentencing legislation should identify which sentencing factors increase the penalty to be imposed (an aggravating factor) and which lessen the penalty to be imposed (a mitigating factor).³⁷³

6.62 The *Crimes Act* does not list aggravating or mitigating factors. New South Wales is the only jurisdiction that sets out a list of aggravating and mitigating factors that the court must take into account.³⁷⁴ Other state and territory sentencing legislation simply states that a court must have regard to the presence of any mitigating or aggravating factor concerning the offender³⁷⁵ or must have regard to any mitigating or aggravating factor in determining the seriousness of an offence,³⁷⁶ without listing examples of such factors. Some sentencing legislation is silent on the issue of aggravating and mitigating factors.³⁷⁷ There is precedent in the sentencing provisions of overseas jurisdictions for the listing of aggravating and mitigating factors³⁷⁸ and some of these provisions expressly allow for the consideration of any aggravating or mitigating factor relating either to the offence or the offender.³⁷⁹

Issues and problems

6.63 Professors Richard Fox and Arie Freiberg have expressed the view that it is:

artificial, misleading and possibly an error in principle to isolate certain factors and label them as always either aggravating or mitigating the circumstances of the offence and, consequently, its penalty.³⁸⁰

6.64 The relationship between mitigating and aggravating factors is complicated by the fact that the opposite of a mitigating factor is not necessarily an aggravating factor, and vice versa.³⁸¹ For example, a plea of guilty could be a mitigating factor but it is improper to treat a plea of not guilty as an aggravating factor. Similarly, while youth or old age may be a mitigating factor, the fact that an offender's age does not fall in either extreme is not an aggravating factor.

6.65 Opposition was expressed in consultations and submissions to federal sentencing legislation specifying aggravating and mitigating factors. It was said that specifying such factors might mislead and give rise to error,³⁸² that it was unnecessary and unhelpful,³⁸³ and that, if factors were to be specified, it would have to be done carefully and would be undertaken more appropriately by a Sentencing Council rather than in legislation.³⁸⁴

ALRC's views

6.66 ALRC 44 expressed the view that no distinction should be drawn between aggravating and mitigating factors.³⁸⁵ The ALRC remains of that view. No problem has been identified during the course of the ALRC's current inquiry that gives cause to reconsider this aspect of federal sentencing legislation. The majority of consultations and submissions addressing this issue were opposed to the specification of aggravating or mitigating factors.

6.67 Some of the sentencing factors set out in Proposal 6–1, such as the maximum penalty for the offence, cannot be categorised as either aggravating or mitigating. Other factors may be either aggravating or mitigating depending on the circumstances. For example, aggravating factors could be that the offender's culpability and degree of responsibility for the offence were high, while mitigating factors could be that an offender's culpability and degree of responsibility for the offence were limited. However, such distinctions seem self-evident and there appears to be little utility in attempting to give them statutory expression.

6.68 The ALRC also considers it to be self-evident that some sentencing factors are mitigating rather than aggravating. For example, the factor relating to time spent in pre-sentence custody or detention where a sentence other than imprisonment is imposed is obviously mitigating.

6.69 Finally, some factors relevant to sentencing are such that their existence may serve neither to increase nor to decrease the severity of a sentence, but may guide the court in selecting an appropriate sentencing option or specifying certain conditions tailored to the needs and circumstances of the offender. Factors that could fall into this category include the cultural background, age, and physical and mental condition of an offender.

<p>Proposal 6–2 Subject to Proposals 6–3 and 6–4, the list of factors relevant to sentencing a federal offender should not distinguish between factors that aggravate and those that mitigate the sentence.</p>

Factors that do not aggravate the sentence

6.70 Part IB of the *Crimes Act* does not identify factors that must be treated as non-aggravating or non-mitigating. There is precedent for the contrary position. Examples of non-aggravating factors identified in legislation are: that a person has pleaded not guilty; that a person has a prior criminal record; and that a previous sentence has not achieved the purpose for which it was imposed.³⁸⁶ Examples of non-mitigating factors identified in legislation are: forfeiture orders of property derived as result of the commission of an offence;³⁸⁷ certain automatic forfeiture orders;³⁸⁸ and voluntary consumption of certain drugs and alcohol.³⁸⁹

6.71 However, some legislative provisions confuse the distinction between irrelevant factors and factors that are not aggravating. Section 344 of the *Crimes Act 1900* (ACT), is headed ‘Matters not to be taken into account’, but the substance of the provision is directed to listing factors that preclude a court from increasing the severity of the sentence that it would have otherwise imposed.³⁹⁰ Among this list of factors are some that are truly irrelevant to sentencing,³⁹¹ and some that properly should be regarded as non-aggravating.

6.72 There was some support in consultations and submissions for federal sentencing legislation to specify factors that should not aggravate a sentence,³⁹² and factors that should not mitigate a sentence.³⁹³ Specific factors that might be treated as either non-aggravating or non-mitigating are discussed separately below.

Plea of not guilty

6.73 At common law a plea of not guilty is not to be treated as aggravating. In *Siganto v The Queen*, the High Court stated:

A person charged with a criminal offence is entitled to plead not guilty, and defend himself or herself, without thereby attracting the risk of the imposition of a penalty more serious than would otherwise have been imposed.³⁹⁴

6.74 ALRC 44 recommended that an offender’s choice to plead not guilty be specified as an irrelevant factor ‘to help ensure that the court does not take into account a not guilty plea to increase the severity of the sentence’.³⁹⁵ While the ALRC recommended that a plea of not guilty be treated as irrelevant, the reasoning was in fact directed to ensuring that a plea of not guilty be treated as non-aggravating.

6.75 The ALRC is of the view that federal sentencing legislation should specify that the fact that the offender has pleaded not guilty to the offence should not be treated as an aggravating factor. This is consistent with the common law position and with the position in Western Australia and the ACT.³⁹⁶ Further, as the court is entitled to treat an offender’s plea of guilty as mitigating, there is merit in expressly stating that a plea

of not guilty is not aggravating. This would provide explicit reassurance that federal offenders who exercise their right to plead not guilty will not be penalised for doing so.

Antecedent criminal history

Background

6.76 Part IB of the *Crimes Act* is silent on the issue of how antecedent criminal history is to be treated. The sentencing legislation of New South Wales and New Zealand expressly provides that prior convictions are to be regarded as aggravating,³⁹⁷ and certain United States sentencing provisions deem certain types of prior convictions to be aggravating in sentencing for specific types of offences.³⁹⁸ The United Kingdom Sentencing Guidelines Council has issued a guideline that identifies prior convictions as an aggravating factor.³⁹⁹ By contrast, the sentencing legislation of Western Australia provides that the fact that an offender has a prior criminal record is not to be regarded as aggravating.⁴⁰⁰

6.77 ALRC 44 expressed the view that the punishment for a current crime should not be increased by reference to an earlier crime, but noted that there are ways in which antecedent criminal history could be relevant to sentencing without contravening that principle.⁴⁰¹

Issues and problems

6.78 The proper treatment of prior convictions or antecedent criminal history in sentencing is open to debate. Professor Julian Roberts has expressed the view that in order to reduce the use of incarceration there should be:

Statutory directions to discourage ‘penal escalation’, namely the imposition of a disproportionate sanction to reflect the fact that the offender has a previous conviction that resulted in imposition of a non-custodial sanction. In addition, courts need to be discouraged from ‘cumulative sentencing’, that is the practice of imposing progressively more severe sanctions to reflect the number and seriousness of the offender’s previous convictions.⁴⁰²

6.79 Professor Bagaric has expressed the view that prior convictions should be irrelevant in sentencing because they are the primary cause of disproportionate sentences and perpetuate existing social injustices by leading to harsher penalties for offenders from deprived social backgrounds.⁴⁰³ He argues that:

imposing harsher punishments on offenders for what they have done in the past not only violates the proscription against punishing people twice for the one offence, but also amounts to the unacceptable notion that people should be punished for their character as opposed to what they have done.⁴⁰⁴

6.80 Professor Kate Warner expressed the view that prior convictions should not be treated as aggravating but that the absence of prior convictions should be a mitigating factor.⁴⁰⁵

6.81 The judgments of the High Court in *Veen [No 2]* expressed differing views about the treatment of prior convictions.⁴⁰⁶ The majority considered that prior convictions could be treated as an aggravating factor within the confines of the proportionality principle:

the antecedent criminal history of an offender may be taken into account in determining a sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. ... The antecedent criminal history is relevant, however, to show whether the offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind.⁴⁰⁷

6.82 By contrast, the minority expressed the view that prior convictions should only militate against any leniency that might otherwise be afforded to the offender,⁴⁰⁸ and should not be considered aggravating or justifying the imposition of a longer sentence than the objective circumstances of the offence would warrant.⁴⁰⁹ In *Baumer v The Queen*, the High Court commented that it would be wrong for a sentencing judge to increase a sentence beyond what was considered appropriate for the offence by reason of the offender's prior convictions. However, the Court said that the existence of prior convictions might make it difficult for a court to view the circumstances of the offence or the offender with any degree of leniency.⁴¹⁰

ALRC's views

6.83 The ALRC notes the widely conflicting views expressed in relation to how antecedent criminal history is to be treated in sentencing. The division of judicial opinion on the High Court demonstrates that there is a contentious but developing body of law in this area. With this mind, the ALRC is presently of the view that legislation in this area should not be overly prescriptive and that the common law should not be hindered from developing over time.

6.84 The ALRC is of the view that, as a general principle, the mere fact that an offender has an antecedent criminal history should not be treated as an aggravating factor, but that the absence of such a history can be treated as a mitigating factor. An antecedent criminal history may, for example, contain trivial or unrelated convictions, or spent convictions, or convictions for offences committed when the offender was a juvenile. Depending on the circumstances, the aggravation of sentence on the basis of such a history might serve no legitimate sentencing purpose.

6.85 However, that is not to say that a court should never find aggravating circumstances on the basis of an antecedent criminal history. A court may justifiably increase a sentence on this basis in furtherance of the purposes of sentencing, so long as the sentence remains proportional to the offence.⁴¹¹

6.86 The ALRC considers that a legislative statement that the mere existence of an antecedent criminal history is not aggravating will prevent judicial officers from automatically treating antecedent criminal history as aggravating without giving due regard to how the purposes of sentencing are served in the individual case. It will also encourage judicial officers to consider actively whether the existence of such a history justifies aggravation of the sentence in light of the purposes of sentencing. This approach may have particular benefits where federal sentencing is conducted in states whose judicial officers are accustomed to treating antecedent criminal history as an aggravating factor.

Declining to participate in restorative justice program

6.87 As discussed in Chapter 4, restoration is a purpose of sentencing that has gained prominence in recent years. The ALRC has proposed that federal sentencing legislation should provide that one of the purposes for which a court can sentence is to ‘promote the restoration of relations between the community, the offender and the victim’.⁴¹²

6.88 The ALRC is of the view that federal sentencing legislation should specify that the fact that an offender has declined to take part in a restorative justice initiative or program should not in itself be an aggravating factor. This is consistent with the position in the ACT.⁴¹³

6.89 Because an offender’s consent is integral to effective participation in a restorative justice program or initiative, it would be improper to treat the absence of consent as an aggravating factor. The integrity of the restorative justice process or outcome would be impaired if offenders were, or were perceived to be, coerced into participation. The fact that an offender declined to take part in a restorative justice initiative or program may nevertheless be relevant to sentencing. For example, in selecting an appropriate sentence or order it may be relevant to know that the offender has declined to take part in such a program so that the court does not impose a sentence or make an order that incorporates a restorative justice element.

Course of conduct

Background

6.90 Under s 16A(2)(c) of the *Crimes Act*, a court may sentence a federal offender for a limited or representative number of offences on the basis that those offences are part of a wider ‘course of conduct’. This practice is often used in relation to fraud or sexual assault cases. However, many cases have held that a course of conduct cannot be treated as an aggravating factor. In *R v D*, Doyle CJ of the Court of Criminal Appeal of South Australia explained that:

A court sentences an offender in respect of a relatively small number of offences, but does so on the basis that those offences were not isolated offences, but part of a course of conduct involving similar behaviour. On that basis, the scope for extending leniency is reduced. The uncharged offences that are part of the course of conduct cannot be used to increase the potential maximum punishment, which maximum remains the accumulation of the maxima attracted by the charged offences. The only way in which the uncharged offences can be used is to rely upon them to refuse to extend the leniency that might be extended if the offences for which the offender is convicted were isolated offences.⁴¹⁴

6.91 This approach has also been adopted by the New South Wales Court of Criminal Appeal. For example, in *R v JCW*, a case dealing with sexual abuse, the offender made an admission that the counts with which he was charged were representative of the general nature of his relationship with his daughter. Spigelman CJ said:

I do not, however, conclude that the admission extended to any, let alone each, of the specific allegations contained in [the daughter's evidence].

An admission of this general character is appropriate to be taken into account for purposes of rejecting any claim to mitigation and attendant reduction of an otherwise appropriate sentence. It is not, however, in my opinion, appropriate to be taken into account as a circumstance of aggravation, if that be permissible at all.⁴¹⁵

Issues and problems

6.92 There appears to be some judicial confusion about the meaning of s 16A(2)(c). In *Weininger v The Queen*, Kirby J stated that the section did not allow 'uncharged criminal acts' to be taken into account in sentencing and expressed the view that s 16A(2)(c) was an attempt to express the totality principle.⁴¹⁶ Confusion about the meaning and operation of the factor was also expressed in consultations. It was said that the section appeared to allow the court to take into account uncharged conduct.⁴¹⁷

ALRC's views

6.93 In the ALRC's view, s 16A(2)(c) is consistent with the totality principle. However, the expression of the totality principle is not the main or exclusive purpose of paragraph (c), nor should the paragraph be construed in this way. In the ALRC's view, sentencing principles should be expressed independently of sentencing factors, as is proposed in Chapter 5.

6.94 The ALRC is of the view that the factor in s 16A(2)(c) does not need modification in substance, although the expression of the factor might be improved. The ALRC is interested in hearing stakeholders' views in this regard. It is only 'the course of conduct' that a court is entitled to take into account in sentencing, not the individual 'criminal acts' comprising that course of conduct. The course of conduct to which s 16A(2)(c) refers comprises a series of criminal acts that have not been proved or admitted. It is to be distinguished from a course of conduct comprised of multiple

proven offences in respect of which a court may impose concurrent or partly concurrent sentences or, in certain circumstances, impose an aggregate sentence.⁴¹⁸

6.95 The ALRC has proposed that the factor expressed in s 16A(2)(c) be included in its present form in the federal sentencing Act.⁴¹⁹ However, there is merit in clarifying how the factor is to be treated in sentencing in accordance with common law principles. Accordingly, the federal sentencing Act should expressly provide that a sentence is not to be aggravated by the fact that the offence for which the offender is being sentenced forms part of a course of conduct consisting of criminal acts of the same or similar character.

Proposal 6–3 Federal sentencing legislation should provide that the following matters are not to aggravate the sentence of a federal offender:

- (a) the fact that the offender has not pleaded guilty to the offence;
- (b) the mere fact that the offender has an antecedent criminal history;
- (c) the fact that the offender declined to take part in any restorative justice initiative or program; and
- (d) the fact that the offence for which the offender is being sentenced forms part of a course of conduct consisting of criminal acts of the same or similar character.

Factors that do not mitigate the sentence

Forfeiture orders

6.96 As noted above, a federal offender who is being sentenced for an offence may be subject to forfeiture orders in relation to property. The orders may pertain to two quite different situations: (a) where the property that is the subject of the order is itself the proceeds of crime; or (b) where the property that is the subject of the order was used in the commission of the offence.

6.97 In relation to the first situation, the sentencing provisions of Western Australia provide that the fact that property derived from the commission of an offence is forfeited is not a mitigating factor in sentencing for that offence.⁴²⁰ The sentencing provisions of the ACT also preclude a court from mitigating a sentence because of such forfeiture orders under the *Confiscation of Criminal Assets Act 2003* (ACT).⁴²¹

6.98 The sentencing provisions of other states and territories prevent a court from taking into account a forfeiture order that merely neutralises a benefit that has been obtained through the commission of the offence,⁴²² or a forfeiture order in respect of property derived or realised as a result of the commission of the offence.⁴²³ However,

the sentencing provisions of these states and territories allow the court to have regard to other types of forfeiture orders that have been, or are to be, imposed as a result of the commission of the offence,⁴²⁴ including certain forfeiture orders of the second type—namely, those in respect of property that was used in the commission of an offence.⁴²⁵

6.99 In *Stock v The Queen*, Underwood J said:

There might be a case in which the forfeiture order and/or pecuniary penalty order impose financial loss upon the convicted person far in excess of profits made by the commission of the crime. In such a case, it would seem appropriate to take into account the impact of the confiscation orders in the imposition of sentence. Conversely, if the making of confiscation orders does no more than deprive the convicted person of the profits of his or her crime, then the making of the confiscation orders would have no weight in the sentencing process. ...

Deprivation of profits from heinous criminal activity does not go in reduction of an appropriate penalty for the commission of that criminal activity.⁴²⁶

ALRC's views

6.100 Forfeiture orders that merely neutralise a benefit obtained by the commission of the offence should be treated differently from forfeiture orders relating to property used in the commission of an offence. Forfeiture of property derived from the commission of an offence should not be treated as a mitigating factor. However, the court should retain the discretion to treat forfeiture of property used in the commission of an offence as a mitigating factor.

6.101 For example, in the case of a fishing offence, an order requiring an offender to forfeit the illegal catch should not be used as a basis for mitigating the sentence because it is a benefit obtained by the commission of the criminal conduct itself. On the other hand, an order requiring an offender to forfeit a valuable fishing vessel might be relevant to mitigating any fine that is imposed. However, there may be situations where it would be inappropriate for the court to mitigate a sentence having regard to a forfeiture of property used in the commission of an offence, such as where that property was unlawfully obtained or was not the property of the offender.

6.102 The distinction in the treatment of different types of forfeiture orders is consistent with many state and territory sentencing provisions that address this issue. In relation to forfeiture orders of the first type, the ALRC proposes a statutory formulation that allows the court to have regard to a forfeiture order that merely neutralises a benefit obtained from the commission of the offence, but requires the court not to treat it as a mitigating factor. This is preferable to a formulation that renders this type of forfeiture order irrelevant to sentencing.

Proposal 6–4 Federal sentencing legislation should provide that any forfeiture order or other court order that merely neutralises a benefit that has been obtained by the commission of a federal offence should not mitigate the sentence.

Factors relevant to the administration of the federal criminal justice system

Background

6.103 Section 16A(2)(g) of the *Crimes Act* provides that a factor to be taken into account in sentencing is the fact that a person has pleaded guilty to the charge in respect of the offence. Section 16A(2)(h) provides that a factor to be taken into account in sentencing is the degree to which the person has cooperated with law enforcement agencies in the investigation of the offence or of other offences.

6.104 Some state and territory sentencing legislation includes as a sentencing factor the time when the offender pleaded guilty or indicated an intention to do so.⁴²⁷ Certain state and territory sentencing provisions adopt a formulation of cooperation with law enforcement agencies that is broader than s 16A(2)(h) and encompasses cooperation at various stages of the criminal justice process, not just the investigative stage,⁴²⁸ or expressly includes past and promised future cooperation.⁴²⁹

6.105 The factors relating to a guilty plea and cooperation with authorities are taken into account by judicial officers as an incentive to promote the effective administration of the criminal justice system. These factors do not strictly focus, as traditional sentencing factors do, on the individual circumstances of the offence, the offender, or the victim. And unlike sentencing factors, these are not factors that on their own promote, or are consistent with, the traditional purposes of sentencing. In *Markarian v The Queen*, McHugh J stated that:

the quantification of the discount commonly applied for an early plea of guilty or assistance to authorities is offered as an incentive for specific outcomes in the administration of criminal justice and is not related to sentencing purposes. The non-sentencing purpose of the discount for an early guilty plea or assistance is demonstrated by the fact that offenders are ordinarily entitled to additional mitigation for any remorse or contrition demonstrated with the plea or assistance, aside from the discount for willingness to facilitate the course of justice.⁴³⁰

Issues and problems

6.106 The CDPP submitted that, in sentencing a federal offender, a court should be able to consider the offender's cooperation with the authorities because it is appropriate to have regard to an offender's behaviour towards the criminal justice system as a whole.⁴³¹ One issue that arises is how pleading guilty and cooperating with the

authorities should be dealt with in federal sentencing legislation given that these factors, on their own, do not advance the traditional purposes of sentencing.

6.107 Another issue is whether the description of each of these factors could be improved, having regard to the comparable provisions in state and territory sentencing legislation. In particular, the description of cooperation in s 16A(2)(h) does not specifically refer to future cooperation. An offender's promise to provide future cooperation is separately dealt with in s 21E of the *Crimes Act*. It was noted in consultations that the relationship between s 16A(2)(h) and s 21E is unclear,⁴³² and there is a need to distinguish clearly between future cooperation as provided for in s 21E from past cooperation as provided for in s 16A(2)(h).⁴³³

ALRC's views

6.108 The ALRC considers that the nature and purpose of factors such as a guilty plea and cooperating with law enforcement authorities necessitates their being identified separately from the factors relevant to sentencing. The former factors should be dealt with in a separate provision in order to make it clear that they advance the goal of promoting the proper administration of the criminal justice system and must be considered by a court in sentencing a federal offender, where they are relevant and known to the court. While these factors may evidence contrition or a subjective willingness to facilitate the administration of justice—which are factors consistent with sentencing purposes—taking into consideration the objective benefit that flows to the federal criminal justice system as a result of such conduct is not consistent with sentencing purposes.⁴³⁴

6.109 Having regard to comparable provisions in state and territory sentencing law, and to the views expressed in consultations, the ALRC considers that the current formulation of the factor relating to cooperation should be modified to make it clear that it relates to both past and future cooperation. The ALRC is also of the view that this factor should be expressed more broadly than is currently the case to encompass the degree of cooperation with law enforcement authorities at various stages of the criminal justice process, including cooperation in the prevention, detection and investigation of, or proceedings relating to, the offence or any other offence.

6.110 While some state and territory sentencing provisions specifically provide that the timing of a guilty plea is a relevant factor, the ALRC does not consider this to be the best approach. The ALRC prefers a formulation that focuses on the broader circumstances in which a guilty plea is made, rather than emphasising only the timing of a plea. Other relevant circumstances may include the degree of prosecution disclosure at the time of the plea, and whether and when legal representation or advice was available to the offender.⁴³⁵ It may not necessarily be the case that a late plea is due to intransigence or fault on the part of an offender.⁴³⁶

Proposal 6–5 Federal sentencing legislation should separately specify that when sentencing a federal offender a court must consider the following factors that pertain to the administration of the federal criminal justice system, where relevant and known to the court:

- (a) the fact that the offender has pleaded guilty and the circumstances in which the plea of guilty was made (see Proposal 11–2); and
- (b) the degree to which the offender has cooperated or promised to cooperate with law enforcement authorities regarding the prevention, detection and investigation of, or proceedings relating to, the offence or any other offence. (See Proposal 11–3).

Taking other offences into account

In what circumstances should a court be permitted to take into account other offences, including those in respect of which a federal offender has pleaded guilty, when determining sentence? [IP 29, Q8–3]

Background

6.111 Section 16A(2)(b) of the *Crimes Act* enables a court to consider ‘other offences (if any) that are required or permitted to be taken into account’. Where a person has been convicted of a federal offence, s 16BA of the *Crimes Act* permits the court, with the consent of the prosecutor, to take into account other federal offences in respect of which an offender has pleaded guilty, where the offender wishes those offences to be taken into account. The consequences of taking other offences into account include that further proceedings in respect of the admitted offences are barred, and that the offences taken into account are not regarded as convictions, although reference may be made to the admitted offences in subsequent proceedings as if they were convictions.⁴³⁷

6.112 The procedure in s 16BA can be invoked only where a person is *convicted* of a federal offence. It cannot be invoked where, notwithstanding that a charge has been proved, the court discharges the person without conviction or dismisses the charges.⁴³⁸ This is consistent with the position in some jurisdictions⁴³⁹ but contrasts with other state and territory provisions, which allow the court to take other offences into account even where the court dismisses the principal charge or conditionally discharges the offender in respect of the principal charge without proceeding to conviction.⁴⁴⁰

6.113 Further, under s 16BA, an offence can be taken into account even where the person has not been charged with that offence. It suffices if the offence is one that the person convicted ‘is believed to have committed’.⁴⁴¹ This is consistent with the

position in some states,⁴⁴² but again contrasts with other state and territory provisions which require the offender to have been charged or presented for trial in respect of the admitted offences.⁴⁴³

Issues and problems

6.114 There was support in consultations and submissions for the retention of a procedure that allows an offender to elect to have matters taken into account with the prosecutor's consent. It was submitted that such a process had utilitarian benefits with respect to the efficient use of court time.⁴⁴⁴ There was express support for the retention of s 16BA,⁴⁴⁵ although it was noted that it is rarely used.⁴⁴⁶ The majority of consultations and submissions that addressed this issue did not consider that there was any need for substantive reform in this area,⁴⁴⁷ although it was submitted that the equivalent provision in the sentencing legislation of New South Wales was better drafted.⁴⁴⁸

6.115 Allowing other offences to be taken into account on sentence has been said to promote the rehabilitation of an offender because he or she is given a clean slate. It also saves the investigative resources of law enforcement authorities by encouraging admissions of guilt; and it facilitates the resolution of offences in respect of which an offender may never have been inculpated.⁴⁴⁹

6.116 Section 16BA provides no guidance about when it is appropriate for other offences to be taken into account in sentencing.⁴⁵⁰ There is, however, authority for the proposition that:

it is contrary both to logic and to established practice for a sentencing judge to take into consideration offences that are not, viewed broadly, of the same kind and of about the same order of gravity as the offence or offences for which the convictions have been recorded.⁴⁵¹

6.117 Judicial officers have expressed concern about the difficulty in sentencing for the principal offence when they are asked to take into account a range of unrelated and incomparable offences.⁴⁵² Further, it has been said that it is normally inappropriate to take more serious offences into account where the maximum penalty available for the principal offence is insufficient to reflect the total criminality of the offender's conduct.⁴⁵³

6.118 The prosecution policy of the CDPP refers to other offences being taken into account in its guidelines on charge bargaining and provides some general guidance in this area.⁴⁵⁴ However, the policy does not contain specific guidance in relation to the suitability of offences to be taken into account under s 16BA.

6.119 In a guideline judgment on equivalent provisions—ss 31–35 of the *Crimes (Sentencing Procedure) Act 1999* (NSW)—the New South Wales Court of Criminal Appeal noted that:

Nothing in the statutory scheme identifies any criterion for selection of matters to be [taken into account]. Nor is there any statutory indication of any desirable, let alone necessary, relationship between a principal offence and offences [to be taken into account].⁴⁵⁵

6.120 The Court expressed the view that the wide discretion conferred on a court to refuse to accede to the wishes of the prosecution and the offender to take certain offences into account should not be statutorily confined.⁴⁵⁶ The Court suggested that the prosecution policy of the New South Wales Director of Public Prosecutions should provide guidance about the suitability of offences to be taken into account in sentencing.⁴⁵⁷

ALRC's views

6.121 The ALRC considers that federal sentencing legislation should contain general guidance about when it is appropriate to take other offences into account in sentencing a federal offender. Legislation should provide that the procedures by which another offence may be taken into account are available only where the conduct that constitutes the other offence is of a like nature and of similar or lesser seriousness to the principal offence. Although the common law provides that another offence may be taken into account if it is of similar seriousness to the principal offence, as a matter of principle there is no objection to offences of lesser seriousness also being taken into account.

6.122 In the ALRC's view there is no need for a legislative requirement that an offence be the subject of a charge before it can be taken into account. There are statutory safeguards against abuse because other offences not the subject of a charge cannot be taken into account without the consent of the offender and the prosecution, and without the ultimate approval of the court.

6.123 However, the ALRC believes that the prosecution policy of the CDPP should provide more specific guidance about when other offences should be taken into account. The factors to be considered should include the degree of similarity between the principal offence and the other offences; the nature, number and seriousness of the other offences; whether the offender was legally represented; and whether the other offences were the subject of investigation or charge. The inclusion of the latter factor is of particular importance. As Wells J stated in *R v McAllister*, there are situations in which the authenticity of an admission of guilt needs to be checked because:

it is not unknown for a person who has been convicted of one offence to confess to other offences and to ask them to be taken into consideration, simply for the sake of saving some other person from prosecution and punishment.⁴⁵⁸

6.124 It may be that extra precautions need to be taken by the prosecution before it consents to having an offence taken into account where that offence was not the subject

of an investigation or charge. For example, it would be relevant for the prosecution to consider whether the offender received legal advice before admitting guilt in those circumstances.

Proposal 6–6 Federal sentencing legislation should provide that the procedures by which another offence may be taken into account in sentencing a federal offender are available only where the conduct that constitutes the other offence is of a like nature and of similar or lesser seriousness to the principal offence.

Proposal 6–7 The Commonwealth Director of Public Prosecutions should amend its prosecution policy to provide guidance about the circumstances in which it is appropriate to take into account other offences in respect of which a federal offender has admitted guilt. The factors to be considered should include:

- (a) the degree of similarity between the principal offence and the other offences;
- (b) the number, seriousness and nature of the other offences;
- (c) whether the other offences were the subject of investigation or a charge; and
- (d) whether the offender was legally represented.

Factors irrelevant to sentencing

Should federal legislation specify factors that are irrelevant to the exercise of the sentencing discretion? If so, what matters should be included? [IP 29, Q8–4]

Background

6.125 Judicial officers have sometimes taken into account factors that have been held on appeal to be irrelevant in sentencing.⁴⁵⁹ Part IB of the *Crimes Act* does not list factors that are irrelevant to the exercise of the sentencing discretion. Some state and territory provisions specify certain factors to which a court must not have regard.⁴⁶⁰ As discussed above, some legislative provisions blur the distinction between factors that are irrelevant and those that are non-aggravating.⁴⁶¹

6.126 ALRC 44 recommended that there should be a statutory list of factors to which the court should not have regard in sentencing. That list included remission entitlements and early release policies; prevalence of the offence; the offender's demeanour in court; the offender's choice not to give evidence; facts relevant to charges to which the offender has pleaded not guilty and on which the prosecution has led no evidence; any antecedent or subsequent offences committed by the offender or in respect of which charges had been laid against him or her; and allegations concerning possible antecedent or subsequent offences.⁴⁶²

6.127 At common law, it has been held that a matter should not be taken into account by a court in sentencing if it would establish a separate offence, a more serious offence, or a circumstance of aggravation that renders the person liable to a greater maximum penalty.⁴⁶³ However, a matter that might technically constitute an incidental separate offence—such as resisting arrest—is not, for that reason, necessarily excluded from consideration.⁴⁶⁴

Issues and problems

6.128 There was some support in consultations and submissions for federal legislation to set out factors that are irrelevant to sentencing.⁴⁶⁵ It was submitted that such a list could be useful,⁴⁶⁶ but would be difficult to formulate because the sentencing process is not static.⁴⁶⁷ There was limited opposition to federal legislation setting out irrelevant factors.⁴⁶⁸ A view was expressed that it was not useful to set out irrelevant factors because if the legislation contained a provision that said the court had to take into account 'any other relevant factor' that would clearly signal that the factor had to be relevant before it was taken into account in sentencing.⁴⁶⁹ The Law Society of South Australia expressed the view that the types of factors recommended in ALRC 44 as irrelevant should be expressed in legislation.⁴⁷⁰

6.129 Whether a particular factor should be treated as relevant or irrelevant can be open to debate. For example, Professor Bagaric expressed the view that prior convictions were irrelevant,⁴⁷¹ and the Offenders Aid and Rehabilitation Services South Australia expressed the view that unrelated crime or juvenile history should be irrelevant.⁴⁷²

ALRC's views

6.130 The ALRC considers that there is merit in having federal sentencing legislation set out those factors that clearly should not be taken into account in sentencing. In deciding what factors should be included in such a list, the ALRC has had regard to views expressed in consultations and submissions, the provisions in state and territory legislation, the common law and the list of factors recommended in ALRC 44.

6.131 The ALRC has formed the view that federal sentencing legislation should express the following to be irrelevant to sentencing:

- the possibility that time spent in custody may be affected by executive action of any kind;⁴⁷³
- the offender's election not to give evidence on oath or by affirmation;⁴⁷⁴
- the legislative intent underpinning a law that has been enacted but has not yet commenced.⁴⁷⁵
- the demeanour of the offender in court, except to the extent that it shows contrition or lack of contrition;
- matters that would establish an offence separate from the offence for which the person has been convicted (other than matters that might technically constitute an incidental separate offence);
- matters that would establish a more serious offence than the offence for which the person has been convicted; and
- a circumstance of aggravation that has not been proved at trial but that renders the person being sentenced liable to a greater maximum penalty.

6.132 An example of the third factor is that unproclaimed legislation may increase the maximum penalty for a federal offence. The legislature may have decided that, in order to deter persons from committing that offence, an increase in the maximum penalty was necessary.

6.133 The ALRC considers that the offender's demeanour in court should be irrelevant, as recommended in ALRC 44;⁴⁷⁶ however, this should be qualified to the extent that such demeanour demonstrates contrition or lack of contrition.⁴⁷⁷

6.134 One factor that was treated as irrelevant in ALRC 44 but which the ALRC has decided not to adopt is the prevalence of the offence, since this may be relevant to the sentencing purpose of deterring other offenders from committing the same or similar offences.⁴⁷⁸

Proposal 6–8 Federal sentencing legislation should specify factors to which the court should not have regard in sentencing a federal offender. The irrelevant factors should include:

- (a) the possibility that time spent in custody may be affected by executive action of any kind;

- (b) the offender's election not to give evidence on oath or by affirmation;
- (c) the legislative intent underpinning a law that has been enacted but has not yet commenced;
- (d) the demeanour of the offender in court, except to the extent that it shows contrition or lack of contrition;
- (e) matters that would establish an offence separate from the offence for which the person has been convicted (other than matters that might technically constitute an incidental separate offence);
- (f) matters that would establish a more serious offence than the offence for which the person has been convicted; and
- (g) a circumstance of aggravation that has not been proved at trial but that renders the person being sentenced liable to a greater maximum penalty.

283 This is discussed more fully in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP
 284 29 (2005), [8.15]–[8.28]. Section 16A(2) is set out in full below.
 285 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A.
 286 *Sentencing Act 1991* (Vic) s 5(2); *Penalties and Sentences Act 1992* (Qld) s 9(2), (4), (6); *Criminal Law*
 287 *(Sentencing) Act 1988* (SA) s 10(1); *Crimes Act 1900* (ACT) s 342(1); *Sentencing Act 1995* (NT) s 5(2).
 See also *Crimes (Sentencing) Bill 2005* (ACT) cl 33(1).
 288 *Sentencing Act 1991* (Vic) s 5(2A), (2C); *Sentencing Act 1995* (NT) s 5(4)(a), (b).
 289 It does, however, list three non-exhaustive factors relevant to the recording of a conviction. See
 290 *Sentencing Act 1997* (Tas) s 9.
 291 *Sentencing Act 1995* (WA) s 6(1), (2).
 292 *Sentencing Act 1991* (Vic) s 5(2)(g); *Penalties and Sentences Act 1992* (Qld) s 9(2)(q); *Criminal Law*
(Sentencing) Act 1988 (SA) s 10(1)(o); *Sentencing Act 1995* (NT) s 5(2)(s).
 293 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1); *Criminal Law (Sentencing) Act 1988* (SA)
 294 s 10(1); *Crimes Act 1900* (ACT) s 342(1). See also *Crimes (Sentencing) Bill 2005* (ACT) cl 33.
 295 See Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [8.18]–[8.20].
 296 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; New South Wales
 297 Public Defenders Office, *Consultation*, Sydney, 22 September 2004; M Johnson, *Consultation*, Darwin,
 298 27 April 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005; T Glynn SC,
 299 *Consultation*, Brisbane, 2 March 2005; BN, *Submission SFO 17*, 8 April 2005; LD, *Submission SFO 9*,
 300 10 March 2005; JC, *Submission SFO 25*, 13 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005.
 301 A Freiberg, *Submission SFO 12*, 4 April 2005.
 302 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
 Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005; New South Wales Public
 Defenders Office, *Consultation*, Sydney, 22 September 2004.
 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.
 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
 Ibid; LD, *Submission SFO 9*, 10 March 2005.
 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.
 BN, *Submission SFO 17*, 8 April 2005.
 Offenders Aid and Rehabilitation Services South Australia, *Consultation*, Adelaide, 20 April 2005; Law
 Society of South Australia, *Consultation*, Adelaide, 21 April 2005.
 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.

- 303 Attorney-General's Department, *Submission SFO 52*, 7 July 2005.
- 304 See, however, *R v Wickham* [2004] NSWCCA 193, [29], and *R v Lilley* (2004) 150 A Crim R 591, [41], suggesting that it is unnecessary for a sentencing judge to refer specifically to every legislative factor.
- 305 *Sentencing Act 1991* (Vic) s 5(2).
- 306 *Sentencing Act 1995* (NT) s 5(2)(a)–(s).
- 307 See, eg, *Defence Force Discipline Act 1982* (Cth) s 70(2), which links relevance to sentencing principles.
- 308 Objects of the proposed federal sentencing Act are discussed in Ch 2.
- 309 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A (14 aggravating and 13 mitigating factors); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1) (18 factors); Crimes (Sentencing) Bill 2005 (ACT) cl 33(1) (25 factors); *Sentencing Act 1995* (NT) s 5(2) (17 factors).
- 310 For example, in Ch 7 of this Discussion Paper, it is proposed that the provision in *Crimes Act 1914* (Cth) s 19B(1)(b) that sets out a limited list of factors to be considered when a court discharges or dismisses a federal offender without conviction should be repealed.
- 311 *Ibid* s 16A(2)(a), (m), (d) respectively.
- 312 *Ibid* s 16A(2)(j), (k) respectively.
- 313 General deterrence and other purposes of sentencing are discussed in Ch 4.
- 314 *Crimes Act 1914* (Cth) s 16A(2)(j), (k).
- 315 See Ch 4.
- 316 See Proposal 4–1(c).
- 317 New South Wales Legal Aid Commission—Criminal Law Division, *Consultation*, Sydney, 22 September 2004; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005; T Glynn SC, *Consultation*, Brisbane, 2 March 2005.
- 318 M Bagaric and R Edney, *Consultation*, Melbourne, 1 April 2005.
- 319 M Bagaric and K Amarasekara, 'Feeling Sorry?—Tell Someone Who Cares: The Irrelevance of Remorse in Sentencing' (2001) 40(4) *The Howard Journal* 364.
- 320 *Crimes Act 1914* (Cth) s 16A(2)(b), (c) respectively. Each of these factors is discussed separately below.
- 321 Principles of sentencing are discussed in Ch 5.
- 322 Purposes of sentencing are discussed in Ch 4.
- 323 Pleading guilty and cooperating with the authorities are discussed separately below. See also Ch 11.
- 324 See *Crimes Act 1914* (Cth) s 16E, which is discussed in Ch 10. The treatment of pre-sentence detention where a sentence of imprisonment is imposed is also considered in Ch 10.
- 325 See Ch 28.
- 326 See *United Nations Convention on the Law of the Sea*, 10 December 1982, ATS 31, (entered into force generally on 16 November 1994) art 73.
- 327 *Fisheries Management Act 1991* (Cth) s 84(1)(ia).
- 328 *Migration Act 1958* (Cth) s 250.
- 329 See *R v Zainudin* [2005] NTSC 14, [26].
- 330 *R v Yusup* (Unreported, NTSC, Angel J, 20 January 2005).
- 331 See *R v Zainudin* [2005] NTSC 14, [42], [37]–[39].
- 332 Northern Territory Legal Aid Commission, *Consultation*, Darwin, 27 April 2005.
- 333 Pre-sentence custody and detention are discussed further in Ch 10.
- 334 See, eg, *Fisheries Management Act 1991* (Cth) s 100A (7,500 or 5,000 penalty units depending on boat's length); ss 101A, 101B (7,500 and 500 penalty units respectively).
- 335 Enforcement of fines is discussed in Ch 17.
- 336 See, eg, *R v Eastway* (Unreported, NSWCCA, 19 May 1992); *R v Delaney* (2003) 59 NSWLR 1; *R v Campbell* [1999] NSWCCA 76, [24]; *R v Everingham* (Unreported, New South Wales Court of Criminal Appeal, 4 July 1994).
- 337 Victim Support Service Inc, *Consultation*, Adelaide, 20 April 2005.
- 338 Crimes (Sentencing) Bill 2005 (ACT) cl 33(1)(f).
- 339 See Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [2.2]–[2.5], [2.14].
- 340 See Ch 14.
- 341 See Ch 2.

- 342 *Sentencing Act 1991* (Vic) s 5(2)(a); *Penalties and Sentences Act 1992* (Qld) s 9(2)(b); *Sentencing Act 1995* (NT) s 5(2). See also *Sentencing Act 1995* (WA) s 6(2)(a) (statutory penalty relevant to determining seriousness of offence).
- 343 *Sentencing Act 1991* (Vic) s 5(2)(c); *Penalties and Sentences Act 1992* (Qld) s 9(2)(c); *Sentencing Act 1995* (WA) s 6(1), (2); *Sentencing Act 1995* (NT) s 5(2)(b). See also *Criminal Justice Act 2003* (UK) s 143; Sentencing Guidelines Council (UK), *Overarching Principles: Seriousness Guideline*, 1 December 2004.
- 344 *Sentencing Act 1991* (Vic) s 5(2)(d); *Penalties and Sentences Act 1992* (Qld) s 9(2)(d); *Crimes Act 1900* (ACT) s 342(g); Crimes (Sentencing) Bill 2005 (ACT) cl 33(1)(h); *Sentencing Act 1995* (NT) s 5(2)(c). See also *Criminal Justice Act 2003* (UK) s 143(1) (offender's culpability relevant to determining seriousness of the offence).
- 345 See Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [8.20].
- 346 *Sentencing Act 1991* (Vic) s 5(2A)(a); *Criminal Law (Sentencing) Act 1988* (SA) s 10(ka); *Sentencing Act 1995* (NT) s 5(4)(b).
- 347 See Proposal 6–4 below.
- 348 Law Society of South Australia, *Consultation*, Adelaide, 21 April 2005.
- 349 See Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 94.
- 350 *Crimes Act 1900* (ACT) s 342(1)(m). See also Crimes (Sentencing) Bill 2005 (ACT) cl 33(1)(q).
- 351 *R v Sellen* (1991) 57 A Crim R 313, 318 (citations omitted). See also *R v Perez-Vargas* (1986) 8 NSWLR 559, 563.
- 352 *York v The Queen* [2005] HCA 60, [23].
- 353 WT, *Submission SFO 23*, 11 April 2005.
- 354 See Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 94.
- 355 *Crimes Act 1900* (ACT) s 342(1)(m). See also Crimes (Sentencing) Bill 2005 (ACT) cl 33(1)(q).
- 356 See Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), Ch 2.
- 357 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.
- 358 *Sentencing Act 1991* (Vic) s 5(2)(db).
- 359 New South Wales Public Defenders Office, *Consultation*, Sydney, 22 September 2004.
- 360 WT, *Submission SFO 23*, 11 April 2005.
- 361 See, eg, *R v Sinclair* (1990) 51 A Crim R 418, 430; *R v Ceissman* (2001) 119 A Crim R 535, [36]. Compare *R v Oancea* (1990) 51 A Crim R 141, 155.
- 362 *Binder v The Queen* (1989) 42 A Crim R 221; *Cobiac v Liddy* (1969) 119 CLR 257.
- 363 Human Rights and Equal Opportunity Commission, *Discrimination in Employment on the Basis of Criminal Record—Discussion Paper* (2004), 15.
- 364 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 365 Offenders Aid and Rehabilitation Services South Australia, *Consultation*, Adelaide, 20 April 2005.
- 366 See, eg, *Veen v The Queen [No 2]* (1988) 164 CLR 465, 477.
- 367 The ALRC's views on prior convictions are discussed further below.
- 368 Taking other offences into account is discussed below.
- 369 As opposed to up until the time that the offence was committed: see *R v Poulton* [1974] VR 716.
- 370 *Crimes Act 1914* (Cth) s 85ZZH(c).
- 371 Australian Law Reform Commission, *Spent Convictions*, ALRC 37 (1987), Rec 7.
- 372 See also Crimes (Sentencing) Bill 2005 (ACT) cl 33(1)(m). The consideration of financial circumstances when imposing a fine is discussed in Ch 7.
- 373 This issue is discussed in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [8.29]–[8.31].
- 374 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A.
- 375 *Sentencing Act 1991* (Vic) s 5(2)(g); *Penalties and Sentences Act 1992* (Qld) s 9(2)(g); *Sentencing Act 1995* (NT) s 5(2)(f).
- 376 *Sentencing Act 1995* (WA) s 6(2)(c), (d).
- 377 See *Criminal Law (Sentencing) Act 1988* (SA) s 10(o) which requires the court to take into account 'any other relevant matter'; *Sentencing Act 1997* (Tas); *Crimes Act 1900* (ACT) s 342; Crimes (Sentencing) Bill 2005 (ACT) cl 33.
- 378 See, eg, *Sentencing Act 2002* (NZ) s 9; *Violent Crime Control and Law Enforcement Act of 1994* (2002) 18 USC s 3592 (US) (mitigating and aggravating factors in determining whether a death sentence is justified); *Criminal Justice Act 2003* (UK) ss 143–146.

- 379 See *Criminal Code (RS 1985, c C-46)* (Canada) s 718.2 which sets out a non-exhaustive list of five aggravating factors.
- 380 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [3.103] (citations omitted).
- 381 Ibid, [3.103].
- 382 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
- 383 T Glynn SC, *Consultation*, Brisbane, 2 March 2005; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 384 A Freiberg, *Consultation*, Melbourne, 30 March 2005.
- 385 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 44.
- 386 *Sentencing Act 1995* (WA) s 7(2).
- 387 Ibid s 8(3).
- 388 *Crimes Act 1900* (ACT) s 344(2); *Crimes (Sentencing) Bill 2005* (ACT) cl 34(2).
- 389 *Sentencing Act 2002* (NZ) s 9(3).
- 390 See also *Crimes (Sentencing) Bill 2005* (ACT) cl 34 (headed 'Sentencing—irrelevant considerations').
- 391 See discussion on irrelevant factors below.
- 392 K Warner, *Consultation*, Hobart, 13 April 2005.
- 393 A Freiberg, *Consultation*, Melbourne, 30 March 2005; A Freiberg, *Submission SFO 12*, 4 April 2005.
- 394 *Siganto v The Queen* (1998) 194 CLR 656, 663.
- 395 See Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [180]; Rec 98.
- 396 *Sentencing Act 1995* (WA) s 7(2)(a); *Crimes Act 1900* (ACT) s 344(1)(f). See also *Crimes (Sentencing) Bill 2005* (ACT) cl 34(1)(f).
- 397 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(d); *Sentencing Act 2002* (NZ) s 9(1)(j). See also *Criminal Law (Sentencing) Act 1988* (SA) s 11(1)(a)(iii).
- 398 See, eg, *Violent Crime Control and Law Enforcement Act of 1994* (2002) 18 USC s 3592(b)(1) (US) (prior conviction for espionage or treason aggravating factor in sentencing for espionage or treason); s 3592(c)(2), (3) (prior conviction for violent felony involving firearm and prior conviction for offence for which a sentence of death or life imprisonment was authorised are aggravating factors in sentencing for homicide).
- 399 Sentencing Guidelines Council (UK), *Overarching Principles: Seriousness Guideline*, 1 December 2004, 6.
- 400 *Sentencing Act 1995* (WA) s 7(2).
- 401 See Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [172].
- 402 J Roberts, 'Reducing the Use of Incarceration: A Review of Strategies' (2005) 86 *Reform* 15, 18.
- 403 M Bagaric, *Punishment & Sentencing: A Rational Approach* (2001), 229. See also M Bagaric and R Edney, *Consultation*, Melbourne, 1 April 2005, which raised the deleterious impact of considering prior convictions on the sentencing of Indigenous Australians.
- 404 M Bagaric, *Punishment & Sentencing: A Rational Approach* (2001), 230.
- 405 K Warner, *Consultation*, Hobart, 13 April 2005.
- 406 *Veen v The Queen [No 2]* (1988) 164 CLR 465.
- 407 Ibid, 477 (Mason CJ, Brennan, Dawson and Toohey JJ).
- 408 See Ibid, 494 (Deane J); 496 (Gaudron J).
- 409 See Ibid, 488–489 (Wilson J).
- 410 *Baumer v The Queen* (1988) 166 CLR 51, 57.
- 411 Purposes of sentencing are discussed in Ch 4.
- 412 Proposal 4–1(f).
- 413 *Crimes Act 1900* (ACT) s 344(1)(g); *Crimes (Sentencing) Bill 2005* (ACT) cl 34(1)(g).
- 414 *R v D* (1997) 69 SASR 413, 419. See also *R v Reiner* (1974) 8 SASR 102; *R v B, RWK* (2005) 91 SASR 200, 203.
- 415 *R v JCW* (2000) 112 A Crim R 466, [67]–[68]. See also *Holyoak v The Queen* (1995) 82 A Crim R 502.
- 416 *Weininger v The Queen* (2003) 212 CLR 629, 647.
- 417 Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005.
- 418 Aggregate sentencing is discussed in Ch 12.
- 419 See Proposal 6–1(e).

- 420 *Sentencing Act 1995* (WA) s 8(2).
 421 *Crimes Act 1900* (ACT) s 344(2); *Crimes (Sentencing) Bill 2005* (ACT) cl 34(2).
 422 *Criminal Law (Sentencing) Act 1988* (SA) s 10(ka).
 423 See *Sentencing Act 1991* (Vic) s 5(2A)(b); *Sentencing Act 1995* (NT) s 5(4)(c). See also *Criminal Property Forfeiture Act 2002* (NT) ss 12, 97 (forfeiture of crime-derived property).
 424 *Criminal Law (Sentencing) Act 1988* (SA) s 10(ka).
 425 *Sentencing Act 1991* (Vic) ss 5(2A)(a), (ab); *Sentencing Act 1995* (NT) s 5(4)(b). See also *Criminal Property Forfeiture Act 2002* (NT) ss 11, 96 (forfeiture of property used in commission of offence).
 426 *Stocks v The Queen* (2000) 9 Tas R 210, 219–220.
 427 *Sentencing Act 1991* (Vic) s 5(2)(e); *Penalties and Sentences Act 1992* (Qld) s 13(2); *Sentencing Act 1995* (NT) s 5(j). See also *Crimes (Sentencing) Bill 2005* (ACT) cl 35(2)(b).
 428 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23(1); *Crimes (Sentencing) Bill 2005* (ACT) cl 36(1).
 429 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23(1); *Crimes Act 1900* (ACT) s 342(h). See also *Crimes (Sentencing) Bill 2005* (ACT) cl 36(1), (2).
 430 *Markarian v The Queen* (2005) 215 ALR 213, [74]. Discounts on sentence are discussed in Ch 11.
 431 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
 432 Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005.
 433 J Champion SC, *Submission SFO 46*, 29 April 2005.
 434 This is discussed further in Ch 11.
 435 See discussion on guilty pleas in Ch 11.
 436 M Johnson, *Consultation*, Darwin, 27 April 2005.
 437 See Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [8.35].
 438 *Dreezer v Duvnjak* (1996) 6 Tas R 294.
 439 See *Sentencing Act 1991* (Vic) s 100(1); *Penalties and Sentences Act 1992* (Qld) s 189(2)(c); *Sentencing Act 1995* (NT) s 107.
 440 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 33; I Potas, *Sentencing Manual: Law, Principles and Practice in New South Wales* (2001); *Sentencing Act 1997* (Tas) s 89 (finding of guilt sufficient). See also *Crimes (Sentencing) Bill 2005* (ACT) cl 55 (prerequisite of conviction or finding of guilt).
 441 *Crimes Act 1914* (Cth) s 16BA(1)(b).
 442 See *Sentencing Act 1997* (Tas) s 89(1)(a). See also *Penalties and Sentences Act 1992* (Qld) s 189(1)(b).
 443 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 31, 32; *Sentencing Act 1991* (Vic) s 100(1)(a); *Sentencing Act 1995* (NT) s 107(1)(a).
 444 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.
 445 Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005. A contrary view was expressed in relation to the procedure set out in s 16BA: Commonwealth Director of Public Prosecutions, *Consultation*, Hobart, 14 April 2005.
 446 Ibid; Commonwealth Director of Public Prosecutions, *Consultation*, Hobart, 14 April 2005.
 447 Law Society of South Australia, *Submission SFO 37*, 22 April 2005; Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.
 448 New South Wales Public Defenders Office, *Consultation*, Sydney, 22 September 2004.
 449 See *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, 161–162.
 450 Compare *Crimes (Sentencing Procedure) Act 1999* (NSW) s 33(4)(b) (procedure not available in respect of indictable offence punishable by life imprisonment); *Sentencing Act 1991* (Vic) s 100(1); *Sentencing Act 1995* (NT) s 107(1) (procedure not available for offences of treason or murder).
 451 *R v White* (1981) 28 SASR 9, 11–12. See also *R v McAllister* (1982) 30 SASR 493, 500.
 452 See *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, 160.
 453 Ibid, 160.
 454 For example, it states that a charge-bargaining proposal is not to be entertained by the prosecution unless the charges provide an adequate basis for an appropriate sentence in all the circumstances of the case. See Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (1998) <<http://www.cdpp.gov.au/Prosecutions/Policy/Default.aspx>> at 6 October 2004, [5.12]–[5.18].
 455 *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, 159.
 456 Ibid, 159–160.

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- 457 Ibid, 161.
 458 *R v McAllister* (1982) 30 SASR 493, 501.
 459 See, eg, *Edwards v Pregnell* (1994) 74 A Crim R 509. This issue is discussed in Australian Law Reform
 Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [8.40]–[8.41].
 460 See, eg, *Sentencing Act 1991* (Vic) s 5(2AA)(a) (possibility that time in custody will be affected by
 executive action).
 461 See *Crimes Act 1900* (ACT) s 344. See also Crimes (Sentencing) Bill 2005 (ACT) cl 34.
 462 See Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 98 for full list of factors.
 463 See *R v De Simoni* (1981) 147 CLR 383; 389–390; *R v Dales* (1995) 80 A Crim R 50, 87–88. See also *R v*
JCW (2000) 112 A Crim R 466, [23].
 464 *R v Dales* (1995) 80 A Crim R 50, 87.
 465 Law Society of South Australia, *Submission SFO 37*, 22 April 2005; JC, *Submission SFO 25*, 13 April
 2005; A Freiberg, *Submission SFO 12*, 4 April 2005, Commonwealth Director of public Prosecutions,
Consultation, Hobart, 14 April 2005.
 466 A Freiberg, *Submission SFO 12*, 4 April 2005.
 467 Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005.
 468 LD, *Submission SFO 9*, 10 March 2005; M Johnson, *Consultation*, Darwin, 27 April 2005.
 469 M Johnson, *Consultation*, Darwin, 27 April 2005.
 470 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
 471 M Bagaric and R Edney, *Consultation*, Melbourne, 1 April 2005. Compare Commonwealth Director of
 Public Prosecutions, *Consultation*, Hobart, 14 April 2005.
 472 Offenders Aid and Rehabilitation Services South Australia, *Consultation*, Adelaide, 20 April 2005.
 473 See *Sentencing Act 1991* (Vic) s 5(2AA)(a).
 474 See Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 98; *Crimes Act 1900* (ACT)
 s 344(1)(c); Crimes (Sentencing) Bill 2005 (ACT) cl 34(1)(c), which are limited to an offender's choice
 not to give evidence on oath.
 475 See different formulation in Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 98;
Crimes Act 1900 (ACT) s 344(1)(a); Crimes (Sentencing) Bill 2005 (ACT) cl 34(1)(a).
 476 See Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 98. See also *Crimes Act*
1900 (ACT) s 344(1)(e); Crimes (Sentencing) Bill 2005 (ACT) cl 34(1)(e).
 477 See *Sentencing Act 1991* (Vic) s 5(2C) (court may have regard to conduct of offender on or in connection
 with the trial as indication of remorse or lack of remorse).
 478 See Ch 4. The proposal in ALRC 44 was consistent with the ALRC's view at that time that general
 deterrence should not be relevant in sentencing.

7. Sentencing Options

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Introduction

7.1 This chapter discusses the sentencing options that are available when sentencing federal offenders, including fines, discharges and dismissals, certain state and territory sentencing options, and imprisonment. Issues relating to sentencing hierarchies and conversion between sentencing options are also considered.

7.2 Sentencing options for federal offenders with a mental illness or intellectual disability are dealt with in Chapter 28. Sentencing options for young federal offenders are dealt with in Chapter 27. Sentencing options for special categories of federal offenders such as corporations are dealt with in Chapters 29 and 30.

Sentencing options under federal law

What non-custodial options should be available in the sentencing of individual and corporate federal offenders? [IP 29, Q 7–5]

What custodial options should be available in the sentencing of federal offenders? [IP 29, Q 7–8]

Should the custodial and non-custodial sentencing options available in sentencing federal offenders be specified in federal legislation or determined by the options available from time to time in the states and territories? [IP 29, Q 7–10]

Fines

Background

7.3 A fine is a monetary penalty imposed on an offender who has been found guilty of a criminal offence.⁴⁷⁹ Legislative provisions creating federal offences generally authorise the court to impose a fine for the offence.⁴⁸⁰ The advantages of fines are that they are flexible, generate revenue for the state, are comparatively cheap to administer, and are suitable for a wide variety of offences.

7.4 Section 16C(1) of the *Crimes Act 1914* (Cth) requires a court to take into account the financial circumstances of an offender before imposing a fine, although s 16C(2) allows a court to impose a fine when it has been unable to ascertain the offender's financial circumstances. A number of overseas and state and territory sentencing Acts contain similar provisions.⁴⁸¹ While fines are frequently used as a sentencing option in the states and territories,⁴⁸² it is unknown how many offenders are

fined for federal offences. However, in 2003–04 the total value of fines and costs ordered in federal criminal matters was \$4,085,826.⁴⁸³

Issues and problems

7.5 A disadvantage of the fine is its potential to operate unequally on offenders, depending on their financial means. The same fine can represent a severe sentence for an impecunious offender and an inconsequential sentence for a wealthy offender. Enabling a court to consider the financial circumstances of an offender before fixing the amount of a fine is a legislative attempt to address this problem.

7.6 However, while s 16C(1) of the *Crimes Act* requires a court to take into account an offender's financial circumstances before imposing a fine, it does not provide any guidance as to how this should be done. A number of state and territory sentencing Acts provide more guidance in this area by directing judicial officers to consider any other orders they have made, or propose to make, in relation to confiscation of proceeds of crime, restitution or compensation when considering the offender's financial circumstances.⁴⁸⁴

7.7 In addition, s 16C(1) does not prevent the court from imposing a fine on an offender who lacks the financial means to pay it.⁴⁸⁵ In contrast, sentencing legislation in South Australia prevents a court from imposing a fine if it is satisfied that the offender would be unable to pay the fine or that payment of the fine would unduly prejudice the welfare of the offender's dependants.⁴⁸⁶

7.8 Another issue is the extent to which the court should be empowered to tailor the order imposing a fine to an offender's circumstances. At present, federal sentencing legislation does not enable judicial officers to order that a fine be paid by instalments or by a particular date; or to vary or cancel an order imposing a fine after it has been made. Some state and territory sentencing Acts allow judicial officers to order that fines be paid by instalments or by a particular date,⁴⁸⁷ or to vary the order imposing a fine at any time during the period allowed for payment of the fine.⁴⁸⁸ Further, in Victoria a court can cancel the order imposing a fine and re-sentence the offender during the period allowed for payment of the fine in certain circumstances.⁴⁸⁹ However, as discussed in Chapter 16, the desirability of finality in sentencing generally militates against the review of sentences that have been passed, other than by way of appeal.

Options for reform

7.9 Federal sentencing legislation could be amended to provide the court with further guidance on how to assess an offender's financial circumstances before imposing a fine. The Northern Territory Legal Aid Commission commented that further legislative guidance was needed.⁴⁹⁰ Federal sentencing legislation could also be amended to enable the court to order that a fine be paid in instalments or by a particular date, or to vary or cancel an order imposing a fine at any time during the period allowed for the payment of the fine.

7.10 A reform that could address the potentially inequitable operation of fines on federal offenders is the ‘day fine’ or ‘unit fine’ scheme. This scheme would enable federal offenders to be fined in units representing a number of days’ work or a number of days’ worth of disposable income. The monetary amount per unit could then be calculated on the basis of the offender’s income.⁴⁹¹ ALRC 44 recommended against the adoption of a day fine scheme for federal offenders on the basis that it would be time consuming to administer and could result in breaches of privacy if financial data were obtained by reviewing offenders’ taxation records.⁴⁹² In 1996 the New South Wales Law Reform Commission concluded that a day fine scheme should not be introduced in New South Wales.⁴⁹³

7.11 Some submissions and consultations expressed support for the introduction of a day fine scheme for federal offenders.⁴⁹⁴ However, Associate John Professor Willis submitted that:

The day-fine scheme has, in my view, little to recommend it. It would cause significant delays in sentencing, raise problems of proof with respect to an offender’s means and could lead to very large fines for wealthy defendants which in some cases could be seen as breaching the need to give primary consideration to the objective seriousness of the offence.⁴⁹⁵

ALRC’s views

7.12 Federal sentencing legislation should require judicial officers to consider an offender’s financial circumstances when fixing the amount of a fine. This is an established method of reducing the unfairness that can arise when fines are imposed on offenders with different financial circumstances. In Chapter 6, the ALRC proposes that federal sentencing legislation should require a court to consider any factor that is relevant and known to the court when sentencing a federal offender. The chapter lists a number of factors that the court may be required to consider according to the circumstances of the case, including an offender’s financial circumstances.⁴⁹⁶ The ALRC is of the view that the term ‘financial circumstances’ encompasses any other order that the court has made, or proposes to make, that will effect an offender’s capacity to pay the fine, such as an order that the offender pay compensation to any victim of the crime.

7.13 Federal sentencing legislation should also enable judicial officers to order that a fine imposed on a federal offender be paid in instalments or by a particular date. This would provide courts with more scope to tailor the order imposing a fine to the particular circumstances of the offender, thereby minimising the risk of fine default. In addition, legislation should enable an offender to apply for an order varying the time or manner of payment of a fine at any time during the period allowed for the payment of the fine. Again, this would minimise the risk of fine default and prevent an offender from suffering undue hardship in circumstances where an offender’s financial circumstances have changed after the imposition of the fine.

7.14 As discussed in Chapter 16, empowering a court to reconsider a sentence after it has been imposed can detract from the finality of the sentencing process. However, the ALRC does not consider that enabling a court to vary the time or manner in which a fine is to be paid undermines the need for finality in litigation because such a variation involves altering only the mechanics of payment as opposed to the amount of the fine.

7.15 The ALRC remains of the view that a day fine scheme should not be introduced for federal offenders. Day fine schemes do not operate in any state or territory, and submissions and consultations revealed limited support for such a scheme. A day fine scheme would be time consuming and complex to administer in practice. In addition, the ALRC is not convinced that a day fine scheme would ensure that fines operated more equitably for all offenders. For example, an offender with little or no income may have substantial assets, a significant future earning capacity, or the capacity to acquire money from other sources.

Proposal 7-1 Federal sentencing legislation should enable a court, when imposing a fine on a federal offender, to order that the fine be paid:

- (a) in a lump sum by a specified future date that the court considers appropriate in all the circumstances; or
- (b) by instalments over a specified period of time that the court considers appropriate in all the circumstances.

Proposal 7-2 Federal sentencing legislation should enable a federal offender to apply to the court that imposed a fine, whether differently constituted or not, for an order varying the time or manner of payment of a fine at any time within the period allowed for payment of the fine.

Dismissals, discharges and releases

Background

7.16 A number of sentencing options are currently available under Part IB of the *Crimes Act*. Section 19B enables the court to dismiss a charge or to discharge an offender without proceeding to conviction upon a finding of guilt.⁴⁹⁷ Section 20(1)(a) provides for the conditional release of an offender after conviction,⁴⁹⁸ and s 20(1)(b) enables the court to wholly or partially suspend a sentence of imprisonment. Suspended sentences and the conditions that should be attached to the sentencing options available under Part IB are discussed further below.

7.17 Dismissals, discharges and releases are available in one form or another in all states and territories.⁴⁹⁹ It has been held that the power to dismiss a charge or discharge an offender pursuant to s 19B should be exercised with ‘compassion and imagination, as well as with wisdom and prudence’.⁵⁰⁰ It is not known how often these sentencing

options are used for federal offenders. However, the ALRC has heard anecdotal evidence that s 19B is used infrequently.⁵⁰¹

7.18 Before deciding to dismiss a charge or discharge an offender pursuant to s 19B, the court must consider certain factors, namely: the character, antecedents, cultural background, age, health or mental condition of the person; the extent (if any) to which the offence is of a trivial nature; or the extent (if any) to which the offence was committed under extenuating circumstances.⁵⁰² These factors were derived from the *Probation of Offenders Act 1907* (UK) and have been discussed in case law.⁵⁰³ When making an order pursuant to s 19B, the court is also required to take into account the factors listed in s 16A(2) of the *Crimes Act*, as well as the nature and severity of the conditions that may be imposed on, or may apply to, the offender.⁵⁰⁴

7.19 In contrast to s 19B(1)(b), s 20(1)(a) does not list any specific factors that the court must consider when exercising its discretion to conditionally release an offender after conviction, although the court must consider the sentencing factors set out in s 16A(2) and the nature and severity of the conditions that may be imposed on, or may apply to, the offender.

7.20 ALRC 44 recommended that dismissals and conditional discharges should continue to be available for federal offenders.⁵⁰⁵

Issues and problems

7.21 While the discretion conferred by s 19B is broad, it may be more restrictive than the discretion conferred by equivalent state and territory provisions. For example, New South Wales legislation provides that a court may have regard to ‘any other matter that the court thinks proper to consider’ when dismissing a person without conviction.⁵⁰⁶

7.22 When considering whether to make an order pursuant to s 19B, the court is required to have regard to two differing sets of factors; those set out in s 19B and those listed in s 16A(2). Little statutory guidance is given on the way in which these two sets of factors interrelate. Some of the factors, such as antecedents, character and cultural background, are listed in both s 19B and s 16A(2) of the *Crimes Act*.

7.23 The Welfare Rights Centre Inc submitted that any provision replacing s 19B should be broad and unfettered to enable judicial officers sufficient scope to deal with the intricacies of social security matters.⁵⁰⁷

ALRC’s views

7.24 Federal sentencing legislation should continue to enable judicial officers to dismiss charges, discharge offenders without conviction, or conditionally release offenders after conviction. These are important sentencing options, which enable

judicial officers to impose lenient sentences when appropriate in all the circumstances of a case. In addition, these sentencing options are available in all states and territories, and retaining them in federal sentencing legislation will enhance consistency between federal and state and territory sentencing legislation.

7.25 However, s 19B of the *Crimes Act* should not continue to list factors to be taken into account when considering whether to dismiss charges or discharge offenders without conviction. The three factors currently listed in s 19B are superfluous because they will be considered by a court as a matter of course when regard is had to the proposed purposes, principles and factors of sentencing and to the factors relevant to the administration of the criminal justice system (see Chapters 4–6). The existence of this additional list of factors creates unnecessary confusion and complexity in the sentencing of federal offenders.

Proposal 7-3 Federal sentencing legislation should repeal s 19B(1) of the *Crimes Act 1914* (Cth). When dismissing a charge or discharging a federal offender without conviction, the court must have regard to the purposes, principles and factors relevant to sentencing, and to the factors relevant to the administration of the criminal justice system.

Common law bonds

Background

7.26 At common law, courts have the power to ‘respite’ judgment by ordering, in lieu of passing sentence, that an offender be released after entering into a recognizance to appear for sentence when called upon and to be of good behaviour.⁵⁰⁸ This power, known as the ‘common law binding over’ power,⁵⁰⁹ has existed for centuries and is a precursor to the modern system of probation.⁵¹⁰ One type of order made pursuant to this power is known as a common law bond.

7.27 It is uncertain whether courts sentencing federal offenders still possess the power to impose common law bonds given that they have a statutory power in s 20 of the *Crimes Act* to release a federal offender ‘without passing sentence’ upon the offender entering into a recognizance to be of good behaviour.⁵¹¹ In any event, it has been argued that the common law bond is unnecessary in light of the provisions in the *Crimes Act*.⁵¹²

7.28 In ALRC 15 it was noted that the existence of overlapping common law and statutory powers to release offenders on recognizances caused confusion and uncertainty which needed to be remedied.⁵¹³ It was argued that federal legislation should abolish the court’s common law powers to release federal offenders.⁵¹⁴ Many state and territory sentencing Acts have abolished the court’s power to release an offender on a common law bond.⁵¹⁵

ALRC's views

7.29 The ALRC remains of the view that the existence of parallel common law and statutory powers of release is confusing. It is unclear whether the statutory power to release offenders pursuant to s 20 of the *Crimes Act* wholly supersedes the common law bond. In addition, the common law bond has a complex history that makes the nature and scope of the court's power to release offenders on such a bond uncertain. Accordingly, federal sentencing legislation should remove the ambiguity surrounding the interaction between common law bonds and statutory powers of release by expressly abolishing the court's power to release an offender on a common law bond.

Proposal 7-4 Federal sentencing legislation should expressly abolish the power of a court sentencing a federal offender to order that the offender be released on a common law bond.

Deferred sentencing orders**Background**

7.30 In *Griffiths v The Queen* the High Court held that the common law binding over power enabled a court to defer the sentence of an offender to a particular date upon the offender entering into a recognizance to be of good behaviour.⁵¹⁶ The deferral of the sentence of an offender is often referred to as a 'Griffiths bond' or a 'Griffiths remand'.⁵¹⁷ A Griffiths bond has certain similarities to a common law bond.

7.31 ALRC 44 recommended that courts sentencing federal offenders should have a statutory power to defer the sentence of an offender for up to 12 months, and that breach of any conditions attached to the deferral should not result in a further sentence being imposed on the offender, but rather in the court declining to continue the period of deferral.⁵¹⁸ Many state sentencing Acts provide statutory powers to defer the sentencing of offenders.⁵¹⁹

Issues and problems

7.32 It is widely accepted that the primary purpose of an order deferring the sentencing of an offender is to provide an offender with an opportunity to demonstrate his or her prospects of rehabilitation. However, it has been argued that such an order may also be appropriate in other circumstances, for example, to avoid the risk of suicide if an offender remains in custody prior to sentence; to enable an offender to undergo surgery;⁵²⁰ or to ensure that a mother is not separated from a newborn baby.⁵²¹ The New South Wales sentencing Act provides that a sentence can be deferred to enable the court to assess the offender's prospects of rehabilitation, or 'for any other purpose the court considers appropriate in the circumstances'.⁵²²

7.33 There has been some judicial debate regarding the circumstances in which it is appropriate to defer the sentencing of an offender. It has been argued that it is not appropriate to order the deferral of a sentence in circumstances where it is inevitable that the offender will be sentenced to a period of full-time imprisonment.⁵²³ However, the New South Wales Court of Criminal Appeal has refused to endorse this argument on a number of occasions,⁵²⁴ although it has been held that a court should clearly inform an offender if he or she will be ordered to serve a period of full-time imprisonment when sentenced.⁵²⁵

7.34 Another question that arises is the period of time for which the sentence should be deferred. Deferring a sentence delays the finalisation of the proceedings. In *R v Palu* the New South Wales Court of Criminal Appeal commented that:

Time and again sentencing courts are asked to have regard to the delay in sentencing an offender as a matter of mitigation because of the adverse effects of the delay upon the wellbeing of the offender and the disruption it causes to his or her everyday life. Delay unavoidably results in unfairness; unnecessary delay results in injustice. Steps have been taken throughout the criminal justice process to eliminate unnecessary delay wherever possible. Unless delay in the sentencing of the offender is essential in order to ensure a just result, the court has failed in its duty both to the offender and the community.⁵²⁶

7.35 State sentencing legislation varies in the maximum period allowed for the deferral. For example, the maximum period of adjournment is 12 months in New South Wales and 60 months in Tasmania.⁵²⁷

ALRC's views

7.36 The ALRC considers that federal sentencing legislation should enable a judicial officer to defer the sentencing of a federal offender for up to 12 months. The power to defer the sentencing of a federal offender is a useful sentencing tool that can facilitate a sentence that is just and appropriate in all of the circumstances of the case. The introduction of a statutory power of deferral is consistent with state and territory sentencing practices. The ALRC is of the view that limiting any deferral to a period of 12 months strikes an appropriate balance between the need for flexibility to enable a court to achieve individualised justice and the need to avoid excessive delay in the resolution of criminal proceedings. The ALRC also considers that the common law power of the court to make a Griffiths bond should be abolished to avoid any confusion as to the source of the power to defer the sentencing of a federal offender.⁵²⁸

Proposal 7-5 Federal sentencing legislation should provide that a court may make a deferred sentencing order in relation to a federal offender. In particular, the legislation should:

- (a) abolish the power of a court at common law to impose a 'Griffiths bond' when making orders in relation to a federal offender; and

- (b) authorise a court to:
- (i) defer sentencing a federal offender for a period up to 12 months; and
 - (ii) release the offender in accordance with the applicable bail legislation for the purpose of assessing the offender's prospects of rehabilitation or for any other purpose the court thinks fit.

Recognizance release orders

What role, if any, should recognizance release orders play in structuring sentences of imprisonment for federal offenders? In what circumstances and upon what terms should such orders be made? [IP 29, Q 9–7, part].

Background

7.37 A 'recognizance' is an undertaking whereby an offender acknowledges liability to pay a specified amount of money to the Crown unless he or she complies with certain conditions.

7.38 A 'recognizance release order' is an order made under s 20(1)(b) of the *Crimes Act*.⁵²⁹ When making a recognizance release order a court sentences a federal offender to a period of imprisonment but orders that the offender be released, either immediately or after having served a specified period of imprisonment, upon the giving of security that he or she will comply with certain conditions.⁵³⁰ Security may be given with or without sureties, by recognizance or otherwise.⁵³¹

7.39 Currently, a court is required to make a recognizance release order (as opposed to fixing a non-parole period) when it sentences a federal offender to a total period of imprisonment that is greater than six months and less than or equal to three years, unless it considers that it would be inappropriate to do so in light of the nature and circumstances of the offence and the offender's antecedents.⁵³² No state or territory has a similar presumption in favour of the making of an order in the nature of a recognizance release order for sentences of a particular duration.

7.40 When a court sentences a federal offender to a total period of imprisonment that is greater than three years it may decide whether to fix a non-parole period or make a recognizance release order. However, it may do neither if it would be inappropriate in light of the nature and circumstances of the offence and the offender's antecedents.⁵³³

7.41 In 2003–04, 883 federal offenders were sentenced to imprisonment but released immediately without serving any period of imprisonment.⁵³⁴

Issues and problems

7.42 A suspended sentence is a sentencing option that is available in varying forms in all states and territories.⁵³⁵ When imposing a suspended sentence a court first determines that a sentence of imprisonment is appropriate and orders that the offender be imprisoned for a specified period of time. The court then orders that the offender be released either immediately without serving any period of imprisonment or after serving only a portion of the sentence of imprisonment. The portion of the sentence of imprisonment that is not served is held in suspense when the offender is released into the community. If the offender commits another offence, or breaches any conditions that have been attached to the suspended sentence, he or she may be ordered to serve part or all of the original sentence of imprisonment. A recognizance release order is essentially a *conditional* suspended sentence, and sentences of this kind are available in New South Wales, South Australia, Tasmania, the ACT and the Northern Territory.⁵³⁶

7.43 The legitimacy of suspended sentences has historically been a matter of controversy. Suspended sentences have not always been available in all jurisdictions. They were abolished in New South Wales in 1974⁵³⁷ and re-introduced in 2000,⁵³⁸ and were abolished in Victoria in 1958 and re-introduced in 1986.⁵³⁹ The Sentencing Advisory Council is currently reviewing the use of suspended sentences in Victoria and has made an interim recommendation that they be abolished and a new form of sentencing order introduced.⁵⁴⁰

7.44 Suspended sentences have been criticised on the basis that they are not sufficiently punitive and hence violate the principle of proportionality; are inappropriate for certain offences; and are illogical given that they are imposed only when the court determines that a sentence of imprisonment is the only appropriate sentence.⁵⁴¹

7.45 However, it has been argued that suspended sentences are ‘an important arrow from the quiver of sentencing dispositions available to the court’.⁵⁴² Arguments in favour of suspended sentences include that they enable courts to denounce objectively serious criminal conduct and impose sentences with a significant personal deterrent effect, while simultaneously allowing courts to give effect to other relevant sentencing considerations such as rehabilitation of the offender.⁵⁴³ In 2005, the High Court held that a suspended sentence imposed on an offender convicted of serious drug offences was appropriate in circumstances where the offender had given valuable assistance to authorities and faced a real risk of serious harm in prison. McHugh J held that in wholly suspending the sentence imposed on the offender the primary judge:

appropriately balanced the relevant, even if conflicting, considerations of ensuring the sentence protected society from the risk of Mrs York re-offending and inflicting condign punishment on her on the one side and ensuring the sentence protected her

from the risk of her fellow inmates committing serious offences against her on the other side.⁵⁴⁴

7.46 A number of stakeholders expressed support for the retention of a sentencing option in the nature of the recognizance release order.⁵⁴⁵ The Commonwealth Director of Public Prosecutions (CDPP) submitted that a sentencing option that enabled courts to release a federal offender conditionally after serving a period of imprisonment was a useful sentencing tool and that such an option should remain in some form in federal sentencing legislation.⁵⁴⁶ However, some stakeholders submitted that recognizance release orders should be abolished.⁵⁴⁷

7.47 If an order in the nature of a recognizance release order is to be available, another issue is whether there should be a presumption in favour of making the order in relation to all offences of a particular duration.

ALRC's views

7.48 A recognizance release order should continue to be a sentencing option available to courts sentencing federal offenders. However, as proposed in Chapter 2, the term 'recognizance release order' should be replaced with the term 'conditional suspended sentence'.⁵⁴⁸

7.49 Judicial officers sentencing federal offenders should have a wide variety of sentencing options at their disposal to enable them to impose the most appropriate sentence in all the circumstances of the case. A recognizance release order has the potential to satisfy a number of the purposes of sentencing, such as denunciation and specific deterrence. It may also represent a proportionate sentence in the circumstances of the case. Recognizance release orders are an established and frequently utilised sentencing option for federal offenders and orders of that nature are currently available in all states and territories.

7.50 However, it is undesirable for federal sentencing legislation to contain a presumption in favour of the imposition of a recognizance release order for a sentence of imprisonment of a certain duration. No state or territory contains a similar presumption. A recognizance release order should be imposed only if it is an appropriate sentence in the circumstances of the case, and that can be determined only after considering the purposes, principles and factors of sentencing. Accordingly, a court sentencing a federal offender should have the discretion to wholly or partially suspend any period of imprisonment imposed on a federal offender, regardless of the length of the sentence.

Proposal 7-6 Federal sentencing legislation should repeal the provision requiring the court to set a ‘recognizance release order’ for sentences of imprisonment between six months and three years, and should grant the court a discretion to suspend a federal offender’s sentence of imprisonment either wholly or partially, regardless of the length of the sentence.

Imprisonment

7.51 Imprisonment involves forcibly depriving an offender of his or her liberty. It is widely recognised at common law that, of the sentencing options in use in Australia, imprisonment is the most severe and should be imposed only as a last resort.⁵⁴⁹ Prison populations in Australia are rising, having doubled nationally since 1978.⁵⁵⁰ While imprisonment has the advantage of protecting the community from an offender during the period in which the offender is incarcerated, it is a costly response to crime, particularly given that its effectiveness as a crime control tool has been questioned.⁵⁵¹

7.52 There was a marked increase in the rate of federal imprisonment between 1998 and September 2001.⁵⁵² This increase peaked in 2001 and then rapidly declined.⁵⁵³ In contrast, state and territory imprisonment rates during this period have increased at a steady rate.⁵⁵⁴ On 13 December 2004 there were 695 federal prisoners in Australia.⁵⁵⁵

7.53 The authority to impose a sentence of imprisonment on a federal offender is usually found in the statute creating the offence. Commonwealth offence provisions generally specify the maximum period of imprisonment that can be imposed for an offence.⁵⁵⁶ Drafters of Commonwealth offence provisions are encouraged not to impose a statutory maximum term of imprisonment of less than six months.⁵⁵⁷ Federal legislation prescribes mandatory minimum terms of imprisonment for some offences.⁵⁵⁸

7.54 Section 17A of the *Crimes Act* reflects the common law position that imprisonment is a sentencing option of last resort. The section provides that a court is not to impose a sentence of imprisonment unless it is satisfied that no other sentence is appropriate in all of the circumstances of the case. In addition, s 17B provides that the court is not to impose a sentence of imprisonment on an offender for certain offences relating to property or money of a total value of \$2,000 or less unless the court is satisfied that there are exceptional circumstances to warrant such a sentence. In one consultation support was expressed for the retention of s 17A.⁵⁵⁹

7.55 The ALRC endorses the view that imprisonment is a sentencing option of last resort. Accordingly, the ALRC considers that ss 17A and 17B of the *Crimes Act* should remain in federal sentencing legislation. They serve as a salutary reminder of the importance of the principle of parsimony when sentencing federal offenders, particularly when imprisonment is being considered as a sentencing option.

Short sentences of imprisonment

Background

7.56 The *Crimes Act* contains no prohibition on the imposition of sentences of imprisonment of six months or less (short sentences of imprisonment). It is estimated that only four per cent of federal prisoners serve sentences of imprisonment of less than six months, compared with seven per cent of the total Australian prison population.⁵⁶⁰

7.57 In the past 10 years there has been considerable debate in Australia and the United Kingdom about the effectiveness of short sentences of imprisonment. In 1995, Western Australia abolished sentences of imprisonment of three months or less, and in March 2004 this was extended to sentences of imprisonment of six months or less.⁵⁶¹ The issue was considered in New South Wales, although the New South Wales Sentencing Council recommended that it was undesirable to make any legislative change prohibiting short sentences of imprisonment until there had been an evaluation of the impact of similar changes in Western Australia.⁵⁶²

Issues and problems

7.58 Several arguments have been made for the abolition of short sentences of imprisonment. Short sentences of imprisonment are said to be costly and to lead to prison overcrowding.⁵⁶³ They are also said to be ‘counter-rehabilitative’ as they destabilise offenders’ lives; expose minor offenders to more serious offenders; and limit the opportunity for offenders to undertake programs to address the underlying causes of their criminal behaviour while incarcerated.⁵⁶⁴ In addition, short sentences of imprisonment do not generally have a non-parole period because short periods of parole are of questionable utility.⁵⁶⁵ Accordingly, offenders who have served short sentences of imprisonment do not benefit from the assistance and supervision of parole authorities when attempting to reintegrate into the community.

7.59 However, it has also been argued that short sentences of imprisonment are a necessary part of the sentencing continuum⁵⁶⁶ and that in some cases a short sentence of imprisonment will be an appropriate sentence.⁵⁶⁷ Many have expressed concern that abolishing short sentences of imprisonment could lead to ‘sentence creep’ or the imposition of longer sentences of imprisonment than would otherwise have been warranted.⁵⁶⁸ Sentence creep can occur if judicial officers are reluctant to impose alternative sentences because the offending conduct appears to require a sentence of imprisonment, or if there is an insufficient range of adequately funded alternative sentencing options for offenders. In addition, it is argued that more offenders may be refused bail and placed in remand as a way of ensuring that they serve a short sentence of imprisonment.⁵⁶⁹

7.60 Some submissions and consultations supported the abolition of short sentences of imprisonment.⁵⁷⁰ However, in consultations, Deputy Chief Magistrate Woods

expressed the view that the abolition of short sentences of imprisonment in Western Australia had been counterproductive and had led to offenders receiving longer sentences than they would have received in the absence of the legislative prohibition.⁵⁷¹ This has been supported by anecdotal comments from legal practitioners in Western Australia.⁵⁷²

ALRC's views

7.61 The ALRC is currently of the view that short sentences of imprisonment should continue to be available in the sentencing of federal offenders. The ALRC considers that the federal sentencing regime protects against the inappropriate imposition of short sentences. Section 17A of the *Crimes Act* provides that a sentence of imprisonment should not be imposed for a federal offence unless the court is satisfied that no other sentence is appropriate in all the circumstances of the case. As discussed below, the ALRC is of the view that federal offenders should continue to have access to state and territory sentencing options. The availability of a wide range of sentencing options for federal offenders will augment the operation of s 17A of the *Crimes Act*.

7.62 In addition, as discussed above, s 17B of the *Crimes Act* prohibits the imposition of sentences of imprisonment for certain minor offences unless the court is satisfied that there are exceptional circumstances to warrant the sentence. Elsewhere in this Discussion Paper the ALRC has proposed that the sentencing principles of proportionality and parsimony be expressed in federal sentencing legislation.⁵⁷³ These features of the federal sentencing regime, taken together, should ensure that federal offenders are not sentenced to short sentences of imprisonment unless such sentences are appropriate in all the circumstances of the case.

7.63 In any event, the ALRC is not convinced that there is a strong evidential basis for the abolition of short sentences of imprisonment at the present time. Few federal offenders receive short sentences of imprisonment and anecdotal evidence from Western Australia indicates that the abolition of short sentences of imprisonment may in fact have perverse consequences, resulting in offenders receiving longer sentences of imprisonment than would otherwise have been warranted.

<p>Proposal 7-7 Sentences of imprisonment of less than six months should continue to be available in the sentencing of federal offenders.</p>
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Conviction only and non-conviction sentencing options

Background

7.64 A conviction is a judicial act that alters an offender's legal status.⁵⁷⁴ An offender is not convicted when he or she enters a plea of guilty or receives a verdict of guilty unless the plea or verdict is explicitly or implicitly accepted by the court.⁵⁷⁵ If an offender is convicted of a criminal offence, he or she will have a criminal record.

7.65 Federal sentencing legislation does not enable a judicial officer to convict a federal offender without making another sentencing order (that is, the court cannot impose a conviction-only sentence); nor can a judicial officer impose a sentence without convicting an offender (that is, the court cannot impose a non-conviction sentence).⁵⁷⁶ However, as discussed above, the *Crimes Act* does enable a judicial officer to dismiss the charge or charges against the offender or discharge the offender without proceeding to conviction upon the offender agreeing to enter into a recognizance.⁵⁷⁷ In addition, the *Crimes Act* establishes a spent conviction scheme which gives individuals the right not to disclose certain convictions if 10 years have passed since the conviction was recorded.⁵⁷⁸

7.66 Conviction-only sentences and non-conviction sentences are available in a number of states and territories.⁵⁷⁹ For example, sentencing legislation in Queensland enables the court to make a non-contact order, a probation order, a community service order or an order imposing a fine without recording a conviction.⁵⁸⁰

Issues and problems

7.67 The existence of conviction-only and non-conviction sentencing options at the state and territory level raises the issue of whether a conviction should be a sentencing option for a federal offender in its own right. A conviction can have adverse civil or administrative consequences for an offender. For example, a conviction can affect an offender's visa status or limit his or her employment options. In addition, the social stigma attached to convictions can result in an offender suffering from discrimination on the basis of his or her criminal record.⁵⁸¹ Non-conviction sentencing options provide a legislative means of avoiding the adverse consequences of conviction.

7.68 A number of stakeholders expressed support for non-conviction sentencing options.⁵⁸² Some noted that adverse social and civil consequences attached to a conviction.⁵⁸³ Professor Arie Freiberg expressed the opinion that a conviction was a sufficient punishment for some offenders.⁵⁸⁴ The CDPP did not support non-conviction sentencing options, noting that they appeared to be an anomaly and submitting that the current power to discharge a federal offender without conviction in certain narrow circumstances remained appropriate.⁵⁸⁵

ALRC's views

7.69 Federal sentencing legislation should not recognise a conviction as a sentencing option in its own right or enable judicial officers sentencing federal offenders to impose non-conviction sentencing options. A conviction is a formal legal step to be taken prior to the imposition of a sentence. Guidelines developed by the Attorney-General's Department (AGD) direct those responsible for framing Commonwealth offences to consider the adverse consequences of conviction, including the consequences resulting from the operation of other federal statutes, when deciding

whether to attach criminal or civil liability to a particular type of conduct.⁵⁸⁶ In addition, the ALRC has proposed that the civil or administrative consequences of a conviction should be included in the list of factors to be considered when sentencing a federal offender,⁵⁸⁷ and the Commonwealth spent convictions scheme enables the adverse consequences of conviction to be avoided in certain circumstances. In the result, the ALRC considers that it is not appropriate to use federal sentencing legislation to seek to avoid the operation of other laws and practices that attach civil consequences to conviction.

7.70 The ALRC recognises that federal offenders may encounter discrimination because of their criminal record. Although such discrimination is a matter of concern and may be in need of further examination, the resolution of these issues is beyond the scope of this Inquiry.

Other sentencing options

7.71 In IP 29 the ALRC noted that other sentencing options can be imposed for certain federal offences, such as forfeiture of employer contributions to superannuation where an employee of the Commonwealth or a Commonwealth authority has been convicted of a ‘corruption offence’.⁵⁸⁸ The AGD submitted that the superannuation orders made under the *Crimes (Superannuation Benefits) Act 1989* (Cth) were not sentencing options or penalties but instead were a consequence of failure to fulfil a condition of employment.⁵⁸⁹

7.72 The rationale underlying superannuation orders is that publicly-funded superannuation benefits should not be available to employees who discharge their duties in a corrupt manner.⁵⁹⁰ The Minister (currently the Attorney-General)⁵⁹¹ can authorise the CDPP to make an application for a superannuation order if satisfied that an employee has been convicted of a corruption offence.⁵⁹² As noted by the AGD, the possibility that a superannuation order might be made in the future cannot be taken into account in sentencing.⁵⁹³ The ALRC agrees that superannuation orders are not sentencing options but are rather orders relating to the forfeiture of benefits upon conviction for certain offences. The ALRC does not propose to consider them further.

Particular issues relating to discharges, releases and suspended sentences

<p>Should federal legislation set out the conditions that may be imposed on a federal offender who is conditionally discharged? If so, what should those conditions be? [IP 29, Q 9–8]</p>
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Permitted conditions

Background

7.73 Part IB of the *Crimes Act* sets out the conditions that may be attached to an order discharging a federal offender without conviction, releasing a federal offender after conviction, or releasing a federal offender pursuant to a recognisance release order. For the purposes of this discussion, these three orders will be referred to collectively as ‘conditional release orders’.

7.74 Before a federal offender is discharged without conviction he or she is required to undertake to comply with the following conditions:

- to be of good behaviour for a period not exceeding three years;
- to make any reparation or pay any costs as ordered by the court; and
- to comply with any other conditions that the court thinks fit, including any condition that the offender be subject to the supervision of a probation officer for a period not exceeding two years.⁵⁹⁴

7.75 A federal offender who is released after conviction or pursuant to a recognisance release order is required to undertake to comply with the same conditions, except that the period of good behaviour may extend up to five years. The offender may also be required to undertake to pay a pecuniary penalty not exceeding the maximum fine for the offence, or, if the offence is not punishable by a fine, a pecuniary penalty not exceeding 60 penalty units in a court of summary jurisdiction and 300 penalty units in any other court.⁵⁹⁵

7.76 Like Part IB, some state and territory sentencing legislation gives judicial officers a broad discretion to specify conditions that the court considers appropriate when making a conditional release order.⁵⁹⁶ Some state and territory legislation sets out examples of the types of conditions that may be imposed.⁵⁹⁷ For example, sentencing legislation in Tasmania sets out a list of special conditions that can be attached to an order releasing an offender on probation, including a condition that an offender attend educational and other programs or submit to medical, psychological or psychiatric assessment and treatment.⁵⁹⁸

7.77 Sentencing legislation in New South Wales allows a court to order that an offender participate in an ‘intervention plan’ as a condition of his or her good behaviour bond.⁵⁹⁹ A court may make such an order only if it is satisfied that the offender is eligible and suitable to participate in the program; that the program is available in the area in which the offender resides or intends to reside; and that

participation by the offender would reduce the likelihood of the offender committing further offences.

Issues and problems

7.78 One issue is whether federal sentencing legislation should continue to require a federal offender who is the subject of any conditional release order to undertake to be of good behaviour in all cases. Sentencing legislation in a number of states and territories requires offenders who have been conditionally released to be of 'good behaviour'.⁶⁰⁰ However, Queensland legislation imposes the lesser requirement that an offender refrain from committing another offence⁶⁰¹ and Western Australian legislation provides that a court may impose 'any requirements on the offender it decides are necessary to secure the good behaviour of the offender'.⁶⁰²

7.79 The concept of good behaviour has been criticised for being poorly defined.⁶⁰³ However, it is accepted that it means more than mere compliance with the law⁶⁰⁴ and the High Court has held that for behaviour to be a breach of a condition to be of good behaviour it must bear some relationship to the original offence.⁶⁰⁵

7.80 Another issue is whether federal sentencing legislation should provide further guidance on the conditions that may be imposed on a federal offender who is the subject of a conditional release order. It has been held that when exercising an unfettered discretion to attach conditions to a conditional release order a court should ensure that the conditions are related to the purposes of sentencing, are defined with reasonable precision, and are not unduly harsh.⁶⁰⁶

7.81 Some stakeholders submitted that federal sentencing legislation should not set out the conditions that may be attached to federal sentencing orders.⁶⁰⁷ Others stated that the conditions should be the same as those that can be attached to state and territory sentencing orders.⁶⁰⁸ Professor Freiberg submitted that the relevant provisions of Part IB needed to be redrafted and simplified.⁶⁰⁹ The CDPP submitted that while it may be of assistance to judicial officers to set out some of the conditions that may be attached to federal sentencing orders, the court should retain a broad discretion to determine the conditions to be imposed in any given case.⁶¹⁰

ALRC's views

7.82 Federal sentencing legislation should continue to require a federal offender who is the subject of a conditional release order to be of good behaviour for a specified period of time because this is a condition that will invariably be appropriate when releasing an offender into the community. However, it should not be mandatory to attach any other condition to a conditional release order. Given the wide range of factors to be considered in sentencing, it is unlikely that any other condition will be appropriate or applicable in every case. The principle of individualised justice requires that courts sentencing federal offenders retain a broad discretion to impose conditions that are appropriate in all the circumstances of a case.

7.83 Nevertheless, it would be useful for legislation to set out examples of the types of conditions that may be attached to conditional release orders and the circumstances in which they can be attached. This is consistent with the approach taken in some states and territories, and will provide guidance to judicial officers without unduly fettering their discretion. Useful examples of conditions are that the offender undertake a rehabilitation program, undergo specified medical or psychiatric treatment, or be subject to the supervision of a probation officer.

7.84 Conditions should be attached to conditional release orders only if they are capable of being complied with. Accordingly, the court should not order a federal offender to participate in a rehabilitation program unless it is satisfied that the offender is a suitable person to participate in the program, is eligible to participate, and the program is accessible to the offender. Similarly, the court should not order a federal offender to undergo medical or psychiatric treatment unless the treatment has been recommended by a qualified medical practitioner and is available to the offender.

Proposal 7-8 Federal sentencing legislation should grant a court a broad discretion to determine the conditions that may be imposed on a federal offender when it discharges an offender without recording a conviction, releases an offender after recording a conviction, or wholly or partially suspends a sentence of imprisonment. In addition to the mandatory condition that the offender be of good behaviour for a specified period of time, a court should be able to impose any of the following conditions:

- (a) that the offender undertake a rehabilitation program;
- (b) that the offender undergo specified medical or psychiatric treatment; or
- (c) that the offender be subject to the supervision of a probation officer and obey all reasonable directions of that officer.

Prohibited conditions

7.85 Part IB of the *Crimes Act* does not list any conditions that cannot be imposed on a federal offender when making a conditional release order. In contrast, some state and territory legislation specifies conditions that cannot be imposed on offenders who are conditionally released. For example, in New South Wales a court cannot impose a condition requiring a person to perform community service work, or pay a fine or compensation, when conditionally releasing an offender.⁶¹¹

7.86 There has been judicial debate about whether a court can attach to a conditional release order a condition that is an independent sentencing option. In *Adams v Carr*, the Full Court of the Supreme Court of South Australia held that an order requiring an

offender to perform community service could be attached to a conditional release order made pursuant to s 20(1) of the *Crimes Act*.⁶¹² However, in *Shambayati v The Queen*, the Queensland Court of Appeal held that a community service order could not be attached to a conditional release order because a community service order had no meaning or operation outside the context of the *Penalties and Sentences Act 1992* (Qld), which was not applicable to federal offenders released pursuant to s 20(1).⁶¹³

7.87 It has been argued that attaching independent sentencing options as conditions of conditional release orders creates confusion about the appropriate sentence to be imposed. It can also result in the imposition of more severe sentences than would otherwise have been the case.⁶¹⁴ The Sentencing Guidelines Council in the United Kingdom has stated that:

Because of the very clear deterrent threat involved in a suspended sentence, requirements imposed as part of that sentence should generally be less onerous than those imposed as part of a community sentence. A court wishing to impose onerous or intensive requirements on an offender should reconsider its decision to suspend sentence and consider whether a community sentence may be more appropriate.⁶¹⁵

7.88 The CDPP submitted that it would be useful if courts sentencing federal offenders were able to impose a short period of full-time imprisonment and order that the offender be released on the condition that he or she comply with another sentencing option such as community service.⁶¹⁶

7.89 Another issue is whether courts sentencing federal offenders should be able to order that a federal offender pay a monetary penalty as a condition of a conditional release order.

ALRC's views

7.90 Judicial officers should not be able to require federal offenders to comply with independent sentencing options, such as community service, as a condition of their release. There is little benefit in enabling independent sentencing options to be imposed as conditions of conditional release orders when those options are already available to courts sentencing federal offenders. If a court sentencing a federal offender determines that a particular sentencing option is appropriate in light of the purposes, principles and factors of sentencing then it should impose that sentencing option in its own right and not as an adjunct to another sentencing option. It would introduce unnecessary complexity and inhibit transparency in sentencing to enable independent sentencing options to be attached as conditions of conditional release orders.

7.91 In addition, courts should not be able to require federal offenders to pay a monetary penalty as a condition of their release. There is no practical difference between a monetary penalty and a fine. It is undesirable to enable a court to impose a monetary penalty as a condition of a conditional release order when the offence in question is punishable by a fine.

7.92 In Chapter 8, the ALRC expresses the view that federal sentencing legislation should prohibit a court from attaching to a conditional release order a condition that a federal offender comply with an ancillary order.

Proposal 7-9 Federal sentencing legislation should prohibit a court from making any of the following conditions when it discharges an offender without recording a conviction, releases an offender after recording a conviction, or wholly or partially suspends a sentence of imprisonment:

- (a) a condition that is an independent sentencing option;
- (b) a condition that the offender pay a monetary penalty; and
- (c) a condition that the offender make restitution, pay compensation or comply with any other ancillary order.

The use of the recognizance

7.93 As noted above, a recognizance is an undertaking whereby an offender acknowledges that he or she may be required to pay an amount of money to the Crown unless he or she complies with certain conditions. A recognizance may be supported by a surety, that is, another person who also acknowledges liability to pay a specified amount of money to the Crown if the offender does not comply with certain conditions. In New South Wales legislation, the term ‘recognizance’ has been replaced with the term ‘bond’.

7.94 Recognizances can be made in respect of recognizance release orders, orders discharging an offender without conviction, and orders releasing an offender after conviction.⁶¹⁷ Section 20A(7) of the *Crimes Act* provides that where a federal offender fails to comply with a condition of one of these sentencing options supported by a recognizance, the court may order that the recognizance entered into by the offender or the surety be forfeited. There is no statutory or common law limit to the amount of money that a court can fix as the amount of a recognizance.⁶¹⁸

7.95 Part IB of the *Crimes Act* does not expressly state when the sum of money fixed in relation to a recognizance must be paid. In contrast, sentencing legislation in Western Australia expressly provides that a court may require an offender or a surety to enter into an undertaking to forfeit a sum of money on breach of a conditional release order, or to deposit a sum of money with the court to be forfeited in event of a breach.⁶¹⁹ One federal offender submitted that he did not know whether he was required to lodge money by way of security immediately or in the event of a breach after receiving a Commonwealth ‘bond’.⁶²⁰

7.96 In consultations, some stakeholders commented that there was uncertainty regarding the manner in which a recognizance should be enforced because there is no federal provision for enforcement.⁶²¹ Section 15A of the *Crimes Act* deals only with the enforcement of fines and other specified pecuniary penalties;⁶²² it does not extend to the enforcement of recognizances. Some commentators have suggested that ss 68(1) and 79 of the *Judiciary Act 1903* (Cth) pick up and apply state and territory provisions regarding the enforcement of recognizances.⁶²³ The provisions relating to the enforcement of recognizances in the states and territories differ.⁶²⁴ Some provisions enable offenders and sureties to be ordered to serve a term of imprisonment in default of payment of an amount fixed pursuant to a recognizance.⁶²⁵

ALRC's views

7.97 The ALRC considers that the provisions allowing a court to require a federal offender to give security in support of his or her undertaking to comply with conditions of a sentencing order, or to require that a recognizance be supported by a surety, should be repealed. Part IB of the *Crimes Act* outlines the action a court may take if a federal offender breaches a sentencing order.⁶²⁶ For example, if an offender breaches an order for conditional discharge or release, he or she may be re-sentenced for the original offence; if a federal offender breaches a recognizance release order, he or she may be imprisoned for the part of the sentence of imprisonment that has not been served. In consequence, the provisions requiring an offender or surety to forfeit money on breach of a sentencing order have limited utility in promoting compliance with conditions of a sentencing order because the consequences of breaches of these orders are already potentially serious.

Proposal 7-10 Federal sentencing legislation should repeal the provision that allows a court to require a federal offender to give security by way of recognizance when he or she is discharged without conviction, released after conviction or sentenced to a wholly or partially suspended sentence of imprisonment.

State and territory sentencing options

Background

7.98 Section 20AB(1) of the *Crimes Act* provides a mechanism for federal offenders to access a number of sentencing options that are available in the states and territories. The provision specifically identifies some of these sentencing options and others are prescribed by regulation.⁶²⁷ The *Crimes Regulations 1990* (Cth) currently lists a number of sentencing options, such as home detention and intensive correction orders, which are available to courts sentencing federal offenders.⁶²⁸ Section 20AB(1) also empowers courts to impose sentencing options that are 'similar' to the ones set out in the provision or listed in the regulations.

7.99 Since the introduction of s 20AB(1) in 1982,⁶²⁹ there has been a proliferation of sentencing options in the states and territories. This has occurred as a result of a growing realisation that full-time imprisonment is not always an appropriate sentencing option, not least because it is costly, can inhibit the rehabilitation of offenders, and does little to prevent crime. According to the CDPP, in 2003–04 approximately 1000 federal offenders were sentenced to options picked up by s 20AB(1). Of these, 46 were sentenced to periodic detention, 36 to home detention, 213 to community based orders, 25 to intensive supervision orders, 37 to intensive correction orders, and 639 to community service orders.⁶³⁰

7.100 One of the purposes of the *United Nations Standard Minimum Rules for Non-custodial Measures 1990* (the Tokyo Rules) is to promote the promulgation and use of sentencing options other than imprisonment. Rule 2.3 provides that:

In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions. The number and types of non-custodial measures available should be determined in such a way that consistent sentencing remains possible.⁶³¹

Issues and problems

7.101 At present, some sentencing options are available only in certain jurisdictions. For example, periodic detention is available only in New South Wales and the ACT;⁶³² home detention is available only in New South Wales, Victoria, the ACT and the Northern Territory;⁶³³ non-association orders are available only in New South Wales and Queensland;⁶³⁴ and place restriction orders are available only in New South Wales and Tasmania.⁶³⁵ Accordingly, when these options are picked up pursuant to s 20AB(1) of the *Crimes Act*, they can only be imposed on federal offenders who are sentenced in the jurisdictions in which the options are available.

7.102 In addition, the nature of the apparently identical sentencing options can vary from jurisdiction to jurisdiction. For example, while community service orders are available in all states and territories,⁶³⁶ the criteria a court applies when considering whether it is appropriate to make a community service order varies.⁶³⁷ Similarly, the core conditions for sentences of home detention vary among the jurisdictions in which it is available.⁶³⁸

7.103 Further, the maximum duration of a sentencing option picked up by s 20AB and the maximum amount of time in which the sentence must be completed varies among the jurisdictions. For example, in New South Wales a community service order cannot exceed 500 hours.⁶³⁹ If the number of hours under the order is less than 300, the community service must ordinarily be completed within 12 months; if the number of hours under the order is greater than 300, the community service must ordinarily be

completed within 18 months.⁶⁴⁰ In contrast, in Queensland a community service order cannot exceed 240 hours and the community service must ordinarily be completed within 12 months.⁶⁴¹

7.104 Accordingly, reliance on state and territory sentencing options raises the issue of equality in the treatment of federal offenders.⁶⁴² The Law Society of South Australia expressed the view that sentencing options for federal offenders should be as uniform as possible.⁶⁴³ The Australian Securities and Investments Commission (ASIC) submitted that the application of state and territory legislation regarding sentencing options could lead to significant disparity in the treatment of federal offenders because not all sentencing options are available in all jurisdictions.⁶⁴⁴

Options for reform

7.105 As discussed in IP 29, one way of ensuring that federal offenders have access to the same sentencing options, and that these options are considered and imposed on the same basis, is to prescribe the options in federal sentencing legislation.⁶⁴⁵ This would ensure that the sentencing options for federal offenders are uniform and remain stable over time. However, it would require considerable resources to make the various sentencing options available to federal offenders in every jurisdiction.

7.106 In addition, in relation to some sentencing options, it is unclear whether s 120 of the *Australian Constitution*—which directs states to accommodate federal offenders in their prisons—would allow the Australian Government to dictate what those prisons should be like, for example, by requiring facilities appropriate for periodic detention of federal offenders.

7.107 These problems could be overcome by curtailing the sentencing options available for federal offenders. For example, federal sentencing legislation could provide for only a limited range of sentencing options, which would require no additional resources to implement, such as fines, discharges, suspended sentences and imprisonment.

7.108 Submissions and consultations revealed limited support for federal prescription of sentencing options.⁶⁴⁶ Professor Freiberg commented that it would be impracticable to attempt to create and administer intermediate federal sentencing options without a completely separate federal criminal justice system.⁶⁴⁷ The CDPP noted that while federal prescription of sentencing options would assist in achieving uniformity of treatment of federal offenders, there were practical difficulties with such a scheme, which included the associated costs of administration.⁶⁴⁸

7.109 Alternatively, federal sentencing legislation could continue to enable federal offenders to access state and territory sentencing options. This would give due recognition to the fact that different sentencing options are needed to enable a court to impose a sentence that is appropriate to the particular offender. If federal offenders were to continue to access state and territory sentencing options, s 20AB could be

expanded to include all existing sentencing options available in the states and territories. Alternatively, an ambulatory provision could be drafted, which would pick up all state and territory options as they exist from time to time. Yet again, the current mechanism by which sentencing options are prescribed in regulations could be retained. This would ensure that the Australian Government retained an element of control over the sentencing options for federal offenders.

7.110 Submissions and consultations showed some support for complete reliance on state and territory sentencing options.⁶⁴⁹ However, the AGD commented that not all sentencing options would be suitable for federal offenders and expressed concern that states and territories could develop sentencing options that were inconsistent with Australia's international obligations.⁶⁵⁰

7.111 A number of stakeholders expressed the view that judicial officers should have a wide range of sentencing options at their disposal when sentencing federal offenders.⁶⁵¹ The CDPP submitted that the range of sentencing options currently available for federal offenders should remain available, and that new state and territory sentencing options should be assessed before being picked up at the federal level.⁶⁵² ASIC also expressed the view that the Australian Government should evaluate state and territory sentencing options before making them available for federal offenders, noting that it may be inappropriate for sentencing options to be made available for federal offenders until they are available in a reasonable number of jurisdictions.⁶⁵³ Associate Professor Willis submitted that federal sentencing options should be listed in regulations or some other legislative instrument that could be amended readily in order to accommodate the mutability of state and territory sentencing practices.⁶⁵⁴

ALRC's views

7.112 As discussed in Chapter 3, equality of treatment of federal offenders is an important goal to be pursued in the sentencing of federal offenders where practicable. However, the ALRC does not consider it practicable for the Australian Government to create and administer new sentencing options for federal offenders, or to develop infrastructure to make existing sentencing options available in all jurisdictions, given the small number of federal offenders dispersed throughout Australia.

7.113 Further, it would be a retrograde step and inconsistent with international standards to limit severely the sentencing options available for federal offenders in an attempt to achieve inter-jurisdictional equality. For sentencing practices to be just and fair, and for the sentencing principles of proportionality, parsimony and individualised justice to have an application in reality, it is essential that courts sentencing federal offenders have a wide range of sentencing options at their disposal.

7.114 However, it is not appropriate to rely automatically and without further inquiry on the sentencing options that happen to be available in the states and territories. As discussed in Chapter 22, the Australian Government has an obligation to ensure that practices relating to the sentencing, administration and release of federal offenders are just and efficient. Some state and territory sentencing options may be unsuitable for federal offenders or may be undesirable if they conflict with international obligations.

7.115 Accordingly, the ALRC has come to the preliminary view that the current mechanism by which federal legislation and regulations pick up state and territory sentencing options should be retained. However, there are ways of achieving greater equality in the treatment of federal offenders while utilising this mechanism. To this end, the ALRC considers that the proposed Office for the Management of Federal Offenders (OMFO) should monitor and evaluate the use and effectiveness of state and territory sentencing options.⁶⁵⁵ A body such as the OMFO is needed to assess new sentencing options as they are developed and implemented by state and territory governments, and to evaluate established sentencing options that are currently unavailable to federal offenders. When evaluating state and territory sentencing options the OMFO should consider how widely the options are available as this may be indicative of their effectiveness or community acceptance. The OMFO should then provide advice to the Australian Government regarding the sentencing options that should be made available to federal offenders.

7.116 In addition, the OMFO should be given the task of reviewing the terms of the sentencing options, such as the maximum hours of community service, and advising the Australian Government about appropriate national limits in relation to sentencing options. This would ensure that the sentencing options available for federal offenders are imposed and administered consistently across the jurisdictions.

Proposal 7-11 Federal sentencing legislation should retain the mechanism by which federal legislation and regulations specify which of the sentencing options available to a court in sentencing a state or territory offender may be picked up and applied in sentencing a federal offender. Federal sentencing legislation or regulations should also specify which state or territory sentencing options, if any, cannot be picked up and applied in sentencing a federal offender.

Proposal 7-12 The proposed Office for the Management of Federal Offenders (OMFO) should monitor the effectiveness and suitability of state and territory sentencing options for federal offenders and should provide advice to the Australian Government regarding the state and territory sentencing options that should be made available for federal offenders.

Proposal 7-13 In monitoring state and territory sentencing options in accordance with Proposal 7–12, the OMFO should:

- (a) review the maximum number of hours of community service and the maximum time within which such service must be completed in each state and territory; and
- (b) advise the Australian Government about appropriate national limits in relation to community based orders and other sentencing options available under state and territory law.

Prohibited sentencing options

Background

7.117 As noted in IP 29, the state's power to sentence an offender should be limited.⁶⁵⁶ The international community has developed a number of binding international instruments dealing with the imposition of punishment by the state, such as the *International Covenant on Civil and Political Rights* (ICCPR)⁶⁵⁷ and the Second Optional Protocol to that Covenant on the abolition of the death penalty;⁶⁵⁸ the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1984 (CAT);⁶⁵⁹ and the *Convention on the Rights of the Child* 1989 (CROC).⁶⁶⁰ Australia is a party to all of these instruments and any federal, state or territory legislation, policy or practice that is inconsistent with them will place Australia in breach of its international obligations.

Capital punishment

7.118 Capital punishment is a term used to describe all state sanctioned executions.⁶⁶¹ Capital punishment was abolished for federal offenders in 1973⁶⁶² and for all state and territory offenders by 1984.⁶⁶³ Currently, over half the countries in the world have abolished capital punishment in either law or practice.⁶⁶⁴ Capital punishment potentially violates two universally recognised human rights, the right to life and the right not to be subjected to cruel, inhuman or degrading punishment.⁶⁶⁵ Australia is a party to the Second Optional Protocol to the ICCPR on the abolition of the death penalty.

Corporal punishment

7.119 Corporal punishment involves the infliction of pain on an offender's body. While capital punishment is a form of corporal punishment, the term is generally used to refer to less severe forms of physical punishment such as whipping and branding. Corporal punishment potentially violates art 7 of the ICCPR, which prohibits the imposition of 'cruel, inhuman or degrading treatment or punishment'.⁶⁶⁶ Some forms of corporal punishment could also constitute torture.⁶⁶⁷ Corporal punishment is no longer authorised in any Australian jurisdiction⁶⁶⁸ and s 16D(1) of the *Crimes Act*

explicitly prohibits the imposition of corporal punishment on any offender found guilty of a federal offence.

Imprisonment with hard labour

7.120 Imprisonment with hard labour is a sentencing option that was introduced in the United Kingdom in 1779.⁶⁶⁹ Offenders sentenced to imprisonment with hard labour were required to dredge the river Thames and later to work the crank or treadwheel in prison.⁶⁷⁰ Hard labour was abolished in the United Kingdom in 1948.⁶⁷¹ Imprisonment with hard labour is not prohibited under the ICCPR.⁶⁷² Although hard labour has been abolished in several Australian states and territories,⁶⁷³ s 18 of the *Crimes Act* currently provides that a period of imprisonment imposed for any federal offence may be imposed ‘with or without hard labour’, unless the contrary intention appears.

Cruel, inhuman or degrading punishment

7.121 The right to freedom from cruel, inhuman or degrading treatment or punishment is a fundamental human right from which there can be no derogation, not even in times of public emergency.⁶⁷⁴ The words ‘cruel’, ‘inhuman’ and ‘degrading’ are not defined in art 7 of the ICCPR but they extend beyond acts causing physical pain to acts causing mental suffering.⁶⁷⁵ The right to freedom from cruel, inhuman or degrading punishment is a right that recognises and protects the inherent dignity and integrity of every human being.

ALRC’s views

7.122 The ALRC is of the view that federal sentencing legislation should explicitly prohibit the imposition of sentences involving capital punishment, corporal punishment, hard labour, or any other form of cruel, inhuman or degrading punishment. Capital punishment is an invidious practice that has no place in an enlightened regime for the sentencing of federal offenders. Imprisonment with hard labour and corporal punishment are also anachronistic sentences, reminiscent of an age when punishments were brutal and abhorrent. Further, specifically prohibiting cruel, inhuman or degrading punishments will amount to partial domestic implementation of Australia’s international obligations under the ICCPR and the CAT.

Proposal 7-14 Federal sentencing legislation should prohibit the following sentencing options in relation to federal offenders:

- (a) capital punishment;
- (b) corporal punishment;
- (c) imprisonment with hard labour; and
- (d) any other form of cruel, inhuman or degrading punishment.

Sentencing hierarchies

Should federal legislation specify a hierarchy of sentencing options for federal offenders? If so, how should that hierarchy be arranged? [IP 29, Q 7–2]

Background

7.123 The creation of a sentencing hierarchy requires the sentencing options available to the court to be ranked in order of severity.⁶⁷⁶ It has been argued that sentencing hierarchies help to ensure that sentences are consistent by providing guidance as to the relative severity of sentencing options.⁶⁷⁷ Sentencing hierarchies have been developed in Victoria and Western Australia.⁶⁷⁸ It is not clear whether they have had any impact on consistency in sentencing.⁶⁷⁹

7.124 Part IB of the *Crimes Act* does not set out a hierarchy of sentencing options although it does provide that imprisonment is to be the sanction of last resort.⁶⁸⁰ In the ALRC's 1987 Discussion Paper on sentencing options the ALRC explored the possibility of a hierarchy of sanctions and potential models for such a hierarchy.⁶⁸¹ However, ALRC 44 did not pursue any proposal in relation to a sanction hierarchy.

Issues and problems

7.125 Differing opinions were expressed in submissions and consultations about the desirability of creating a federal sentencing hierarchy. Some stakeholders supported the idea of a federal sentencing hierarchy.⁶⁸² It was argued that a sentencing hierarchy could promote consistency in sentencing.⁶⁸³ However, Professor Freiberg submitted that sentencing hierarchies did not necessarily enhance consistency, but instead were a valuable way of promoting the principle of parsimony.⁶⁸⁴ Other stakeholders were opposed to the idea of a sentencing hierarchy.⁶⁸⁵ It was submitted that case law already provides guidance on the relative severity of sentencing options and that the creation of a legislative hierarchy would unduly fetter the sentencing discretion.⁶⁸⁶ It was also noted that a federal sentencing hierarchy could conflict with state or territory sentencing provisions.⁶⁸⁷

7.126 Others stakeholders were more ambivalent about the creation of a sentencing hierarchy, commenting that while such a development could be useful it would be difficult to implement in practice because it was hard to compare the severity of sentences.⁶⁸⁸ Some suggested that this could be overcome by grouping different sentencing options together in the hierarchy rather than attempting to compare and rank the severity of every sentencing option.⁶⁸⁹

7.127 The CDPP submitted that sentencing options could have different effects on different offenders and that a strict legislative hierarchy could limit the court's flexibility to consider the individual circumstances of an offender.⁶⁹⁰ However, the CDPP suggested that the provisions of federal sentencing legislation could be structured to reflect the following broad hierarchy of sentencing options:

- Non-conviction bond;
- Conviction bond;
- Fine;
- Community service and like orders;
- Suspended sentence;
- Imprisonment involving a component of custody including home detention and periodic detention;
- Imprisonment involving full-time custody.

ALRC's views

7.128 Subject to the ALRC's view that imprisonment is a sentencing option of last resort, the ALRC does not consider that federal sentencing legislation should include any further hierarchy of sentencing options. The severity of a sentence must always depend on the circumstances of the individual offender. For example, a large fine would be a more severe sentence for an impecunious offender than for a wealthy one; a sentence of home detention would be a more severe sentence for an offender living in meagre circumstances than for an offender with a luxurious home; and a sentence of periodic detention would be more severe sentence for an offender whose employment was disrupted by the detention than for an offender whose employment was unaffected by the sentence. In addition, the severity of any sentence depends on its quantum. For example, a large fine could be a more severe than a short period of community service, and a lengthy period of community service could be more severe than a short period of periodic detention.

7.129 The ALRC is not convinced that the principle of parsimony is better served by the creation of a sentencing hierarchy. The principle of parsimony prevents a court from imposing a sanction that is more severe than is necessary to achieve the purpose or purposes of the sentence. Whether or not a sentence is more severe than necessary must be determined in light of all the circumstances of the case.

7.130 In any event, the ALRC considers that a sentencing hierarchy would be impractical and undesirable in the federal context. First, a federal sentencing hierarchy could conflict with state or territory sentencing hierarchies, causing unnecessary

confusion about the actual severity of similar sentencing options and unwarranted disparity in federal and state and territory sentencing practices. Secondly, it would be difficult to devise a federal sentencing hierarchy given the diverse range of state and territory sentencing options available to federal offenders—a problem that is not encountered to the same degree within an individual state or territory. This problem would be exacerbated by the variations in the structure of ostensibly identical sentencing options between jurisdictions. Finally, the severity of a sentencing option that is available in two or more jurisdictions may depend on the manner in which the option is administered in the state or territory. For example, periodic detention could be a more severe sentence in a jurisdiction in which offenders are required to travel long distances to attend the detention centre than in a jurisdiction in which periodic detention was readily available in a number of convenient locations.

7.131 For these reasons the ALRC is of the view that courts should retain a broad discretion to impose a sentence that is appropriate in all the circumstances of the case and should not be required to impose sentences in accordance with a legislative sentencing hierarchy.

Penalty conversions

Should there be greater flexibility in converting between sentencing options for federal offenders? What types of conversion should be allowed? What role should the offender have in relation to the conversion? [IP 29, Q 7–3]

Background

7.132 Provisions creating federal offences specify the maximum penalty for the offence, which is intended for the worst type of case covered by the offence.⁶⁹¹ Section 4B(2) of the *Crimes Act* sets out a formula that can be applied to determine the maximum pecuniary penalty for an offence where the provision creating the offence refers only to a penalty of imprisonment.⁶⁹² In addition, s 4B(3) provides that the maximum pecuniary penalty that can be imposed on a body corporate convicted of an offence is five times the maximum pecuniary penalty that can be imposed on a natural person convicted of the same offence, and s 4(2A) states that if an offence provides for imprisonment for life, the court may impose a maximum pecuniary penalty of 2,000 penalty units.⁶⁹³

7.133 Section 4B was introduced into the *Crimes Act* in 1987.⁶⁹⁴ Prior to its introduction, legislative penalties for federal offences of comparable severity were inconsistent.⁶⁹⁵ Section 4B provides a mechanism for ensuring that offences of comparable severity—that is, offences attracting the same maximum period of imprisonment—attract the same maximum fine if none is prescribed. It also gives

effect to the policy that imprisonment should never be the sole option available to a court sentencing a federal offender.

Issues and problems

7.134 Some stakeholders expressed support for the idea of enabling conversion between sentencing options after the imposition of a sentence.⁶⁹⁶ However, others were concerned that allowing conversion between sentencing options would in effect allow offenders to choose their sentence, thereby derogating from the court's authority to impose an appropriate sentence in all the circumstance of the case.⁶⁹⁷ ASIC expressed the concern that offenders who engaged in corporate crime were often well resourced and would not be appropriately punished if they were able to convert a sentence of imprisonment to a financial penalty.⁶⁹⁸

7.135 Associate Professor Willis submitted that s 4B of the *Crimes Act* does not provide for conversion of penalties but instead provides a formula to determine the maximum fine for an offence if the offence provision only refers to imprisonment.⁶⁹⁹

ALRC's views

7.136 The ALRC agrees that s 4B of the *Crimes Act* does not enable the court to convert one particular sentence into another. Instead, it enables the court to determine the maximum fine that can be imposed for certain federal offences. It provides a mechanism for ensuring maximum monetary penalties for federal offences are fixed in a rational, consistent and coherent manner. Submissions and consultations did not identify any difficulty with the operation of s 4B and the ALRC is of the view that this provision should remain in federal sentencing legislation.

7.137 The ALRC has concluded that it is unnecessary and impracticable to attempt to devise other formulae to determine other maximum penalties when sentencing federal offenders. Most sentencing options available to federal offenders are already limited in duration. For example, community service orders in New South Wales cannot exceed 500 hours.⁷⁰⁰ While the maximum duration of similar sentencing options can differ between jurisdictions, the ALRC has proposed that the OMFO should advise the Australian Government on appropriate national limits for these sentencing options to enhance consistency in sentencing federal offenders.⁷⁰¹ While creating further formulae to determine other maximum penalties would perhaps provide a greater degree of consistency in the sentencing of federal offenders, it would also make federal sentencing legislation undesirably complex. The ALRC has proposed other methods for enhancing consistency in sentencing.⁷⁰²

7.138 The ALRC agrees that judicial officers should retain the ultimate responsibility for imposing appropriate sentences after considering the purposes, principles and factors of sentencing and the factors relevant to the administration of the criminal justice system. Accordingly, the ALRC does not consider that offenders should be entitled to convert between sentencing options once a sentence has been imposed.

Restorative justice

Background

7.139 In IP 29 the ALRC asked whether restorative justice initiatives should be included in federal sentencing legislation or made more widely available to federal offenders.⁷⁰³ As discussed in Chapter 4 of this Discussion Paper, restorative justice can be defined broadly as an approach to crime that focuses on repairing the harm caused by criminal activity and addressing the underlying causes of criminal behaviour. Restorative justice initiatives can be employed at any stage in the criminal justice process, including the sentencing stage. Some examples of restorative justice initiatives are victim-offender mediation and conferencing. While restorative justice initiatives were originally developed for young offenders, they are becoming increasingly available for adult offenders. For example, a restorative justice scheme for adult offenders has recently been established in the ACT.⁷⁰⁴

Issues and problems

7.140 As discussed above, s 20AB of the *Crimes Act* provides that the certain sentencing options can be picked up and applied to federal offenders. The sentencing options listed in s 20AB are community service orders, work orders, attendance centre orders, attendance orders, and sentences of periodic and weekend detention. Other sentencing options are prescribed in regulations. Section 20AB also provides that sentencing options of a ‘similar’ nature to the ones listed in s 20AB or prescribed in the regulations can also be picked up and applied to federal offenders. It is unlikely that restorative justice initiatives could be picked up and applied pursuant to s 20AB as they are not sufficiently similar to the existing sentencing options, not least because they are interim rather than final in nature.⁷⁰⁵

7.141 Section 68(1) of the *Judiciary Act 1903* (Cth) picks up and applies state and territory procedural laws to federal prosecutions in state and territory courts. However, the distinction between what is ‘procedural’ and what is ‘substantive’ is not always clear. It is possible that some restorative justice initiatives could be procedural, but this would need to be determined by the courts on a case-by-case basis. Section 79 of the *Judiciary Act* picks up and applies to a court exercising federal jurisdiction certain state and territory procedural laws, except in so far as they are inconsistent with the *Australian Constitution* or with other federal laws. However, as these laws are picked up with their meaning unchanged, they cannot be given a different meaning in the federal context.⁷⁰⁶ Therefore, it is possible that some state or territory laws relating to restorative justice initiatives may not be picked up so that they can be applied to federal offenders.

7.142 Some stakeholders expressed support for the utilisation of restorative justice initiatives when sentencing federal offenders.⁷⁰⁷ The Law Society of South Australia

submitted that restorative justice programs and sentencing options should be recognised in the federal sphere.⁷⁰⁸ Professor Freiberg commented that establishing such initiatives for federal offenders would require additional resources.⁷⁰⁹

ALRC's views

7.143 Given the relatively small number of federal offenders and the significant resources that would be required to establish and operate restorative justice initiatives, the ALRC considers it preferable to facilitate access by federal offenders to existing state and territory initiatives. To avoid the need to determine whether state or territory laws relating to restorative justice initiatives are picked up and applied on a case-by-case basis, and to eliminate any confusion as to the applicability of these initiatives in the federal sentencing context, the ALRC considers that federal sentencing legislation should enable federal offenders to participate in state and territory restorative justice initiatives. Any matter referred from the court to a restorative justice initiative must be referred back to the court for determination because the *Australian Constitution* precludes a non-judicial body from exercising federal judicial power.

Proposal 7-15 Federal sentencing legislation should facilitate access by federal offenders to state or territory restorative justice initiatives in appropriate circumstances. Where a court refers a federal offender to a restorative justice initiative, the outcome of the process must be reported back to the court and the court must finalise the matter after taking into consideration the outcome of the process.

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- 479 Fines are discussed in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [7.55]–[7.57].
 - 480 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2004) <www.ag.gov.au> at 17 September 2004, 36.
 - 481 *Fines Act 1996* (NSW) s 6; *Sentencing Act 1991* (Vic) s 50; *Penalties and Sentences Act 1992* (Qld) s 48; *Crimes Act 1900* (ACT) s 348; *Sentencing Act 1995* (NT) s 17; *Sentencing Act 2002* (NZ) s 40; *Criminal Justice Act 2003* (UK) s 164.
 - 482 K Warner, *Sentencing in Tasmania* (2nd ed, 2002), [4.101]; R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [4.101].
 - 483 Commonwealth Director of Public Prosecutions, *Annual Report 2003–2004* (2004), 11.
 - 484 *Sentencing Act 1991* (Vic) s 50(3); *Penalties and Sentences Act 1992* (Qld) s 48(3); *Sentencing Act 1995* (NT) s 17(3). See also *Sentencing Act 2002* (NZ) s 40.
 - 485 *CEO of Customs v Rota Tech Pty Ltd* [1999] SASC 64, [35]–[36].
 - 486 *Criminal Law (Sentencing) Act 1988* (SA) s 13. See also *Criminal Code (RS 1985, c C–46)* (Canada) s 734(2).
 - 487 *Sentencing Act 1991* (Vic) ss 53, 54; *Penalties and Sentences Act 1992* (Qld) s 50; *Sentencing Act 1997* (Tas) s 44. See also Crimes (Sentencing) Bill 2005 (ACT) cl 14(4).
 - 488 *Sentencing Act 1991* (Vic) s 61; *Sentencing Act 1997* (Tas) s 46.
 - 489 *Sentencing Act 1991* (Vic) s 61.
 - 490 Northern Territory Legal Aid Commission, *Consultation*, Darwin, 27 April 2005.
 - 491 J Greene, 'The Unit Fine: Monetary Sanctions Apportioned to Income' in A von Hirsch and A Ashworth (eds), *Principled Sentencing: Readings on Theory and Policy* (2nd ed, 1998) 268, 268.
 - 492 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [114].

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- 493 New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), [3.14].
- 494 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Prison Reform Group WA, *Consultation*, Perth, 18 April 2005.
- 495 J Willis, *Submission SFO 20*, 9 April 2005.
- 496 See Proposal 6–1.
- 497 Section 19B of the *Crimes Act 1914* (Cth) is discussed in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [7.58]–[7.66].
- 498 Section 20 of the *Crimes Act 1914* (Cth) is discussed in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [7.67]–[7.71].
- 499 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10; *Penalties and Sentences Act 1992* (Qld) ss 19, 30, 31; *Criminal Law (Sentencing) Act 1988* (SA) ss 15, 39.
- 500 *Uznanski v Searle* (1981) 26 SASR 388, 390.
- 501 Law Society of the Northern Territory, *Consultation*, Darwin, 29 April 2005.
- 502 *Crimes Act 1914* (Cth) s 19B(1)(b).
- 503 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [7.218].
- 504 *Crimes Act 1914* (Cth) s 16A(3).
- 505 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [139].
- 506 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(3). See also *Sentencing Act 1991* (Vic) s 76.
- 507 Welfare Rights Centre Inc (Queensland), *Submission SFO 29*, 15 April 2005.
- 508 *R v McHutchison* (1990) 3 WAR 261, 268. Recognizances are discussed further below.
- 509 *Ibid*, 268–269.
- 510 *Devine v The Queen* (1967) 119 CLR 506, 516.
- 511 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [375]; *Devine v The Queen* (1967) 119 CLR 506, 511.
- 512 K Warner, *Sentencing in Tasmania* (2nd ed, 2002), [7.104].
- 513 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [373].
- 514 *Ibid*, [373].
- 515 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 101; *Sentencing Act 1991* (Vic) s 71; *Sentencing Act 1995* (WA) s 12; *Sentencing Act 1997* (Tas) s 101.
- 516 *Griffiths v The Queen* (1977) 137 CLR 293, 305.
- 517 *Ibid*.
- 518 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [67].
- 519 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11; *Sentencing Act 1991* (Vic) ss 72, 83A; *Penalties and Sentences Act 1992* (Qld) s 24; *Sentencing Act 1995* (WA) ss 16, 17; *Sentencing Act 1997* (Tas) s 7(f). See also *Crimes (Sentencing) Bill 2005* (ACT) Ch 8.
- 520 *R v Trindall* (2002) 133 A Crim R 119, 130.
- 521 *R v Togias* (2001) 127 A Crim R 23.
- 522 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11.
- 523 *R v Tindall* (1994) 74 A Crim R 275, 276–277.
- 524 See, eg, *R v Trindall* (2002) 133 A Crim R 119; *R v Leahy* [2004] NSWCCA 148; *R v Clark* (1997) 95 A Crim R 585.
- 525 *R v Trindall* (2002) 133 A Crim R 119, 131.
- 526 *R v Palu* (2002) 134 A Crim R 174, 182.
- 527 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11(2); *Sentencing Act 1997* (Tas) s 7(f).
- 528 See, eg, *Director of Public Prosecutions (SA) v District Court of South Australia* (1995) 65 SASR 357.
- 529 *Crimes Act 1914* (Cth) s 16.
- 530 *Ibid* s 20(1)(a), (b). The conditions of a recognizance release order are discussed further below.
- 531 *Ibid* s 20(1)(a), (b).
- 532 *Ibid* s 19AC(1), (2), (3), (4).
- 533 *Ibid* s 19AB(1), (2), (3).
- 534 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 535 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 12; *Sentencing Act 1991* (Vic) s 27; *Penalties and Sentences Act 1992* (Qld) s 144; *Sentencing Act 1995* (WA) s 76; *Criminal Law (Sentencing) Act 1988*

- (SA) s 38; *Sentencing Act 1997* (Tas) pt 3 div 4; *Crimes Act 1900* (ACT) s 403(1); *Sentencing Act 1995* (NT) s 40. See also Crimes (Sentencing) Bill 2005 (ACT) cl 12.
- 536 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 12, 95, 95A; *Criminal Law (Sentencing) Act 1988* (SA) ss 38, 42; *Sentencing Act 1997* (Tas) s 24; *Crimes Act 1900* (ACT) s 403(1); *Sentencing Act 1995* (NT) s 40(2).
- 537 New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), [4.20].
- 538 *Crimes (Sentencing Procedure) Act 1999* (NSW).
- 539 Sentencing Advisory Council—Victoria, *Suspended Sentences in Victoria: A Preliminary Information Paper* (2005), 1.
- 540 Sentencing Advisory Council—Victoria, *Suspended Sentences: Interim Report* (2005).
- 541 See Sentencing Advisory Council—Victoria, *Suspended Sentences Discussion Paper* (2005), [7.1]–[7.41].
- 542 Submission of the Magistrates' Court of Victoria to Sentencing Advisory Council—Victoria, *Suspended Sentences: Interim Report* (2005), [2.4].
- 543 Sentencing Advisory Council—Victoria, *Suspended Sentences Discussion Paper* (2005), [8.18]–[8.29].
- 544 *York v The Queen* [2005] HCA 60, [32].
- 545 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; JC, *Submission SFO 25*, 13 April 2005; PS, *Submission SFO 21*, 8 April 2005.
- 546 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 547 LD, *Submission SFO 9*, 10 March 2005; M Bagaric and R Edney, *Consultation*, Melbourne, 1 April 2005.
- 548 See Proposal 2–3.
- 549 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [9.205].
- 550 D Brown, 'Continuity, Rupture, Or Just More of the 'Volatile and Contradictory'? Glimpses of New South Wales' Penal Practice Behind and Through the Discursive' in J Pratt and others (eds), *The New Punitiveness: Trends, Theories, Perspectives* (2005) 27.
- 551 D Weatherburn, *Law and Order in Australia: Rhetoric and Reality* (2004), 128.
- 552 See Appendix 1, Figure A1.4.
- 553 See Appendix 1, Figure A1.4.
- 554 See Appendix 1, Figure A1.5.
- 555 See Appendix 1, [29].
- 556 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2004) <www.ag.gov.au> at 17 September 2004, 36.
- 557 *Ibid.*, 39.
- 558 *Migration Act 1958* (Cth) s 233C.
- 559 Aboriginal Justice Advisory Committee and North Australian Aboriginal Legal Aid Service, *Consultation*, Darwin, 28 April 2005.
- 560 See Appendix 1, Figure A1.19.
- 561 *Sentencing Act 1995* (WA) s 86.
- 562 New South Wales Sentencing Council, *Abolishing Prison Sentences of 6 Months or Less* (2004), 4.
- 563 *Ibid.*, 10–11.
- 564 *Ibid.*, 9–10.
- 565 For further discussion of short parole periods, see Ch 9.
- 566 A Freiberg, *Pathways to Justice: Sentencing Review 2002* (2002) Victorian Government, 136.
- 567 New South Wales Sentencing Council, *Abolishing Prison Sentences of 6 Months or Less* (2004), 13–14.
- 568 *Ibid.*, 14.
- 569 N Morgan, 'The Abolition of Six-Month Sentences, New Hybrid Orders and Truth in Sentencing: Western Australia's Latest Sentencing Laws' (2004) 28 *Criminal Law Journal* 8, 16.
- 570 Prisoners' Legal Service, *Submission SFO 28*, 15 April 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
- 571 Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.
- 572 P Wright, 'Impact of Abolishing Short Sentences of Imprisonment' (Paper presented at No Imprisonment—Mandatory Imprisonment, Sydney, 24 May 2004), 4.
- 573 See Chs 4, 5.
- 574 R Fox and A Freiberg, 'Sentences Without Conviction: From Status to Contract in Sentencing' (1989) 13 *Criminal Law Journal* 297, 300.
- 575 *Ibid.*, 302.

- 576 Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [7.86]–[7.87].
 577 *Crimes Act 1914* (Cth) s 19B(1).
 578 Ibid, pt VIIC.
 579 See, eg, *Sentencing Act 1991* (Vic) s 7(e), (f); *Criminal Law (Sentencing) Act 1988* (SA) ss 15(b), 16.
 580 *Penalties and Sentences Act 1992* (Qld) ss 43A, 90, 100, 44 respectively.
 581 Human Rights and Equal Opportunity Commission, *Discrimination in Employment on the Basis of Criminal Record—Discussion Paper* (2004).
 582 T Glynn SC, *Consultation*, Brisbane, 2 March 2005; Prison Reform Group WA, *Consultation*, Perth, 18 April 2005; M Bagaric and R Edney, *Consultation*, Melbourne, 1 April 2005; Chief Magistrate M Irwin, *Submission SFO 33*, 20 April 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005; Northern Territory Legal Aid Commission, *Consultation*, Darwin, 27 April 2005; J Willis, *Submission SFO 20*, 9 April 2005.
 583 T Glynn SC, *Consultation*, Brisbane, 2 March 2005; Prison Reform Group WA, *Consultation*, Perth, 18 April 2005; Chief Magistrate M Irwin, *Submission SFO 33*, 20 April 2005.
 584 A Freiberg, *Consultation*, Melbourne, 30 March 2005.
 585 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
 586 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2004) <www.ag.gov.au> at 17 September 2004, 13.
 587 See Ch 6.
 588 Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [7.88].
 589 Attorney-General's Department, *Submission SFO 52*, 7 July 2005.
 590 Commonwealth, *Parliamentary Debates*, House of Representatives, 17 August 1989, 388 (L Bowen—Deputy Prime Minister and Attorney-General).
 591 Commonwealth of Australia, *Administrative Arrangements Order*, 16 December 2004 sch, pt 2.
 592 *Crimes (Superannuation Benefits) Act 1989* (Cth) s 16.
 593 Ibid s 43.
 594 *Crimes Act 1914* (Cth) s 19B(d).
 595 Ibid s 20(1)(a), (b), (5). A penalty unit is \$110: *Crimes Act 1914* (Cth) s 4AA.
 596 *Sentencing Act 1991* (Vic) ss 72(2), 75(2); *Penalties and Sentences Act 1992* (Qld) s 19(1), (2), (2A); *Crimes Act 1900* (ACT) s 402(1); *Sentencing Act 1995* (NT) ss 11(1), 13(1).
 597 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95A; *Penalties and Sentences Act 1992* (Qld) s 19(2A); *Criminal Law (Sentencing) Act 1988* (SA) s 42; *Sentencing Act 1997* (Tas) s 37(2).
 598 *Sentencing Act 1997* (Tas) s 37(2)(a), (d).
 599 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95A. See also *Crimes (Sentencing) Bill 2005* (ACT) cll 96, 97.
 600 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95(b); *Sentencing Act 1991* (Vic) ss 72(2)(b), 75(2)(b); *Criminal Law (Sentencing) Act 1988* (SA) ss 38(1)(a), 39(1)(a).
 601 *Penalties and Sentences Act 1992* (Qld) s 93(1)(a). See also *Sentencing Act 1997* (Tas) s 37(1)(a).
 602 *Sentencing Act 1995* (WA) s 49(1).
 603 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [7.304].
 604 Ibid, [7.304].
 605 *Devine v The Queen* (1967) 119 CLR 506.
 606 *R v Bugmy* [2004] NSWCCA 258, [61].
 607 LD, *Submission SFO 9*, 10 March 2005; JC, *Submission SFO 25*, 13 April 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
 608 Offenders Aid and Rehabilitation Services South Australia, *Consultation*, Adelaide, 20 April 2005; Correctional Services Northern Territory, *Submission SFO 14*, 5 April 2005.
 609 A Freiberg, *Submission SFO 12*, 4 April 2005.
 610 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
 611 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95(c).
 612 *Adams v Carr* (1987) 81 ALR 151, 160.
 613 *Shambayati v The Queen* (1999) 105 A Crim R 373, 375–376.
 614 Sentencing Advisory Council—Victoria, *Suspended Sentences Discussion Paper* (2005), [8.62].
 615 Sentencing Guidelines Council (UK), *New Sentences: Criminal Justice Act 2003* (2004), [2.2.14].

- 616 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
 617 *Crimes Act 1914* (Cth) ss 19B(1)(d), 20(1)(a), (b).
 618 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [7.303].
 619 *Sentencing Act 1995* (WA) s 51(1).
 620 RC, *Submission SFO 50*, 13 May 2005.
 621 Commonwealth Director of Public Prosecutions, *Consultation*, Melbourne, 31 March 2005;
 Commonwealth Director of Public Prosecutions, *Consultation*, Darwin, 28 April 2005.
 622 *Crimes Act 1914* (Cth) s 3(2).
 623 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [7.503].
 624 See, eg, *Crown Proceedings Act 1958* (Vic); *Penalties and Sentences Act 1992* (Qld) s 33B; *Fines and*
Penalties (Recovery) Act 2002 (NT) s 109.
 625 See *Crown Proceedings Act 1958* (Vic); *Penalties and Sentences Act 1992* (Qld) s 33B.
 626 Breach of sentencing orders is discussed in Ch 17.
 627 These sentencing options are discussed in further detail in Australian Law Reform Commission,
Sentencing of Federal Offenders, IP 29 (2005), [7.72]–[7.85], [7.99]–[7.128].
 628 *Crimes Regulations 1990* (Cth) reg 6.
 629 *Crimes Amendment Act 1982* (Cth).
 630 Commonwealth Director of Public Prosecutions, *Correspondence*, 4 May–2 September 2005.
 631 *United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)*, UN Doc
 A/RES/45/110 (1990) r 2.3.
 632 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 6; *Crimes (Administration of Sentences) Act 1999*
 (NSW) pt 3; *Periodic Detention Act 1995* (ACT).
 633 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7; *Sentencing Act 1991* (Vic) pt 3 div 2; *Rehabilitation*
of Offenders (Interim) Act 2001 (ACT) ch 2; *Sentencing Act 1995* (NT) pt 3 div 5.
 634 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A; *Penalties and Sentences Act 1992* (Qld) pt 3A.
 635 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A; *Sentencing Act 1997* (Tas) s 70.
 636 *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 7; *Penalties and Sentences Act 1992* (Qld) pt 5, div 2;
Criminal Law (Sentencing) Act 1988 (SA) s 7; *Sentencing Act 1997* (Tas) s 7; *Crimes Act 1900* (ACT)
 s 403; *Sentencing Act 1995* (NT) pt 3, div 4. See also *Sentencing Act 1991* (Vic) pt 3, div 3; *Sentencing*
Act 1995 (WA) pt 9, which provide for community based orders.
 637 Compare *Crimes (Sentencing Procedure) Act 1999* (NSW) s 86(1) and *Sentencing Act 1997* (Tas) s 7.
 638 See, eg, *Sentencing Act 1991* (Vic) s 18ZZB(o); *Rehabilitation of Offenders (Interim) Regulation 2001*
 (ACT) reg 7(n); *Prisons (Correctional Services) (Home Detention Orders) Regulations 1996* (NT)
 reg 4(m)(i).
 639 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8(2).
 640 *Crimes (Administration of Sentences) Act 1999* (NSW) ss 107, 110.
 641 *Penalties and Sentences Act 1992* (Qld) s 103(2).
 642 This issue is discussed further in Ch 3.
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 644 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.
 645 See, Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [7.136]–
 [7.141].
 646 LD, *Submission SFO 9*, 10 March 2005; JC, *Submission SFO 25*, 13 April 2005.
 647 A Freiberg, *Submission SFO 12*, 4 April 2005.
 648 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
 649 Confidential, *Consultation*, Melbourne, 31 March 2005; Correctional Services Northern Territory,
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 650 Attorney-General's Department, *Consultation*, Canberra, 16 March 2005.
 651 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; Australian
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 2005; A Freiberg, *Submission SFO 12*, 4 April 2005.
 652 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
 653 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.
 654 J Willis, *Submission SFO 20*, 9 April 2005.
 655 The Office for the Management of Federal Offenders is discussed in Ch 22.
 656 Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [3.1]–[3.7].

- 657 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976).
- 658 *Second Optional Protocol to the International Covenant on Civil and Political Rights*, 15 December 1989, [1991] ATS 19, (entered into force generally on 11 July 1991).
- 659 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, [1989] ATS 21, (entered into force generally on 26 June 1987).
- 660 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990).
- 661 I Potas and J Walker, 'Capital Punishment' (1987) 3 *Trends and Issues in Crime and Criminal Justice* 1, 1.
- 662 *Death Penalty Abolition Act 1973* (Cth) s 4.
- 663 I Potas and J Walker, 'Capital Punishment' (1987) 3 *Trends and Issues in Crime and Criminal Justice* 1, 1–2.
- 664 See, Amnesty International, *Abolitionist and Retentionist Countries* Amnesty International <www.web.amnesty.org/pages/deathpenalty-countries-eng> at 20 September 2005.
- 665 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) arts 6, 7; *Second Optional Protocol to the International Covenant on Civil and Political Rights*, 15 December 1989, [1991] ATS 19, (entered into force generally on 11 July 1991); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, [1989] ATS 21, (entered into force generally on 26 June 1987).
- 666 *United Nations Human Rights Committee General Comment 20: Article 7*, UN Doc HRI/GEN/1/Rev7 (1992), [5]; *Osbourne v Jamaica, Communication No 759/1997, Report of the Human Rights Committee 2000 (Volume II)*, UN Doc A/55/40 (2000).
- 667 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, [1989] ATS 21, (entered into force generally on 26 June 1987) art 1.1.
- 668 The last officially sanctioned whipping is believed to have occurred in 1958: see Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [39], [63]–[65].
- 669 Home Office, *Prisons Over Two Centuries* (2005) Home Office <www.homeoffice.gov.uk/docs/prishist.html> at 20 September 2005.
- 670 *Ibid.*
- 671 *Criminal Justice Act 1948* (UK).
- 672 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) art 8(3)(b).
- 673 *Crimes Act 1900* (ACT) s 580G; *Criminal Law (Sentencing) Act 1988* (SA) s 73; *Criminal Law (Amendment) Act 1992* (WA).
- 674 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) arts 4(1), (2), 6; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, [1989] ATS 21, (entered into force generally on 26 June 1987) art 16.
- 675 *United Nations Human Rights Committee General Comment 20: Article 7*, UN Doc HRI/GEN/1/Rev7 (1992), [5].
- 676 Sentencing hierarchies are discussed in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [7.17]–[7.25].
- 677 Council of Europe, *Consistency in Sentencing* (1993) Council of Europe Press, 29; A Freiberg and R Fox, 'Sentencing Structures and Sanction Hierarchies' (1986) 10 *Criminal Law Journal* 216; Victorian Sentencing Committee, *Sentencing* (1988), 363–364.
- 678 *Sentencing Act 1991* (Vic) s 5(3)–(7); *Children and Young Persons Act 1989* (Vic) ss 137–138; *Sentencing Act 1995* (WA) s 39.
- 679 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [3.204].
- 680 *Crimes Act 1914* (Cth) s 17A.
- 681 Australian Law Reform Commission, *Sentencing: Penalties*, DP 30 (1987), [138]–[156].
- 682 Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005; JC, *Submission SFO 25*, 13 April 2005; LD, *Submission SFO 9*, 10 March 2005; Confidential, *Consultation*, Melbourne, 31 March 2005.

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- 683 K Warner, *Consultation*, Hobart, 13 April 2005; Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.
- 684 A Freiberg, *Submission SFO 12*, 4 April 2005.
- 685 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; J Willis, *Submission SFO 20*, 9 April 2005.
- 686 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.
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- 688 Attorney-General's Department, *Consultation*, Canberra, 16 March 2005; K Warner, *Consultation*, Hobart, 13 April 2005.
- 689 Attorney-General's Department, *Consultation*, Canberra, 16 March 2005; Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.
- 690 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005. A similar view was expressed by ASIC: Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.
- 691 *Ibbs v The Queen* (1987) 163 CLR 447, 451–452; *Veen v The Queen [No 2]* (1988) 164 CLR 465, 478.
- 692 Penalty conversions are discussed in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [7.32]–[7.38].
- 693 A penalty unit is \$110: *Crimes Act 1914* (Cth) s 4AA.
- 694 *Crimes Legislation Amendment Act 1987* (Cth).
- 695 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [409]–[426].
- 696 Australian Taxation Office, *Submission SFO 18*, 8 April 2005; JC, *Submission SFO 25*, 13 April 2005; LD, *Submission SFO 9*, 10 March 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.
- 697 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; T Glynn SC, *Consultation*, Brisbane, 2 March 2005.
- 698 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.
- 699 J Willis, *Submission SFO 20*, 9 April 2005.
- 700 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8.
- 701 See Proposal 7–13.
- 702 These are discussed in Chs 20 and 21.
- 703 Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [7.89].
- 704 *Crimes (Restorative Justice) Act 2004* (ACT).
- 705 *Director of Public Prosecutions (Cth) v Costanzo* [2005] QSC 79, [25].
- 706 See, eg, *Solomons v District Court of New South Wales* (2002) 211 CLR 119.
- 707 Prison Reform Group WA, *Consultation*, Perth, 18 April 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
- 708 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
- 709 A Freiberg, *Submission SFO 12*, 4 April 2005.

8. Ancillary Orders

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Introduction

8.1 This chapter examines the nature and effectiveness of the provisions of Part IB of the *Crimes Act 1914* (Cth) relating to ancillary orders.⁷¹⁰ Ancillary orders are orders made at the time of sentencing that do not have a punitive purpose,⁷¹¹ such as orders for restitution, compensation, forfeiture or costs.

8.2 Forfeiture orders are made pursuant to federal proceeds of crime legislation and are often made independently of the sentencing process.⁷¹² Accordingly, they are not discussed further in this chapter, although they may be relevant to the sentence imposed on a federal offender.⁷¹³

Clarification of terminology

Background

8.3 Reparation is a broad term used to describe any attempt to make amends for a wrong or injury. It encompasses both restitution and compensation.⁷¹⁴ Restitution in the criminal context refers to the return of the exact property taken by an offender to its owner. Compensation refers to the provision of monetary or other recompense by the offender to another for any loss, damage or injury suffered as a result of a crime.⁷¹⁵

Issues and problems

8.4 The terminology used in the *Crimes Act* in relation to reparation orders is confusing. Some provisions of the Act refer to reparation only,⁷¹⁶ while others refer to reparation, restitution and compensation simultaneously.⁷¹⁷ The terms reparation,

restitution and compensation are not defined in the Act and the relationship between them is uncertain. At times the terms appear to be used interchangeably.

8.5 It has been argued that the word ‘reparation’ in the *Crimes Act* could be broad enough to encompass some forms of restorative labour or community service.⁷¹⁸ The ambiguous language used in certain provisions of the Act could support this argument.

ALRC’s views

8.6 The ALRC is of the view that federal sentencing legislation should omit all references to reparation and replace them with the words ‘restitution’ and ‘compensation’. Restitution and compensation should be defined appropriately in the legislation. This will eliminate any confusion arising from the inconsistent use of the words reparation, restitution and compensation. It will also prevent the use of the ancillary orders power in Part IB to impose orders that are not strictly ancillary, such as orders for community service. However, for convenience the term ‘reparation’ will be used in the remainder of this chapter to refer to both restitution and compensation because this is the terminology currently used in the *Crimes Act*.

Proposal 8-1 Federal sentencing legislation should replace the term ‘reparation’ with the terms ‘restitution’ and ‘compensation’, and define them appropriately.

Availability of reparation orders in criminal proceedings

What provision should federal legislation make for orders ancillary to the sentencing of a federal offender, for example, for restitution or reparation for loss suffered? [IP 29, Q7–4, part]

Background

8.7 Section 21B of the *Crimes Act* was introduced in 1926⁷¹⁹ and is the main provision enabling judicial officers to make reparation orders when sentencing federal offenders. Section 21B(1)(c) provides that a judicial officer may order a federal offender to make reparation to the Commonwealth, or to a public authority under the Commonwealth, for any loss suffered or expense incurred by reason of the offence. Section 21B(1)(d) provides that a judicial officer may order a federal offender to make reparation to a person who has suffered loss as a direct result of the offence.

8.8 Other provisions of Part IB empower judicial officers to make reparation orders in certain circumstances, such as when taking other offences into account on sentence or imposing state or territory sentencing options pursuant to s 20AB.⁷²⁰

8.9 In 2002–03 the CDPP obtained reparation orders to the value of \$18,799,396 and in 2003–04 to the value of \$34,905,838.⁷²¹

8.10 All states and territories have legislation enabling criminal courts to make reparation orders when sentencing offenders.⁷²² The *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* states that offenders should, where appropriate, make fair restitution to victims, their families or dependants.⁷²³ It also provides that judicial and administrative procedures should enable victims of crime to obtain redress through procedures that are expeditious, fair, inexpensive and accessible.⁷²⁴

Issues and problems

8.11 Some submissions expressed support for the retention of provisions enabling reparation orders to be made.⁷²⁵ The Australian Securities and Investments Commission (ASIC) submitted that reparation orders help to alleviate the financial loss suffered by victims of financial crime, and emphasise to the offender and the community that financial crimes are harmful and serious.⁷²⁶ The Australian Taxation Office (ATO) submitted that the Australian Government Investigation Standards required investigating agencies to attempt to recover the proceeds of fraud against the Commonwealth, and that ancillary orders provided a means of establishing a legally enforceable civil debt against an offender without the need for separate civil action.⁷²⁷

ALRC's views

8.12 In 1988, the ALRC's report, *Sentencing* (ALRC 44) recommended that ancillary orders for restitution and compensation should continue to be available in the sentencing of federal offenders.⁷²⁸ The ALRC remains of the view that federal sentencing legislation should continue to enable judicial officers to make reparation orders when sentencing federal offenders. Reparation orders are an established and effective way of recognising the interests and needs of victims of crime. Empowering a court to make reparation orders provides victims of crime (whether individuals or institutions) with a statutory remedy that aims to restore victims to the position they were in prior to the offence, in so far as money can do so. It also promotes the effective use of judicial resources by eliminating the need for separate civil and criminal proceedings in relation to the same conduct.

8.13 As discussed below, the ALRC considers that reparation orders should retain their civil status and should be enforced civilly. Accordingly, empowering judicial officers to make reparation orders when sentencing federal offenders will not undesirably conflate civil and criminal proceedings.

Reparation as a sentencing option

What are the objectives of [ancillary] orders and in what circumstances should they be available? [IP 29, Q7–4, part]

Background

8.14 Many criminal offences also constitute civil wrongs that give rise to civil liability. For example, the crime of assault can also constitute the tort of battery.⁷²⁹ Although one act may give rise to both criminal and civil liability, the criminal law and the civil law have historically pursued very different objectives. The criminal law is primarily concerned with punishment, while the civil law is primarily concerned with compensation.⁷³⁰ Statutory provisions enabling a criminal court to order that an offender make reparation have traditionally been viewed as a means of providing a victim with a ‘quick and easy civil remedy’.⁷³¹

8.15 Several provisions of Part IB of the *Crimes Act* suggest that reparation orders *are* intended to enable victims of crime to achieve quick and easy civil remedies. This is evident from the fact that: reparation orders may be made ‘in addition to the penalty’ imposed on the offender; reparation orders are enforced as civil debts; and federal offenders cannot be imprisoned for failure to comply with a reparation order.⁷³²

8.16 A number of state and territory jurisdictions characterise reparation orders as civil orders.⁷³³ However, in some jurisdictions reparation orders can be imposed as independent sentencing options.⁷³⁴ The *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* states that governments should consider making restitution a sentencing option.⁷³⁵

Issues and problems

8.17 It has been argued that reparation orders may achieve some of the purposes of sentencing such as deterrence, rehabilitation and denunciation.⁷³⁶ Surveys have revealed that victims of crime and the general public view reparation as an important feature of the sentencing process.⁷³⁷

8.18 However, it has been argued that reparation orders are inappropriate sentencing options because they are not punitive and seek only to restore the status quo. It has been argued that the appropriate and proportionate sentence for a particular offence will not always be linked to the harm caused by the offence.⁷³⁸ Further, making reparation orders available as sentencing options could allow wealthy offenders to escape punishment and would give victims of crime an advantage over other civil litigants by enabling reparation orders to be enforced in the criminal justice system.⁷³⁹

8.19 In 1994, the Law Reform Committee of the Parliament of Victoria rejected the idea of establishing reparation orders as sentencing options,⁷⁴⁰ and in 1996 the New

South Wales Law Reform Commission concluded that reparation orders should retain their ancillary status.⁷⁴¹

8.20 A number of stakeholders expressed the view that reparation orders were analogous to monetary penalties and effectively served to punish offenders twice for the same conduct.⁷⁴² Sisters Inside submitted that:

the sentencing process should provide that judges and magistrates *must* consider the issue of reparation for social security offences and include any reparation as part of the sentence for the offence and that the imposition of reparation orders—in social security and other matters—should only be considered where it would not impact negatively on the resettlement and community reintegration of a person sentenced to imprisonment.⁷⁴³

ALRC's views

8.21 The ALRC is of the view that reparation orders should retain their ancillary status and should not be made independent sentencing options. A reparation order seeks to restore a victim of crime to his or her situation prior to the offence. Restoring the status quo does not constitute punishment. Further, a reparation order may not be an appropriate sentencing option in circumstances where there is little correlation between the harm caused by an offence and the objective seriousness of the offence.

8.22 The ALRC agrees that reparation orders can impose significant financial burdens on federal offenders, which may hinder an offender's prospects of rehabilitation and reintegration into the community. Where the victim of a federal crime is the Commonwealth, there is a potential conflict between the state's interest in promoting the effective rehabilitation of federal offenders and its interest in protecting public funds for the benefit of society. In such cases, the ALRC is of the view that the Commonwealth should not seek a reparation order if there is a real prospect that such an order would impede the purposes of sentencing, in particular the rehabilitation of the offender and his or her reintegration into the community.

Ancillary orders as conditions of sentencing options

Background

8.23 The *Crimes Act* currently enables reparation and costs orders to be made as conditions of sentencing orders imposed pursuant to ss 19B and 20(1) of the Act. If an ancillary order has been made a condition of a sentencing order, an offender who fails to comply with the ancillary order will be in breach of his or her sentencing order. Accordingly, the original sentencing order imposed on the offender may be revoked and the offender may be re-sentenced for the original offence.⁷⁴⁴ However, a federal offender cannot be imprisoned for failure to comply with an ancillary order that has been imposed as a condition of a federal sentencing order.⁷⁴⁵ The ALRC was informed that there are difficulties enforcing reparation orders that are conditions of federal

sentences because Part IB does not enable these orders to be treated as civil debts in the same way that orders made pursuant to s 21B are treated as civil debts.⁷⁴⁶

8.24 Some state and territory sentencing Acts enable reparation orders to be conditions of sentencing orders,⁷⁴⁷ while others prohibit this.⁷⁴⁸

ALRC's views

8.25 In Chapter 7, the ALRC proposes that federal sentencing legislation should prohibit a court from making a reparation order a condition of a federal offender's discharge, release or suspended sentence.⁷⁴⁹ The *Crimes Act* enables judicial officers to make reparation orders in addition to the sentence imposed. These orders are enforced by way of civil enforcement action such as the seizure and sale of land or property, registration of a charge on land, or garnishee of wages.⁷⁵⁰ It is incongruous that reparation orders can be attached as conditions of some sentencing options and enforced through the breach procedures in the *Crimes Act* when other reparation orders are ancillary to the sentencing process and are enforced as civil debts.

8.26 The ALRC does not consider it desirable to use the criminal justice system to coerce payment of a reparation order by placing offenders at risk of being re-sentenced for failure to make reparation. To require a federal offender to comply with a reparation order as a condition of his or her sentence is to create an undesirable and confusing amalgam of criminal and civil procedures, which should be avoided.

Relevance of the means of offender

Background

8.27 Section 16C of the *Crimes Act* requires a court to take into account a federal offender's financial circumstances before imposing a fine. This provision was introduced to 'reduce the likelihood of default imprisonment for impecunious offenders'.⁷⁵¹ There is no legislative requirement that a court take into account the financial circumstances of a federal offender before making a reparation order. In contrast, some state legislation expressly authorises a court to take into account the financial circumstances of an offender before making an order for compensation.⁷⁵²

Issues and problems

8.28 There has been some judicial debate about the relevance of an offender's financial circumstances to the making of reparation orders. It has been argued that it is inappropriate to take an offender's financial circumstances into account when providing victims of crime with a civil remedy when the offender's financial circumstances would be irrelevant in civil proceedings.⁷⁵³

8.29 In *R v Braham*, the Full Court of the Supreme Court of Victoria noted that the power to make a compensation order was intended to enable criminal courts to provide victims of crimes with a civil remedy and held that the means of an offender should not be considered when exercising the power to make a compensation order unless there

was a 'necessary implication to the contrary'.⁷⁵⁴ In *R v Knight* the New South Wales Court of Criminal Appeal upheld a reparation order made pursuant to s 21B despite accepting that it was unlikely that the offender would ever be able to pay the amount specified in the order.⁷⁵⁵ Further, in *Gregory v Gregory*, Cummins J held that:

differentially to award compensation because of the offender's means to pay gives the wholly undesirable appearance that victims with similar suffering are valued differentially by the law. Just as there should not be one law for the rich and one for the poor, so there should not be a sliding scale of compensation for victims of crime because the offender is rich or poor.⁷⁵⁶

8.30 However, in *Vlahov v Commissioner of Taxation*, the Full Court of the Supreme Court of Western Australia held that a court could consider the personal circumstances and means of the offender when exercising the discretion conferred by s 21B.⁷⁵⁷ Appellate courts in some jurisdictions have applied this judgment.⁷⁵⁸ It has been noted that the judicial reluctance to order reparation that an offender cannot pay

seems to be as much to do with the court's reluctance to make futile orders or orders that by objective standards are likely to be counterproductive as it is to do with notions of rehabilitation or subjective concern for the wrongdoer's wellbeing.⁷⁵⁹

8.31 The decision in *Vlahov* has been criticised for relying on United Kingdom authorities when legislation in the United Kingdom expressly requires judicial officers to consider the financial circumstances of an offender when making a compensation order.⁷⁶⁰ In *R v Hookham* the High Court left open the question of whether the financial circumstances of the offender should be taken into account in determining the quantum of reparation to be made, holding that the question did not properly arise for determination in the matter before the court.⁷⁶¹

8.32 The New South Wales Legal Aid Commission and Victoria Legal Aid submitted that a court should take into account the financial circumstances of a federal offender before making a reparation order.⁷⁶² Victoria Legal Aid submitted that courts should be given clear guidance regarding their power to reduce or waive reparation orders in circumstances where an offender has limited capacity to pay.⁷⁶³

8.33 In its 1994 report, *Restitution for Victims of Crime*, the Law Reform Committee of the Parliament of Victoria concluded that sentencing courts should take the financial circumstances of offenders into account when making reparation orders and should decline to make such orders when offenders would be unable to comply with them.⁷⁶⁴ In its 1996 report on sentencing, the New South Wales Law Reform Commission concluded that the New South Wales provision enabling courts to make compensation orders when sentencing offenders was broad enough to enable the court to consider an offender's ability to pay when making such an order.⁷⁶⁵

ALRC's views

8.34 The ALRC is currently of the view that federal sentencing legislation should preclude a court from considering an offender's financial circumstances when making a reparation order. Clearly, a tension exists between the desire to recognise the civil rights of victims of crime in the sentencing process and the desire to avoid the imposition of crushing financial burdens on federal offenders. However, the ALRC does not believe that this tension is best resolved by empowering courts to consider factors relevant to sentencing when making ancillary orders.

8.35 A central purpose of the power to make reparation orders is to ensure that victims of crime receive adequate compensation for the loss they have suffered as a result of an offence. This purpose is not achieved if the financial circumstances of an offender are taken into account so as to reduce the quantum of the compensation to be paid to a victim. The ALRC does not consider it desirable that victims of crime receive less compensation than other civil litigants because of the financial circumstances of the offender.

8.36 As discussed in Chapter 7, the ALRC is of the view that s 16C of the *Crimes Act*—which requires a court to take into account an offender's financial circumstances before imposing a fine—enables a court to consider a reparation order that it has made or proposes to make when imposing a fine on a federal offender. This may reduce the financial burden placed on a federal offender who is ordered to pay a fine and make reparation.

Priority issues

Should federal legislation specify priorities in relation to the payment of fines and ancillary monetary orders? [IP 29, Q7–4, part]

Background

8.37 Part IB of the *Crimes Act* does not require a court sentencing federal offenders to give priority to a reparation order over a fine when an offender is ordered to pay both, but lacks the means to do so. In contrast, some state sentencing legislation expressly provides that, where a court considers it appropriate to make a compensation order and impose a fine, and the offender cannot pay both, the court must give priority to the compensation order.⁷⁶⁶ One state provision provides that where a court makes a costs recovery order, a compensation order, and imposes a fine, but the offender has insufficient means to pay them all, the court must give first preference to the compensation order, second preference to the costs recovery order, and third preference to the fine.⁷⁶⁷

Issues and problems

8.38 In 1987, the ALRC expressed the view that where the means of an offender are limited, priority should be given to reparation.⁷⁶⁸ It has been said that giving priority to a reparation order over a fine is an acknowledgment that compensating victims is more important than punishing offenders.⁷⁶⁹

8.39 A number of stakeholders expressed the view that federal sentencing legislation should specify that reparation orders take priority over the payment of fines.⁷⁷⁰ The ATO submitted that it was necessary to specify priorities between reparation orders and fines in order to ensure that proceeds of crime were not used to pay fines.⁷⁷¹ However, it has been argued that prioritising reparation orders over fines overrides the general principle that these orders are ancillary to the sentencing process.⁷⁷²

ALRC's views

8.40 The ALRC does not believe that federal sentencing legislation should specify priorities between fines and ancillary orders. As discussed above, ancillary orders are compensatory rather than punitive, and they should not be sentencing options in their own right. While prioritising an ancillary order over a fine may help to ensure that a victim of crime receives recompense for loss suffered by reason of an offence, it displaces the state's interest in punishing an offender for committing an offence. While it is important to attempt to ensure that victims of federal offences are restored to the position they were in prior to the offence, this is not the principal function of the criminal justice system. Criminal proceedings are generally initiated and conducted by the state on behalf of the community to vindicate a public wrong. Accordingly, the ALRC considers that ancillary orders should remain separate from, and ancillary to, the sentencing process and should not take priority over sentencing options. If the impecuniosity of federal offenders is a real obstacle to the just compensation of victims of crime, the appropriate solution may be to establish a federal victims compensation fund. That matter is discussed briefly below but is outside the terms of this Inquiry.

Reparation for non-economic loss***Background***

8.41 Part IB of the *Crimes Act* allows reparation orders to be made in respect of loss suffered or (in some cases) expense incurred as a result of a federal offence. It does not explicitly provide that a reparation order may be made in respect of non-economic loss such as pain and suffering, loss of amenities or loss of expectation of life. However, some provisions of Part IB implicitly accept that injury, which may give rise to non-economic loss, may result from the commission of a federal offence. Section 16A(e) provides that the court is to take into account any 'injury, loss or damage' resulting from the offence when sentencing a federal offender, and s 16A(f) provides that the court is to take into account the degree to which a person has shown contrition for an

offence by taking action to make reparation for any injury, loss or damage resulting from the offence.

8.42 There are currently a number of federal offences that may result in individual victims suffering non-economic loss—for example slavery, sexual servitude and terrorism offences.⁷⁷³

8.43 In most states and territories, courts are empowered to direct offenders to pay compensation to victims for injury suffered as a result of an offence.⁷⁷⁴ In addition, all states and territories have established statutory criminal injuries compensation schemes that enable victims of crime to receive compensation from public funds.⁷⁷⁵ For example, in New South Wales victims of acts of violence can receive compensation from the Victims Compensation Fund for injury and financial loss attributable to the act of violence.⁷⁷⁶

Issues and problems

8.44 There is no federal victim compensation scheme. In ALRC 15, the ALRC considered arguments for and against such a scheme and concluded that it was desirable and should be established.⁷⁷⁷

8.45 Victim Support Services Inc submitted that there should be national coordination of issues relating to compensation for victims of federal offences and that the Australian Government should compensate victims of federal offences where the offender lacks the means to make reparation for his or her offending conduct.⁷⁷⁸ Victims Support Australasia expressed the view that there needed to be a coordinated, national approach to victims' issues in Australia.⁷⁷⁹

ALRC's views

8.46 There is no reason in principle to distinguish between economic and non-economic loss suffered as a result of a federal offence. There are a number of federal offences that could give rise to non-economic loss. The ALRC considers that federal sentencing legislation should be amended to clarify that judicial officers are authorised to order federal offenders to pay compensation for any loss suffered by reason of an offence, whether the loss is economic or non-economic. The question of whether a federal victim compensation scheme should be established is outside the scope of this Inquiry.

<p>Proposal 8-2 Federal sentencing legislation should clarify that a court may order a federal offender to pay compensation for any loss suffered by reason of the offence, regardless of whether the loss is economic or non-economic.</p>
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Preserving civil rights of action

8.47 Section 15F of the *Crimes Act* provides that nothing in the Act affects the right of a person aggrieved by an offence under the Act to institute civil proceedings in any court. Only the civil rights of victims of offences under the *Crimes Act* are expressly preserved, yet many offences that were formerly located in the *Crimes Act* are now located in the *Criminal Code Act 1995* (Cth). In addition, over 500 Commonwealth statutes contain criminal offences.⁷⁸⁰ Accordingly, the ALRC considers that s 15F should be amended to clarify that the civil rights of victims of all federal offences are preserved.

Proposal 8-3 Federal sentencing legislation should be amended to clarify that nothing in that legislation affects the right of any person who is aggrieved by conduct punishable as a federal offence to institute civil proceedings in respect of that conduct, but the person shall not be compensated more than once for the same loss.

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- 710 Ancillary orders are discussed in Australian Law Reform Commission, *Sentencing of Federal Offenders*,
IP 29 (2005) [7.39]–[7.48].
- 711 K Warner, *Sentencing in Tasmania* (2nd ed, 2002), [5.101].
- 712 *Proceeds of Crime Act 2002* (Cth).
- 713 Forfeiture orders are discussed further in Ch 6.
- 714 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [5.102].
- 715 *Ibid*, [5.102].
- 716 *Crimes Act 1914* (Cth) s 16A(2)(f)(i).
- 717 *Ibid* ss 16BA(5), 19B(1)(d)(ii), 20(1)(ii), 20AB(4)(b).
- 718 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [5.209].
- 719 *Crimes Act 1926* (Cth).
- 720 *Crimes Act 1914* (Cth) ss 16BA(5), 20AB(4)(b).
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- 724 *Ibid*, [5].
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- 731 V Morabito, 'Compensation Orders Against Offenders: An Australian Perspective' (2000) 4 *Singapore Journal of International and Comparative Law* 59, 86; Law Reform Committee—Parliament of Victoria, *Restitution for Victims of Crime*, Interim (1993), [2.34]–[2.35].
- 732 *Crimes Act 1914* (Cth) ss 21B, 19B(2A), 20(2A).
- 733 See, eg, *Victims Support and Rehabilitation Act 1996* (NSW); *Sentencing Act 1991* (Vic) pt 4; *Sentencing Act 1995* (WA) s 110; *Sentencing Act 1997* (Tas) pt 9.
- 734 See, eg, *Criminal Law (Sentencing) Act 1988* (SA). See also Crimes (Sentencing) Bill 2005 (ACT) cll 19, 20; *Sentencing Act 2002* (NZ) s 12.
- 735 *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc A/Res/40/34 (1985), [9].
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- 741 New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), [13.2].
- 742 JC, *Submission SFO 25*, 13 April 2005; Offenders Aid and Rehabilitation Services South Australia, *Consultation*, Adelaide, 20 April 2005; Prisoners' Legal Service and others, *Consultation*, Brisbane, 4 March 2005; Welfare Rights Centre Inc (Queensland), *Submission SFO 29*, 15 April 2005; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005.
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- 744 *Crimes Act 1914* (Cth) s 20A. Breach of sentencing orders is discussed in Ch 17.
- 745 *Ibid.* ss 19B(2A), 20(2A).
- 746 Commonwealth Director of Public Prosecutions, *Correspondence*, 21 April 2005.
- 747 See, eg, *Penalties and Sentences Act 1992* (Qld) ss 94, 104. See also Crimes (Sentencing) Bill 2005 (ACT) cl 13(3)(e) (reparation order condition of good behaviour order).
- 748 See, eg, *Sentencing Act 1995* (WA) s 110(5).
- 749 See Ch 7.
- 750 *Crimes Act 1914* (Cth) s 21B(3).
- 751 Explanatory Memorandum (Senate), Crimes Legislation Amendment Bill (No 2) 1989 (Cth), 8.
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- 754 *R v Braham* [1977] VR 104, 112.
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- 756 *Gregory v Gregory* (2000) 112 A Crim R 19, 26.
- 757 *Vlahov v Federal Commissioner of Taxation* (1993) 93 ATC 4501, 4507.
- 758 See, *R v Hookham* (1993) 68 A Crim R 129; *Vadasz v Director of Public Prosecutions (Cth)* [1999] SASC 255; *Davies v Taylor* (1997) 7 Tas R 265.
- 759 *Gould v Commissioner of Taxation (Cth)* (1998) 100 A Crim R 300, 306.
- 760 V Morabito, 'Compensation Orders Against Offenders: An Australian Perspective' (2000) 4 *Singapore Journal of International and Comparative Law* 59, 95.
- 761 *Hookham v The Queen* (1994) 181 CLR 450.
- 762 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Victoria Legal Aid, *Submission SFO 31*, 18 April 2005.
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- 765 New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), [13.14].
- 766 *Sentencing Act 1991* (Vic) s 50(4); *Penalties and Sentences Act 1992* (Qld) ss 14, 48(4); *Criminal Law (Sentencing) Act 1988* (SA) s 14; *Sentencing Act 1997* (Tas) s 43; *Sentencing Act 1995* (NT) s 17(3).
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- 770 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005; Victim Support Service Inc, *Consultation*, Adelaide, 20 April 2005.
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- 772 K Warner, *Sentencing in Tasmania* (2nd ed, 2002), [5.307].
- 773 *Criminal Code* (Cth) ch 8 div 270, ch 5 pt 5.3 div 101. Trends in federal offences are discussed further in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), Ch 2.
- 774 See, eg, *Victims Support and Rehabilitation Act 1996* (NSW) pt 4 div 1; *Sentencing Act 1991* (Vic) s 85B; *Criminal Offence Victims Act 1995* (Qld) s 24; *Penalties and Sentences Act 1992* (Qld) s 35(1)(c); *Criminal Law (Sentencing) Act 1988* (SA) s 53; *Sentencing Act 1997* (Tas) s 67; *Sentencing Act 1995* (NT) s 88(a).
- 775 *Victims Support and Rehabilitation Act 1996* (NSW); *Victims of Crime Assistance Act 1996* (Vic); *Criminal Offence Victims Act 1995* (Qld); *Criminal Injuries Compensation Act 2003* (WA); *Victims of Crime Act 2001* (SA); *Criminal Injuries Compensation Act 1976* (Tas); *Victims of Crime (Financial Assistance) Act 1983* (ACT); *Crimes (Victims Assistance) Act 1982* (NT).
- 776 *Victims Support and Rehabilitation Act 1996* (NSW) s 10, sch 1.
- 777 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [462]–[466].
- 778 Victim Support Service Inc, *Consultation*, Adelaide, 20 April 2005.
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- 780 See Law Book Co, *Watson & Watson Australian Criminal Law: Federal Offences*, vol 1.

9. Determining the Non-Parole Period

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9.1 This chapter considers particular issues in relation to determining the non-parole period, namely, the purpose of the non-parole period; the factors to be considered in fixing the non-parole period; when a non-parole period should be fixed; and the relation between the non-parole period and the head sentence.

Purpose and factors

What is the purpose of setting a non-parole period? Should the purpose be set out in federal legislation? What factors should be considered in determining the non-parole period? [IP 29, Q8–5, part]

Background

9.2 The non-parole period in relation to a sentence of imprisonment is the period during which an offender must remain in custody and is not to be released on parole.⁷⁸¹ Under Part IB of the *Crimes Act 1914* (Cth) the court is directed to explain to a federal offender the purpose of the non-parole period, although this purpose is not expressed in the legislation.⁷⁸² Similarly, the sentencing legislation of the states and territories does not set out the purpose or purposes of a non-parole period.

9.3 The non-parole period serves initially to demarcate both the minimum period that must be served in custody and the longest possible term of parole supervision under the sentence.⁷⁸³

9.4 In *R v Shrestha*, Brennan and McHugh JJ stated:

It is clear that, although a minimum term is a benefit for the offender, it is a benefit which the offender may be allowed only for the purpose of his rehabilitation and it must not be shortened beyond the lower limit of what might be reasonably regarded as condign punishment.⁷⁸⁴

9.5 In *Bugmy v The Queen*, Mason and McHugh JJ stated that a judicial officer does not fix a minimum term solely or primarily in accordance with the offender's prospects of rehabilitation.⁷⁸⁵ Thus, other purposes of sentencing—such as punishment, deterrence and protection of the community—are relevant to fixing the non-parole period as well as to fixing the head sentence.⁷⁸⁶

9.6 Part IB does not set out a separate list of factors to which the court must have regard in fixing a non-parole period, but it does set out specific factors to which the court is to have regard in declining to fix a non-parole period. These factors are the nature and circumstances of the offence and the antecedents of the offender.⁷⁸⁷

Issues and problems

9.7 No issues or problems were identified in consultations or submissions in relation to the purposes of the non-parole period. One submission stated that the non-parole period serves many purposes, and that the main one was reinforcing the potential for rehabilitation.⁷⁸⁸ Other submissions and consultations nominated the rehabilitation of an offender, or allowing an offender to reintegrate into the community, as the only purposes of a non-parole period.⁷⁸⁹ However, no stakeholder addressed the issue of whether the purposes of a non-parole period should be set out in federal legislation.

9.8 Similarly, no issues or problems were expressed in consultations or submissions in relation to the factors to be considered by a court in fixing a non-parole period. The Law Society of South Australia submitted that there was no difference in principle or practice between the factors relevant to the non-parole period and those relevant to the head sentence.⁷⁹⁰

ALRC's views

9.9 Fixing a non-parole period is just one aspect of sentencing.⁷⁹¹ The principles, purposes and factors relevant to sentencing are also relevant to fixing the non-parole period, or to declining to fix a non-parole period. However, while the factors that the court must take into account when fixing the non-parole period are likely to be the same as those applicable to fixing the head sentence, the weight to be attached to these

factors and the manner in which they are relevant will differ because of the different questions being considered when fixing a non-parole period.⁷⁹²

9.10 The ALRC does not believe there is any need for a separate legislative provision explaining the purposes of a non-parole period, or setting out factors to be considered in determining a non-parole period. Rather, federal sentencing legislation should provide that, in fixing the non-parole period or in declining to fix a non-parole period, the court must have regard to the purposes, principles and factors relevant to sentencing, and to the factors relevant to the administration of the criminal justice system.⁷⁹³ The current provision in Part IB, which requires the court to have regard to the nature and circumstances of the offence and the antecedents of the offender, does not give a clear indication that the court must have regard to other potentially relevant factors in fixing or declining to fix a non-parole period.

9.11 Although Part IB directs the court to explain to an offender the ‘purpose’ of fixing a non-parole period, the ALRC considers ‘purpose’ to be the wrong term if it means that a court is expected to explain the justification or philosophy underpinning the non-parole period, as opposed to the practical effect of the non-parole period on the offender’s sentence. This issue is addressed in the proposal dealing with explanation of sentence in Chapter 13.

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

When non-parole period should be fixed

In what circumstances should a non-parole period be set when sentencing a federal offender to a term of imprisonment? [IP 29, Q 8–5, part]

Background

9.12 Part IB of the *Crimes Act* precludes a court from fixing a non-parole period for sentences of three years or less,⁷⁹⁴ and provides that a court must fix a non-parole period (or a recognizance release order) for sentences exceeding three years.⁷⁹⁵ However, as discussed above, even for sentences of more than three years, a court may currently decline to fix a non-parole period having regard to the nature and circumstances of the offence and the antecedents of the offender.⁷⁹⁶

9.13 The sentencing provisions of many states and territories generally require a non-parole period to be fixed in respect of comparatively shorter periods of imprisonment, ranging from sentences in excess of six months,⁷⁹⁷ one year,⁷⁹⁸ or two years.⁷⁹⁹

ALRC's views

9.14 No views were expressed in consultations or submissions in relation to this issue but the ALRC considers that Part IB of the *Crimes Act* is out of step with the position in many states and territories in requiring a non-parole period to be fixed only in respect of comparatively longer sentences of imprisonment. Section 19AC of the *Crimes Act*, which precludes a court from fixing a non-parole period for sentences of three years or less, should be amended.

9.15 Having regard to the sentences for which a non-parole period must be fixed in the states and territories, the ALRC considers that a sentence of 12 months or more is an appropriate term in respect of which a court should generally fix a non-parole period. Parole is generally unsuitable in respect of sentences of imprisonment of 12 months or less because there is insufficient time for effective supervision on parole, or to complete rehabilitative programs in prison, which is a factor to be considered in deciding whether to release an offender on parole.⁸⁰⁰

9.16 As discussed in Chapter 23, parole serves a number of useful purposes, including the reintegration of the offender in the community and the rehabilitation of the offender. The ALRC supports the principle that federal offenders serving sentences of less than three years should be able to enjoy the benefits of parole provided the sentence is of sufficient duration to make parole feasible. At present, those benefits are available only to federal offenders serving sentences greater than three years. The ALRC's support for extending the circumstances in which a court should fix a non-parole period should also to be viewed in the context of the proposal to repeal the provision in Part IB requiring the court to make a 'recognizance release order' for sentences of three years or less.⁸⁰¹

9.17 A court should not be required to fix a non-parole period in respect of a sentence exceeding 12 months where it has ordered the sentence to be suspended⁸⁰² or where it has expressly declined to fix a non-parole period.

Proposal 9–2 Federal sentencing legislation should provide that, when sentencing a federal offender to a term of imprisonment, a court must set a non-parole period unless it is satisfied that it is not appropriate to set a non-parole period and expressly declines to do so. However, a court must not set a non-parole period if:

- (a) the term of imprisonment is less than 12 months; or
- (b) the court has made an order to suspend the sentence.

Relation between non-parole period and head sentence

What is the appropriate relation between the non-parole period and the head sentence? [IP 29, Q8–5, part]

Background

9.18 Amendments made to Part IB by the *Anti-Terrorism Act 2004* (Cth) introduced minimum non-parole periods for persons sentenced for ‘minimum non-parole offences’, namely, treachery, a terrorism offence, treason or espionage.⁸⁰³ The minimum non-parole period is to be at least three-quarters of the sentence of imprisonment imposed by the court, although the court retains the discretion to impose a longer non-parole period if considered appropriate in the circumstances.⁸⁰⁴

9.19 Apart from the ‘minimum non-parole offences,’ Part IB provides no guidance in relation to determining the length of a non-parole period for federal offences. This is also the case in a number of the states and territories.⁸⁰⁵

9.20 However, some state and territory sentencing legislation does provide guidance about the proportion between the non-parole period and the head sentence, which in this chapter is called the ‘relative non-parole period’. General guidance is sometimes provided by legislative specification of a minimum relative non-parole period—which ranges from half of the sentence⁸⁰⁶ to three-quarters of the sentence.⁸⁰⁷ Specific guidance is sometimes provided for particular offences by legislative specification of minimum relative non-parole periods⁸⁰⁸ or standard non-parole periods.⁸⁰⁹ Where standard non-parole periods are specified, the court is able, in defined circumstances, to impose a non-parole period that is longer or shorter than the standard.⁸¹⁰ In some cases a court must find ‘exceptional circumstances’ in order to justify a non-parole period that is shorter than the standard.⁸¹¹

9.21 Some state and territory legislation provides guidance in relation to the duration of a non-parole period. The Northern Territory sentencing legislation precludes the fixing of a non-parole period of less than eight months in certain circumstances.⁸¹² Victorian sentencing legislation provides that the non-parole period must be at least six months less than the term of the sentence⁸¹³—which is to allow for a realistic period of supervision if the offender is released on parole⁸¹⁴—but it is otherwise silent on the relationship between the non-parole period and the head sentence.

Issues and problems

9.22 Views expressed in consultations and submissions were divided on the issue of whether federal sentencing legislation should provide guidance about the relative non-parole period. Some stakeholders were opposed to any form of legislative guidance involving minimum, fixed or maximum non-parole periods.⁸¹⁵ The Law Society of South Australia expressed the view that such guidance was inappropriate⁸¹⁶ and the New South Wales Legal Aid Commission submitted that:

rather than specifying the various circumstances in relation to the setting of non-parole periods courts should retain a general discretion as to the length of any non-parole period and the reasons for determining the ratio in a particular case.⁸¹⁷

9.23 On the other hand, some stakeholders supported legislative guidance about the relative non-parole period in order to address disparities in sentencing in this area.⁸¹⁸ One federal offender submitted that the relative non-parole period should be between 50 and 70 per cent of the head sentence.⁸¹⁹ The Commonwealth Director of Public Prosecutions submitted that there should be an appropriate relative non-parole period and that, in the interests of promoting consistency, a legislative ‘starting point’ of two-thirds or 70 per cent should be adopted, and that judicial officers should be required to give reasons where they depart from this ‘starting point’.⁸²⁰

9.24 Data on federal offenders, maintained by the Attorney-General’s Department and analysed by the Australian Institute of Criminology (AIC), reveals that across the entire federal prisoner population 69 per cent of federal offenders receive non-parole periods that are at least 50 per cent of their head sentence; with a noticeable clustering of non-parole periods between 50 and 59 per cent of the head sentence and a further, larger clustering between 60 and 69 per cent of the head sentence.⁸²¹

9.25 The AIC’s analysis reveals that there is some variation in the mean (average) ratio of the non-parole period to the head sentence across the jurisdictions, ranging from 51 per cent in the Northern Territory to 72 per cent in Tasmania.⁸²²

9.26 The AIC’s analysis of the relative non-parole period for each jurisdiction shows that non-parole periods are most frequently fixed at 50 per cent of the head sentence in Western Australia, Tasmania and the Northern Territory, while in New South Wales non-parole periods are most frequently fixed at 60 to 69 per cent of the head sentence. Some jurisdictions—namely Queensland, the ACT and the Northern Territory—impose a relatively high percentage of sentences with non-parole periods that are less than half the head sentence. In Queensland, for example, 50 per cent of prisoners had sentences imposed in which the non-parole period was less than 50 per cent of the head sentence.⁸²³

9.27 Another measure of the non-parole period—‘time expected to serve’—also shows substantial variation across the states and territories. Time expected to serve is a

measure of how long a prisoner is expected to remain in prison before being released, assuming the prisoner is released on the date he or she first becomes eligible. Generally speaking, it is a measure of the non-parole period where one is included in the sentence and a measure of the total sentence for those cases where there is a fixed sentence without a non-parole period. For all federal prisoners in custody on 13 December 2004, the mean (average) time expected to serve was 65 months, but this ranged from 17 months in Tasmania to 115 months in the Northern Territory.⁸²⁴ Similar disparities existed for particular categories of federal offences. For example, the mean time expected to serve for drug offences under the *Customs Act 1901* (Cth) was 89 months across all jurisdictions, but this ranged from 58 months in South Australia to 182 months in the Northern Territory, nearly double the national average.⁸²⁵

Options for reform

9.28 There are two main options for reform. Having regard to the desirability of promoting consistency, the first is to establish a benchmark for the relative non-parole period of a federal sentence. Judicial officers would be able to fix either a lower or higher non-parole period where it is warranted in all the circumstances, taking into account the purposes, principles and factors relevant to sentencing, and the factors relevant to the administration of the criminal justice system. A judicial officer would not need to find special circumstances in order to make a variation from the benchmark. Unlike a minimum non-parole period, which restricts a judicial officer's ability to fix a lower non-parole period, this approach allows for flexibility in fixing a non-parole period that is appropriate in all the circumstances of the case.

9.29 Having regard to the fact that most federal offenders (38.9 per cent) have a sentence imposed in which the non-parole period represents 60 to 69 per cent of the head sentence,⁸²⁶ an appropriate benchmark for the non-parole period could be fixed at either two-thirds of the head sentence, or perhaps somewhat lower, at 60 per cent.

9.30 An alternative option to establishing a benchmark is to allow judicial officers unfettered discretion in fixing the length of non-parole periods for federal sentences. This is closer to the current situation, as judicial officers already have complete discretion in fixing non-parole periods except for minimum non-parole offences. Such an approach allows a high degree of flexibility but provides no guidance to judicial officers and therefore does not address the marked disparities in fixing non-parole periods across the jurisdictions.

ALRC's views

9.31 ALRC 44 expressed the view that, in the interests of certainty and 'truth in sentencing', a significant proportion of a custodial order should be spent in prison. It recommended that this proportion be specified in legislation, and that in general it should be 70 per cent (and in no case less than 50 per cent) of the head sentence.⁸²⁷

9.32 The ALRC remains of the view that judicial officers should maintain a broad discretion in fixing the length of a non-parole period. However, having regard to the

data described above, which reveal significant disparities in the percentage of the head sentence formed by the non-parole period, the ALRC has formed the preliminary view that it would be advantageous to provide judicial officers with more guidance.

9.33 The ALRC prefers the less prescriptive approach of establishing a benchmark non-parole period, which a court can increase or decrease in appropriate cases, having regard to the purposes, principles and factors relevant to sentencing, and the factors relevant to the administration of the criminal justice system. The ALRC does not support an approach that would allow variation from the benchmark only in special or exceptional circumstances. The benchmark should be a starting point, which can be varied whenever the purposes, principles and factors relevant to sentencing, and the factors relevant to the administration of the criminal justice system, indicate that a different non-parole period would be more appropriate.

9.34 The ALRC's approach strikes a balance between two principles of sentencing, namely, promoting consistency by establishing a benchmark, and allowing for individualisation by allowing for variation.⁸²⁸ This proposal is also consistent with one of the objects of the proposed federal sentencing Act, which is to promote flexibility in sentencing.⁸²⁹ Having regard to these principles and objects, the ALRC considers that the current provisions in Part IB of the *Crimes Act* that set out minimum non-parole periods for certain federal offences should be repealed.

9.35 The ALRC is currently of the view that the benchmark non-parole period should be set at two-thirds of the head sentence, but would be interested in hearing from stakeholders about this issue.

Proposal 9–3 In order to strike an appropriate balance between promoting consistency in sentencing and allowing individualisation of sentencing in particular cases, federal sentencing legislation should establish a benchmark for the relative non-parole period of a federal sentence at two-thirds of the head sentence. However, a court may impose a different non-parole period whenever it is warranted in the circumstances, taking into account the purposes, principles and factors relevant to sentencing, and the factors relevant to the administration of the criminal justice system.

781 A federal offender may nevertheless be released by the executive prior to the expiration of the non-parole period pursuant to a pre-release scheme or following the exercise of the executive prerogative to pardon or remit a sentence. See Ch 25.

782 *Crimes Act 1914* (Cth) s 16F. This issue is discussed in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [8.42]–[8.44].

783 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [9.901].

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- 784 *R v Shrestha* (1991) 173 CLR 48, 63.
- 785 *Bugmy v The Queen* (1990) 169 CLR 525, 530–531.
- 786 See, eg, *Ibid*, 532; *R v Lane* (1995) 80 A Crim R 208; *Attorney-General v Kortum* (Unreported, VSCA, 23 September 1977).
- 787 *Crimes Act 1914* (Cth) s 19AB(3). See *Wangsaimas v The Queen* (1996) 6 NTLR 14 (court must have regard to both these factors).
- 788 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
- 789 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; JC, *Submission SFO 25*, 13 April 2005; New South Wales Public Defenders Office, *Consultation*, Sydney, 22 September 2004.
- 790 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
- 791 This is emphasised by the fact that there is no general obligation on a court to give separate reasons for imposing a particular non-parole period. It suffices if adequate reasons are given for the overall sentence: see *R v Dujew* (2004) 146 A Crim R 121.
- 792 *Bugmy v The Queen* (1990) 169 CLR 525; *R v Suarez-Mejia* (2002) 131 A Crim R 564, [48]; *Norton v The Queen* [2003] WASCA 86, [12].
- 793 See Chs 4, 5, 6.
- 794 *Crimes Act 1914* (Cth) s 19AC.
- 795 *Ibid* s 19AB.
- 796 *Ibid* s 19AB(3).
- 797 See *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 44–46.
- 798 *Criminal Law (Sentencing) Act 1988* (SA) s 32; *Crimes (Sentencing) Bill 2005* (ACT) cl 65; *Sentencing Act 1995* (NT) s 53. See also *Sentencing Act 1995* (WA) s 89(2).
- 799 *Sentencing Act 1991* (Vic) (mandatory non-parole period for sentences greater than two years; discretionary non-parole period for sentences between one and two years).
- 800 See discussion on release on parole in Ch 23. Compare *Crimes (Sentencing Procedure) Act 1999* (NSW) s 46 (court precluded from setting non-parole period for sentences of six months or less).
- 801 See discussion on recognizance release orders and suspended sentences in Ch 7.
- 802 Suspended sentences are discussed in Ch 7. Compare *Crimes (Sentencing Procedure) Act 1999* (NSW) s 12(3) (setting non-parole period for suspended sentence) and *R v Tolley* [2004] NSWCCA 165.
- 803 *Crimes Act 1914* (Cth) s 19AG(1).
- 804 *Ibid* s 19AG(2).
- 805 See, eg, *Sentencing Act 1995* (WA); *Criminal Law (Sentencing) Act 1988* (SA); *Crimes Act 1900* (ACT).
- 806 *Sentencing Act 1997* (Tas) s 17(3); *Sentencing Act 1995* (NT) s 54.
- 807 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2).
- 808 See eg, *Sentencing Act 1995* (NT) ss 55, 55A (minimum non-parole period of 70 per cent of the head sentence for sexual offences and offences against persons under 16 years).
- 809 *Sentencing Act 1995* (NT) s 53A (standard non-parole period for murder); *Crimes (Sentencing Procedure) Act 1999* (NSW) Pt 4, Div 1A.
- 810 In New South Wales this can be done only by reference to the aggravating and mitigating factors set out in *Ibid* s 21A.
- 811 *Sentencing Act 1995* (NT) s 53A(6)–(8).
- 812 *Ibid* s 54(2).
- 813 *Sentencing Act 1991* (Vic) s 11(3).
- 814 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [9.906].
- 815 Law Society of South Australia, *Submission SFO 37*, 22 April 2005; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; New South Wales Legal Aid Commission—Criminal Law Division, *Consultation*, Sydney, 22 September 2004; A Freiberg, *Submission SFO 12*, 4 April 2005.
- 816 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
- 817 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.
- 818 JC, *Submission SFO 25*, 13 April 2005; LD, *Submission SFO 9*, 10 March 2005; WT, *Submission SFO 23*, 11 April 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 819 JC, *Submission SFO 25*, 13 April 2005.
- 820 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 821 See Appendix 1, Figure A1.25 and accompanying text.
- 822 See Appendix 1, Figure A1.26.
- 823 See Appendix 1, Figure A1.27 and accompanying text.

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- 824 See Appendix 1, Figure A1.30 and accompanying text.
- 825 See Appendix 1, Figure A1.32 and accompanying text. These figures are influenced by the small number of prisoners held in the Northern Territory for these offences and the exclusion of life sentence prisoners in New South Wales.
- 826 See Appendix 1, Figure A1.25.
- 827 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Recs 25–26. These recommendations must be viewed in the broader context of Recs 33–35 in that report supporting earned remissions, and the application of earned remissions to reduce the non-parole period.
- 828 Principles of sentencing are discussed in Ch 5.
- 829 See Ch 2.

10. Commencement and Pre-sentence Custody

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10.1 This chapter considers particular issues arising from the mechanics of sentencing, namely, determining the commencement date of a sentence and how to treat any time spent in pre-sentence custody or detention where a federal offender is sentenced to a term of imprisonment.

Commencement of sentence

Should federal legislation specify when a federal sentence commences and how any pre-sentence custody is to be taken into account? [IP 29, Q 9–3]

Background

10.2 Part IB of the *Crimes Act 1914* (Cth) does not specify when a federal sentence is to commence. Rather, s 16E of the Act picks up and applies state and territory legislation in relation to the commencement of sentences. The purpose of the section is ‘to avoid the problem of an offender who is sentenced to joint State and federal terms (eg a drug offender) commencing the terms on different dates’.⁸³⁰

10.3 Factors that may affect the commencement date of a federal sentence include: (a) in the case of multiple offences, whether the court intends the sentences to be served concurrently or consecutively; and (b) where the offender has spent time in pre-sentence custody, how that time is to be treated.

10.4 Some state and territory sentencing legislation contains a general rule that a sentence is to commence on the day it is imposed, although this rule is expressed to be

subject to varying exceptions including: orders allowing for backdating of sentences to take into account pre-sentence custody; orders requiring sentences to be served consecutively; and allowances to be made to accommodate the fact that an offender is not in custody at the time of sentencing.⁸³¹

Issues and problems

10.5 Professor Arie Freiberg expressed the view that the law in relation to the commencement of sentences was complex, confusing and in need of reform.⁸³² The Commonwealth Director of Public Prosecutions submitted that it was appropriate for legislative provisions in relation to the commencement of sentences to be prescriptive.⁸³³

10.6 There were opposing views among stakeholders on the issue of whether federal legislation should specify the commencement date of a sentence. The Law Society of South Australia submitted that it may be helpful for federal legislation to specify when a federal sentence commences.⁸³⁴ On the other hand, Associate Professor John Willis said that:

Attempting to graft a Commonwealth regime on top of various State and Territory schemes is likely to be very difficult and will also very likely produce its own set of problems.⁸³⁵

10.7 One federal offender submitted that although it would be ideal to have a federal provision in relation to commencement of sentence to ensure consistency of treatment of federal offenders, given that sentences imposed on federal offenders were administered by the states and territories it was preferable to maintain the status quo in order to preserve consistency of treatment of offenders within each state and territory.⁸³⁶

ALRC's views

10.8 Determining the commencement date of a sentence is an important part of the mechanics of sentencing. It is an area warranting clarity, simplicity and consistency in the treatment of federal offenders. With this in mind, the ALRC has formed the preliminary view that federal sentencing legislation should specify when a federal sentence of imprisonment is to commence, and that the date of commencement should be the day on which the sentence is imposed, subject to any court order directed to the consecutive service of sentences.

10.9 The general rule that a sentence of imprisonment is to commence on the day it is imposed is consistent with the position in most states and territories. However, one advantage of prescribing a federal commencement date is that federal sentencing legislation can avoid picking up two of the exceptions to this general rule, for which

provision is made in some states and territories, on the basis that the exceptions are not appropriate when sentencing federal offenders.

10.10 It is inappropriate to make an exception to the general rule on the basis that an offender is not in custody at the time of sentencing. As proposed in Chapter 13, an offender should be present during sentencing proceedings where a sentence of imprisonment is to be imposed.⁸³⁷ Additionally, the ALRC considers that there should be no exception to the general rule to make allowance for the backdating of a sentence to take pre-sentence custody into account. Backdating creates an artificial commencement date. For the reasons discussed below, the ALRC considers that the issue of credit for pre-sentence custody in respect of a federal sentence is dealt with more appropriately by declaring such time to be time already served under the sentence.

Proposal 10–1 Federal sentencing legislation should provide that, where a court sentences an offender to a term of imprisonment in relation to a federal offence, the sentence commences on the day the sentence is imposed, subject to any court order directed to the consecutive service of sentences.

Pre-sentence custody

Background

10.11 A federal offender may spend time in custody in relation to an offence prior to being sentenced for that offence. An example of this is time spent in remand after bail has been refused. Part IB of the *Crimes Act* does not specify how pre-sentence custody is to be taken into account in sentencing. Rather, s 16E of the Act picks up and applies certain state and territory laws dealing with the treatment of pre-sentence custody.

10.12 There are three ways in which time spent by a federal offender in pre-sentence custody can be taken into account, depending on the jurisdiction in which he or she is sentenced. Some jurisdictions empower a court to credit pre-sentence custody in more than one way.⁸³⁸

- The first method is to backdate the commencement of a sentence. Backdating is available in some jurisdictions⁸³⁹ but not in others.⁸⁴⁰ Of those jurisdictions that allow backdating, South Australia allows backdating only to the day on which an offender was taken into custody (and not a later date), rendering this method unsuitable for crediting interrupted periods of pre-sentence custody.⁸⁴¹
- The second method is to count time in custody as time already served under the sentence.⁸⁴² For example, if a federal offender is to receive a sentence of 12 months, but has already spent 11 months in custody, a court using this

method would impose a sentence of 12 months but declare that 11 months of the sentence has already been served.

- The third method is to reduce the term of the sentence.⁸⁴³ For example, if a federal offender is to receive a sentence of 12 months, but has already spent 11 months in custody, a court using the reduction method would impose a sentence of only one month.

10.13 Under some state and territory legislation it is mandatory for the court to take into account any time for which the offender has been held in custody in relation to the offence,⁸⁴⁴ while under other state and territory legislation it is discretionary.⁸⁴⁵ Some sentencing legislation states that pre-sentence custody must be taken into account ‘unless the court otherwise orders’.⁸⁴⁶

Issues and problems

Ambiguous drafting of s 16E

10.14 One problem is that the drafting of s 16E of the *Crimes Act* is ambiguous. Section 16E(2) of the Act picks up and applies to the sentencing of federal offenders those state and territory laws that allow for reduction or backdating of sentences,⁸⁴⁷ but it does not expressly refer to laws that allow for time spent in pre-sentence custody to be declared as time already served under the sentence. It is unclear whether s 16E(2) intends to pick up and apply such state and territory laws.

10.15 Section 16E(3) of the Act provides that where the law of a state or territory does not have the effect that a sentence or a non-parole period may be reduced by the time that a person has been in custody, or is to commence on the day on which the person was taken into custody, a court in the state or territory must take into account any time spent in custody in relation to the offence. However, the direction in s 16E(3) is also ambiguous. It is not clear whether it requires the court to give full credit for time in custody or whether it simply requires the court to take the pre-sentence custody into account as a relevant consideration in determining the commencement date of the sentence.

Federal provision for pre-sentence custody?

10.16 One argument in favour of having a federal provision for pre-sentence custody is that the picking up of state and territory laws on this subject has the potential to create inconsistencies in the treatment of federal offenders depending on the jurisdiction in which they are sentenced. Federal offenders are potentially in a more advantageous position in jurisdictions in which it is mandatory to take pre-sentence custody into account than in jurisdictions in which the court has a discretion to take it into account or is empowered to ‘otherwise order’.

10.17 Some stakeholders favoured federal legislation making provision for how pre-sentence custody should be taken into account. The Law Society of South Australia submitted that it may be helpful for federal legislation to lay down guidelines for how to credit pre-sentence custody, and that it should be mandatory for a court to give credit for time spent in pre-sentence custody.⁸⁴⁸ The New South Wales Legal Aid Commission submitted that if provisions in relation to crediting pre-sentence custody were set out in federal legislation, it would provide greater clarity.⁸⁴⁹ However, Associate Professor Willis opposed a federal regime for crediting pre-sentence custody, stating that it would produce its own complications.⁸⁵⁰

Manner of crediting pre-sentence custody

10.18 If there is to be a federal provision covering the field of pre-sentence custody for federal offenders, the issue arises as to what is the most appropriate manner of crediting time spent in pre-sentence custody. As discussed above, the options available are backdating the sentence, reducing the sentence, or declaring time spent in pre-sentence custody as time already served under the sentence.

10.19 The majority of stakeholders expressed the view that pre-sentence custody should be credited by backdating a sentence to reflect the time spent in custody in relation to the offence.⁸⁵¹ The Law Society of South Australia supported the backdating of a sentence to when an offender was initially taken into custody where the period of pre-sentence custody was continuous.⁸⁵² One judicial officer expressed the view that irrespective of the method chosen to credit pre-sentence custody in respect of federal sentences, it was important that such method was clearly spelt out in legislation.⁸⁵³

10.20 Particular problems have been identified in using the reduction method of crediting time spent in pre-sentence custody.⁸⁵⁴ In *R v Newman*, Howie J (McColl JA agreeing) said:

If a sentence is decreased by a substantial period already served in custody, it can have the appearance of being inadequate both to public perception and when it appears in the statistical information that is now so often relied upon by sentencing courts. ...

Such a sentence [reduced for pre-sentence custody], particularly where there are few comparable sentences for similar offences, can also skew the statistical information derived from sentences imposed by other courts and give a false indication of the range of sentences that have been imposed for a similar offence or on a similar offender.⁸⁵⁵

Interrupted periods of custody

10.21 A further issue that arises is whether credit should be given for interrupted periods of pre-sentence custody and, if so, the best way of doing so.

10.22 The Law Society of South Australia submitted that credit should be given for non-continuous periods of pre-sentence custody:

if an offender went into custody and was then released on bail for a short period before returning to custody, some method by which the time spent in custody can be credited should be allowed for. Even if this results in an artificial starting date, it should do so to be fair to the offender and to take into account any time served.⁸⁵⁶

10.23 In some jurisdictions, where a person charged with a series of offences committed on different occasions has been in custody continuously since arrest, the period of pre-sentence custody must be reckoned from the time the offender was arrested even if the offender is not convicted of the offence for which he or she was first arrested or any other offences in the series.⁸⁵⁷ However, the benefit of these provisions does not flow to persons whose period in custody has been interrupted.

10.24 In *R v Newman*, Howie J expressed the view that in cases involving non-continuous periods of pre-sentence custody, a sentence should be backdated rather than reduced in order to give credit for pre-sentence custody. His Honour acknowledged that there may be an element of fiction involved in backdating the commencement of a sentence to a day when an offender may not have actually been in custody. However, he explained that the undesirable consequences flowing from a reduction of sentence rendered backdating the preferable option.⁸⁵⁸

Custody referable to other offences

10.25 Time spent in pre-sentence custody must relate to the offence in relation to which the sentence is being imposed. However, an offender facing charges for multiple offences may be in custody in relation to more than one offence—that is, the time spent in pre-sentence custody may not be exclusively referable to the particular offence or offences in respect of which the offender is being sentenced.

10.26 Queensland Legal Aid expressed a concern in relation to the ambiguous drafting of the Queensland sentencing provision that requires any time that an offender has been held in custody in relation to proceedings for the offence *and for no other reason* to be declared as time already served.⁸⁵⁹ The provision—which is arguably picked up and applied in the sentencing of federal offenders—was said to produce unfair results because it did not apply to an offender who was remanded in custody in relation to a number of offences that were subsequently dealt with in separate proceedings. On a strict interpretation of the provision it could not be said that the offender was in custody in relation to the offence the subject of sentencing and for no other reason.⁸⁶⁰

Extension to pre-sentence detention

10.27 Another issue that arises is that s 16E(2) of the *Crimes Act* is expressed to pick up and apply the laws of a state or territory that have the effect of crediting time spent by an offender in *custody*. This does not necessarily encompass time spent by an offender in administrative detention.

10.28 In any event, apart from the sentencing legislation of Victoria and the Northern Territory, which make specific provision for credit to be given for periods of detention under hospital orders,⁸⁶¹ other state and territory sentencing provisions are, on their face, limited to enabling a court to give credit for time spent in custody,⁸⁶² which is typically time spent in remand after bail has been refused.⁸⁶³

10.29 However, federal offenders may also be subject to administrative detention in relation to federal offences. For example, mentally ill federal offenders may be subject to pre-sentence detention;⁸⁶⁴ and unlawful non-citizens can be detained by the authorities under s 250 of the *Migration Act 1958* (Cth) for the purpose of determining whether or not to prosecute them for certain offences in respect of which they may ultimately be sentenced to imprisonment.⁸⁶⁵ There is no limit to the time that a person may be held in immigration detention and there is no requirement to bring a charge against a detainee within any particular time.

10.30 The Northern Territory Legal Aid Commission expressed the view that immigration detention that is connected to an offence should be taken into account in sentencing.⁸⁶⁶ The conflicting judicial views in relation to crediting time spent in pre-sentence immigration detention are discussed in Chapter 6.

ALRC's views

Credit to be given for pre-sentence custody or detention

10.31 The ALRC is of the view that federal sentencing legislation should make it clear that, when sentencing a federal offender to a term of imprisonment, it is mandatory for a court to give credit for any time spent by the offender in pre-sentence custody or detention in relation to the offence for which sentence is being imposed. In the case of pre-sentence immigration detention, the need for fairness is highlighted by the fact that there is no limit to the amount of time that an unlawful non-citizen can be kept in detention in relation to a suspected offence before a charge is laid.

Manner of crediting pre-sentence custody or detention

10.32 The ALRC has formed the preliminary view that, in the interests of promoting clarity, simplicity and consistency of approach, federal sentencing legislation should prescribe only one method by which credit is to be given for pre-sentence custody or detention. That method should be declaring such time as time already served under the sentence of imprisonment.⁸⁶⁷ Of the three methods available for crediting pre-sentence custody, declaring time as time already served is the most principled and transparent, and it lends itself equally to crediting time for continuous and interrupted periods of custody.

10.33 Adopting the proposed method is consistent with having a federal sentence commence on the day it is imposed (see Proposal 10–1), and it avoids the fiction associated with backdating sentences, especially where backdating sentences to take into account interrupted periods of custody results in a commencement date that does not correspond to a time when the offender was actually in custody. Further, this

approach does not suffer from the disadvantages associated with crediting pre-sentence custody by reducing the sentence, namely, creating a public perception of inadequate sentences, and skewing statistics in relation to that category of offence and offender.

10.34 The stated rationale of s 16E was to avoid the problem of an offender who is sentenced to joint state and federal sentences of imprisonment commencing the terms on different dates. However, this issue will arise only in limited situations. First, the issue arises only in respect of joint federal and state or territory sentences that are to be served concurrently: if joint sentences are to be served consecutively they will obviously have different commencement dates. Secondly, where joint sentences are to be served concurrently, different commencement dates will arise only where courts take into account pre-sentence custody by backdating a state or territory sentence. Where courts, in respect of a state or territory sentence, credit pre-sentence custody or detention either by reducing the sentence or declaring time spent in pre-sentence custody or detention as time already served under the sentence, the state or territory sentence, like its federal counterpart, will commence on the day that it is imposed. As mentioned above, some state and territory sentencing legislation gives the courts a discretion to choose the method by which pre-sentence custody is taken into account.

10.35 The ALRC is not presently convinced that there is any significant problem presented by the fact that its proposal may result in different commencement dates in respect of some joint federal and state/territory sentences that are to be served concurrently. However, the ALRC is interested in hearing further views from stakeholders on this issue.

Calculating credit for pre-sentence custody or detention

10.36 In order to resolve any ambiguity about how pre-sentence custody or detention is to be credited where an offender is sentenced to a term of imprisonment, the ALRC considers that federal sentencing legislation should make it clear that one day's credit must be given for each full day of pre-sentence custody or detention. This rule should be expressly set out in legislation to distinguish it from the court's approach when sentencing a federal offender to a sentence other than imprisonment. As discussed in Chapter 6, where a court imposes a sentence other than imprisonment it is appropriate for the court to consider any pre-sentence custody or detention, not as a rule, but as a relevant factor in determining the sentence.

10.37 Federal sentencing legislation should also make it clear that credit must be given for pre-sentence custody or detention irrespective of whether the custody or detention was continuous. There appears to be no reason in principle to distinguish between the treatment of continuous and interrupted custody.

10.38 Finally, federal sentencing legislation should make it clear that credit is to be given irrespective of the fact that the pre-sentence custody or detention may not relate exclusively to the offence for which the offender is being sentenced, provided that credit is not given more than once for the same period of custody or detention. In this regard, the Victorian sentencing legislation may serve as a possible model in so far as it precludes credit from being given for a period of pre-sentence custody that has already been declared as time served in relation to a period of imprisonment for an offence in respect of which an offender has previously been sentenced.⁸⁶⁸

10.39 However, it is likely that specific provision will need to be made to deal with pre-sentence custody in connection with a series of offences of the same or a similar character. Consider the example of an offender who has engaged in a course of conduct involving social security fraud, and who is sentenced to several terms of imprisonment of 12 months, to be served concurrently. If the offender is to receive any practical benefit from, say, five months of pre-sentence custody, credit will need to be given in relation to all offences comprising that course of conduct, not just one of them. The ALRC is interested in hearing the views of stakeholders about how this issue is best addressed.

Proposal 10–2 Federal sentencing legislation should provide that, where a court sentences an offender to a term of imprisonment in relation to a federal offence, the court must give credit for time spent in pre-sentence custody or detention in connection with the offence by declaring the time as time already served under the term of imprisonment.

Proposal 10–3 In calculating the credit to be granted to a federal offender for pre-sentence custody or detention under Proposal 10–2:

- (a) one day's credit must be given for each full day of pre-sentence custody or detention;
- (b) credit must be given whether or not the custody or detention was continuous; and
- (c) credit must be given irrespective of the fact that the custody or detention may not relate exclusively to the offence for which the offender is being sentenced, provided that credit is not given more than once for the same period of custody or detention.

830 Explanatory Memorandum (Senate), Crimes Legislation Amendment Bill (No 2) 1989 (Cth), 8.
 831 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 47(1)(a); *Sentencing Act 1991* (Vic) s 17(1); *Penalties and Sentences Act 1992* (Qld) s 154(a); *Sentencing Act 1997* (Tas) s 14; *Crimes Act 1900* (ACT) s 352; *Sentencing Act 1995* (NT) s 62(1). See also Crimes (Sentencing) Bill 2005 (ACT) cl 62.

- 832 A Freiberg, *Submission SFO 12*, 4 April 2005; A Freiberg, *Consultation*, Melbourne, 30 March 2005.
 833 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
 834 Law Society of South Australia, *Submission SFO 37*, 22 April 2005. See also LD, *Submission SFO 9*,
 10 March 2005.
 835 J Willis, *Submission SFO 20*, 9 April 2005.
 836 JC, *Submission SFO 25*, 13 April 2005.
 837 See Proposal 13–1.
 838 *Sentencing Act 1995* (WA) s 87(c), (d); *Criminal Law (Sentencing) Act 1988* (SA) s 30(2)(a), (b).
 839 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 47(2)(a); *Sentencing Act 1995* (WA) s 87(d); *Criminal*
Law (Sentencing) Act 1988 (SA) s 30(2)(b); *Sentencing Act 1997* (Tas) s 16(1); *Sentencing Act 1995* (NT)
 s 63(5).
 840 For example, this method is not available under the *Sentencing Act 1991* (Vic) s 18. See R Fox and
 A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [9.804].
 841 See *Criminal Law (Sentencing) Act 1988* (SA) s 30(2)(b). Compare, eg, *Sentencing Act 1995* (NT) s 63(5)
 (sentence may commence on day of arrest or on any other day between that day and the day on which the
 court passes sentence).
 842 *Sentencing Act 1991* (Vic) s 18(1); *Penalties and Sentences Act 1992* (Qld) s 161(1); *Crimes Act 1900*
 (ACT) s 360(1)(a).
 843 *Sentencing Act 1995* (WA) s 87(c); *Criminal Law (Sentencing) Act 1988* (SA) s 30(2)(a).
 844 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 24(a), 47(3); *Sentencing Act 1997* (Tas) s 16(1)(a);
Crimes Act 1900 (ACT) s 360(1).
 845 *Sentencing Act 1995* (WA) s 87; *Criminal Law (Sentencing) Act 1988* (SA) s 30; *Sentencing Act 1995*
 (NT) s 63(5).
 846 *Sentencing Act 1991* (Vic) s 18(1); *Penalties and Sentences Act 1992* (Qld) s 161(1). Pre-sentence
 custody is discussed in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29
 (2005), [9.34]–[9.42].
 847 See *Crimes Act 1914* (Cth) s 16E(2)(a), (b).
 848 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
 849 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.
 850 J Willis, *Submission SFO 20*, 9 April 2005.
 851 Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005; New South
 Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; M Johnson, *Consultation*, Darwin,
 27 April 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
 852 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
 853 Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.
 854 Queensland Legal Aid, *Consultation*, Brisbane, 2 March 2005.
 855 *R v Newman* (2004) 145 A Crim R 361, [27], [30].
 856 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
 857 *Sentencing Act 1991* (Vic) s 18(6); *Crimes Act 1900* (ACT) s 360(3).
 858 See *R v Newman* (2004) 145 A Crim R 361, [26]–[32].
 859 *Penalties and Sentences Act 1992* (Qld) s 161(1).
 860 Queensland Legal Aid, *Consultation*, Brisbane, 2 March 2005.
 861 *Sentencing Act 1991* (Vic) s 18(1); *Sentencing Act 1995* (NT) s 63(3).
 862 See *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 24(a), 47(3); *Penalties and Sentences Act 1992*
 (Qld) s 161; *Sentencing Act 1995* (WA) s 87; *Criminal Law (Sentencing) Act 1988* (SA) s 30; *Sentencing*
Act 1997 (Tas) s 16; *Crimes Act 1900* (ACT) s 360.
 863 However, see the discussion on the treatment of quasi-custody in Ch 6.
 864 See Ch 28.
 865 For example, a non-citizen can be detained in relation to a suspected offence under *Criminal Code* (Cth)
 s 149.1 (resisting public official in performance of functions—carrying maximum penalty of two years’
 imprisonment). The crediting of pre-sentence detention where a sentence other than imprisonment is
 imposed is discussed in Ch 6.
 866 Northern Territory Legal Aid Commission, *Consultation*, Darwin, 27 April 2005.

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- 867 The ALRC previously recommended this approach. See Australian Law Reform Commission,
868 *Sentencing*, ALRC 44 (1988), Rec 27.
868 See *Sentencing Act 1991* (Vic) s 18(2)(d).

11. Discounts and Remissions

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11.1 This chapter considers issues arising in relation to two methods for reducing the sentence of a federal offender. The first method—discounting of a sentence—involves reduction of a sentence by a judicial officer at the time of determining the sentence. Issues that arise in relation to discounting of sentences include: whether a judicial officer should be required to specify any discount given; what factors should be taken into account in determining discounts for guilty pleas and cooperation with the authorities; and whether the legislative provision relating to the sentencing of a federal offender who undertakes to cooperate with the authorities needs to be amended.

11.2 The second method—remissions—involves reduction of a sentence after it has been judicially determined. The reduction may be either automatic or earned by an offender through good behaviour. Issues that arise in relation to remissions include whether automatic or earned remissions should be available to federal offenders; and whether the application of remissions to federal non-parole periods should be extended.

The executive prerogative to pardon or remit a sentence is dealt with separately in Chapter 25.

Specification of discounts

In what circumstances should judicial officers be required to specify the discounts in sentence that they impose on federal offenders by reducing the quantum or imposing an alternative sentencing option? For example, should judicial officers be required to quantify discounts for a guilty plea or for past or promised future cooperation by the offender? [IP 29, Q 9–1]

Background

11.3 There are two ways in which judicial officers assess the factors relevant to determining an offender's sentence. 'Instinctive synthesis' is an approach in which a judicial officer simultaneously takes account of all relevant factors in arriving at a single appropriate sentence.⁸⁶⁹ This approach places a premium on judicial discretion, and has been the dominant approach to sentencing in Australia. This may be contrasted with a 'two-stage approach' in which, for example, a judicial officer starts at a benchmark sentence and then adjusts the sentence up or down to take account of particular circumstances of the case at hand.⁸⁷⁰

11.4 The use of the instinctive synthesis approach to sentencing means that courts specify neither the discount for each mitigating factor nor the premium for each aggravating factor taken into account in determining a federal sentence. Three judges of the High Court have said that:

So long as a sentencing judge must, or may, take account of *all* of the circumstances of the offence and the offender, to single out some of those considerations and attribute specific numerical or proportionate value to some features, distorts the already difficult balancing exercise which the judge must perform.⁸⁷¹

11.5 But in *Markarian v The Queen*, the High Court softened its criticism of the 'two-stage' approach to sentencing. The majority acknowledged that there may be some circumstances where 'an indulgence in arithmetical process' would better serve the ends of transparency and accessible reasoning.⁸⁷²

11.6 It has been suggested that the instinctive synthesis approach to sentencing would not be compromised if certain factors were treated separately, so long as those factors were 'few in number and narrowly confined'.⁸⁷³ Two factors in respect of which courts in some jurisdictions specify discounts are guilty pleas and cooperation by an offender. As discussed in Chapter 6, the basis upon which courts have regard to guilty pleas and cooperation by the offender is that such factors are not traditional sentencing factors but are relevant to the proper administration of the criminal justice system.

Pleading guilty

11.7 Section 16A(2)(g) of the *Crimes Act 1914* (Cth) lists as a factor to be taken into account in sentencing that the offender has pleaded guilty to the charge in respect of the offence. In contrast to most state and territory sentencing legislation, Part IB does not provide that the weight to be attached to a plea is dependent on the timeliness of the plea.⁸⁷⁴ Some state sentencing legislation expressly allows for a discount for a guilty plea⁸⁷⁵ and requires a court to give reasons for not reducing a sentence if there has been a guilty plea.⁸⁷⁶

11.8 Where a discount is given for a guilty plea, Part IB does not require the court to specify the discount. The practice in several states—including New South Wales, South Australia and Western Australia—is to encourage judicial officers to quantify discounts for guilty pleas.⁸⁷⁷ Specification of discounts for a guilty plea is also a loose practice in the Northern Territory.⁸⁷⁸ In *Cameron v The Queen*, the High Court stated that the amount of the discount does not appear to vary greatly in practice.⁸⁷⁹ However, unless courts in all jurisdictions specify what discounts they are giving, it is difficult to ascertain the extent of any variation.

11.9 There is a distinction between a discount given for the utilitarian value of a plea—that is, the value attributed to the fact that the guilty plea saves the state the expense and time of a trial—and discounts given for non-utilitarian reasons such as contrition and willingness to facilitate the course of justice.

11.10 New South Wales has developed a reform agenda in relation to criminal proceedings, designed to encourage early pleas of guilty. As part of the reform package an offender who enters a plea of guilty in the Local Court will be entitled to a discount on sentence of 25 per cent based on utilitarian considerations, whereas an offender who enters a plea of guilty in the District Court to the same charge that was on foot when the matter was in the Local Court is entitled to receive a maximum discount of 12.5 per cent on utilitarian grounds. There are some exceptions: for example, the maximum utilitarian discount may be available in the superior courts in the event of a substantial change to the prosecution charges or case.⁸⁸⁰

11.11 The sentencing legislation of the United Kingdom provides that if a court reduces an offender's sentence because of a guilty plea it is required to state this in open court.⁸⁸¹ A guideline issued by the United Kingdom Sentencing Guidelines Council provides for a sliding scale of discounts for guilty pleas; the level of discount ranging from one-third to one-tenth according to the stage in the proceedings at which the guilty plea was entered.⁸⁸²

Cooperation by an offender

11.12 Section 16A(2)(h) of the *Crimes Act* requires a court to take into account the degree to which a federal offender has cooperated with law enforcement agencies in the investigation of the offence or other offences.

11.13 Under Part IB and some state sentencing legislation, it is necessary to specify the reduction given for promised future cooperation.⁸⁸³ This is often expressed in terms that the court must state the sentence it would have imposed but for the undertaking. A court is not generally required to specify any reduction in sentence given for past cooperation, but the practice of courts in New South Wales is to quantify discounts for both past and promised future cooperation with law enforcement authorities.⁸⁸⁴ Similarly, under the proposed sentencing legislation of the ACT, a court is required to specify any reduction it has given in a sentence on the basis of either past or promised future cooperation.⁸⁸⁵

Issues and problems***Should there be a discount for a guilty plea and on what basis?***

11.14 Discounting for a guilty plea has stirred some academic and judicial controversy. A preliminary issue is whether discounts for guilty pleas should be allowed at all and, if so, on what basis.

11.15 Professors Kathy Mack and Sharyn Roach Anleu oppose discounts being given for guilty pleas on the basis that:

it puts an inappropriate burden on the accused's choice to plead guilty, undermines proper sentencing principles, risks inducing a guilty plea from the innocent, undermines judicial neutrality and independence, and does not directly address the problems of time and delay which motivated its introduction by the courts.⁸⁸⁶

11.16 One federal offender also expressed concern that the promise of a substantial discount for a guilty plea could coerce an innocent person to plead guilty to an offence that he or she did not commit. However, he submitted that the way to counter potential abuse was to place a limit on any discount rather than not make it available.⁸⁸⁷

11.17 In *Cameron v The Queen* the High Court accepted that discounts for a guilty plea could be given for remorse or for willingness to facilitate the course of justice but rejected the view that the discount could be given because it will save the expense of a trial. It said that to allow discounts for utilitarian considerations may have a discriminatory effect on offenders who do not plead guilty:

It is difficult to see that a person who has exercised his or her right to trial is not being discriminated against by reason of his or her exercising that right if, in otherwise comparable circumstances, another's plea of guilty results in a reduction of the sentence that would otherwise have been imposed. However, the same is not true if the plea is seen, subjectively, as the willingness of the offender to facilitate the course of justice.

Reconciliation of the requirement that a person not be penalised for pleading not guilty with the rule that a plea of guilty may be taken into account in mitigation requires that the rationale for that rule, so far as it depends on factors other than remorse and acceptance of responsibility, be expressed in terms of willingness to facilitate the course of justice and not on the basis that the plea has saved the community the expense of a contested hearing.⁸⁸⁸

11.18 In *Cameron v The Queen*, Kirby J, in dissent, expressed support for a discount to be given on the basis of the utilitarian value of a guilty plea but he noted that this did not detract from the fact that an accused was entitled to plead not guilty and to put the prosecution to proof without being punished more severely for exercising that right.⁸⁸⁹ He said:

The main features of the public interest, relevant to the discount for a plea of guilty, are ‘purely utilitarian’. ... it is in the public interest to facilitate pleas of guilty by those who are guilty and to conserve the trial process substantially to cases where there is a real contest about guilt.⁸⁹⁰

11.19 The New South Wales Court of Criminal Appeal’s guideline judgment with respect to the treatment of guilty pleas in relation to state offences expressly encourages quantification of discount for the utilitarian value of a plea. The judgment provides that this value should generally be assessed in the range of a 10 to 25 per cent discount on sentence.⁸⁹¹

11.20 In *R v Sharma*, the New South Wales Court of Criminal Appeal held that the subjective perspective of a ‘willingness to facilitate the course of justice’—referred to in *Cameron v The Queen*—is not required to operate to the exclusion of objective considerations in New South Wales. Accordingly, a New South Wales court is entitled to have regard to the utilitarian benefits associated with a guilty plea.⁸⁹²

11.21 The Law Society of South Australia expressed the view that the ALRC’s inquiry represented an opportunity to address proactively the issues raised in *Cameron v The Queen*.⁸⁹³ Some stakeholders disagreed with the approach of the High Court in *Cameron v The Queen* and supported a court being empowered to discount the sentence of a federal offender on the basis of the utilitarian value of a guilty plea.⁸⁹⁴ For example, Professor Arie Freiberg suggested that courts needed to be pragmatic in this regard.⁸⁹⁵

Should legislation specify the discount or a discounting range?

11.22 Views expressed in consultations and submissions were divided on the issue of whether, if specification of particular discounts were required, federal legislation should prescribe the discount or the range within which the discount should fall. Some stakeholders supported legislative prescription of discounts on the basis that it would

increase transparency in sentencing, limit judicial discretion, and in particular encourage pleas of guilty at the earliest stage in court proceedings.⁸⁹⁶

11.23 The New South Wales Legal Aid Commission expressed support for the proposed legislative scheme for New South Wales, which prescribes a sliding scale of discounts for guilty pleas, depending on the stage of the proceedings at which an offender pleads guilty. The Legal Aid Commission submitted that it would be timely to consider the adoption of such procedures in federal sentencing.⁸⁹⁷

11.24 Other stakeholders were opposed to the legislative specification of discounts on the basis that it represented an inappropriate fetter on judicial discretion, and would hinder application of the ‘instinctive synthesis’ approach to sentencing.⁸⁹⁸ The Law Society of South Australia expressed opposition to a legislative sliding scale of discounts for guilty pleas.⁸⁹⁹ One legal practitioner expressed the view that legislative specification of a discount for a guilty plea could make the sentencing process inflexible and may not take into account the fact that an offender is sometimes not at fault when entering a late plea.⁹⁰⁰

11.25 If there were to be legislative prescription of discounts, issues may arise in relation to setting the amounts of such discounts. For example, Stephen Odgers SC has expressed the view that the proposal to cut the discount available for guilty pleas in the District Court and Supreme Court in New South Wales to 12.5 per cent removes vital flexibility and could dissuade offenders from pleading guilty.⁹⁰¹

Should courts specify discounts and for what factors?

11.26 If a discount on sentence is to be given in certain circumstances, the next issue that arises is whether the court should specify the amount of that discount. There is some judicial support for specification of discounts in respect of factors that are relevant to the proper administration of the criminal justice system. In *Markarian v The Queen* McHugh J stated that the instinctive synthesis approach to sentencing was not inconsistent with awarding a discount for some factors, provided that the discount relates to a purpose distinct from a sentencing purpose:

The distinction between permissible and impermissible quantification of ‘discounts’ on a sentence will usually be found in whether the quantification relates to a sentencing purpose rather than some other purpose. So, the quantification of the discount commonly applied for an early plea of guilty or assistance to authorities is offered as an incentive for specific outcomes in the administration of criminal justice and is not related to sentencing purposes. ... I think the use of discounts should be reserved for only one—maybe two—factors in a particular sentence that serve some goal other than a sentencing goal.⁹⁰²

11.27 In *R v Place* the South Australian Court of Criminal Appeal stated that there were compelling public policy reasons why a court should identify the specific reduction given in respect of a guilty plea:

Experience in this State and in New South Wales has demonstrated that the public policy objectives are not achieved unless the specific reduction is identified. ... After

sentence has been imposed an offender is not left in any doubt as to whether benefit was given for a plea of guilty as full knowledge of the extent of the reduction and the reasons for it are given. The community and the appellate court are similarly well informed.⁹⁰³

11.28 In *R v Nagy*, McGarvie J (in dissent) acknowledged that specification of discounts makes the task of a judicial officer more difficult but nonetheless expressed support for specification of discounts for cooperation.⁹⁰⁴ However, the majority of the Victorian Court of Criminal Appeal in *R v Nagy* opposed the specification of discounts for cooperation on the basis that it involved the adoption of the ‘two-tier’ process of sentencing.⁹⁰⁵

11.29 One advantage of specifying discounts is increased transparency of decision making by judicial officers. In *Cameron v The Queen* Kirby J expressed the view that if the fact of giving a discount and the specification of that discount are not expressly identified

there will be a danger that the lack of transparency, effectively concealed by judicial ‘instinct’, will render it impossible to know whether proper sentencing principles have been applied.⁹⁰⁶

11.30 Many stakeholders expressed support for specification of discounts, either for past or promised cooperation or for a plea of guilty.⁹⁰⁷ The advantages of specification identified by stakeholders included increased consistency and transparency in sentencing, and increasing the incentive for guilty offenders to plead guilty and to cooperate with the authorities.

11.31 Professors Mack and Roach Anleu, who opposed any discount for a guilty plea, expressed the view that if there were to be a discount for a guilty plea

a clear statement of the amount of the discount is necessary, otherwise the accused is left to wonder whether the benefit which was the inducement for the plea was actually conferred.⁹⁰⁸

11.32 One federal offender supported specification of discounts in a number of circumstances including: an early guilty plea; the age and ill health of an offender (including any psychiatric condition); and the fact that an offender would be placed in protective custody.⁹⁰⁹ Victoria Legal Aid—while not objecting to judicial officers specifying discounts in particular cases—expressed concern that if some factors were to be the subject of a discount this could discriminate against certain categories of offenders. It submitted, for example, that ‘if payment of restitution is a discounting factor, then financially disadvantaged defendants will effectively receive “tougher” sentences than wealthy defendants’.⁹¹⁰

11.33 The Law Society of South Australia expressed concern that requiring judicial officers to specify particular discounts represented an inappropriate intrusion on the sentencing discretion and risked making the sentencing process inflexible. However, in the case of an offender who had given an undertaking to cooperate with the authorities, the Law Society submitted that a judicial officer would not be remiss in referring to the time range that would have been imposed if the undertaking had not been given.⁹¹¹

ALRC's views

Availability and basis of the discounts

11.34 As discussed in Chapter 6, the ALRC is of the view that guilty pleas and cooperation with the authorities should be taken into account in sentencing because they promote the proper administration of the criminal justice system. Where appropriate, they are to be treated as mitigating factors.

11.35 The value of awarding a discount for a guilty plea is recognised in contexts other than criminal proceedings such as disciplinary proceedings before tribunals determining charges against football players.⁹¹² The ALRC's views about the particular grounds upon which a court may give a discount for a guilty plea are addressed separately below.

Legislative specification of discounts

11.36 The ALRC does not support legislative prescription of the quantum of a discount, whether in the form of a fixed percentage or a range of percentages. Such an approach unduly fetters judicial discretion. Sliding scales of discounts based solely on the timing of a guilty plea are also problematic because they do not recognise the particular circumstances in which a plea is made.

11.37 Further, legislative prescription of discounts may promote the false view that a discount can only be given by way of reducing the quantum of the penalty. As discussed below, there was some support among stakeholders for courts to be given the flexibility to give discounts in the form of less severe sentencing options.

Judicial specification of discounts

11.38 In order to encourage guilty offenders to plead guilty and to cooperate with the authorities—thereby promoting the proper administration of the criminal justice system—the ALRC is of the view that offenders should be informed of the discount that they receive on account of their guilty plea or cooperation.

11.39 Specifying discounts for guilty pleas and for future cooperation is already the practice in some states and, at the federal level, sentencing law currently requires the specification of any discount for promised future cooperation. As noted above, specification of discounts has some judicial and stakeholder support on public policy grounds relating to the administration of the criminal justice system and because it increases transparency in sentencing. Requiring a court to specify the discount it has

given on account of an offender's undertaking to cooperate with the authorities also serves the pragmatic function of informing a court that re-sentences an offender who fails to comply with the undertaking of the sentence that the offender would have received in the absence of such an undertaking. The practice of specifying a discount for past cooperation appears to be less common, although it is the practice in New South Wales and is the approach proposed to be taken in the new ACT sentencing legislation.

11.40 However, the ALRC does not support an approach that would require judicial officers to specify discounts in relation to any mitigating factor in sentencing, such as youth, old age, ill health or the making of reparation. In relation to traditional sentencing factors, transparency can be achieved by a judicial officer addressing, in his or her reasons for decision, the factors that were taken into account in determining the sentence. To require specification of discounts for each mitigating factor would threaten the established instinctive synthesis approach to sentencing, but to require specification of discounts for the two factors that relate to the administration of the criminal justice system does not present a similar threat.

Proposal 11–1 Federal sentencing legislation should provide that, where a court discounts the sentence of a federal offender for pleading guilty or for past or promised future cooperation, the court must specify the discount given, whether by way of reducing the quantum of the sentence or by imposing a less severe sentencing option. The amount of the discount, if any, should be left to the court's discretion.

Factors relevant to discounting a sentence for pleading guilty

Background

11.41 As stated above, Part IB requires the court, when sentencing a federal offender, to take into account the fact that the offender pleaded guilty but does not refer to any other circumstance in relation to the plea.

11.42 Other state and territory sentencing legislation provides that a court is to have regard to the timing of a plea.⁹¹³ The proposed sentencing legislation of the ACT identifies a number of factors that a court must consider in assessing whether to reduce a sentence of imprisonment because of a guilty plea. In addition to the fact of the plea and the timing of the plea, the legislation refers to whether the guilty plea was related to negotiations between the prosecution and the defence about the charge to which the offender pleaded guilty; the seriousness of the offence; and the effect of the offence on the victims of the offence.⁹¹⁴ A court is precluded from making a significant reduction

in sentence if the court considers that the prosecution's case is overwhelmingly strong.⁹¹⁵

11.43 The sentencing legislation of the United Kingdom requires a court to take into account the stage in the proceedings at which the offender indicated his or her intention to plead guilty and the circumstances in which this indication was given. A guideline issued by the United Kingdom Sentencing Guidelines Council provides that:

The critical time for determining the maximum reduction for a guilty plea is the first reasonable opportunity for the defendant to have indicated a willingness to plead guilty. This opportunity will vary with a wide range of factors and the Court will need to make a judgment on the particular facts of the case before it.⁹¹⁶

Issues and problems

11.44 The issue arises whether it is desirable for federal sentencing legislation to set out the factors to which a court must have regard in determining whether to discount a sentence on account of a guilty plea and, if so, the level of the discount.

11.45 The Commonwealth Director of Public Prosecutions (CDPP) submitted that any discount should reflect the stage when a plea is entered, and that a plea at a late stage should not lead to a significant discount.⁹¹⁷ This supports the view that the timing of a plea should be a relevant factor in assessing any discount to be given. The Law Society of South Australia submitted that, irrespective of when it was entered, a guilty plea should always attract an exercise of the judicial discretion to provide a discount, even if the discount is minor.⁹¹⁸ This supports the view that factors other than the timing of the plea are relevant to the discount.⁹¹⁹

ALRC's views

11.46 The ALRC is of the view that there is merit in federal sentencing legislation providing additional guidance to judicial officers in determining whether to discount a sentence on account of a guilty plea and in assessing the level of any such discount. Providing guidance promotes consistency and clarity of approach, particularly in the context of conflicting judicial opinions about aspects of the discount for a guilty plea.

11.47 Guilty pleas are taken into account in sentencing because it is important to encourage behaviour that promotes the proper administration of the criminal justice system. The subjective willingness of an offender to facilitate the administration of justice is relevant to various purposes of sentencing. However, the ALRC agrees with the view expressed in consultations that, for pragmatic reasons, federal sentences should not be determined solely by reference to the purposes of sentencing. Accordingly, in determining whether to give a discount for a guilty plea, and the nature and extent of any discount, the ALRC considers that a court should have regard to the degree to which the plea of guilty objectively facilitates the administration of the criminal justice system. In making this assessment, courts could have regard to the saving in: judicial and court resources; prosecutorial operations; the provision of legal aid to accused persons; witness fees; and the fees paid to jurors.⁹²⁰ The court should

also consider whether the guilty plea spared any victims of the offence from the trauma of giving evidence.

11.48 The ALRC is also of the view that a court should have regard to the objective circumstances in which a plea of guilty is made. Under this approach, the timing of a guilty plea is a relevant consideration but it is not the only factor to be considered. Rather, adapting the formulation of the United Kingdom guideline on discounts—as well as the approach recently favoured by the New Zealand Law Commission⁹²¹ and the High Court in *Cameron v The Queen*⁹²²—a court should have regard to whether an offender pleaded guilty at the first reasonable opportunity to do so. For example, in determining whether an offender pleaded guilty at the first reasonable opportunity it would be relevant to know the extent of prosecution disclosure in relation to the charges at that time. It would also be relevant to know whether the offender had legal representation.

11.49 In order to avoid the problem of ‘double-discounting’ a court should have regard to whether, as a result of negotiations between the prosecution and the defence, the offender was charged with a less serious offence because of the guilty plea. This is consistent with the approach in the proposed sentencing legislation of the ACT.

11.50 The ALRC notes the concern expressed in one submission⁹²³ that a court should be careful in discounting a sentence for a guilty plea on the basis that it evidences remorse or contrition, and also discounting the sentence on the basis of the degree to which the person has shown contrition for the offence—because the latter is a sentencing factor in its own right.⁹²⁴ In this regard, the ALRC considers that an offender’s contrition, subjective willingness to facilitate the administration of the criminal justice system, and acknowledgement of responsibility—which all relate to the offender’s attitude—are interrelated and should be considered by a court as sentencing factors. They should not be considered separately as factors relevant to determining whether to give a discount for a guilty plea, and the extent of any such discount. On this approach, the potential for double discounting in relation to subjective factors, such as contrition, does not arise.

11.51 Finally, the ALRC does not support the inclusion of some of the factors that the proposed ACT sentencing legislation identifies as relevant to the treatment of a guilty plea—namely the seriousness of the offence and the effect of the offence on victims. These are sentencing factors in their own right, so there is no need for a court to consider them separately in determining both the head sentence and the amount of any discount to be given.⁹²⁵

Proposal 11–2 Federal sentencing legislation should provide that in determining whether to discount the sentence of a federal offender for pleading guilty, and the extent of any discount, the court must consider the following matters:

- (a) the degree to which the plea of guilty objectively facilitates the administration of the federal criminal justice system; and
- (b) the objective circumstances in which the plea of guilty was made, including:
 - (i) whether the offender pleaded guilty at the first reasonable opportunity to do so;
 - (ii) whether the offender had legal representation; and
 - (iii) whether, as a result of negotiations between the prosecution and the defence, the offender was charged with a less serious offence because of the guilty plea.

Factors relevant to discounting a sentence for cooperation

Background

11.52 Part IB of the *Crimes Act* does not provide any guidance to a court in assessing whether to give a discount, and the level of any such discount, on account of an offender's undertaking to cooperate with the authorities.

11.53 In contrast, the sentencing legislation of New South Wales and the proposed sentencing legislation of the ACT set out a number of factors to which the court must have regard in deciding: (a) whether to impose a lesser penalty for an offence on account of an offender's past or promised future cooperation with the authorities; and (b) the nature and the extent of the penalty to be imposed. These factors include: the significance and usefulness of the assistance taking into consideration any evaluation by the authorities of the assistance rendered or undertaken to be rendered; the nature, extent and timeliness of the assistance or promised assistance; any risk of danger or injury or any injury suffered by the offender or the offender's family as a result of the assistance; and the impact of the offence on the victims.⁹²⁶

Issues and problems

11.54 One issue that was identified in consultations was the lack of guidance in relation to assessing the discount that should be given to a defendant who undertakes to cooperate with the authorities. One prosecutor said that it was not clear what information should be put before a judicial officer in order to establish promised future

cooperation. He expressed the view that determining future cooperation could warrant a hearing in itself.⁹²⁷

ALRC's views

11.55 The ALRC believes there is merit in federal sentencing legislation providing additional guidance to judicial officers in determining whether to discount a sentence by reason of past or promised cooperation, and in assessing the level of any such discount.

11.56 Guidance should be provided through a list of factors to be considered by the court. The New South Wales sentencing legislation and the proposed sentencing legislation of the ACT provide useful models in identifying the types of factors to be included,⁹²⁸ and many of the factors identified in those pieces of legislation are appropriate for adoption in federal sentencing legislation. The ALRC does not, however, support including factors that are sentencing factors in their own right.

Proposal 11–3 Federal sentencing legislation should provide that in determining whether to discount the sentence of a federal offender for past or promised cooperation, and the extent of any discount, the court must consider the following matters:

- (a) the significance and usefulness of the offender's assistance to law enforcement authorities;
- (b) the truthfulness, completeness and reliability of any information or evidence provided by the offender;
- (c) the nature and extent of the offender's assistance or promised assistance;
- (d) the timeliness of the assistance or the undertaking to assist;
- (e) any benefits that the offender has gained or may gain because of the assistance or the undertaking to assist; and
- (f) any injury suffered by the offender or the offender's family or any danger or risk of injury to the offender or the offender's family because of the assistance or undertaking to assist.

Sentencing offenders who undertake to cooperate

Background

11.57 In sentencing a federal offender, a court may reduce the sentence or the non-parole period imposed because of the offender's undertaking to provide cooperation with law enforcement agencies. Where a court reduces a sentence or a non-parole period because of such an undertaking, s 21E of the *Crimes Act* requires the court to state that fact and to specify the sentence or the non-parole period that it would have imposed but for the reduction. Section 21E also authorises the CDPP, while the offender is under sentence, to appeal against the inadequacy of the sentence or the non-parole period, where the offender fails to cooperate.⁹²⁹

11.58 The sentencing legislation of other jurisdictions typically deals with a court's obligation to specify any reduction in sentence separately from a provision dealing with how an offender's failure to provide post-sentence cooperation may be redressed.⁹³⁰

Issues and problems

11.59 A number of criticisms and issues in relation to the operation of s 21E are set out in IP 29.⁹³¹ Key issues are as follows:

Reduction in quantum or type

11.60 Section 21E refers only to reduced sentences and reduced non-parole periods, so that it is not clear whether the section allows a court to impose a less severe sentencing option rather than reducing a sentence in quantum, as a way of acknowledging the offender's undertaking to cooperate. Officers of the CDPP expressed support for authorising a court to discount a sentence for future cooperation by imposing a less severe sentencing option, and requiring the court to state that it had done so.⁹³²

Confidentiality

11.61 Practical difficulties may arise from the requirement to specify the reduction in sentence attributable to an offender's cooperation where there is a need to protect the offender from retaliation. The CDPP submitted that federal legislation should address the confidentiality of material given to courts, without the need to rely on state and territory provisions.⁹³³

11.62 The sentencing legislation of Queensland, for example, expressly empowers a court, where the safety of any person is in issue or where there is a need to guarantee the confidentiality of information given by an informer: (a) to close proceedings where oral submissions are to be made or evidence is to be led relevant to the reduction of sentence; and (b) to prohibit publication of the proceedings or the personal details of a witness.⁹³⁴ The CDPP has expressed the view that this section is picked up and applied to the sentencing of federal offenders by s 68 of the *Judiciary Act 1903* (Cth).⁹³⁵

Documenting the undertaking to cooperate

11.63 Another issue that was identified in consultations was the need for formal evidence and procedures to establish cooperation under s 21E. It was stated that sometimes an offender merely promises cooperation from the bar table, without reinforcement through sealed letters or other formalities.⁹³⁶ Queensland sentencing legislation expressly requires that a written undertaking be handed up to the court in an unsealed envelope addressed to the sentencing judge or magistrate.⁹³⁷

Need for judicial education

11.64 Further problems identified in consultations and submissions were the refusal by some judicial officers to specify the reduction for future cooperation as required by s 21E of the *Crimes Act*,⁹³⁸ and the difficulty experienced by some judicial officers in applying the section.

In Victoria the concept of ‘two-tiered sentencing’ does not apply in the normal course of events, and accordingly the structure of s 21 requires a State judge to apply a different approach to the forming of an appropriate sentence.⁹³⁹

ALRC’s views

11.65 The ALRC is of the view that amendments should be made to the provision dealing with the sentencing of a federal offender who undertakes to cooperate with law enforcement authorities. Federal sentencing legislation should deal separately with: (a) the court’s obligations at the time of sentencing an offender who has undertaken to cooperate with the authorities; and (b) the post-sentencing issue of how to address an offender’s failure to comply with an undertaking to cooperate (which is considered in Chapter 16). This is consistent with the approach in some states and with the proposed position for the ACT. It is also in step with the ALRC’s proposal elsewhere in this Discussion Paper to improve the structure and order of federal sentencing provisions.⁹⁴⁰

11.66 Provisions dealing with the sentencing of a federal offender who undertakes to provide future cooperation with law enforcement authorities should be amended to provide as follows:

- in addition to imposing a reduced head sentence or non-parole period, a court may impose a less severe sentencing option, in which case it must state what sentencing option it would have imposed but for the undertaking to cooperate;
- the court has the power, on application of any party to the proceedings or on its own motion, to close the court and to make orders to protect confidential

information or evidence in relation to the undertaking or to protect the safety of any person; and

- an undertaking to cooperate must provide details of the promised cooperation, and must be in writing or reduced to writing and signed or otherwise acknowledged by the offender.

11.67 Requiring a written undertaking setting out details of the promised cooperation will assist a court, when originally imposing sentence, in assessing the extent of any reduction in sentence or whether to impose a less severe sentencing option. It will also assist when reconsidering a sentence following failure to comply with the undertaking, as there will be documentation against which the court can assess the extent of an offender's failure to comply.

11.68 There also appears to be a need for judicial education in certain jurisdictions to address judicial reluctance or difficulties in applying the requirement to specify reduction in sentences on the basis of promised cooperation. Proposals in relation to judicial education are set out in Chapter 19.

Proposal 11–4 Federal sentencing legislation should provide that, in sentencing a federal offender who undertakes to provide future cooperation with law enforcement authorities:

- (a) in addition to imposing a reduced head sentence or non-parole period, a court may impose a less severe sentencing option, in which case it must state what sentencing option it would have imposed but for the undertaking to cooperate;
- (b) the court has the power, on application of any party to the proceedings or on its own motion, to close the court and to make orders to protect confidential information or evidence in relation to the undertaking or to protect the safety of any person; and
- (c) the undertaking must provide details of the promised cooperation and, must be in writing or reduced to writing and signed or otherwise acknowledged by the offender.

Remissions

Should federal legislation make provision for remission or reduction of sentences imposed on federal offenders? If so, for what types of remission should federal legislation make provision? If not, which aspects of state and territory law with respect to remission or reduction of sentences should apply to federal offenders? [IP 29, Q 9–6]

Background

11.69 Remission is the reduction of a sentence by administrative action after a sentence has been imposed by a court. Remissions can operate either to reduce the amount of time to be served in prison—for example by reducing the non-parole period—or to reduce the length of a head sentence. Where a court has not set a non-parole period in relation to a term of imprisonment, remissions can also operate to reduce both the time in custody and the head sentence. Remissions are typically characterised as either general remissions—which are usually granted automatically at the commencement of the sentence or at regular intervals during the sentence—or special or earned remissions—which are usually awarded at the discretion of prison authorities on evidence of good behaviour and industry on the part of the offender.⁹⁴¹

11.70 Section 19AA(1) of the *Crimes Act* applies state and territory remission laws to federal sentences being served in prisons of those states and territories. The provision expressly excludes state and territory laws that allow remissions of non-parole periods or ‘periods of imprisonment equivalent to pre-release periods of imprisonment in respect of recognizance release orders’. However, if special reductions of the non-parole period are available under state law by reason of industrial action taken by prison warders, those remissions are also to be made available to federal prisoners.⁹⁴²

11.71 One of the explicit purposes of the legislation introducing Part IB was to provide that federal offenders would not have their non-parole periods reduced by remissions.⁹⁴³ The intention of the legislation was to provide ‘certainty in the period that the person is to serve before parole eligibility arises’.⁹⁴⁴

11.72 Remissions are no longer widely used in Australia. The movement towards abolition of remissions arose as a result of the adoption of the ‘truth in sentencing’ principle, which sought to ensure that sentences of imprisonment announced in courts were actually served. In one case, state legislation—now repealed—made provision for automatic remission of one third of a sentence of imprisonment.⁹⁴⁵

11.73 However, the sentencing legislation of the Northern Territory, Tasmania and Victoria still makes provision for remissions,⁹⁴⁶ and some jurisdictions preserve

remission entitlements for offenders sentenced prior to the commencement of legislation that repealed such entitlements.⁹⁴⁷ In the Northern Territory, the Director of Correctional Services is empowered to grant a period of remission up to 30 days per year in such circumstances as the Director thinks fit.⁹⁴⁸ In Tasmania, the Director of Corrective Services is empowered to remit the whole or part of a prisoner's sentence provided that the remission does not:

- exceed three months;
- exceed one-third of the total period of imprisonment to which a prisoner is sentenced; and
- operate so as to reduce the total period of imprisonment served by a prisoner to less than three months.⁹⁴⁹

11.74 Tasmanian and Victorian corrections legislation makes provision for special remissions. In those jurisdictions, a prisoner's sentence of imprisonment or non-parole period may be remitted by either the Director or Secretary of Corrective Services on account of a prisoner's good behaviour while suffering disruption or deprivation: (a) during an industrial dispute or emergency existing in the prison; or (b) in other circumstances of an unforeseen and special nature.⁹⁵⁰

11.75 Remissions are common in other countries, although the extent of remissions for good behaviour varies. In Canada, a prisoner can earn up to 15 days remission for each month of a sentence of imprisonment.⁹⁵¹ In the United States, a federal prisoner serving a term of imprisonment for more than one year, other than a term of life imprisonment, may receive credit of up to 54 days for each year of imprisonment.⁹⁵² In New Zealand, an offender may receive up to 10 per cent remission on the number of hours of community service work imposed by the court.⁹⁵³

Issues and problems

Should general remissions apply to federal offenders?

11.76 ALRC 44 recommended that general remissions unrelated to any particular aspect of the prisoner's behaviour should not be available—even if they are capable of being forfeited—because they are inconsistent with the principle of 'truth in sentencing'.⁹⁵⁴

11.77 There was some support expressed in consultations and submissions for automatic or general remissions.⁹⁵⁵ One federal offender submitted that there should be a general remission on sentences of up to 10 to 20 per cent.⁹⁵⁶ Professor Kate Warner expressed the view that automatic remissions that could be lost for prison offences were a useful management tool and did not impact greatly on 'truth in sentencing'.⁹⁵⁷

11.78 On the other hand, Professor Arie Freiberg noted that most jurisdictions had done away with remissions. He expressed the view that reintroducing remissions was

unnecessary and would be contrary to ‘truth in sentencing’.⁹⁵⁸ One federal offender also expressed opposition to automatic or general remissions.⁹⁵⁹

11.79 While not expressly supporting the reintroduction of general or automatic remissions, the New South Wales Legal Aid Commission submitted that consideration be given to the fact that:

In New South Wales there has been concern that the repeal of s 16G of the *Crimes Act* ... in relation to federal sentences will have the effect of dramatically increasing prison sentences in New South Wales. ... Given that the majority of Federal prisoners are in New South Wales and that a large proportion of these are for drug importation matters where sentences are generally lengthy, it can be expected that this will have the effect of increasing the overall amount of time that such federal offenders will spend in custody in New South Wales.⁹⁶⁰

Should special or earned remissions apply to federal offenders?

11.80 ALRC 44 recommended that earned remissions should apply to federal offenders because they form part of the rehabilitation process and provide incentive for offenders to be of good behaviour.⁹⁶¹ The report recommended that earned remissions should be restricted to a maximum of 20 per cent of the custodial order, and that to maximise their value as an incentive to the prisoner, the non-parole period should also be reduced by the amount of the remissions earned.⁹⁶²

11.81 There was considerable support expressed in consultations and submissions for earned remissions to apply in the sentencing of federal offenders as an incentive for rehabilitation.⁹⁶³ One federal offender submitted:

I believe that remissions must be reimplemented to assist the rehabilitative process and to encourage good behaviour. It also allows the offender to be released without being imprisoned for longer than absolutely necessary. One must consider the point in time in an offender’s sentence where the sentence stops being rehabilitative and starts to become detrimental to a person’s psychological well-being. Surely it would be in society’s best interest to release a rehabilitated offender from prison rather than an offender who has been profoundly affected by an excessively long sentence.⁹⁶⁴

11.82 On the other hand, Professor Warner expressed the view that earned remissions can be problematic because they are subjective.⁹⁶⁵

11.83 There was some support for earned remissions to apply to the non-parole period or to the time that an offender was in custody.⁹⁶⁶ Some stakeholders expressed the view that special or earned remissions should be expressly provided for in federal legislation, especially in light of the fact that their availability under state and territory legislation was limited.⁹⁶⁷

Remissions to the non-parole period in special circumstances

11.84 Part IB picks up and applies to a federal sentence state legislation that allows for remissions on non-parole periods where prisoners have been of good behaviour while suffering disruption or deprivation during industrial disputes. However, it does not pick up and apply state legislation that allows for remissions on non-parole periods where an offender is subject to similar conditions arising out of an emergency existing in the prison in which the sentence is being served—for example, a siege—or in other circumstances of an unforeseen and special nature.

ALRC's views***Application of remissions to federal offenders***

11.85 The ALRC is of the view that automatic or general remissions unrelated to any aspect of a prisoner's behaviour should not be available to federal offenders. Automatic remissions have been abolished in most jurisdictions and the ALRC is not convinced that there is any valid policy reason to re-introduce them. The ALRC notes in this regard the comments made by the Western Australian Legislation Committee considering legislation to abolish automatic remissions, 'that there appears to be no reason to impose a sentence that contains a one-third component that will never be served'.⁹⁶⁸

11.86 The ALRC notes the considerable support expressed by stakeholders for having earned remissions apply to federal offenders, a view the ALRC shared in its 1988 report. However, the ALRC is of the view that re-introducing a system of earned remissions for federal offenders would be fraught with difficulties. It would be impractical to introduce a federal scheme of earned remissions in states and territories that have abolished such schemes, given the relatively small number of federal offenders held within some prisons. For a system of earned remissions to be worthwhile it must be capable of being administered effectively. One of the main reasons that an earned remissions scheme was abandoned in Western Australia, for example, was that it was time consuming to administer.⁹⁶⁹

11.87 The other major difficulty is that it would create disparity of treatment of state and federal offenders within the same prison. It could be a source of tension in prisons if federal offenders were entitled to substantial earned remissions, but state or territory offenders were not.

11.88 The ALRC is of the view that discretionary parole is a more appropriate mechanism than earned remissions to promote positive prison conduct. Under the scheme proposed in Chapter 23, automatic parole is to be abolished. The abolition of automatic parole will provide an incentive for offenders to be of good behaviour in order to increase their prospects of being released when they first become eligible for parole. Under the ALRC's proposed scheme, one of the factors to be considered by the Federal Parole Board is 'the offender's conduct while serving his or her sentence'.⁹⁷⁰

11.89 In addition, there are other ways to provide incentives for offenders to be of good behaviour while in prison, such as the granting and withdrawal of privileges (for example, access to recreation, hobbies and sporting facilities or equipment; or allowing a television, radio, computer or approved items of personal property in the prisoner's cell).⁹⁷¹ In this regard, the ALRC notes that in 1998 a formal review of remissions in Western Australia concluded that remissions, or the threat of their removal, were not a necessary motivator of prison conduct and that there were other ways of sanctioning prisoners for unacceptable behaviour.⁹⁷²

Application of remissions to the non-parole period

11.90 The ALRC is of the view that federal sentencing legislation should expressly pick up and apply to federal non-parole periods a law of a state or territory that provides for the remission of a non-parole period because of an emergency within the prison or other unforeseen and special circumstances. The same principle should apply to remission of pre-release periods in respect of suspended sentences.

11.91 There appears to be no reason in principle to distinguish between remissions for industrial action and remissions for other emergencies where an offender has been of good behaviour while being subjected to deprivation or disruption. It is arbitrary to give a federal offender credit only where such deprivation has arisen because of an industrial dispute.

Proposal 11–5 Federal sentencing legislation should expressly pick up and apply to federal non-parole periods a law of a state or territory that provides for the remission of a non-parole period because of an emergency within the prison or other unforeseen and special circumstances. The same principle should apply to remission of pre-release periods in respect of suspended sentences.

869 *R v Williscroft* [1975] VR 292, 300; *Wong v The Queen* (2001) 207 CLR 584, [75].

870 *Wong v The Queen* (2001) 207 CLR 584, [76].

871 *Ibid*, [76] (Gaudron, Gummow, Hayne JJ).

872 *Markarian v The Queen* (2005) 215 ALR 213, [39].

873 *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [57].

874 See *Sentencing Act 1991* (Vic) s 5(2)(e); *Penalties and Sentences Act 1992* (Qld) s 13A(2); *Sentencing Act 1995* (WA) s 8(2); *Crimes Act 1900* (ACT) s 342(1)(r); *Crimes (Sentencing) Bill 2005* (ACT) cl 35(2)(b); *Sentencing Act 1995* (NT) s 5(2)(j). See also *Sentencing Act 2002* (NZ) s 9(2)(b).

875 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(1); *Penalties and Sentences Act 1992* (Qld) s 13.

876 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(2); *Penalties and Sentences Act 1992* (Qld) s 13(4). Under the *Sentencing Act 1995* (WA) s 8(4), when a court reduces a sentence because of a mitigating fact (including a guilty plea) it must state that fact in open court.

877 K Warner, *Sentencing in Tasmania* (2nd ed, 2002), [3.607]. In Tasmania the view has been expressed that a precise discount should not be identified: *Pavlic v R* (1995) 5 Tas R 186, [7], [13].

- 878 M Johnson, *Consultation*, Darwin, 27 April 2005. See also Law Society of the Northern Territory, *Consultation*, Darwin, 29 April 2005.
- 879 *Cameron v The Queen* (2002) 209 CLR 339, [95]. See also *R v Thomson*; *R v Houlton* (2000) 49 NSWLR 383, [148]–[149].
- 880 See New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; S Beckett, 'Practice and Procedure of Indictable Matters Set for Reform' (2005) 43(5) *Law Society Journal* 32; J Feneley, *Indictable Criminal Case Processing Reforms* (2005) Sydney Morning Herald <http://smh.com.au> at 7 April 2005.
- 881 *Criminal Justice Act 2003* (UK) ss 144, 174(2)(d).
- 882 Sentencing Guidelines Council (UK), *Reduction in Sentence for a Guilty Plea—Guideline*, 1 December 2004. See also Sentencing Advisory Panel (UK), *Advice to the Sentencing Guidelines Council—2: Reduction in Sentence for a Guilty Plea*, 1 June 2004.
- 883 *Crimes Act 1914* (Cth) s 21E; *Penalties and Sentences Act 1992* (Qld) s 13A(7); *Sentencing Act 1995* (WA) s 8(5); *Crimes Act 1900* (ACT) s 358. The *Crimes Act 1914* (Cth) s 21E and *Crimes Act 1900* (ACT) s 358 also require a court to quantify any reduction of the non-parole period as a result of promised cooperation.
- 884 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.
- 885 Crimes (Sentencing) Bill 2005 (ACT) cl 37.
- 886 K Mack and S Roach Anleu, *Submission SFO 16*, 7 April 2005; K Mack and S Roach Anleu, 'Sentencing Discount for a Guilty Plea: Time for a New Look' (1997) 1 *Flinders Journal of Law Reform* 123, 124.
- 887 JC, *Submission SFO 25*, 13 April 2005.
- 888 *Cameron v The Queen* (2002) 209 CLR 339, (Gaudron, Gummow, Callinan JJ), [13]–[14]. See also the views expressed by McHugh J, [44]–[47].
- 889 *Ibid*, [68].
- 890 *Ibid*, [66]–[67]. See also *R v Howard* (2003) 48 ACSR 438, 446–447.
- 891 *R v Thomson*; *R v Houlton* (2000) 49 NSWLR 383, [158].
- 892 *R v Sharma* (2002) 54 NSWLR 300.
- 893 Law Society of South Australia, *Consultation*, Adelaide, 21 April 2005.
- 894 A Freiberg, *Submission SFO 12*, 4 April 2005; M Bagaric and R Edney, *Consultation*, Melbourne, 1 April 2005; T Glynn SC, *Consultation*, Brisbane, 2 March 2005.
- 895 A Freiberg, *Submission SFO 12*, 4 April 2005.
- 896 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; JC, *Submission SFO 25*, 13 April 2005; JK, *Submission SFO 10*, 15 March 2005; M Bagaric and R Edney, *Consultation*, Melbourne, 1 April 2005.
- 897 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005. See also Attorney-General's Department, *Submission SFO 52*, 7 July 2005.
- 898 Law Society of South Australia, *Submission SFO 37*, 22 April 2005; M Johnson, *Consultation*, Darwin, 27 April 2005; Northern Territory Legal Aid Commission, *Consultation*, Darwin, 27 April 2005; Victoria Legal Aid, *Submission SFO 31*, 18 April 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005; A Freiberg, *Submission SFO 12*, 4 April 2005.
- 899 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
- 900 M Johnson, *Consultation*, Darwin, 27 April 2005.
- 901 M Pelly, 'Fears late guilty plea penalties could backfire', *The Sydney Morning Herald*, 7 April 2005, 4.
- 902 *Markarian v The Queen* (2005) 215 ALR 213, [74].
- 903 *R v Place* (2002) 81 SASR 395, [81].
- 904 See *R v Nagy* [1992] 1 VR 637, 650.
- 905 *Ibid*, 638, 652.
- 906 *Cameron v The Queen* (2002) 209 CLR 339, [70].
- 907 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; New South Wales Bar Association, *Consultation*, Sydney, 2 September 2004; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Victoria Legal Aid, *Submission SFO 31*, 18 April 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005; T Glynn SC, *Consultation*, Brisbane, 2 March 2005; M Johnson, *Consultation*, Darwin, 27 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; M Bagaric and R Edney, *Consultation*, Melbourne, 1 April 2005; JC, *Submission SFO 25*, 13 April 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005.
- 908 K Mack and S Roach Anleu, *Submission SFO 16*, 7 April 2005.
- 909 JK, *Submission SFO 10*, 15 March 2005.

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- 910 Victoria Legal Aid, *Submission SFO 31*, 18 April 2005.
- 911 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
- 912 C Le Grand, *Discounts Centre of Tribunal Review* (2005) <www.theaustralian.news.com.au> at 6 October 2005.
- 913 *Sentencing Act 1991* (Vic) s 5(2)(e); *Penalties and Sentences Act 1992* (Qld) s 13A(2); *Sentencing Act 1995* (WA) s 8(2); *Crimes Act 1900* (ACT) s 342(1)(r); Crimes (Sentencing) Bill 2005 (ACT) cl 35(2)(b); *Sentencing Act 1995* (NT) s 5(2)(j). See also *Sentencing Act 2002* (NZ) s 9(2)(b).
- 914 Crimes (Sentencing) Bill 2005 (ACT) cl 35(2).
- 915 Ibid cl 35(3).
- 916 Sentencing Guidelines Council (UK), *Reduction in Sentence for a Guilty Plea—Guideline*, 1 December 2004.
- 917 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 918 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
- 919 See also M Johnson, *Consultation*, Darwin, 27 April 2005.
- 920 See *Cameron v The Queen* (2002) 209 CLR 339, [66] (Kirby J).
- 921 New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency*, NZLC R89 (2005), [311].
- 922 *Cameron v The Queen* (2002) 209 CLR 339, [22].
- 923 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 924 *Crimes Act 1914* (Cth) s 16A(2)(f). See also Proposal 6–1.
- 925 See Ch 6 and Proposal 6–1.
- 926 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23; Crimes (Sentencing) Bill 2005 (ACT) cl 33.
- 927 Commonwealth Director of Public Prosecutions, *Consultation*, Hobart, 14 April 2005.
- 928 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23; Crimes (Sentencing) Bill 2005 (ACT) cl 36.
- 929 The ambit of s 21E is discussed further in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [9.23]. Dealing with the failure of a federal offender to comply with an undertaking to cooperate with the authorities is discussed in Ch 16.
- 930 *Penalties and Sentences Act 1992* (Qld) ss 13A, 188; *Sentencing Act 1995* (WA) ss 8(5), 37A; Crimes (Sentencing) Bill 2005 (ACT) cll 36–37, 136.
- 931 Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [9.24]–[9.32].
- 932 Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005.
- 933 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 934 *Penalties and Sentences Act 1992* (Qld) s 13A(5), (7)–(9).
- 935 Commonwealth Director of Public Prosecutions, *Consultation*, Sydney, 16 September 2004.
- 936 Commonwealth Director of Public Prosecutions, *Consultation*, Hobart, 14 April 2005.
- 937 *Penalties and Sentences Act 1992* (Qld) s 13A(3)(a), (4). See also the discussion above on factors relevant to reduction of sentence for cooperation.
- 938 Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005.
- 939 J Champion SC, *Submission SFO 46*, 29 April 2005.
- 940 See Proposal 2–2.
- 941 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [70]; Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [301]–[302].
- 942 *Crimes Act 1914* (Cth) s 19AA(4).
- 943 Explanatory Memorandum (Senate), Crimes Legislation Amendment Bill (No 2) 1989 (Cth), 1.
- 944 Ibid, 14.
- 945 The *Sentencing Act 1995* (WA) s 95 used to provide for an automatic remission of one-third of sentences of imprisonment.
- 946 *Prisons (Correctional Services) Act 1980* (NT) s 93; *Corrections Act 1986* (Vic) s 58E; *Children and Young Persons (General) Regulations 2001* (Vic) reg 15; *Corrections Act 1997* (Tas) ss 86, 87; *Corrections Regulations 1998* (Tas) regs 23, 24.
- 947 See, eg, *Correctional Services Act 1982* (SA) ss 20, 21. See also *Penalties and Sentences Act 1992* (Qld) s 75(1)(a), (2).
- 948 *Prisons (Correctional Services) Act 1980* (NT) s 93.
- 949 *Corrections Act 1997* (Tas) s 86; *Corrections Regulations 1998* (Tas) reg 23.

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- 950 *Corrections Act 1986* (Vic) s 58E; *Corrections Act 1997* (Tas) s 87.
 951 *Prisons and Reformatory Act (RS 1985, cP-20)* (Canada) s 6.
 952 *Sentencing Reform Act of 1984* 18 USC s 3624(b)(1) (US). See also *Sentencing Reform Act of 1984* 18 USC s 3621(2)(B) (US) (Bureau of Prisons may reduce sentence for a non-violent offence where offender successfully completes treatment program).
 953 *Sentencing Act 2002* (NZ) s 67.
 954 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 32, [86].
 955 Law Society of South Australia, *Submission SFO 37*, 22 April 2005; JC, *Submission SFO 25*, 13 April 2005; K Warner, *Consultation*, Hobart, 13 April 2005.
 956 JC, *Submission SFO 25*, 13 April 2005.
 957 K Warner, *Consultation*, Hobart, 13 April 2005.
 958 A Freiberg, *Submission SFO 12*, 4 April 2005.
 959 BN, *Submission SFO 17*, 8 April 2005.
 960 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005. Section 16G required a court imposing federal sentences that were to be served in a prison of a state or territory where sentences were not subject to remissions, to take that into account in determining the length of the sentence, and to adjust the sentence accordingly. See Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [9.61]–[9.63].
 961 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 33, [86].
 962 *Ibid*, Recs 34–35.
 963 Correctional Services Northern Territory, *Submission SFO 14*, 5 April 2005; BN, *Submission SFO 17*, 8 April 2005; JC, *Submission SFO 25*, 13 April 2005; Confidential, *Submission SFO 8*, 8 March 2005; LD, *Submission SFO 9*, 10 March 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Offenders Aid and Rehabilitation Services South Australia, *Consultation*, Adelaide, 20 April 2005; Prisoners' Legal Service, *Submission SFO 28*, 15 April 2005.
 964 Confidential, *Submission SFO 8*, 8 March 2005.
 965 K Warner, *Consultation*, Hobart, 13 April 2005.
 966 Confidential, *Submission SFO 8*, 8 March 2005; Prisoners' Legal Service, *Submission SFO 28*, 15 April 2005.
 967 Correctional Services Northern Territory, *Submission SFO 14*, 5 April 2005; Confidential, *Submission SFO 8*, 8 March 2005; BN, *Submission SFO 17*, 8 April 2005.
 968 Standing Committee on Legislation—Parliament of Western Australia, *Sentencing Legislation Amendment and Repeal Bill 2002 and the Sentence Administration Bill 2002*, Report 18 (2003), [4.10].
 969 Western Australia Ministry of Justice, *Report of the Review of Remission and Parole* (1998), 16.
 970 See Proposal 23–6.
 971 See, eg, *Director General's Rules 1981* (WA), r 3.2.2; 3.1(b), (d).
 972 Western Australia Ministry of Justice, *Report of the Review of Remission and Parole* (1998), 17.

12. Sentencing for Multiple Offences

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12.1 This chapter considers particular issues that arise when a court is sentencing an offender for more than one offence, namely, the setting of cumulative or concurrent sentences, and the imposition of an aggregate sentence for multiple offences arising out of the same criminal enterprise.

Cumulative or concurrent sentences

Should federal legislation provide guidance to courts about when it is appropriate to set cumulative, partly cumulative, or concurrent sentences? Should there be a legislative presumption in favour of concurrent or cumulative sentences? [IP 29, Q 9–4]

Background

12.2 Where a court sentences a federal offender for more than one offence the issue arises whether those sentences should be served concurrently (at the same time), cumulatively (one after the other), or partly cumulatively and partly concurrently.⁹⁷³

12.3 The orthodox practice in sentencing an offender for multiple offences is to set an appropriate sentence for each offence and then have regard to questions of cumulation or concurrence, as well as the principle of totality.⁹⁷⁴ As discussed in Chapter 5, the principle of totality ensures that an offender who is sentenced for multiple offences receives an appropriate sentence overall and does not receive a ‘crushing sentence’.⁹⁷⁵

The setting of concurrent or cumulative sentences is a method by which courts can ensure that multiple sentences comply with the totality principle.

12.4 When an offender is being sentenced for multiple offences, including federal offences, or at the time of being sentenced for a federal offence is subject to existing sentences, s 19 of the *Crimes Act 1914* (Cth) requires the court to state the commencement date of any federal sentence that it imposes. The section allows the court to declare a commencement date for a sentence in a way that makes the sentence cumulative, partly cumulative, or concurrent on an existing sentence or sentence passed at the same sitting in respect of federal, state, or territory offences. The section ensures that there is no gap between the end of a non-parole period that an offender is serving in relation to a state or territory offence and the commencement of the sentence for any new federal offence.

12.5 The term ‘cumulative’ is used in the sentencing legislation of most states and territories.⁹⁷⁶ However, the term ‘consecutive’ rather than ‘cumulative’ is used in the sentencing legislation of New South Wales and the proposed sentencing legislation of the ACT.⁹⁷⁷

Issues and problems

Power to pronounce cumulative or concurrent sentences

12.6 One issue identified in consultations and in case law is that judicial officers do not have express power under s 19 of the *Crimes Act* to order that sentences be served cumulatively or concurrently. They can only structure sentences so that they are in fact cumulative, partly cumulative or concurrent by declaring the commencement date of each sentence in order to bring about that result.⁹⁷⁸ Accordingly, on appeal, it has been found that an order made by a judicial officer that a federal sentence be cumulative on sentences imposed for state offences could have no effect, although it was possible to re-sentence the offender and impose a lawfully structured sentence having the same practical effect as that originally imposed.⁹⁷⁹

12.7 Members of the Victorian Bar submitted that it would be simpler and would save court time if judicial officers were given the express power to order that sentences be served concurrently or cumulatively. To this end, they expressed the view that ‘concurrent’ and ‘cumulative’ should be defined terms in federal sentencing legislation.⁹⁸⁰

Need for guidance

12.8 Section 19 does not provide any guidance as to when it is appropriate to make sentences concurrent or cumulative. There is a common law presumption in favour of concurrency of sentences.⁹⁸¹ Most state and territory sentencing legislation provides that sentences of imprisonment are to be served concurrently unless the court otherwise orders or the legislation otherwise provides.⁹⁸² State and territory legislation also typically sets out the circumstances or the types of sentences in respect of which the presumption of concurrency does not apply. For example, the presumption sometimes

does not apply to offences committed in custody or while an offender is on parole or unlawfully at large; or in respect of sentences of imprisonment imposed in default of payment of a fine.⁹⁸³

12.9 On appeal, it has sometimes been found that judicial officers have failed to take into account the totality principle when imposing sentences for multiple offences and have imposed cumulative sentences where a concurrent sentence may have been more appropriate.⁹⁸⁴ Conversely, judicial officers have sometimes improperly categorised separate and distinct acts of criminality as part of the one transaction, and imposed concurrent sentences when cumulative or partly cumulative sentences were found to be more appropriate on appeal.⁹⁸⁵

12.10 Stakeholders—including legal practitioners, federal offenders and academics—expressed support in consultations and submissions for federal sentencing legislation to contain a presumption that multiple sentences be served concurrently.⁹⁸⁶ The Criminal Bar Association of Victoria submitted that:

In federal sentencing there should be a ‘built-in’ assumption of concurrency of sentences when multiple sentences are imposed in respect of the same indictment. As observed in the Issues Paper the enactment of such a provision would give effect to the ‘common law presumption in favour of concurrency of sentences’. However, the Association disagrees with the recommendation of ALRC 44 that sentences should only be required to be served cumulatively in exceptional circumstances. This ought not be a matter of exceptional circumstance. Such an approach would have the effect of imposing an unwarranted limitation on the sentencing discretion of judicial officers. This approach would not assist in giving effect to the current requirement [in s 16(1) of the *Crimes Act*] that a sentence appropriate in all the circumstances should be passed in respect of each offence for which an offender falls to be sentenced.⁹⁸⁷

12.11 The New South Wales Law Reform Commission has recommended that there be a general legislative presumption in favour of concurrent sentences.⁹⁸⁸ However, the Gibbs Committee stated that it was proper that s 19 of the *Crimes Act* not contain a presumption in favour of sentences being made concurrent or cumulative.⁹⁸⁹

12.12 The presumption of concurrency aside, submissions and consultations were divided on the issue of whether federal sentencing legislation should provide guidance to courts about when it is appropriate to set concurrent, cumulative or partly cumulative sentences. The majority of stakeholders—including judicial officers, prosecutors, legal practitioners and academics—opposed such an approach.⁹⁹⁰ Reasons for stakeholders rejecting this approach included that legislative guidance was unnecessary because the applicable common law principles were well understood and adhered to by the courts,⁹⁹¹ that it would be impossible to provide general guidance given the potentially infinite circumstances which arise for consideration,⁹⁹² and that it would be an inappropriate fetter on judicial discretion to set rigid or mandatory guidelines.⁹⁹³ The Commonwealth Director of Public Prosecutions (CDPP) agreed with

the view expressed by Wells J in *Attorney-General v Tichy*, and adopted by Gleeson CJ in *Johnson v The Queen*, that:

It is both impracticable and undesirable to attempt to lay down comprehensive principles according to which a judicial officer may determine, in every case, whether sentences should be ordered to be served concurrently or consecutively. According to an inflexible Draconian logic, all sentences should be consecutive, because every offence, as a separate case of criminal liability, would justify the exaction of a separate penalty. But such a logic could never hold. ... Sometimes, a single act of criminal conduct will comprise two or more technically identified crimes. Sometimes, two or more technically identified crimes will comprise two or more courses of criminal conduct, that reasonably characterized, are really separate invasions of the community's right to peace and order, notwithstanding that they are historically interdependent; the courses of criminal conduct may coincide with the technical offences or they may not. Sometimes, the process of characterization rests upon an analysis of fact and degree leading to two possible answers, each of which, in the hands of the trial judge, could be made to work justice.⁹⁹⁴

12.13 The CDPP submitted that:

it is important for a legislative provision in this area to be flexible to enable a judicial officer to indeed mould a just sentence, by enabling concurrent, consecutive or partly consecutive sentences to be imposed.⁹⁹⁵

12.14 Other stakeholders expressed support for legislative guidance in relation to the setting of concurrent and cumulative sentences on the basis that it could assist a court in sentencing.⁹⁹⁶ One legal practitioner expressed the view that federal sentencing legislation should make it clear that totality was an important principle to be adhered to when a court was sentencing for multiple offences.⁹⁹⁷

12.15 The Attorney-General's Department submitted that it would be desirable for consideration to be given to whether any additional sentence imposed for an escape should be cumulative on the balance of any other sentence remaining to be served but did not express a view in this regard.⁹⁹⁸

ALRC's views

Power to pronounce cumulative or concurrent sentences

12.16 The ALRC prefers the plain English term 'consecutive', as used in the sentencing legislation of New South Wales and the proposed sentencing legislation of the ACT, to the term 'cumulative', which is used in the sentencing legislation of other jurisdictions. A preference for the use of plain English might similarly lead to the conclusion that the term 'concurrent' should be replaced with the term 'simultaneous'. The ALRC is interested in hearing stakeholders' views on this issue.

12.17 The ALRC is of the view that federal sentencing legislation should expressly empower a court, when sentencing a federal offender for more than one offence, to order the sentences to be served concurrently, consecutively or partly consecutively. The ALRC considers that federal sentencing legislation should be drafted in such a

way as to minimise the potential for courts to make errors in sentencing. When sentencing a federal offender for multiple offences the potential for error is increased by the fact that state and territory judicial officers in some jurisdictions have the express power to order sentences to be served concurrently or consecutively, whereas that power is not available to them under federal sentencing law.

12.18 The ALRC is of the view that it is unnecessary to define the terms ‘concurrent’ and ‘consecutive’. Neither these terms nor the term ‘cumulative’ are defined in the sentencing legislation of the states and territories. The Explanatory Statement to the proposed sentencing legislation of the ACT provides that ‘concurrent’ has its common meaning of ‘occurring side by side’ or ‘existing together’, and ‘consecutive’ has its common meaning of ‘following one another’.⁹⁹⁹ These are the ordinary meanings of these terms and little would be gained by including a statutory definition.

Need for guidance

12.19 The ALRC is of the view that federal sentencing legislation should provide that, when a court sentences a federal offender for more than one offence, there is a presumption that the sentences are to be served concurrently. However, the court should retain the discretion to set consecutive or partly consecutive sentences where it thinks that it is appropriate, and it need not find exceptional circumstances in order to do so. The ALRC’s approach is consistent with the common law, and with most state and territory sentencing legislation. It is also the approach supported by most stakeholders.

12.20 The ALRC also considers that there should be legislative recognition of the totality principle because this is a guiding principle in determining whether to set concurrent, consecutive or partly consecutive sentences for multiple offences. The ALRC’s views on the totality principle are discussed in Chapter 5.

12.21 Apart from a legislative presumption of concurrency and legislative recognition of the totality principle, the ALRC is currently of the view that it is unnecessary and undesirable for federal sentencing legislation to provide any further guidance in relation to when it is appropriate to set concurrent or consecutive sentences. However, the ALRC would be interested in hearing further views from stakeholders in relation to the issue raised by the Attorney-General’s Department as to whether federal sentencing legislation should expressly provide that any additional sentence imposed for an escape should be consecutive on the balance of any other sentence remaining to be served.

<p>Proposal 12-1 Federal sentencing legislation should expressly empower a court, when sentencing a federal offender for more than one offence, to order the sentences to be served concurrently, consecutively or partly consecutively.</p>
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Proposal 12-2 Federal sentencing legislation should provide that, when a court sentences a federal offender for more than one offence, there is a presumption that the sentences are to be served concurrently.

Aggregate sentences

How should federal legislation treat multiple offences forming part of a single criminal enterprise? For example, should the court have the option of imposing one penalty for multiple offences (whether summary or indictable) or imposing concurrent sentences in respect of each offence? Should the court have the ability to aggregate sentences irrespective of whether the offences relate to ‘the same provision of a law of the Commonwealth’? [IP 29, Q 9–5]

Background

12.22 In some cases, where a court sentences a federal offender for multiple offences arising out of the same criminal enterprise it has the option to aggregate the sentences for those offences and impose a single sentence.¹⁰⁰⁰ This is an alternative to the court imposing concurrent sentences for each offence.

12.23 Section 4K(3) of the *Crimes Act* provides that charges for multiple offences against the same provision of a Commonwealth law may be joined in the same information, complaint or summons if they are based on the same facts, or form, or are part of a series of offences of the same or similar character.¹⁰⁰¹ Section 4K(4) provides that the court may then impose one penalty for all such offences but the penalty is not to exceed the sum of the maximum penalties that could be imposed if a separate penalty were imposed in respect of each offence. It has been held that s 4K(4) is confined to summary offences.¹⁰⁰²

12.24 There is no statutory provision in New South Wales, Victoria, Queensland or Western Australia allowing for the imposition of one sentence on a person convicted on indictment of multiple offences.¹⁰⁰³ However, the sentencing legislation of South Australia, Tasmania and the Northern Territory allows aggregate sentencing for indictable offences.¹⁰⁰⁴ Where the state or territory sentencing scheme allows an aggregate sentence to be imposed for indictable offences, this is picked up and applied by s 68(1) of the *Judiciary Act 1903* (Cth) to federal offenders.¹⁰⁰⁵

Issues and problems

Indictable offences

12.25 The majority of stakeholders—including prosecutors, legal practitioners and a correctional services department—expressed support for allowing a court to impose one sentence for multiple offences, irrespective of whether the offences are summary

or indictable, but recognized that aggregate sentencing would not be appropriate in all circumstances.¹⁰⁰⁶

12.26 Stakeholders submitted that it was anomalous that a court exercising summary jurisdiction had greater powers in this area than a court dealing with matters on indictment;¹⁰⁰⁷ and that there was no relevant difference in principle between offenders who are being sentenced summarily and those who are being sentenced on indictment, as even magistrates could impose heavy sentences.¹⁰⁰⁸ Various legal bodies submitted that it could be cumbersome for a judicial officer to have to pronounce numerous separate federal sentences,¹⁰⁰⁹ and that it would be useful and appropriate for a court to have available to it the option of aggregating a sentence in respect of a course of conduct reflected in multiple charges contained in the one indictment.¹⁰¹⁰

12.27 The CDPP, the Criminal Bar Association of Victoria, and the New South Wales Legal Aid Commission expressed the view that the ability to aggregate sentences would be appropriate for taxation offences or fraud, where offences were often repetitive and occurred over many years.¹⁰¹¹ Social security fraud, in particular, lent itself to aggregate sentencing as each time a person receives a social security payment to which they are not entitled they commit a new offence, although the offending amounts to a course of conduct. The CDPP submitted that in such circumstances it was unnecessary for the offender to be given multiple sentences.¹⁰¹²

12.28 Correctional Services Northern Territory submitted that:

The court should have the power to impose one penalty for multiple offences. An offender does not really care what he receives for the individual offences. What matters is how long they must be in custody or under supervision.¹⁰¹³

12.29 Stakeholders expressed the view that the power to impose an aggregate sentence for multiple indictable or summary offences should be available to the court on a discretionary, rather than mandatory, basis. The CDPP submitted that:

Of course, such a mechanism is enabling rather than prescriptive, in the sense that it would not be mandatory for a Judge to impose a single sentence. A single sentence would only be imposed in circumstances where the offending behaviour was linked in such a way as to make an aggregate sentence the appropriate course of action.¹⁰¹⁴

12.30 Some federal offenders expressed a preference for courts to deal with multiple offences arising out of the same course of conduct by imposing concurrent sentences, rather than aggregating a sentence; and one federal offender expressed outright opposition to a court being able to impose aggregate sentences.¹⁰¹⁵ One legal practitioner expressed opposition to a court being able to aggregate sentences in respect of joint federal and state or territory offences.¹⁰¹⁶

Transparency in sentencing

12.31 In *Putland v The Queen* Kirby J (dissenting) opposed aggregate sentencing for multiple indictable offences:

Only if specific sentences are identified for federal indictable offences ... will the transparency of the sentencing process be fully upheld. ... The submergences of sentences for major crimes in a single undifferentiated aggregate sentence carries a risk of injustice to the offender. In practical terms, it makes the offender's task of challenging the unidentified components of the aggregate sentence much more difficult. It risks depriving the offender of the provision of adequate reasons for the components of the sentence. It undermines the objective of identifying differential sentences for specific federal crimes so that their content might be known and compared throughout the Commonwealth by all concerned. It diminishes the effectiveness of the deterrent value of particularised sentences. It reduces the utility and availability of effective appellate review addressed to consistency throughout Australia in the sentencing of federal offenders for particular offences. ...

Sentences for *summary* offences may be aggregated; but not sentences for the typically more serious *indictable* offences. In the case of indictable offences specificity in sentencing is at a premium. That is so because the punishment (including ... loss of liberty) is typically greater and more onerous. It should therefore be identified and identifiable.¹⁰¹⁷

12.32 Kirby J expressed the view that it was a matter for the Australian Parliament to consider explicitly any extension of the aggregate sentencing principle contained in s 4K of the *Crimes Act* to federal indictable offences, if that were its purpose.¹⁰¹⁸

12.33 The potential for aggregate sentencing for multiple indictable offences to impact adversely on the transparency of sentencing, and the difficulties this gives rise to on appeal, were also raised in consultations and submissions.¹⁰¹⁹ Where an appellate court sets aside findings of guilt in relation to certain counts that were the subject of an aggregate sentence, an adjustment would have to be made to the aggregate sentence without the appellate court having the benefit of knowing the individual sentences that the lower court may have had in mind in respect of those counts. One prosecutor expressed opposition to aggregate sentencing for indictable offences on this basis.¹⁰²⁰

Inconsistent treatment of federal offenders

12.34 The power of a court to impose an aggregate sentence for multiple indictable offences is one that is available in the sentencing of federal offenders in some jurisdictions and not others by virtue of the fact that s 68 of the *Judiciary Act* picks up and applies state and territory schemes that invest courts with such a power. Accordingly, this is an area where there is inconsistent treatment, or the potential for inconsistent treatment, of federal offenders.

12.35 The Legal Services Commission of South Australia noted that the ability in South Australia to impose aggregate sentences for state offences operates effectively and that it was useful to have a similar power for federal offences. It submitted that

federal sentencing legislation should make the procedures for federal offenders the same throughout the states.¹⁰²¹

Offences against different provisions of Commonwealth law

12.36 There was some support for s 4K of the *Crimes Act* to be amended to allow a court to impose an aggregate sentence for a course of criminal conduct comprised of different but related offences, notwithstanding that those offences were not against the same provision of a Commonwealth law.¹⁰²² The CDPP submitted:

The question of whether it is appropriate to enable aggregate sentences to be given for different offences is more difficult. ...

However, from time to time, cases arise where it is clear that although there are different offences which have been made out, it is, in fact, appropriate that the offender be punished once only for the behaviour. For example, in some fraud cases, the offender may have committed several different types of offences (making a false statement, obtaining a benefit not payable), but the circumstances of the offending is such that it could all be said to be part of the same wrongdoing.

In those cases, it is fairer to the offender that one punishment be given. It is not helpful to have multiple sentences to reflect a technical distinction in the law, where it is clear what behaviour is being punished.

... The CDPP is of the view that it would be helpful if the legislation reflected an option to allow courts to join sentences in this way, in appropriate cases.¹⁰²³

Options for reform

12.37 There are two ways of achieving consistency of treatment of federal offenders across jurisdictions in relation to aggregate sentencing for multiple indictable offences. One option is for federal sentencing legislation to be amended to extend aggregate sentencing to indictable matters. Express federal legislative provision would obviate the process by which s 68 of the *Judiciary Act* picks up and applies to the sentencing of federal offenders state and territory provisions that allow for aggregate sentencing for multiple indictable offences.

12.38 Another option is for federal sentencing legislation to be amended to provide that aggregate sentencing is not available where a federal offender is to be sentenced for multiple indictable offences. Such a provision would exclude the availability of aggregate sentences for multiple indictable offences in those states and territories in which they are currently available by virtue of s 68 of the *Judiciary Act*.

12.39 A further option for reform—which could be pursued independently of any reform of aggregate sentencing for indictable offences—is to extend the court's powers to impose an aggregate sentence notwithstanding that the offences relate to more than one provision of Commonwealth law where the offences constitute a course of conduct.

ALRC's views***Indictable offences***

12.40 The ALRC is of the view that, in addition to the option of imposing concurrent sentences for indictable offences arising out of the same criminal enterprise or course of conduct, federal sentencing legislation should invest a court with the power to impose an aggregate sentence in respect of such offences. Section 4K of the *Crimes Act* should be amended so that the scope of the provision extends beyond summary matters to indictable matters.

12.41 The ALRC has come to this view having regard to the majority of views expressed in consultations and submissions; and, in particular, to the fact that certain federal offences such as social security fraud and taxation offences appropriately lend themselves to disposition in this manner. Allowing a single aggregate sentence to be imposed in respect of multiple indictable offences also has the advantage of simplifying a court's task of explaining to a federal offender the sentence imposed.¹⁰²⁴ Investing courts with the power to impose aggregate sentences for indictable federal offences will also promote consistency of treatment of federal offenders in all state and territory jurisdictions.

Offences against different provisions of Commonwealth law

12.42 For the reasons advanced by the CDPP concerning fairness to an offender, the ALRC has formed the view that s 4K of the *Crimes Act* should also be amended to empower charges against more than one provision of Commonwealth law to be joined where those charges arise out of the same criminal enterprise, thereby facilitating a court's power to impose an aggregate sentence in such circumstances.

Prosecution policy to give guidance

12.43 It should be borne in mind that the exercise of the CDPP's discretion to join charges in the same information, complaint, summons or indictment is a precursor to the exercise of a court's discretion to impose an aggregate sentence, although the CDPP's decision to join charges may be informed by other considerations. Moreover, the ALRC is mindful of the disadvantages, identified by Kirby J in *Putland v The Queen*, of allowing major indictable offences to be the subject of an aggregate sentence, and of the fact that stakeholders who supported an expansion of a court's powers to impose aggregate sentences stressed that aggregate sentencing is not appropriate in all circumstances.

12.44 In light of these considerations, the CDPP should develop guidelines about when it is appropriate for a prosecutor to seek an aggregate sentence for multiple summary or indictable offences. The types of factors that might be considered for inclusion in the guidelines include: the seriousness of the offences, including harm caused by the offences; the nature of the offences, including whether they were repetitive in nature; the period of time over which the offences were committed; and whether identifiable individuals were the victims. For example, it may be less

appropriate to seek an aggregate sentence for multiple offences if a number of individuals have suffered harm as a result of the offences because victims have an interest in knowing the sentence that an offender has received in relation to the conduct that has caused them harm. It may also be inappropriate to seek an aggregate sentence in relation to the more serious indictable offences.

Reasons to indicate weight attached to each count

12.45 As mentioned above, consultations and submissions noted that aggregate sentencing for multiple indictable offences may detract from the transparency of sentencing and has the potential to cause difficulties on appeal. In order to address these concerns, the ALRC considers that federal sentencing legislation should require a court that chooses to impose one sentence in relation to more than one federal offence to address, in its reasons for sentence, the weight it has attached to each individual count in a manner that would assist an appellate court in making appropriate orders in the event of a successful appeal. For example, a court could indicate where it had apportioned equal punishment for certain counts, or where the quantum of a sentence was heavily based on the offender's culpability in relation to a particular count.

Proposal 12-3 Section 4K of the *Crimes Act 1914* (Cth), which allows charges for a number of federal offences to be joined in the same information, complaint or summons, and permits aggregate sentencing of summary matters in certain circumstances, should be amended as follows:

- (a) the scope of the provision should be extended beyond summary matters to indictable matters; and
- (b) the provision should be extended to allow the joining of charges against more than one provision of Commonwealth law.

Proposal 12-4 The Commonwealth Director of Public Prosecutions should develop guidelines in relation to when it is appropriate for a prosecutor to seek an aggregate sentence for multiple summary or indictable offences.

Proposal 12-5 Federal sentencing legislation should require a court that chooses to impose one sentence in relation to more than one federal offence to address, in its reasons for sentence, the weight it has attached to individual counts in a manner that would assist an appellate court in making appropriate orders in the event of a successful appeal.

- 973 Cumulative and concurrent sentences are discussed in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [9.43]–[9.48].
- 974 *Johnson v The Queen* (2004) 205 ALR 346, [26]; *Pearce v The Queen* (1998) 194 CLR 610, [45]; *Mill v The Queen* (1988) 166 CLR 59.
- 975 D Thomas, *Principles of Sentencing* (2nd ed, 1979), 57–58, cited in *Postiglione v The Queen* (1997) 189 CLR 295, 413; *Johnson v The Queen* (2004) 205 ALR 346, 355.
- 976 See, eg, *Sentencing Act 1991* (Vic) ss 6E, 16; *Penalties and Sentences Act 1992* (Qld) ss 156, 156A; *Sentencing Act 1995* (WA) s 88; *Criminal Law (Sentencing) Act 1988* (SA) s 38; *Sentencing Act 1997* (Tas) s 15; *Sentencing Act 1995* (NT) s 51. See also *Defence Force Discipline Act 1982* (Cth) s 74.
- 977 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 55; Crimes (Sentencing) Bill 2005 (ACT) pt 5.3.
- 978 *R v O'Brien* (1991) 57 A Crim R 80, 84–88.
- 979 *R v Daswani* (2005) 53 ACSR 675, [10].
- 980 Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005.
- 981 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [9.601].
- 982 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 55(1); *Sentencing Act 1991* (Vic) s 16(1); *Penalties and Sentences Act 1992* (Qld) s 155; *Sentencing Act 1995* (WA) s 50; *Sentencing Act 1997* (Tas) s 15; *Crimes Act 1900* (ACT) s 354; Crimes (Sentencing) Bill 2005 (ACT) cl 71(1).
- 983 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 56, 57; *Sentencing Act 1991* (Vic) s 16; *Penalties and Sentences Act 1992* (Qld) s 156A; *Sentencing Act 1997* (Tas) s 15(2); *Crimes Act 1900* (ACT) s 354(2)(a), (3); Crimes (Sentencing) Bill 2005 (ACT) cl 71(3).
- 984 *Johnson v The Queen* (2004) 205 ALR 346, [35], [45]. Failure to consider the totality principle has occurred in cases dealing with joint federal and state offences: *R v Weiss* [2000] QCA 262; *Hooton v Hales* [2002] 12 NTLR 15, [12].
- 985 *R v Lappas* (2003) 139 A Crim R 77, [137].
- 986 Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; JC, *Submission SFO 25*, 13 April 2005; LD, *Submission SFO 9*, 10 March 2005; A Freiberg, *Submission SFO 12*, 4 April 2005.
- 987 Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005 (citations omitted).
- 988 New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), Rec 43.
- 989 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991) Attorney-General's Department, [12.29]–[12.31]. The establishment of the Gibbs Committee is discussed in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [6.6].
- 990 Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Hobart, 14 April 2005; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005.
- 991 Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.
- 992 A Freiberg, *Submission SFO 12*, 4 April 2005.
- 993 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.
- 994 See *Attorney-General (SA) v Tichy* (1982) 30 SASR 84, 92–93; *Johnson v The Queen* (2004) 205 ALR 346, [4].
- 995 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 996 Law Society of South Australia, *Submission SFO 37*, 22 April 2005; JC, *Submission SFO 25*, 13 April 2005.
- 997 M Johnson, *Consultation*, Darwin, 27 April 2005.
- 998 Attorney-General's Department, *Submission SFO 52*, 7 July 2005.
- 999 Crimes (Sentencing) Bill Explanatory Statement 2005 (ACT) cl 70.
- 1000 Aggregate sentencing for multiple offences is discussed in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [9.49]–[9.55].
- 1001 Section 4K lies outside Part IB but is directly related to the sentencing of federal offenders. The location of this provision is discussed in Ch 2. The use of representative charges for a course of conduct and taking other offences into account in sentencing are discussed in Ch 6.
- 1002 *R v Bibaoui* (1997) 2 VR 600; *Putland v The Queen* (2004) 218 CLR 174, [9].

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- 1003 The *Sentencing Act 1991* (Vic) s 9 authorises the Magistrates' Court to impose an aggregate sentence of imprisonment, including for indictable offences being tried summarily.
- 1004 *Criminal Law (Sentencing) Act 1988* (SA) s 18A; *Sentencing Act 1997* (Tas) s 11; *Sentencing Act 1995* (NT) s 52(1).
- 1005 *Putland v The Queen* (2004) 218 CLR 174; *Jackson v The Queen* (1998) 104 A Crim R 196. See also M Pedley, *Federal Sentencing in Victoria* (2004) Commonwealth Director of Public Prosecutions, 2.
- 1006 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; Legal Services Commission of South Australia, *Submission SFO 19*, 8 April 2005; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Correctional Services Northern Territory, *Submission SFO 14*, 5 April 2005.
- 1007 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.
- 1008 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005.
- 1009 Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005.
- 1010 Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Legal Services Commission of South Australia, *Submission SFO 19*, 8 April 2005; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 1011 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; New South Wales Legal Aid Commission—Criminal Law Division, *Consultation*, Sydney, 22 September 2004.
- 1012 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 1013 Correctional Services Northern Territory, *Submission SFO 14*, 5 April 2005.
- 1014 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005. See also New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005.
- 1015 LD, *Submission SFO 9*, 10 March 2005; JC, *Submission SFO 25*, 13 April 2005.
- 1016 M Johnson, *Consultation*, Darwin, 27 April 2005.
- 1017 *Putland v The Queen* (2004) 218 CLR 174, [116], [119].
- 1018 *Ibid*, [118].
- 1019 A Freiberg, *Submission SFO 12*, 4 April 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Hobart, 14 April 2005.
- 1020 Commonwealth Director of Public Prosecutions, *Consultation*, Hobart, 14 April 2005.
- 1021 Legal Services Commission of South Australia, *Submission SFO 19*, 8 April 2005.
- 1022 New South Wales Legal Aid Commission—Criminal Law Division, *Consultation*, Sydney, 22 September 2004; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 1023 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 1024 Explanation of sentence is discussed in Ch 13.

13. The Sentencing Hearing

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Introduction

13.1 This chapter considers a number of procedural issues that arise in the context of the sentencing hearing. They include when a federal offender is required to be present for sentencing; the consequences of a federal offender not having legal representation at sentencing; the explanation of the sentence imposed; and the provision of sentencing orders to federal offenders.

13.2 This chapter also considers a number of evidential issues in relation to the sentencing hearing, including the process of fact-finding in sentencing, and the burden and standard of proof. Finally, the issue of whether the jury should be given an increased role in sentencing is explored.

13.3 Sections 68(1) and 79 of the *Judiciary Act 1903* (Cth) pick up and apply state and territory procedural laws to federal prosecutions in state and territory courts. It is not always clear whether particular sentencing provisions can be categorised as ‘procedural’ rather than substantive, such that they are picked up and applied in the sentencing of federal offenders. The question of whether ss 68 or 79 pick up and apply particular state and territory provisions is often tested on a case-by-case basis.¹⁰²⁵ State and territory provisions relating to victim impact statements and pre-sentence reports have been described as matters of sentencing procedure¹⁰²⁶ and these are discussed separately in Chapter 14.

Presence of offender

Background

13.4 Part IB of the *Crimes Act 1914* (Cth) does not require a federal offender to be present at sentencing. Because a number of provisions in Part IB include a specific requirement that the court explain *or cause to be explained* the purposes and consequences of imposing particular sentencing options, Part IB appears to envisage that there are circumstances in which an offender will not be present at sentencing.

13.5 Article 14(1) of the *International Covenant on Civil and Political Rights 1966* (ICCPR) provides for a fair and public trial and art 14(3)(d) provides that one of the minimum guarantees to be afforded to a defendant is the right to be tried in his or her presence.¹⁰²⁷ Article 6 of the *European Convention on Human Rights 1950* (ECHR) is in similar terms.¹⁰²⁸ While the ICCPR does not explicitly state that a defendant’s right to be present at trial extends to sentencing, there is some international authority for the proposition that the right to a fair trial extends to the sentencing process.¹⁰²⁹

13.6 Some state and territory sentencing legislation makes provision for the presence of an offender at sentencing,¹⁰³⁰ but the reach of these provisions varies. For example, South Australian legislation only requires the presence of an offender who is to be sentenced for an indictable offence;¹⁰³¹ New South Wales legislation precludes only the Local Court from imposing certain sentencing options in the absence of an offender;¹⁰³² and the relevant Victorian provision applies only where the court imposes an indefinite sentence in respect of a serious offence.¹⁰³³ In contrast, the reach of the Northern Territory and Western Australian legislation is considerably wider: the requirement for an offender to be present at sentencing is not limited to any category of offence, nor does it vary according to the court in which an offender is sentenced, although it is subject to exceptions.¹⁰³⁴

13.7 There is also international precedent for a legislative provision requiring the presence of a defendant at sentencing. In the United States, as a general rule, an offender is required to be present at sentencing in the federal district courts.¹⁰³⁵

13.8 Jurisdictions that require an offender's presence during sentencing typically set out a number of exceptions to the general rule. These include: where the court imposes a fine,¹⁰³⁶ where the court does not impose a sentence,¹⁰³⁷ where an order is made on the hearing of an appeal,¹⁰³⁸ where the proceeding involves the correction of a sentence,¹⁰³⁹ where the defendant is absent with the prosecutor's consent,¹⁰⁴⁰ or where the defendant is being sentenced for an offence punishable by fine or imprisonment for not more than one year, or both, as long as the defendant has given written consent to be absent and the court gives its permission.¹⁰⁴¹

13.9 In addition, sentencing legislation in South Australia allows a court to exclude an offender from proceedings if it is satisfied that the exclusion is necessary in the interests of safety or for the orderly conduct of the proceedings. If such an exclusion is made, the court must make arrangements to enable the offender to see and hear the proceedings by videolink.¹⁰⁴² In the United States, a federal offender may waive his or her right to be present at sentencing by disruptive behaviour.¹⁰⁴³

13.10 Some legislation expressly empowers a court to make any order necessary to ensure that an offender is present at sentencing, including issuing a summons to appear or a warrant to have the offender arrested and brought before the court.¹⁰⁴⁴

ALRC's views

13.11 The ALRC is of the view that a sentencing hearing should be conducted fairly and in accordance with the principles of natural justice, particularly having regard to the fact that sentencing is the stage at which an offender is often at risk of losing his or her liberty or having it curtailed in some way. A fundamental aspect of a fair hearing is that the person who will ultimately be affected by its outcome should be able to participate in a meaningful way. The presence of a person at a hearing increases the likelihood of meaningful participation and may also promote those sentencing purposes that aim to deter the offender or denounce his or her conduct.¹⁰⁴⁵

13.12 Having regard to these considerations, the ALRC believes that federal sentencing legislation should provide that, subject to defined exceptions, the offender must be present during sentencing proceedings where the court intends to impose a sentence that: (a) deprives the offender of his or her liberty or places the offender in jeopardy of being deprived of his or her liberty; or (b) requires the offender to consent to conditions or give an undertaking. In the latter case, the presence of the offender is necessary to ensure that the court is in a position to obtain informed consent and to explain the conditions or undertaking and the consequences of breach.¹⁰⁴⁶

13.13 Drawing on the types of exceptions that are stipulated in other jurisdictions, the ALRC considers that one exception to the general rule should be where the physical

presence of the offender may jeopardise the safety of any person or the orderly conduct of proceedings. In such a case the court should make arrangements, where practicable, to enable the offender to participate by videolink or other similar method.

13.14 In addition, federal offenders should not have to be present for the correction of ‘slip’ errors in sentencing, although they should be given an opportunity to be heard in relation to the correction of more substantive sentencing errors.¹⁰⁴⁷ However, even in the latter case, offenders should not have to be present where they have been given an opportunity to be present at the correction hearing, they have consented to the correction being made in their absence, and the court has given its permission. Requiring the presence of an offender in these circumstances may unnecessarily delay the proceedings.

13.15 As noted above, some state legislation does not require the presence of an offender at sentencing where a fine is to be imposed. For pragmatic reasons, the ALRC agrees that an offender should not be required to be present in these circumstances. Because the imposition of a fine neither deprives an offender of his or her liberty nor requires consent or an undertaking, the ALRC’s proposal has the practical effect of exempting cases where the court intends to impose a fine alone.

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

Federal legislation may specify limited exceptions to this rule, such as:

- (i) where the presence of the offender may jeopardise the safety of any person or the orderly conduct of the proceedings;
- (ii) where the proceedings involve the correction of slip errors; or
- (iii) where the proceedings involve the correction of substantive sentencing errors, provided the offender has been given an opportunity to be present, has consented to the correction being made in his or her absence and the court has given its permission.

Legal representation

Background

13.16 Neither Part IB of the *Crimes Act* nor the sentencing legislation of the states and territories make provision for an offender to be legally represented at sentencing. The New Zealand *Sentencing Act* provides that, except in defined circumstances, a court may not impose a sentence of imprisonment on an offender who has not been legally represented 'at the stage of the proceedings at which the offender was at risk of conviction'. The prohibition does not apply if the court is satisfied that the offender was made aware of, and understood, his or her rights relating to legal representation and, having had an opportunity to exercise those rights, refused or failed to do so. Refusal or failure is made out where an offender refuses or fails to apply for legal aid, or unsuccessfully applies for it and does not engage legal representation by other means.¹⁰⁴⁸

13.17 In *Dietrich v The Queen*, the High Court dealt with the issue of legal representation at trial. The court held that a defendant does not have the right to be provided with legal representation at public expense. However, the common law recognises that a defendant has the right to a fair trial and that depending on the circumstances of the case, the absence of legal representation may mean that a defendant is unable to receive a fair trial.¹⁰⁴⁹ In such cases the courts have a power to stay the criminal proceedings. Mason CJ and McHugh J expressed the view that:

the desirability of an accused charged with a serious offence being represented is so great that we consider that the trial should proceed without representation for the accused in exceptional circumstances only. In all other cases of serious crimes, the remedy of an adjournment should be granted in order that representation can be obtained.¹⁰⁵⁰

13.18 Deane J said:

There are circumstances in which a criminal trial will be relevantly fair notwithstanding that the accused is unrepresented. The most obvious category of case in which that is so is where an accused desires to be unrepresented or persistently neglects or refuses to take advantage of legal representation which is available ... Another category of case in which that is so is where the accused has the financial means to engage legal representation but decides not to incur the expense. ... Finally it is arguable that there are categories of criminal proceedings where inability to obtain legal representation would not have the effect that the trial of an accused person was an unfair one. For example, there is much to be said for the view that proceedings before a magistrate or judge, without a jury, for a non-serious offence ... eg where there is no real threat of deprivation of personal liberty ... would not be rendered inherently unfair by reason of inability to obtain full legal representation.¹⁰⁵¹

ALRC's views

13.19 As stated above, a sentencing hearing should be conducted fairly because of the risk that an offender may be deprived of his or her liberty or have it curtailed in some

way. Depending on the circumstances, fairness may dictate that a federal offender not be sentenced in the absence of legal representation.

13.20 The ALRC considers that the principles enunciated by the High Court in *Dietrich v The Queen* are applicable by analogy to sentencing. The ALRC is particularly attracted to the view expressed by Deane J that, where an offender does not face a threat of deprivation of personal liberty, the absence of legal representation is unlikely to render the process inherently unfair.

13.21 Accordingly, the ALRC proposes that federal sentencing legislation should provide that, where a federal offender is not represented in a sentencing proceeding, the court should generally adjourn the proceeding to allow the offender a reasonable opportunity to obtain legal representation. However, the court may proceed without adjournment and may impose a sentence on a federal offender where: (a) the offender has refused or failed to exercise the right to legal representation in circumstances where the offender fully understands the right and the consequences of not exercising it; or (b) the court does not intend to impose, and does not impose, a sentence that would deprive the offender of his or her liberty or that would place the offender in jeopardy of being so deprived.

13.22 As discussed above, the ALRC is of the view that an offender should be present at a sentencing hearing where the court intends to impose a sentence that attaches conditions requiring the offender to consent or to give an undertaking. However, the ALRC does not consider it essential for an offender to be legally represented when a court imposes such a sentence, unless the court imposes a suspended sentence. A suspended sentence usually requires an offender to undertake that he or she will comply with certain conditions but, unlike other orders for conditional release, it places the offender in jeopardy of losing his or her liberty.

13.23 Under this scheme it would be possible, for example, for a court to discharge an offender without conviction, make an order of conditional release (other than a suspended sentence) or impose a fine or community service order, notwithstanding that the offender is not legally represented at the sentencing hearing.

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

- (a) the offender has refused or failed to exercise the right to legal representation in circumstances where the offender fully understands the right and the consequences of not exercising it; or
- (b) the court does not intend to impose, and does not impose, a sentence that would deprive the offender of his or her liberty or place the offender in jeopardy of being deprived of his or her liberty.

Explanation of sentence

When sentencing a federal offender, should a court be required to explain to the offender the purposes and consequences of the sentence? In what circumstances, if any, should a court be able to delegate this function to others, and if so, to whom? [IP 29, Q 9–9]

Background

13.24 Distinct from the requirement to give reasons for sentencing decisions is the requirement that courts explain to offenders the meaning of the sentencing order imposed upon them.¹⁰⁵²

13.25 A number of provisions in Part IB of the *Crimes Act* include a requirement that the court explain or cause to be explained to the offender, in language likely to be understood by the person, the purposes and effects of imposing particular sentencing options, including the consequences of failing to comply with a sentence or order.¹⁰⁵³ Some state sentencing legislation also imposes a requirement that the court explain sentences,¹⁰⁵⁴ or certain sentences,¹⁰⁵⁵ or sentencing orders that attach conditions to which an offender is required to consent or that require an offender to give an undertaking.¹⁰⁵⁶ Provision is also made in some overseas legislation for courts to explain to offenders the effects of any sentences they impose.¹⁰⁵⁷

13.26 Where offenders are not present in court, judges may cause an explanation to be given to the offender under s 16F of the *Crimes Act*. For example, in *R v Carroll*, the explanation was delegated to an appropriate officer of the Office of Corrections, who was directed to report in writing to the Registrar of Criminal Appeal that the explanation had been given.¹⁰⁵⁸ In *R v Wright*, the Queensland Court of Appeal delegated the task of explaining the sentence to the offender's solicitor, who was directed to file an affidavit deposing to compliance.¹⁰⁵⁹

Issues and problems

Should an explanation be given and by whom?

13.27 Some submissions and consultations supported the view that judicial officers should explain the sentences they impose because it is important that offenders understand the terms of their sentences.¹⁰⁶⁰ The Law Society of South Australia submitted that:

It is of paramount importance that the sentencing judge should explain to an offender the nature of any penalty/option which has been imposed, otherwise fixing a sentencing option is really meaningless if an offender does not understand what he/she must/must not do ...

There should also be an obligation on the Registrars of the Courts, when taking the offender's signature on any recognizance, bond or conditional release order, that the Registrar explain to the offender the nature of the document he/she is signing, as quite often these documents are framed in quite legalistic language.¹⁰⁶¹

13.28 There was some opposition expressed to allowing a court to delegate the function of explaining a sentence.¹⁰⁶² The Commonwealth Director of Public Prosecutions (CDPP) submitted that:

as a general rule, it may be appropriate that the legislation reflect the general principle that it is desirable that the Court explains the sentence to the offender, rather than this being delegated to another person.¹⁰⁶³

13.29 Some stakeholders said that, as a matter of practice, judicial officers do explain sentences;¹⁰⁶⁴ while others noted that in their experience judicial officers generally delegate explanations.¹⁰⁶⁵ One judicial officer stated that it was often difficult in practice to explain sentences due to time constraints, and expressed the view that a requirement for judicial officers to explain sentences would not be popular in busy courts of petty sessions.¹⁰⁶⁶ The particular difficulties of explaining sentences in local courts with a high caseload were echoed in another consultation.¹⁰⁶⁷

Should the explanation be oral or written?

13.30 Another issue that arises is whether explanations of sentence, if they are to be given, should be oral, written or both. Part IB of the *Crimes Act* does not explicitly require the giving of written explanations of sentence.

13.31 In contrast, the sentencing legislation of the ACT provides that where a court is required to explain certain matters in relation to a sentence of imprisonment—including a suspended sentence—the registrar of the court is to provide, or cause to be provided, to the offender or his or her legal representative a written record of those matters.¹⁰⁶⁸ The proposed sentencing legislation of the ACT makes similar provision and states that a copy of the transcript of the oral explanation is an example of a written record of the explanation.¹⁰⁶⁹

Quality of explanations

13.32 In IP 29, the ALRC expressed its interest in hearing whether there have been any issues in relation to the quality of explanations given to offenders by third parties pursuant to a judicial direction under Part IB.¹⁰⁷⁰ From views expressed in consultations and submissions, it appears that there are concerns about the quality of explanations of sentence given to offenders, but these are not limited to delegated explanations.

13.33 Some federal offenders submitted that they did not receive an adequate explanation of the sentences imposed on them. One submitted that the Commonwealth ‘bond’ imposed upon him was not explained. He did not know when the bond would take effect and whether he was required to lodge money by way of security immediately or only in the event of breach.¹⁰⁷¹ Another federal offender stated that the judicial officer who sentenced him delegated to his barrister the task of explaining the recognizance release order imposed on him. He said that his barrister gave him incorrect information about the order.¹⁰⁷²

13.34 Other stakeholders stated that many offenders did not understand their sentences.¹⁰⁷³ The Department of Justice Western Australia noted that its Sentence Information Unit routinely explained sentences to offenders in the absence of any judicial direction to do so.¹⁰⁷⁴ The North Australian Aboriginal Legal Aid Service said that some magistrates give very detailed, technical explanations to indigenous offenders, who do not understand them.¹⁰⁷⁵

13.35 However, the fact that offenders do not always understand their sentences does not necessarily mean that there is problem with the quality of explanations given. One judicial officer stated that offenders were often under considerable stress at sentencing, so they were not always receptive to a judicial explanation of the sentence, even if simple language was used and the explanation was done carefully.¹⁰⁷⁶ The Northern Territory Legal Aid Commission also expressed the view that offenders were sometimes too anxious at the time of sentencing to understand any explanation given by the court, and that in such circumstances defence lawyers would also provide an explanation.¹⁰⁷⁷

What should be the content of the explanation?

13.36 Part IB sets out some matters that must be covered in explaining certain sentences to offenders. These generally include the purposes and consequences of the sentence or order; whether it can be varied, discharged or revoked; and the consequences of failure to comply. Where a sentence of imprisonment with a non-parole period is imposed, the court is required to explain the purposes and consequences of fixing the non-parole period. This is to include: an explanation of the fact that the sentence will entail a period of imprisonment not less than the non-parole period and, if a parole order is made, a period of service in the community; the fact that any release on parole will be subject to conditions; and the fact that the parole order may be amended or revoked.¹⁰⁷⁸

13.37 The sentencing legislation of New South Wales and the proposed sentencing legislation of the ACT provides that when sentencing an offender to imprisonment the court must specify:

- the day when the sentence commences ; and
- the earliest day on which it appears that the offender will become entitled to be released from custody or eligible to be released on parole, having regard to the non-parole period and other sentences of imprisonment to which the offender is subject.¹⁰⁷⁹

ALRC's views

Should explanation be given, by whom and in what form?

13.38 ALRC 44 recommended that the requirement that an explanation be given should attach to any kind of sentence imposed on federal offenders, and the ALRC remains of this view.¹⁰⁸⁰ Explanations promote understanding and if federal offenders understand their sentences they are more likely to comply with them. In this regard, clear explanations are particularly important for federal offenders with a mental illness or intellectual disability,¹⁰⁸¹ or who come from culturally and linguistically diverse backgrounds.¹⁰⁸² In addition, federal offenders should be entitled to receive explanations of their sentences, given that sentences usually impinge on liberties they would otherwise enjoy, or impose obligations they would otherwise not be required to meet.

13.39 The ALRC is of the view that where a federal offender is present in court it is incumbent on the court—as the body that exercises the authority of the state—to explain the sentence to the offender. An explanation of the conditions attached to a sentence or the consequences of non-compliance may have more impact on a federal offender when it emanates from a judicial officer than when it is given by a legal practitioner. Of course, legal practitioners may still have a role in supplementing or clarifying any explanation given by a court. A court should delegate the important task of explaining a sentence only where the offender is not present in court. In such circumstances, the court should consider whether it should make any order—such as requiring the filing of an affidavit of compliance—to satisfy itself that the explanation has been given.

13.40 The court should give an oral explanation of the sentence at the time it is imposed, and provide a written record of the explanation within a period specified by law. An advantage of providing a federal offender with a written record of the explanation is that he or she will have it for continuing reference. Given the views expressed in consultations that offenders are often too stressed at sentencing to be receptive to an oral explanation, provision of a written record enables an offender to

refer to the explanation later. Even where offenders are unable to read English, provision of the written record may assist them in seeking translation of its contents. A copy of the transcript of the oral explanation should suffice as a written record of the explanation.

Proposal 13-3 Federal sentencing legislation should provide that, when sentencing a federal offender who is present at the sentencing proceedings, the court must itself give to the offender: (a) an oral explanation of the sentence at the time of sentencing; and (b) a written record of the explanation within a period specified by law.

When a federal offender is not present at the sentencing proceedings, the court may delegate the function of explaining the sentence and should consider whether it needs to make any order (for example, an order requiring an affidavit of compliance) to satisfy itself that the explanation has been given.

Quality and content of explanation

13.41 Sentencing orders can sometimes be technical and difficult to understand. That difficulty is compounded where the offender being sentenced is under stress or young; suffers a mental illness or intellectual disability; or comes from a culturally or linguistically diverse background. It is important that any explanation of the sentence by the court or its delegate is given in terms likely to be readily understood by the offender. This is consistent with the present position under Part IB of the *Crimes Act*.¹⁰⁸³

13.42 Part IB currently requires the court to explain the purpose and consequences of certain sentences. The ALRC considers ‘purpose’ to be the wrong term if it means that a court is expected to explain the justification or philosophy underpinning the sentence, as opposed to explaining how the sentence will operate in practice. A federal offender is more likely to be interested in hearing about the practical effect of a sentence than its theoretical justification.

13.43 The ALRC is of the view that the matters that should be addressed in an explanation of sentence are:

- how the sentence will operate in practice, the consequences of the sentencing order, and whether the order may be varied or revoked; and
- any conditions attached to the sentencing order and the consequences of breach.

13.44 In addition, the ALRC believes that where a court sentences a federal offender to a sentence of imprisonment it is incumbent on the court to address specifically in its explanation a number of matters that affect how the sentence will operate in practice.

These matters are set out in Proposal 13–4. Some of these matters—such as explaining the non-parole period—are already the subject of requirements under Part IB.¹⁰⁸⁴ Others—such as informing the offender of the earliest date that he or she will become entitled to be released from custody or be eligible for parole—are not currently required to be addressed in explanations of sentence, but in the ALRC’s view they should be.

Proposal 13-4 Federal sentencing legislation should provide that in giving an explanation of sentence, the court or the court’s delegate must address the following matters in language likely to be readily understood by the offender, in so far as they are relevant:

- (a) how the sentence will operate in practice, the consequences of the sentencing order, and whether the order may be varied or revoked;
- (b) any conditions attached to the sentencing order and the consequences of breach; and
- (c) where a sentence of imprisonment has been imposed:
 - (i) the date when the sentence starts and ends;
 - (ii) any time declared to have been served as credit for pre-sentence custody or detention;
 - (iii) whether the sentence is to be served concurrently, consecutively, or partially consecutively to any other sentence of imprisonment;
 - (iv) if a non-parole period is set—the non-parole period, when it starts and ends, whether release on parole will be subject to a decision of the Federal Parole Board, the fact that any release on parole will be subject to conditions, and the fact that the parole order may be amended or revoked;
 - (v) if a partly suspended sentence is imposed—when the suspended part of the sentence starts and ends; and
 - (vi) the earliest date the offender will become entitled to be released from custody or will be eligible to be released on parole.

Provision of sentencing orders

Background

13.45 Part IB of the *Crimes Act* requires the court to cause certain sentencing orders to be reduced to writing, and for a copy of those orders to be given to, or served on, federal offenders. The sentencing orders that are subject to these requirements are: conditional release orders where no conviction is recorded; conditional release orders where no sentence is passed; sentences of imprisonment where a recognizance release order is made; and sentencing orders available under state and territory laws—such as community service orders and periodic detention orders—that are picked up and applied to federal offenders under s 20AB.¹⁰⁸⁵ State and territory sentencing legislation also makes provision for copies of certain sentencing orders to be provided to offenders.¹⁰⁸⁶

13.46 There is no requirement under Part IB that a federal offender be provided with a copy of an order sentencing him or her to imprisonment if a recognizance release order is not made. Accordingly, where a federal offender is sentenced to imprisonment and a non-parole period is set or the court declines to fix either a recognizance release order or a non-parole period, there is no requirement that a copy of the order be provided to the federal offender. In contrast, the proposed sentencing legislation of the ACT requires a court that sentences an offender to imprisonment to provide the offender with written notice of such an order—which is to include specified information about the sentence—as well as a copy of the order.¹⁰⁸⁷

ALRC's views

13.47 It is anomalous that Part IB requires a court to provide federal offenders with copies of certain sentencing orders—including orders of a non-custodial nature—but does not require a court to provide federal offenders with copies of orders of imprisonment where a recognizance release order is not made.

13.48 In the ALRC's view, federal sentencing legislation should provide that, as soon as practicable after a court has made an order sentencing a federal offender to a term of imprisonment, the court should provide the offender with a copy of the order. The order should refer, where relevant, to the matters that a court is required to address in its explanation of sentence, which are listed in Proposal 13–4(c) above.

<p>Proposal 13-5 Federal sentencing legislation should provide that, as soon as practicable after a court makes an order sentencing a federal offender to a term of imprisonment, the court must provide the offender with a copy of the order. The order must set out the relevant matters listed in Proposal 13–4(c).</p>
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Fact-finding in sentencing

What process should be used to determine the facts or opinions upon which a sentence for a federal offence is based, especially where they are disputed? Is there a legitimate role for ‘fact-bargaining’ in this context? In what circumstances, if any, should the laws of evidence apply to federal sentencing hearings? [IP 29, Q 11–2]

Background

The decision maker

13.49 It is for the trial judge or magistrate to ascertain the facts upon which a sentence is based. In indictable matters—if the facts implied in the jury’s verdict are clear—the judge must accept the necessary implications and sentence the offender accordingly.¹⁰⁸⁸

13.50 Depending on their nature, aggravating circumstances are to be determined by either the jury or the judicial officer. Where an aggravating circumstance comprises an element of the offence charged, it should be alleged in the indictment and it is for the jury to decide whether the prosecution has proved its existence. Where an aggravating circumstance is only a sentencing factor, it is for the judicial officer to determine its existence. Aggravating circumstances that affect the maximum sentence but are not an element of the offence must be alleged in the indictment and determined by a jury. An example of this is the quantity of narcotics in relation to illegal importation and possession offences.¹⁰⁸⁹

Process of fact-finding

13.51 Where there has been a summary conviction following a hearing or a conviction on indictment following a jury trial, the court will ordinarily be informed about what the offender did from the evidence tendered and adduced at the hearing or the trial.¹⁰⁹⁰ However, many matters that are relevant to sentencing are not implied by a jury verdict.

13.52 Where an offender pleads guilty (which is in the vast majority of cases), the facts are less well known to the court. A plea of guilty amounts to an admission of all the essential facts necessary to constitute the offence with which the offender is charged. However, it does not amount to an admission of any aggravating circumstances that the prosecution may allege, unless those aggravating matters are an element of the offence; nor does it amount to an admission of the consequences and impact of the offence.¹⁰⁹¹

13.53 The prosecution and defence can enlarge upon the facts implied by a guilty plea by engaging in ‘fact-bargaining’. A common mode of such bargaining is to prepare an agreed statement of facts.¹⁰⁹²

13.54 An offender often has exclusive knowledge of the existence of mitigating factors that may be relevant to sentencing. These factors are often initially presented in an unsworn form, either by the offender or his or her counsel, and it is common practice for a court to accept statements by the offender’s counsel from the bar table. Where facts are disputed, the parties may choose to apply for a direction to apply the laws of evidence in order that the facts may be ascertained.

Laws of evidence

13.55 The *Evidence Act 1995* (Cth) applies in all federal courts and in courts in the ACT.¹⁰⁹³ New South Wales, Tasmania and Norfolk Island have passed mirror legislation, which is substantially the same as the Commonwealth Act but is not identical.¹⁰⁹⁴ The Commonwealth legislation and the mirror legislation are often referred to as the ‘uniform Evidence Acts’. In 2004, the Victorian Government announced its intention to implement legislation consistent with the uniform Evidence Acts.¹⁰⁹⁵

13.56 Section 4(2) of the uniform Evidence Acts provides that the Acts apply to sentencing proceedings only if the court directs that the law of evidence applies either generally or in relation to specified matters.¹⁰⁹⁶ The court must make such a direction if it considers it appropriate in the interests of justice, or if a party to the proceedings applies for such a direction and the court is of the view that proof of that fact is or will be significant in determining sentence.¹⁰⁹⁷

13.57 In *Weininger v The Queen*, the High Court considered s 16A of the *Crimes Act*, which requires the court to take into account in sentencing a list of specified matters so far as ‘they are relevant and known to the court’.¹⁰⁹⁸ The High Court stated that the use of the phrase ‘known to the court’ as distinct from a phrase such as ‘proved in evidence’ meant that it was not to be construed as imposing a universal requirement that matters presented in sentencing hearings be formally proved or admitted. The section had been enacted against a background of long established procedures in sentencing hearings in which much of the material placed before a sentencing judge was not proved by admissible evidence.¹⁰⁹⁹ The High Court agreed with the Victorian Court of Appeal in *R v Storey* that it was important to avoid introducing ‘excessive subtlety and refinement’ to the task of sentencing.¹¹⁰⁰

Issues and problems

Application of the laws of evidence

13.58 One federal offender supported the laws of evidence applying in federal sentencing hearings.¹¹⁰¹ However, both prosecutors and defence lawyers expressed the view that it would not be appropriate to apply the rules of evidence generally to sentencing proceedings because it would introduce unnecessary delay and

complexity.¹¹⁰² It was said that if every fact had to be formally proved the sentencing process would grind to a halt.¹¹⁰³ The CDPP submitted that:

as a general rule, the sentencing process should remain flexible and straightforward. It would be undesirable to introduce a legislative regime which obliged Courts to undertake extensive fact-finding or consideration of extrinsic material in every case.

...

if it is necessary for evidence to be brought to prove a particular matter, appropriate mechanisms should be in place. However, the CDPP is of the opinion that it is important that sentencing remain a relatively simple procedure, with a view to streamlining the criminal justice process. ...

it is appropriate that the Court be entitled to rely on the facts alleged by the prosecutor, except in circumstances where there is a matter in dispute.¹¹⁰⁴

13.59 One judicial officer stated that, in her experience, disputed facts in sentencing were rare but when such a dispute arose it was suitably resolved by the application of the laws of evidence.¹¹⁰⁵ However, the view was also expressed that disputed facts are becoming more common in federal sentencing proceedings and will tend to arise more frequently because of the new fault provisions in the *Criminal Code 1995* (Cth).¹¹⁰⁶

Fact-bargaining

13.60 Defence practitioners expressed support for the process of fact-bargaining—for example by the use of agreed statements of facts—on the basis that it saved time and minimised the need to call offenders to give evidence.¹¹⁰⁷ They also stated that the CDPP was amenable to negotiating agreed statements of facts. Support was also expressed for the practice of separately documenting disputed facts.¹¹⁰⁸

ALRC's views

Application of the laws of evidence

13.61 The ALRC believes that no change is warranted to the law in this area. No specific concerns were identified in consultations and submissions about the limited circumstances in which the laws of evidence may apply in sentencing. The law already provides an important safeguard by enabling a court to apply the laws of evidence where it considers it appropriate in the interests of justice, or where proof of a disputed fact is significant in determining sentence.

13.62 To impose a requirement that facts relevant to sentencing be proved only by admissible evidence would transform sentencing into an adversarial process, increase cost and delay, and tend to exclude some information that may be useful in sentencing, such as material in pre-sentence reports.¹¹⁰⁹

Fact-bargaining

13.63 The ALRC is of the view that the practice of allowing parties to sentencing proceedings to identify and document the facts on which they agree is appropriate and promotes the efficient disposal of those proceedings. In this regard, it is noteworthy that the uniform Evidence Acts regulate the process by which facts are to be agreed.¹¹¹⁰

13.64 Equally, it is appropriate for the parties to identify the facts on which they do not agree, and to decide whether any of those disputed facts are of sufficient significance to warrant the application of the laws of evidence.

13.65 No specific problems were identified in consultations and submissions in relation to the practice of fact-bargaining and the ALRC does not make any proposal in this regard.

Burden and standard of proof

Whose responsibility is it to raise and prove the facts upon which a sentence for a federal offence is based? What standard of proof should apply to determining those facts, and in what circumstances should the standard of proof vary? [IP 29, Q 11–3].

Background

13.66 The persuasive (or legal) burden of proof refers to the duty of a party to persuade the trier of fact of the truth of particular propositions. The evidential burden of proof refers to a party's duty to lead sufficient evidence for the court to call upon the other party to respond.¹¹¹¹

13.67 The standard of proof refers to the degree of rational certainty or probability that must be met before a court accepts that facts have been proved.¹¹¹² Standards of proof include the criminal standard of 'beyond reasonable doubt' and the less onerous civil standard of 'on the balance of probabilities'. The degree of satisfaction that is called for under the civil standard of proof may vary according to the gravity of the fact to be proved.¹¹¹³

13.68 Federal legislation sets out the applicable standards of proof to be applied in criminal¹¹¹⁴ and civil proceedings,¹¹¹⁵ respectively.

Criminal trial

13.69 In a criminal trial, the prosecution bears the persuasive burden of proving each *element* of an offence, and the standard of proof is 'beyond reasonable doubt'.¹¹¹⁶ However, the prosecution need not prove every *fact* alleged beyond reasonable doubt. There may be situations where an evidential burden falls on the accused to lead

evidence to raise a reasonable doubt about the prosecution's case or to have an issue considered at all.¹¹¹⁷

Burden of proof in sentencing

13.70 In *R v Storey*, the Victorian Court of Appeal said that there was no burden of proof in sentencing.¹¹¹⁸ That decision was approved by the High Court in *R v Olbrich*,¹¹¹⁹ which stated that references to burden of proof in sentencing could mislead. However, it accepted that if the prosecution wished to have the court take a matter into account it was for the prosecution to bring that matter to the attention of the court and, if necessary, call evidence in relation to it. Similarly, if the offender wished to bring a matter to the attention of the court, it was for him or her to do so and, if necessary, call evidence about it. It would not be necessary to call evidence if the parties agreed to the asserted fact or if the court was prepared to act on the assertion.¹¹²⁰

Standard of proof in sentencing

13.71 Part IB is silent on the standard of proof in federal sentencing. In *R v Olbrich*¹¹²¹ and *Weininger v The Queen*,¹¹²² the High Court approved the formulation of the standard of proof expressed by the Victorian Court of Appeal in *R v Storey*:

the judge may not take facts into account in a way that is adverse to the interests of the accused unless those facts have been established beyond reasonable doubt but if there are circumstances which the judge proposes to take into account in favour of the accused it is enough if those circumstances are proved on the balance of probabilities.¹¹²³

13.72 The practical effect of this rule is that where neither the prosecution nor the defence meet the relevant standard of proof on an issue, the court must ignore that issue altogether in determining sentence. The High Court stated that a judge who is not satisfied of a matter urged in a plea on behalf of an offender is not bound to accept the accuracy of the offender's contention even if the prosecution does not prove the contrary beyond reasonable doubt.¹¹²⁴

13.73 There is precedent for the standard of proof in sentencing to be given statutory expression. The *Evidence Act 1977* (Qld) provides that a judicial officer may act on an allegation of fact that is not admitted or is challenged if satisfied on the balance of probabilities that the allegation is true—with the degree of satisfaction varying according to the adverse consequences of finding the allegation to be true.¹¹²⁵

13.74 Queensland and Northern Territory sentencing legislation provides that a court may make a finding that an offender is a serious danger to the community only if it is satisfied to a high degree of probability.¹¹²⁶ Victorian sentencing legislation also has specific provisions in relation to the standard of proof. For example, a court may

impose an indefinite sentence on an offender in respect of a serious offence only if it is satisfied, to a high degree of probability, that the offender is a serious danger to the community.¹¹²⁷ Western Australian sentencing legislation provides that in deciding matters in connection with the making of a reparation order, the standard of proof is proof on the balance of probabilities.¹¹²⁸

13.75 The sentencing legislation of New Zealand sets out the facts that may be accepted by a court in sentencing; and the procedure to be followed where there is a disputed fact. It provides that the prosecution must prove disputed aggravating facts and negate certain disputed mitigating facts raised by the defence beyond reasonable doubt, and that the offender must prove, on the balance of probabilities, any disputed mitigating fact that is not related to the nature of the offence or the offender's part in the offence.¹¹²⁹

Issues and problems

13.76 There was no suggestion in consultations and submissions that the standard of proof in sentencing established at common law needs to be amended, or that judicial pronouncements in relation to the burden of proof were problematic.

13.77 However, the issue arose as to whether there should be a legislative statement of the standard of proof that is to apply in sentencing. Views in consultations and submissions were divided on this issue. There was some support for the standard of proof, adopted by the High Court in *R v Olbrich*, to be set out in legislation.¹¹³⁰ One prosecutor expressed the view that a legislative restatement of the common law principles would be helpful because some lower courts adopted the practice of requiring the prosecution to disprove any facts that it disputed.¹¹³¹ However, the view was also expressed that legislative provisions in this area were unnecessary.¹¹³²

ALRC's views

13.78 The ALRC believes that federal sentencing legislation should expressly adopt the common law rules in relation to the standard of proof in sentencing. Federal legislation already sets out the applicable standard of proof to be applied in criminal proceedings, notwithstanding that the standard of proof beyond reasonable doubt is well established at common law.¹¹³³ It would be consistent for federal legislation to set out the applicable standard of proof in sentencing proceedings. There is also precedent in other jurisdictions for legislation to set out the standard of proof in sentencing.

13.79 A further advantage of codifying the standard of proof arises from the fact that the *Evidence Act 1977* (Qld) is not consistent with the common law. As noted above, the Queensland provision does not require a fact that is adverse to the interests of the offender to be proved beyond reasonable doubt, and this may cause confusion in sentencing federal offenders in that state. Legislative restatement of the common law principles would promote clarity of approach in this respect.

13.80 As discussed in Chapter 8, the ALRC is of the view that federal sentencing legislation should enable a court, when sentencing a federal offender, to make ancillary orders of restitution or compensation. It is consistent with the civil nature of these orders that the standard of proof is the civil standard, notwithstanding that they are made in the context of criminal proceedings. The Law Reform Committee of the Parliament of Victoria has also expressed the view that it is appropriate that reparation applications be determined in accordance with the civil standard of proof.¹¹³⁴ The ALRC considers that federal sentencing legislation should also provide that, in deciding matters in connection with the making of a restitution or compensation order, the standard of proof is the balance of probabilities.

Proposal 13-6 Federal sentencing legislation should restate the common law rules in relation to the standard of proof in sentencing. In particular, in sentencing a federal offender:

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

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

Role of the jury in sentencing

Should juries have a greater role in the sentencing of federal offenders? For example, should juries be involved in determining any of the facts upon which a sentence for a federal offence is based, or be required to clarify or specify the facts upon which a conviction is based? If so, what procedures should be adopted for this purpose? [IP 29, Q 11–4]

Background

13.81 Section 80 of the *Australian Constitution* requires that ‘the trial on indictment of any offence against the law of the Commonwealth shall be by jury’. Juries have no role

to play in the adjudication of summary offences. Similarly, where there is a plea of guilty, there is no occasion to empanel a jury because there is no function for the jury to perform.¹¹³⁵

13.82 The role of a jury in a trial on indictment is to decide the facts of a case and to determine whether or not a defendant is guilty of the offence beyond reasonable doubt. The jury has no direct role in the sentencing hearing.¹¹³⁶ However, where the facts implied in a verdict are clear, the sentence passed must not conflict with the jury's verdict.¹¹³⁷ Further, a jury may make recommendations for leniency or mercy, which are to be treated 'with respect and careful attention' but are not binding on the court.¹¹³⁸

13.83 In the United States, juries have a greater role to play in sentencing. The *United States Code* makes provision for separate sentencing hearings, to be conducted before the jury that determined the defendant's guilt, to determine whether a federal death sentence is justified.¹¹³⁹ Jury sentencing is used in the determination of death penalty cases in American states that have capital punishment.¹¹⁴⁰ In addition, in Arkansas, Kentucky, Missouri, Oklahoma, Texas and Virginia juries impose sentences in non-capital cases. Trial judges in Kentucky, Virginia and Arkansas have the power to reduce a jury's sentence but not to raise it unless it fails to comply with mandatory minimum sentencing statutes.¹¹⁴¹

Issues and problems

13.84 An issue arises as to whether juries should play a greater role in sentencing federal offenders, for example, by determining the sentence to be passed; clarifying the factual basis of a verdict;¹¹⁴² or otherwise determining the facts upon which a sentence is to be based.

13.85 In 1973, the Criminal Law and Penal Methods Reform Committee of South Australia, chaired by the Hon Justice Mitchell (the Mitchell Committee), concluded that there was no merit in the suggestion that a jury should impose a sentence.

It is unfair to the jury because it places upon them responsibility for the decision of a complex question in an area in which, apart from the occasional individual exception perhaps, they have neither experience nor expertise. The weight of this responsibility is not lessened by the fact that the liberty of an individual is at stake.¹¹⁴³

13.86 The Mitchell Committee noted that a jury sentence would either have to follow immediately after a verdict without benefit of a pre-sentence report, or the jury would have to be reconvened at a later time for the purposes of sentencing, and that there were obvious disadvantages with either course of action. It also noted that because sentencing by juries would not arise in summary matters

jury sentencing would mean ... that in the very area where experience and expertise is at a premium, which is sentencing for more serious offences, the sentencing function is removed to a discontinuous and non-expert body.¹¹⁴⁴

13.87 In January 2005, Spigelman CJ suggested that consideration be given to a system in which judges consult with juries about sentencing, after evidence and submissions on sentence and prior to the determination of sentence. The consultations would take place in camera, and would be protected by secrecy provisions:

A process of consultation can improve both the jury decision-making process and the judicial sentencing process, as well as enhancing public confidence in the administration of the criminal justice system. ...

many of the matters that arise for determination in the sentencing process are such that, in my opinion, judges would welcome assistance from a spectrum of opinion reflecting a diversity of experience. ...

Furthermore, there are occasions when the judge has to make assumptions about the jury's reasoning process. ... it will assist the sentencing exercise for the judge to understand why the verdict was as it was.¹¹⁴⁵

13.88 The New South Wales Law Reform Commission is currently conducting an inquiry into 'whether or not a judge in a criminal trial, might, following a finding of guilt, and consistent with the final decision remaining with the judge, consult with the jury on aspects of sentencing'.¹¹⁴⁶

13.89 The New South Wales Law Society has expressed opposition to Spigelman CJ's proposal on the basis that:

- sentencing is too complex and specialised a task to be undertaken by jurors and that it would be too costly and time-consuming to educate juries about sentencing law;
- it may lead to greater inconsistencies in sentencing;
- it could compromise a jury's adjudication on guilt;
- the proposed in camera consultations are a denial of natural justice;
- it would represent an intrusion into the secrecy of the jury's deliberations;
- it would increase the already onerous burden placed on jurors in determining guilt;
- it would impose extra costs and further delays in the criminal justice system because jurors would need to be recalled for sentencing; and
- there was a risk that in the period between determination of guilt and sentencing, jurors may be affected by external influences.¹¹⁴⁷

13.90 The majority of stakeholders expressed opposition to extending the role of the jury in sentencing on the grounds that it was neither desirable nor practical, and would complicate the sentencing process with no determinable benefit.¹¹⁴⁸ Specific concerns that were identified included: that jurors' lack knowledge about sentencing options and comparative sentences; that jury involvement would increase inconsistency in sentencing; and that it would place an extra burden on jurors, requiring them to serve for longer periods of time. One federal offender submitted:

I do not believe there is any role for the jury on the matter of sentencing. Their task is already difficult as finders of fact in complex federal cases and it would merely compound errors to give them a role in sentencing.¹¹⁴⁹

13.91 The CDPP submitted that:

the process of sentencing involves a careful consideration of a range of matters which are not limited to fact-finding. They rightly include the offender's personal circumstances and previous history, the circumstances of the offence, the culpability of the offender and comparative sentences. In the view of the CDPP, sentencing is best conducted by judicial officers who have had extensive experience in synthesising all of the relevant facts and circumstances in imposing the appropriate sentence.¹¹⁵⁰

13.92 One legal practitioner expressed the view that if the jury were to have any role it could be to make determinations about certain facts. However, he noted that this could present difficulties where the jury made a finding of fact that was inconsistent with its guilty verdict.¹¹⁵¹

ALRC's views

13.93 The ALRC is of the preliminary view that it is neither necessary nor desirable to expand the role of the jury in federal sentencing proceedings. This view takes into account the many concerns that have been identified in connection with jury sentencing—the difficulties arising from the fact that a jury would need to be recalled some time after a verdict has been entered; the jurors' lack of expertise in sentencing; the potential for greater inconsistencies in sentencing; increased cost and delay in sentencing; and the fact that in camera consultations between judges and juries contradict the principles of natural justice.

13.94 The ALRC remains of the view that it tentatively expressed in its previous inquiry into sentencing, namely, that even where there is a need to clarify the factual basis of a verdict, the jury's role should not be expanded beyond the determination of guilt.¹¹⁵² Substantial difficulties may arise if the jury's answer to a judge's question was inaccurate or inconsistent with the verdict reached.

1025 Commonwealth Director of Public Prosecutions, *Consultation*, Sydney, 16 September 2004.

1026 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.406], [2.507].

1027 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976).

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- 1028 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, (ETS) No 5, 213 UNTS 222, (entered into force generally on 3 September 1953).
- 1029 *Cuscani v The United Kingdom* [2002] 32771/96 ECHR 630 (considering ECHR art 6).
- 1030 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25; *Sentencing Act 1991* (Vic) s 18P; *Sentencing Act 1995* (WA) s 14; *Criminal Law (Sentencing) Act 1988* (SA) s 9B; *Sentencing Act 1995* (NT) s 117(1).
- 1031 *Criminal Law (Sentencing) Act 1988* (SA) s 9B.
- 1032 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25.
- 1033 *Sentencing Act 1991* (Vic) s 18P.
- 1034 *Sentencing Act 1995* (WA) s 14; *Sentencing Act 1995* (NT) s 117.
- 1035 *Federal Rules of Criminal Procedure* 18 USC (Appendix) (US) r 43(a)(3).
- 1036 *Sentencing Act 1995* (WA) s 14(2)(b); *Sentencing Act 1995* (NT) s 117(2)(a).
- 1037 *Sentencing Act 1995* (WA) s 14(2)(a).
- 1038 *Sentencing Act 1995* (NT) s 117(2)(b).
- 1039 *Federal Rules of Criminal Procedure* 18 USC (Appendix) (US) r 43(b)(4).
- 1040 *Criminal Law (Sentencing) Act 1988* (SA) s 9B(1).
- 1041 *Federal Rules of Criminal Procedure* 18 USC (Appendix) (US) r 43(b)(2).
- 1042 *Criminal Law (Sentencing) Act 1988* (SA) s 9B(2).
- 1043 *Federal Rules of Criminal Procedure* 18 USC (Appendix) (US) r 43(c)(1)(C).
- 1044 *Sentencing Act 1995* (WA) s 14(5); *Criminal Law (Sentencing) Act 1988* (SA) s 9B(3).
- 1045 Purposes of sentencing are discussed in Ch 4.
- 1046 Explanation of sentence is discussed below.
- 1047 Correction of sentencing errors is discussed in Ch 16.
- 1048 See *Sentencing Act 2002* (NZ) s 30.
- 1049 *Dietrich v The Queen* (1992) 177 CLR 292, 311.
- 1050 *Ibid*, 311.
- 1051 *Ibid*, 336.
- 1052 Reasons for decisions are discussed in Ch 19.
- 1053 *Crimes Act 1914* (Cth) ss 16F(2), 19B(2), 20(2), 20AB(2).
- 1054 *Children and Young Persons Act 1989* (Vic) s 23; *Sentencing Act 1995* (WA) s 34; *Juvenile Justice Act 1992* (Qld) s 158.
- 1055 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 48 (explanation of release date where sentence of imprisonment imposed); *Sentencing Act 1991* (Vic) s 27(4) (explanation of suspended sentence); *Crimes Act 1900* (ACT) s 359 (explanation of sentence of imprisonment including suspended sentence). See also *Crimes (Sentencing) Bill 2005* (ACT) s 82 (explanation of sentence of imprisonment).
- 1056 See *Sentencing Act 1991* (Vic) s 95; *Sentencing Act 1997* (Tas) s 92; *Sentencing Act 1995* (NT) s 102.
- 1057 See, eg, *Criminal Justice Act 2003* (UK) s 174.
- 1058 *R v Carroll* [1991] 2 VR 509, 517. See also *R v O'Brien* (1991) 57 A Crim R 80, 97; *R v Schofield* (2003) 138 A Crim R 19, [166].
- 1059 *R v Wright* [1995] QCA 279.
- 1060 Law Society of South Australia, *Submission SFO 37*, 22 April 2005; JC, *Submission SFO 25*, 13 April 2005; LD, *Submission SFO 9*, 10 March 2005; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 1061 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
- 1062 Justice R Atkinson, *Consultation*, Brisbane, 2 March 2005; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; LD, *Submission SFO 9*, 10 March 2005.
- 1063 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 1064 Commonwealth Director of Public Prosecutions, *Consultation*, Hobart, 14 April 2005; M Johnson, *Consultation*, Darwin, 27 April 2005.
- 1065 Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005.
- 1066 Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.
- 1067 Law Society of the Northern Territory, *Consultation*, Darwin, 29 April 2005.
- 1068 *Crimes Act 1900* (ACT) s 359.
- 1069 *Crimes (Sentencing) Bill 2005* (ACT) cl 83.
- 1070 Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [9.82].

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- 1071 RC, *Submission SFO 50*, 13 May 2005.
- 1072 PS, *Submission SFO 21*, 8 April 2005. See also RH, *Submission SFO 4*, 28 January 2005 (received adequate explanation of some sentences but not others).
- 1073 Offenders Aid and Rehabilitation Services South Australia, *Consultation*, Adelaide, 20 April 2005; Department of Justice Western Australia, *Consultation*, Perth, 18 April 2005.
- 1074 Department of Justice Western Australia, *Consultation*, Perth, 18 April 2005.
- 1075 Aboriginal Justice Advisory Committee and North Australian Aboriginal Legal Aid Service, *Consultation*, Darwin, 28 April 2005.
- 1076 Justice R Atkinson, *Consultation*, Brisbane, 2 March 2005.
- 1077 Northern Territory Legal Aid Commission, *Consultation*, Darwin, 27 April 2005.
- 1078 See *Crimes Act 1914* (Cth) s 16F.
- 1079 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 48; *Crimes (Sentencing) Bill 2005* (ACT) cl 82.
- 1080 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 93.
- 1081 See Ch 28.
- 1082 See Ch 29.
- 1083 See *Crimes Act 1914* (Cth) ss 16F, 19B(2), 20(2), 20AB(2).
- 1084 See *Ibid* s 16F.
- 1085 *Ibid* ss 19B(4), 20(4), 20AB(5).
- 1086 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 93 (community service order); *Penalties and Sentences Act 1992* (Qld) s 136 (community based order); *Crimes Act 1900* (ACT) s 408(4) (community service order); *Sentencing Act 1995* (NT) s 34 (community work order). See also *Crimes (Sentencing) Bill 2005* (ACT) cl 14(6) (fine order), 17(5) (non-conviction order), 103 (good behaviour order), 113(2) (reparation order), 121(2) (deferred sentence order).
- 1087 See *Crimes (Sentencing) Bill 2005* (ACT) cl 84.
- 1088 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.312]. See also *R v Webb* [1971] VR 147.
- 1089 See *Kingswell v The Queen* (1985) 159 CLR 264; *R v Meaton* (1986) 160 CLR 359.
- 1090 The process of fact-finding is discussed in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [11.27]–[11.32].
- 1091 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.315].
- 1092 See Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [11.29]–[11.30].
- 1093 Some provisions have a wider reach: *Evidence Act 1995* (Cth) ss 5, 185–187.
- 1094 *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas); *Evidence Act 2004* (NT). See also Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [2.1].
- 1095 State Government of Victoria, *New Directions for the Victorian Justice System 2004–2014: Attorney-General's Justice Statement* (2004), 26.
- 1096 However, s 94(2) of the uniform Evidence Acts specifically excludes the application of Pt 3.6 of the Acts (tendency and coincidence) to sentencing hearings.
- 1097 See uniform Evidence Acts s 4(3), (4).
- 1098 Section 16A is discussed in Ch 6.
- 1099 *Weininger v The Queen* (2003) 212 CLR 629, [21].
- 1100 *Ibid*, [24]; *R v Storey* [1998] 1 VR 359, 372.
- 1101 JC, *Submission SFO 25*, 13 April 2005.
- 1102 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; New South Wales Public Defenders Office, *Consultation*, Sydney, 22 September 2004.
- 1103 New South Wales Public Defenders Office, *Consultation*, Sydney, 22 September 2004.
- 1104 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 1105 Justice R Atkinson, *Consultation*, Brisbane, 2 March 2005. See also T Glynn SC, *Consultation*, Brisbane, 2 March 2005 (disputed facts in federal criminal matters tend to be rare).
- 1106 Law Society of South Australia, *Consultation*, Adelaide, 21 April 2005.
- 1107 *Ibid*; Queensland Legal Aid, *Consultation*, Brisbane, 2 March 2005.
- 1108 Law Society of South Australia, *Consultation*, Adelaide, 21 April 2005.
- 1109 See Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [186].
- 1110 See uniform Evidence Acts s 191. See also *Evidence Act 1958* (Vic) s 149AB.
- 1111 D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (3rd ed, 2001), 412–416.

- 1112 Burden and standard of proof in sentencing is discussed in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [11.39]–[11.53].
- 1113 See *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362; *Rejcek v McElroy* (1965) 112 CLR 517, 521.
- 1114 See *Evidence Act 1995* (Cth) s 141; *Criminal Code* (Cth) s 13.2.
- 1115 See *Evidence Act 1995* (Cth) s 140(1), (2).
- 1116 *Woolmington v Director of Public Prosecutions (UK)* [1935] AC 462.
- 1117 See, eg, *Criminal Code* (Cth) s 13.3(2) (evidential burden on defendant in relation to certain defences).
- 1118 *R v Storey* [1998] 1 VR 359, 368.
- 1119 *R v Olbrich* (1999) 199 CLR 270.
- 1120 *Ibid.*, [25].
- 1121 *Ibid.*, [27].
- 1122 *Weininger v The Queen* (2003) 212 CLR 629, [18], [24].
- 1123 *R v Storey* [1998] 1 VR 359, 371. See also *Langridge v The Queen* (1996) 87 A Crim R 1; *R v Morrison* [1999] 1 Qd R 397.
- 1124 *R v Olbrich* (1999) 199 CLR 270, [24]. See also *R v Storey* [1998] 1 VR 359, [30].
- 1125 *Evidence Act 1977* (Qld) s 132(3), (4).
- 1126 *Penalties and Sentences Act 1992* (Qld) s 170; *Sentencing Act 1995* (NT) s 71.
- 1127 *Sentencing Act 1991* (Vic) s 18B. See also *Sentencing Act 1991* (Vic) ss 6C, 18Z(c), 18ZL, 18ZP, 18ZM.
- 1128 *Sentencing Act 1995* (WA) s 114.
- 1129 *Sentencing Act 2002* (NZ) s 24.
- 1130 Law Society of the Northern Territory, *Consultation*, Darwin, 29 April 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Hobart, 14 April 2005. See also Victoria Legal Aid, *Submission SFO 31*, 18 April 2005 (support for legislative expression of evidentiary burdens).
- 1131 Commonwealth Director of Public Prosecutions, *Consultation*, Hobart, 14 April 2005.
- 1132 Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Darwin, 28 April 2005.
- 1133 See *Evidence Act 1995* (Cth) s 141; *Criminal Code* (Cth) s 13.2.
- 1134 Law Reform Committee—Parliament of Victoria, *Restitution for Victims of Crime*, Interim (1993), [4.189].
- 1135 *R v Cheng* (2000) 203 CLR 246, [41]–[42].
- 1136 The role of the jury in sentencing is discussed in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [11.54]–[11.65].
- 1137 *R v Ford* (1994) 75 A Crim R 398 (guilty verdict); *R v Webb* [1971] VR 147 (verdict of acquittal).
- 1138 *Whittaker v The King* (1928) 41 CLR 239, 240.
- 1139 *Federal Death Penalty Act of 1994* 18 USC s 3593 (US). The federal death penalty is rarely invoked.
- 1140 See A Lanni, ‘Jury Sentencing in Non-capital Cases: An Idea Whose Time Has Come (Again)?’ (1999) 108 *The Yale Law Journal* 1775.
- 1141 N King and R Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, Working Paper Number 04–08 (2004) Vanderbilt University Law School, 9.
- 1142 Clarifying the factual basis of a verdict is discussed in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [11.58]–[11.61].
- 1143 Criminal Law and Penal Methods Reform Committee of South Australia, *First Report: Sentencing and Corrections* (1973), 25–26.
- 1144 *Ibid.*, 26.
- 1145 J Spigelman, *A New Way to Sentence for Serious Crime (Paper Presented at the Opening of Law Term Dinner of the Law Society of New South Wales)* (2005). See also J Spigelman, ‘The Power of Twelve: A New Way to Sentence for Serious Crime’ (2005) 85 *Reform* 51, 54.
- 1146 *Law Reform Commission New South Wales* <www.lawlink.nsw.gov.au/lrc> at 14 October 2005.
- 1147 J McIntyre, ‘The Role of Juries in Sentencing: The Case Against’ (2005) 86 *Reform* 56, 56–57. See also R Johns, *Trial By Jury: Recent Developments—Briefing Paper No 4/05* (2005) NSW Parliamentary Library Research Service, 55–57 for an outline of other responses to Spigelman CJ’s proposal.
- 1148 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005;

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- K Warner, *Consultation*, Hobart, 13 April 2005; WT, *Submission SFO 23*, 11 April 2005; JC, *Submission SFO 25*, 13 April 2005.
- 1149 WT, *Submission SFO 23*, 11 April 2005.
- 1150 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 1151 T Glynn SC, *Consultation*, Brisbane, 2 March 2005.
- 1152 Australian Law Reform Commission, *Sentencing: Procedure*, DP 29 (1987), [62].

14. Victim Impact Statements and Pre-Sentence Reports

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Introduction

What information should be available to the court before a sentence for a federal offence is passed, and how should that information be obtained and presented? Should federal legislation make express provision for victim impact statements and pre-sentence reports? [IP 29, Q11–1]

14.1 A range of information may be relevant to a court in passing sentence. This includes information relevant to sentencing factors;¹¹⁵³ information relevant to factors affecting the administration of the federal criminal justice system;¹¹⁵⁴ information about the time an offender has spent in pre-sentence custody or detention;¹¹⁵⁵ and comparative sentencing statistics.¹¹⁵⁶

14.2 This chapter focuses on two methods of presenting information to a judicial officer prior to the imposition of a federal sentence, namely, victim impact statements and pre-sentence reports.

Victim impact statements

Background

14.3 As discussed in Chapter 6, one sentencing factor that is of increasing relevance in sentencing federal offenders is the impact of the offence on any victim. New federal offences such as sexual servitude, child sex tourism and terrorism offences depart from the traditional subject matter of federal offences. While many traditional federal offences are often considered to be victimless—in the sense that the injury is not to an identifiable individual but to the Commonwealth as a polity—many newer offences may affect individuals directly.

14.4 A victim impact statement is one way of informing a court about the harm, loss or injury suffered by a victim as a result of the offence that is the subject of the sentencing proceedings.

14.5 *The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* provides that:

The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: ...

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.¹¹⁵⁷

14.6 Part IB of the *Crimes Act 1914* (Cth) does not make provision for victim impact statements. Professors Richard Fox and Arie Freiberg have expressed the view that because the Commonwealth has not entered this field, state courts exercising federal jurisdiction are subject to the obligations imposed by ss 68(1) and 79 of the *Judiciary Act 1903* (Cth) to apply to federal prosecutions the same state and territory procedural laws that they apply in state or territory prosecutions.¹¹⁵⁸ They have also expressed the view that provisions in relation to victim impact statements are matters of sentencing procedure and are therefore picked up and applied in the sentencing of federal offenders.¹¹⁵⁹

14.7 However, practitioners have noted that it is not always clear whether particular sentencing provisions can be categorised as ‘procedural’, such that they are picked up and applied in the sentencing of federal offenders. The question of whether s 68 of the *Judiciary Act* picks up and applies particular state and territory provisions to the sentencing of federal offenders often has to be tested on a case-by-case basis.¹¹⁶⁰

14.8 All states and territories, except Queensland,¹¹⁶¹ have legislative provisions or court rules governing the use of victim impact statements.¹¹⁶² There are a number of differences between state and territory laws concerning the availability, content, form and use of victim impact statements. These differences are addressed below. Other countries also allow victim impact statements to be presented at sentencing.¹¹⁶³ In the

United States, federal district courts are required to permit victims of crime to speak or submit information about the sentence.¹¹⁶⁴

Issues and problems

Should victim impact statements be available in federal sentencing?

14.9 The literature about victim impact statements points to the benefits to the victim in terms of catharsis, vindication, healing, restoration and being granted a voice in relation to the sentencing hearing.¹¹⁶⁵ Arguments in favour of the use of victim impact statements include that they may: reduce the perception of the victim's alienation in the criminal justice process; assist in making sentencing more transparent and more reflective of the community's response to crime; and promote the rehabilitation of defendants by confronting them with the impact of their offending behaviour.¹¹⁶⁶

14.10 Problems with victim impact statements include that they can: raise a victim's expectations about sentence, which may not be fulfilled; expose offenders to unfounded allegations by victims;¹¹⁶⁷ lead sentencers to give disproportionate weight to the impact of a crime on a victim, to the detriment of other relevant considerations;¹¹⁶⁸ and skew an otherwise objective and dispassionate process by the introduction of emotional and possibly vengeful content.¹¹⁶⁹

14.11 In 1988, the Victorian Sentencing Committee noted that if victim impact statements were introduced and were not made compulsory in every case, disparity could arise in the sentencing process: more severe sentences might be imposed in cases where victim impact statements were available than in cases where they were not, even if the culpability of the offender were the same.¹¹⁷⁰ Victim impact statements may also result in inconsistent sentences where one victim asserts greater psychological harm than another more robust victim.¹¹⁷¹

14.12 A 1994 study into the effect of victim impact statements on sentencing in South Australia noted that:

prosecutors and judges stated that the information provided in VIS was highly variable in quality and often was not adequately followed up or updated ... All groups believed that VIS have not led to court delays, additional expenses or mini trials on VIS content. Many of those interviewed actually suggested that VIS save court time. Judges and prosecutors felt that only rarely did VIS contain exaggerations or inappropriate remarks. Defence lawyers stated that they were often suspicious of material relating to the emotional harm suffered by victims; however, they rarely challenged VIS because of the damaging effect a cross-examination of the victim might have on sentencing.

One-third of the judges interviewed stated that VIS were important for sentencing; a third thought that the VIS itself was not very important; and the remaining judges were of the view that the VIS were only important in some cases, in particular, offences against the person and cases in which the defendant pleaded guilty. Most

professionals believed that VIS have not increased the severity of sentencing. ... Most judges did not believe that VIS have lead to sentencing disparity.¹¹⁷²

14.13 Stakeholders expressed support in consultations and submissions for victim impact statements to be used in federal sentencing proceedings where the circumstances of a particular matter indicated a need to do so, provided that the procedures for their use were properly regulated.¹¹⁷³ Victim Support Services Inc expressed the view that the opportunity for a victim to make a victim impact statement was an important part of the recognition of the victim's rights.¹¹⁷⁴ However, one federal offender expressed the view that victim impact statements 'are more a political feel good tool rather than a valid constructive mechanism to assist in sentencing'.¹¹⁷⁵

14.14 The Australian Securities and Investments Commission (ASIC) submitted that:

[Corporate] crimes often have a large number of victims, some of whom may have suffered a little and others who have suffered a substantial loss. ASIC often prosecutes matters where a vulnerable group is the specific target of offenders, such as retirees, the elderly, those who are socially disadvantaged, or a particular ethnic community. It would be desirable for some mechanism to be in place to allow information to be presented to a court where appropriate, on behalf of such victims. Some ways in which this information could be presented are by way of submissions, a general statement or expert evidence, such as from a psychiatrist or social worker who can attest to the impact of the offence on the affected group.¹¹⁷⁶

In what circumstances should victim impact statements be able to be used?

14.15 If it is accepted that victim impact statements have a role to play in federal sentencing, the issue arises as to whether they should be available for all federal offences—summary and indictable—and irrespective of the type of injury, loss or damage suffered by any victim.

14.16 There is disparity between state and territory legislation in relation to the types of offences for which a victim impact statement may be made. Some legislation applies only in relation to indictable offences,¹¹⁷⁷ and others to offences punishable by a certain period of imprisonment.¹¹⁷⁸

14.17 Another problem is that the provisions regulating victim impact statements in New South Wales apply only in relation to certain offences that result in death, actual physical bodily harm, actual or threatened violence or an act of sexual assault.¹¹⁷⁹ Primary victims may give particulars in a statement of any 'personal harm' that they have suffered as a direct result of the offence.¹¹⁸⁰ 'Personal harm' is defined as 'actual physical bodily harm, mental illness or nervous shock'.¹¹⁸¹ The provisions do not cover economic loss, which is a type of loss suffered by some victims of federal offences, such as corporations law offences. In contrast, 'harm' is defined broadly in the provisions regulating victim impact statements in some other jurisdictions, and specifically includes economic loss.¹¹⁸²

14.18 Some provisions that permit economic loss to be the subject of a victim impact statement allow the statement to be made only by a natural person.¹¹⁸³ However, a corporation can suffer economic loss as a result of certain federal offences. In this regard, the sentencing legislation of Victoria expressly allows a victim impact statement to be made by a person on behalf of a victim that is not an individual.¹¹⁸⁴

14.19 There is also disparity between state and territory legislation about the scope of the term ‘victim’. While all jurisdictions that have provisions regulating victim impact statements apply those provisions to a primary victim, some also apply them to family or dependants of a victim where the victim has died as a result of the offence.¹¹⁸⁵ However, the New South Wales Court of Criminal Appeal has ruled that victim impact statements are irrelevant to the sentencing of an offender in matters involving the death of the primary victim because

the idea that it is more serious or more culpable to kill someone who has or is surrounded by a loving and grieving family than someone who is alone is offensive to our notions of equality before the law.¹¹⁸⁶

14.20 The proposed sentencing legislation of the ACT significantly expands the scope of persons who can make a victim impact statement to include parents, close family members, carers of victims and people in an intimate relationship with the victim.¹¹⁸⁷

14.21 The Law Society of South Australia submitted that ‘all persons directly affected by any Commonwealth offence should be able, if they choose, to provide a victim impact statement to the sentencing court’.¹¹⁸⁸

Should victims be allowed to express opinions about the sentence?

14.22 In Australia, a victim’s desire for retribution, or a victim’s opinion about what is an appropriate sentence for the offender, are generally considered to be illegitimate considerations in sentencing.¹¹⁸⁹ One state sentencing Act expressly prohibits a victim impact statement from addressing the way in which or the extent to which an offender ought to be sentenced.¹¹⁹⁰ However, the sentencing legislation of the Northern Territory expressly provides that a victim impact statement may contain a statement as to the victim’s wishes in respect of the sentencing order to be made by the court,¹¹⁹¹ and the New South Wales legislation does not prevent a court from considering a victim impact statement given by a family victim ‘in connection with the determination of punishment for the offence’ if it considers it appropriate to do so.¹¹⁹²

14.23 The Law Society of South Australia submitted that victims should not be permitted to express personal opinions on the appropriate sentence.¹¹⁹³

What provision should be made to protect offenders?

14.24 One concern that has been identified is that victim impact statements can expose offenders to unfounded allegations by a victim. The view was also expressed in consultations that victim impact statements have the potential to be highly prejudicial, vitriolic and unbalanced.¹¹⁹⁴

14.25 Some state and territory legislation makes provision for the victim to be cross-examined in relation to the contents of a statement,¹¹⁹⁵ or expressly grants the court the power to rule as inadmissible the whole or any part of a victim impact statement.¹¹⁹⁶ New South Wales legislation also prohibits a victim impact statement from containing anything that is 'offensive, threatening, intimidating or harassing'.¹¹⁹⁷

14.26 Some support was expressed in consultations and submissions for the maker of the statement to be called to give sworn evidence if required by the offender.¹¹⁹⁸ However, one practitioner expressed the view that even where the defence is allowed to cross-examine a victim on a victim impact statement, it would hesitate to do so because it risks making the defendant appear unremorseful.¹¹⁹⁹ Victims Support Service Inc opposed the cross-examination of victims in relation to their statements on the basis that it would be tantamount to disenfranchising victims of their personal opinions about the impact of the offence.¹²⁰⁰ Support was also expressed for prior scrutiny by the defence and the court of written victim impact statements for improper or irrelevant content.¹²⁰¹

Can inferences be drawn from the absence of a victim impact statement?

14.27 Some state and territory legislation provides that no inferences are to be drawn about the harm suffered from the fact that a victim has chosen not to make an impact statement.¹²⁰² Queensland Legal Aid noted that sometimes appeal courts draw the inference that because no victim impact statement was tendered the victim did not suffer terrible adverse consequences.¹²⁰³

What form should victim impact statements take, and should they be served?

14.28 The states and territories differ about whether a victim may give a statement in written or oral form. A victim impact statement must be in writing in New South Wales, South Australia and Tasmania¹²⁰⁴ but can be presented orally in Western Australia and the Northern Territory.¹²⁰⁵ Where a statement is in written form, some jurisdictions allow the statement to be read aloud in court.¹²⁰⁶ In South Australia, a child or young person who is a victim of an offence may present particulars of the impact of an offence by writing, drawing, telling a story or writing a poem.¹²⁰⁷

14.29 Victim impact statements in New South Wales are unsigned and unsworn documents.¹²⁰⁸ The New South Wales Law Reform Commission has made various recommendations in relation to the form and presentation of victim impact statements, including that they be signed or otherwise acknowledged as accurate by their authors before the court receives them.¹²⁰⁹ The practice in South Australia of having police

officers prepare victim impact statements, which are not signed or acknowledged by the victim, has been criticised by the South Australian Court of Criminal Appeal.¹²¹⁰

14.30 Some state and territory provisions require victim impact statements to be served on the parties to the proceedings,¹²¹¹ or the defence,¹²¹² or the prosecution.¹²¹³ Where the statement is required to be served on the defence, only the Victorian provision states that this must be done a reasonable time before sentencing is to take place.¹²¹⁴ The New South Wales and Western Australian provisions allow the court to make a victim impact statement available to the parties on such conditions as it thinks fit, including preventing the offender from retaining copies of the statement.¹²¹⁵

14.31 Stakeholders expressed support for a requirement that victim impact statements be provided to the offender and the court in a timely fashion. Victorian and Queensland practitioners stated that victim impact statements were often served late or provided at the bar table, and this could disadvantage offenders.¹²¹⁶

Options for reform

14.32 One option for reform is for federal law to make provision for victim impact statements that would replace existing state and territory provisions in relation to federal offences, and introduce a comprehensive and self-contained scheme in relation to these offences.

14.33 Stakeholders expressed support for federal provision for victim impact statements on the basis that it would promote a uniform approach in the federal context, given existing disparities in state and territory provisions;¹²¹⁷ and that it would be useful in relation to offences where the victim was outside the jurisdiction.¹²¹⁸ Victim Support Service Inc expressed the view that it was necessary to have federal provisions in this area, having regard to the benefits that victim impact statements provide to both victims and courts.¹²¹⁹

14.34 A second option for reform is to make comprehensive federal provision for victim impact statements in federal matters but allow those provisions to roll back once a state or territory enacts laws that conform to specified federal minimum standards. The roll-back mechanism respects state diversity in so far as states may adopt their own procedures and may choose to enact laws that exceed the federal minimum standards. It would thus allow jurisdictional variations in relation to victim impact statements, but in a way that does not impact on the fairness of the federal sentencing process. There are examples of roll-back provisions in various areas of the law.¹²²⁰ The setting of federal minimum standards received some support in consultations.¹²²¹

14.35 A third option is to retain the current position whereby state and territory provisions in relation to victim impact statements are picked up and applied in federal

sentencing. This approach received some support in consultations.¹²²² A variation of this option would be for federal sentencing legislation to identify expressly which state and territory provisions in relation to victim impact statements are picked up and applied in the sentencing of federal offenders, and which are not. Under this approach, state and territory provisions that are not considered appropriate—such as provisions allowing a victim to express an opinion about the sentence to be imposed—could be expressly excluded from application in federal sentencing.

ALRC's views

Victim impact statements to be allowed in sentencing federal offenders

14.36 Victim impact statements should be allowed in the sentencing of federal offenders. They assist the sentencing process by providing judicial officers with details of the impact of offences. They also benefit victims of crime and may promote the rehabilitation of offenders by confronting them with the details of the harm they have inflicted.

14.37 Many of the concerns that have been expressed about the use of victim impact statements can be addressed through the adoption of certain safeguards, which are discussed below.

Victim impact statements to be available in all proceedings

14.38 Victim impact statements should be available in all federal sentencing proceedings, irrespective of whether the offence is summary or indictable, and irrespective of whether the victim is an individual or a corporation. However, the use of victim impact statements should be discretionary. In some cases, it may be appropriate for the prosecution to use other methods to present particulars of injury, loss or damage, such as where there are a large number of individual victims each suffering only a small amount of harm.¹²²³

14.39 In addition, a victim should be able to present particulars of any injury, loss or damage suffered as a result of the offence, including any economic loss. The inclusion of economic loss is important in the federal context because many federal offences cause economic loss.

Roll-back provisions to be enacted

14.40 Some jurisdictions already have reasonably sophisticated provisions regulating the use of victim impact statements, and not every discrepancy between jurisdictions has the potential to impact adversely on the fairness of the federal sentencing process. Accordingly, the ALRC favours an approach whereby: (a) federal sentencing legislation makes comprehensive provision for the use of victim impact statements in sentencing federal offenders; and (b) where states and territories have laws about the use of victim impact statements that comply with specified federal minimum standards, those laws are to be applied in the sentencing of federal offenders to the exclusion of the federal provisions.

14.41 The adoption of federal roll-back provisions has some advantages over federal provisions that operate to the exclusion of state or territory laws. It recognises that some jurisdictions would have to make only minor changes to existing laws in order to comply with the proposed federal minimum standards. Additionally, once a jurisdiction complies with the federal minimum standards, its own provisions will apply. The state or territory will then have a single set of provisions regulating victim impact statements, which can be used in the sentencing of state or territory offenders and federal offenders. Having a single set of provisions will ultimately reduce the potential for error and will render this aspect of the sentencing process simpler, especially where the provisions are to be used in the sentencing of offenders for joint state or territory and federal offences.

Federal minimum standards to be adopted

14.42 Having regard to the concerns expressed about the content and form of victim impact statements, the way in which their use can adversely impact on an offender, and the way in which their absence can adversely impact on a victim, the ALRC considers that federal sentencing legislation should adopt a set of minimum standards.

14.43 The details of those standards are set out in Proposal 14–1 below. They cover such issues as: the range of offences for which victim impact statements are available, the nature of the loss suffered, the relevance of a victim’s opinion about the sentence, verification of facts, inferences to be drawn from the absence of a statement, and the timely provision of statements to the parties.

14.44 Different mechanisms can be used to determine when a state or territory law meets the federal minimum standards such that the federal provisions no longer apply in that jurisdiction. One possibility is to provide that the relevant federal minister may issue a proclamation stating that he or she is satisfied that the federal minimum standards have been met in the specified jurisdiction. The ALRC is interested in hearing the views of stakeholders about the most appropriate means of implementing a roll-back provision of the kind described above.

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

- (a) allow a victim impact statement to be made in relation to summary and indictable offences;

- (b) allow a victim (whether an individual or corporation) to present particulars of any injury, loss or damage suffered as a result of the commission of a federal offence, including particulars of economic loss;
- (c) preclude a victim from expressing an opinion about the sentence that should be imposed on a federal offender;
- (d) allow any facts stated in a victim impact statement to be verified where they are likely to be material to the determination of sentence;
- (e) preclude a court from drawing any inference about the harm suffered by a victim from the fact that a victim impact statement has not been made; and
- (f) provide that, a victim impact statement may be given orally or in writing, but where it is in writing: (i) it must be signed or otherwise acknowledged by the victim; and (ii) a copy of the statement must be provided to the prosecution and to the offender or the offender's legal representative a reasonable time before the sentencing hearing, on such terms as the court thinks fit.

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

Pre-sentence reports

Background

14.45 A pre-sentence report is a document prepared for the court, usually at its request, to provide background information about an offender and to assist the court in determining the most appropriate manner of dealing with an offender.¹²²⁴ Pre-sentence reports have an important role in the sentencing of special categories of offenders, such as offenders with a mental illness or intellectual disability, and Aboriginal and Torres Strait Islander offenders.¹²²⁵ The conclusions of pre-sentence reports do not compel the court to impose a particular sentence.¹²²⁶

14.46 Part IB of the *Crimes Act* does not make provision for pre-sentence reports. Professors Fox and Freiberg have expressed the view that provisions in relation to pre-sentence reports are matters of sentencing procedure and are therefore picked up and applied in the sentencing of federal offenders by ss 68 and 79 of the *Judiciary Act*.¹²²⁷

14.47 All states and territories other than New South Wales have legislation governing the use of pre-sentence reports.¹²²⁸ New South Wales makes provision for suitability assessment reports, which are prepared to provide advice to the court on the offender's suitability for community service orders, periodic detention orders and home detention orders.¹²²⁹ There are disparities between the states and territories regarding the authors, content, distribution and use of pre-sentence reports. These are addressed below.

Issues and problems

When should pre-sentence reports be available in federal sentencing?

14.48 Stakeholders expressed support in consultations and submissions for the use of pre-sentence reports in federal sentencing proceedings, if the circumstances of a particular matter indicated a need for such report.¹²³⁰ The Welfare Rights Centre submitted that 'the need for pre-sentence reports is manifest', and that it was important for properly researched individual case histories to be provided to a court prior to the sentencing of female offenders who committed offences because of poverty or necessity.¹²³¹ The Law Society of South Australia submitted that:

Pre-sentence reports are a useful option for the court, particularly where a defendant is unrepresented, or where a psychiatric or psychological report on the defendant is not tendered by defence counsel during submissions.¹²³²

14.49 If it is accepted that pre-sentence reports have a role to play in federal sentencing proceedings, issues arise as to whether they should be mandatory or discretionary, and whether they should be made available irrespective of the type of sentence the court is considering imposing. In most jurisdictions, courts have a discretion to order a pre-sentence report before passing any sentence on an offender.¹²³³ In certain cases, where a court is considering imposing a specific sentencing option, it is mandatory for the court to order a pre-sentence report.¹²³⁴ ALRC 44 recommended that pre-sentence reports should not be mandatory but that the court should be able to use them if they would be helpful.¹²³⁵

14.50 In New South Wales, the court has a discretion to order, prior to the imposition of sentence, a report to assess an offender's suitability for periodic detention or a community based order but there is no express legislative power for a court to order a pre-sentence report prior to the imposition of any other sentence. In contrast, the court's power to seek a suitability assessment report in relation to home detention is exercisable only *after* the court imposes a sentence of imprisonment. This sits uncomfortably with Part IB of the *Crimes Act*, which provides that a federal offender may be sentenced to home detention without receiving a sentence of imprisonment.¹²³⁶

Who should prepare them and in what time frame?

14.51 Some state and territory sentencing legislation is silent as to who should prepare a pre-sentence report.¹²³⁷ In other jurisdictions the person responsible for preparing a

pre-sentence report varies. In Victoria, pre-sentence reports are prepared by the Secretary to the Department of Justice;¹²³⁸ in the ACT by a public servant who is authorised to do so;¹²³⁹ in Queensland by a corrective services officer;¹²⁴⁰ and in Western Australia by one or more ‘appropriately qualified’ persons.¹²⁴¹

14.52 Some jurisdictions expressly authorise a court to adjourn proceedings for a pre-sentence report to be prepared,¹²⁴² but only some address the time frame in which the report is to be provided to the court;¹²⁴³ or in which the report is to be prepared.¹²⁴⁴ The South Australian sentencing legislation precludes the court from ordering a pre-sentence report where the information sought by the court cannot be furnished within a reasonable time, but there is no express obligation on the author of the report to furnish the information within a reasonable time.¹²⁴⁵

14.53 The Department of Corrective Services New South Wales submitted that some reports are prepared on the day they are requested by a court, the reports being compiled by a Probation and Parole Officer who is on call at the court for this purpose.¹²⁴⁶ The *Standard Guidelines for Corrections in Australia* provide that reports on offenders should be timely.¹²⁴⁷

What form should they take and what should be included?

14.54 Most jurisdictions expressly allow a pre-sentence report to be given orally or in writing.¹²⁴⁸ In New South Wales, specific reports can be delivered verbally by a Court Duty Probation and Parole Officer.¹²⁴⁹

14.55 There is disparity in the extent to which state and territory legislation specifies the contents of pre-sentence reports. In addition to providing that a pre-sentence report is to include any matter that the court has directed to be addressed, some legislation sets out a number of common factors that should or may be included in a report. These factors include: the offender’s age; social history and background; medical and psychiatric history; educational and employment history; financial circumstances; special needs; the extent to which the offender has complied with any sentence; and any courses, treatment or other assistance that is available to the offender and from which he or she could benefit.¹²⁵⁰ In contrast, South Australian legislation restricts the scope of a pre-sentence report to the physical and mental condition of the offender or the personal circumstances and history of the offender.¹²⁵¹ Western Australia provides that a court may give instructions as to the issues to be addressed in a pre-sentence report and that, in the absence of instructions, the report is to address matters relevant to sentencing.¹²⁵²

14.56 Of the jurisdictions that set out the factors that must or may be addressed in a pre-sentence report, only the ACT specifies that one of the factors is the opinion of the author of the report about the offender’s propensity to commit further offences.¹²⁵³

14.57 ALRC 44 recommended that there should be no statutory specification of the contents of a pre-sentence report.¹²⁵⁴ One federal offender submitted that pre-

sentence reports should address an offender's physical and psychiatric health, age, education and any mitigating factors relevant to sentencing.¹²⁵⁵

14.58 The *Standard Guidelines for Corrections in Australia* provide that reports on offenders should be concise, objective and factual, and that any expression of opinion should be clearly identified as such.¹²⁵⁶ In addition, the guidelines provide that:

Assessment of offenders should draw upon and identify:

- the widest practicable range of information sources regarding offenders and their offences;
- relevant issues in their social and cultural background; and
- knowledge of available correctional services, programmes, and other avenues of information and support. ...

Where there is insufficient information regarding an offender to permit a responsible assessment and recommendation to be made to a court ... advice to this effect should be provided.¹²⁵⁷

Should their contents be subject to challenge?

14.59 Pre-sentence reports may be self-serving and contain unsubstantiated allegations by the offender.¹²⁵⁸ The New South Wales Court of Criminal Appeal has said that a judicial officer should give little weight to any statement in a pre-sentence report concerning the offence if the offender does not give evidence in relation to those matters.¹²⁵⁹

14.60 In *R v Niketic*, an offender who did not give evidence at sentencing presented his version of events about his role in the commission of an offence through statements made to a consultant forensic psychiatrist, which were included in a pre-sentence report. Wood CJ referred to the

wholly unsatisfactory practice whereby facts of relevance to an assessment of the role of an offender are sought to be proved through histories provided to third parties, which cannot then be tested.¹²⁶⁰

14.61 In light of these concerns, the issue arises whether the contents of pre-sentence reports should be subject to challenge. Some legislation is silent on this point.¹²⁶¹ Other legislation provides a mechanism for the prosecution or the defence to dispute the contents of a pre-sentence report,¹²⁶² or expressly provides for the cross-examination of the author of the report.¹²⁶³ South Australian legislation provides that where a statement of fact or opinion in a pre-sentence report is challenged the court must disregard the fact or opinion unless it is substantiated on oath.¹²⁶⁴ Queensland legislation provides that a report purporting to be a pre-sentence report made by a corrective services officer is evidence of the matters contained in it.¹²⁶⁵

14.62 ALRC 44 recommended that both parties should be entitled to challenge the accuracy of any factual statement contained in a pre-sentence report.¹²⁶⁶

What provision should be made for their distribution?

14.63 Most jurisdictions provide for the distribution of a pre-sentence report to the prosecution and the defence, but some jurisdictions are silent on this issue.¹²⁶⁷ While some legislation makes it mandatory for either the court or the author of the report to provide a copy of the pre-sentence report to the parties,¹²⁶⁸ other legislation gives the court a discretion to make the report available to the parties on such conditions as it thinks fit.¹²⁶⁹ In New South Wales, once a report has been delivered to the court, a unit within the Department of Corrective Services provides a copy to the defence and prosecution upon request.¹²⁷⁰

14.64 Of the jurisdictions that provide for distribution of a pre-sentence report, only some address the time within which the report is to be provided to the parties. The ACT legislation provides that any pre-sentence report is to be provided before the court passes sentence.¹²⁷¹ Other jurisdictions require pre-sentence reports to be provided a reasonable time before sentencing is to take place,¹²⁷² or require the court to ensure that the parties have sufficient time before the proceedings to consider and respond to the report.¹²⁷³

14.65 ALRC 44 recommended that both parties should be entitled to a copy of a pre-sentence report.¹²⁷⁴ In 1996, the New South Wales Law Reform Commission recommended that written reports ordered by the court should generally be made available to the parties at least the day before the sentencing hearing.¹²⁷⁵ The Department of Corrective Services New South Wales submitted that if written reports were required to be made available to the parties at least the day before the sentencing hearing then parties requiring access to pre-sentence reports should make arrangements for these to be collected from the court; and that an exception should be made for pre-sentence reports prepared in court or provided verbally.¹²⁷⁶

Options for reform

14.66 One option for reform is for federal law to make comprehensive provision for pre-sentence reports, which would replace the use of state and territory provisions in relation to federal offences.

14.67 The Law Society of South Australia opposed federal legislation making provision for pre-sentence reports because it was unclear who would prepare the reports in accordance with any federal standards.¹²⁷⁷

14.68 A second option for reform is to make comprehensive federal provision for pre-sentence reports but allow those federal provisions to roll back once a state or territory enacts laws that conform to specified federal minimum standards. As discussed above, this approach allows for jurisdictional variations that do not derogate from the fairness of the federal sentencing process.

14.69 A third option is to retain the current position whereby state and territory provisions in relation to pre-sentence reports are picked up and applied in federal sentencing. This approach received some support in consultations.¹²⁷⁸

ALRC's views

Pre-sentence reports to be allowed in federal sentencing proceedings

14.70 Pre-sentence reports should be allowed in federal sentencing proceedings. They benefit the sentencing process by assisting judicial officers in their consideration of relevant sentencing factors, and may assist a court in determining whether a federal offender is suited to a particular sentencing option. Pre-sentence reports may have particular utility in sentencing federal offenders with special needs.

14.71 The ALRC believes that issues raised in relation to the use and attributes of pre-sentence reports can be addressed through the adoption of specific safeguards, which are discussed below.

Pre-sentence reports to be available prior to imposing any federal sentence

14.72 A court should be able to request a pre-sentence report prior to the imposition of any federal sentence where the court considers it appropriate to do so. There may be cases where there is no need to order a pre-sentence report, but the availability of reports should not be restricted by legislation to cases in which the court is considering the imposition of particular sentencing options.

14.73 In addition, as discussed in Chapter 28, there are some circumstances in which it should be mandatory for a court to obtain a pre-sentence report when sentencing a federal offender who has a mental illness or intellectual disability.

Roll-back provisions to be enacted

14.74 Given the differences in state and territory provisions about pre-sentence reports, and the fact that some legislation is silent on key issues, the ALRC considers that federal sentencing legislation should make comprehensive provision for the use of pre-sentence reports in the sentencing of federal offenders. The ALRC proposes the adoption of a roll-back mechanism—similar to that canvassed above for victim impact statements—rather than the enactment of federal provisions that would operate to the exclusion of state or territory provisions on the subject of pre-sentence reports.

14.75 As noted above, roll-back provisions offer the advantage of enabling a state or territory to have a single set of provisions regulating pre-sentence reports, which can be used in sentencing state or territory offenders and federal offenders, once the state or territory complies with the minimum federal standards.

Minimum standards in relation to pre-sentence reports

14.76 Federal sentencing legislation should authorise a court to specify any matter that it wishes to have addressed in a pre-sentence report. The contents of pre-sentence reports to be used in federal sentencing should not be restricted, as they currently are in South Australia, to the physical and mental condition or the personal circumstances and history of the offender. State and territory legislation may, however, exceed the minimum standard by specifying certain factors that a pre-sentence should or may address, in addition to matters directed by the court.

14.77 The ALRC favours the Western Australian approach of requiring the author of a pre-sentence report to be an ‘appropriately qualified’ person, rather than the approach used in other legislation, which focuses on an author’s job title (for example, a corrective services officer). Accordingly, federal legislation should require a pre-sentence report to be prepared by a suitably qualified person.

14.78 The author of a pre-sentence report should be precluded from expressing an opinion about the offender’s propensity to commit further offences, unless the author is suitably qualified to give such an opinion. Other minimum standards are listed in Proposal 14-2.

14.79 As discussed in Chapter 22, the ALRC proposes that the Australian Government establish an Office for the Management of Federal Offenders (OMFO) within the Attorney-General’s Department to monitor and report on all federal offenders (see Proposal 22-4). One of the functions of the OMFO would be to monitor state and territory compliance with federal minimum standards in relation to pre-sentence reports and victim impact statements. In addition, the ALRC considers that the OMFO should promote the fulfilment of the *Standard Guidelines for Corrections in Australia*, including in so far as they relate to the preparation of pre-sentence reports.

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

- (a) authorise a court to request a pre-sentence report prior to the imposition of any sentence, where the court considers it appropriate to do so;
- (b) authorise a court to specify any matter that it wishes to have addressed in the pre-sentence report;
- (c) require the pre-sentence report to be prepared by a suitably qualified person within a reasonable time;

- (d) preclude the author of the pre-sentence report from expressing an opinion about the offender's propensity to commit further offences, unless the author is suitably qualified to give such an opinion;
- (e) allow the content of the pre-sentence report to be contested, for example by cross-examination of any person other than the offender; and
- (f) provide that a pre-sentence report may be given orally or in writing, but where it is in writing, a copy of the report must be provided to the prosecution and to the offender or the offender's legal representative a reasonable time before the sentencing hearing, on such terms as the court thinks fit.

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

- 1153 See Ch 6.
- 1154 See Ch 6.
- 1155 See Ch 10.
- 1156 See Ch 21.
- 1157 *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc A/Res/40/34 (1985) art 6(b).
- 1158 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.507].
- 1159 *Ibid*, [2.507].
- 1160 Commonwealth Director of Public Prosecutions, *Consultation*, Sydney, 16 September 2004.
- 1161 See, however, *Criminal Offence Victims Act 1995* (Qld) s 14 (prosecutor to inform court of details of harm caused to a victim by the crime); *Penalties and Sentences Act 1992* (Qld) s 15 (court can receive any information it considers appropriate to enable it to impose a proper sentence).
- 1162 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 26–30A; *Crimes (Sentencing Procedure) Regulation 2000* (NSW) regs 9–12; *Sentencing Act 1991* (Vic) pt 6 div 1A; *Criminal Law (Sentencing) Act 1988* (SA) s 7A; *Magistrates Court Rules 1992* (SA) r 41.06; *Supreme Court Criminal Rules 1992* (SA) r 19.01–19.08; *Sentencing Act 1997* (Tas) s 81A; *Justice Rules 2003* (Tas) pt 9A; *Sentencing Act 1995* (WA) pt 3 div 4; *Crimes Act 1900* (ACT) s 343; *Sentencing Act 1995* (NT) ss 106A–106B. See also *Crimes (Sentencing) Bill 2005* (ACT) pt 4.3.
- 1163 See *Victims' Rights Act 2002* (NZ) ss 17–27; *Criminal Code* (RS 1985, c C–46) (Canada) s 722.
- 1164 *Federal Rules of Criminal Procedure* 18 USC (Appendix) (US) r 32(i)(4)(B).
- 1165 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.501].
- 1166 J Baptie, 'The Effect of the Provision of Victim Impact Statements in the Local Courts of New South Wales' (2004) 7 *The Judicial Review* 73, 79–80.
- 1167 A Ashworth, 'Victim Impact Statements and Sentencing' (1993) *The Criminal Law Review* 498, 501, 507.
- 1168 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.502].
- 1169 J Baptie, 'The Effect of the Provision of Victim Impact Statements in the Local Courts of New South Wales' (2004) 7 *The Judicial Review* 73, 80.

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- 1170 Victorian Sentencing Committee, *Sentencing* (1988), [13.3.26].
- 1171 J Baptie, 'The Effect of the Provision of Victim Impact Statements in the Local Courts of New South Wales' (2004) 7 *The Judicial Review* 73, 80.
- 1172 E Erez, L Roeger and M O'Connell, *Victim Impact Statements in South Australia, An Evaluation* (1994) Office of Crime Statistics, Attorney-General's Department (SA), cited in J Baptie, 'The Effect of the Provision of Victim Impact Statements in the Local Courts of New South Wales' (2004) 7 *The Judicial Review* 73, 81.
- 1173 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; LD, *Submission SFO 9*, 10 March 2005; Victim Support Service Inc, *Consultation*, Adelaide, 20 April 2005.
- 1174 Victim Support Service Inc, *Consultation*, Adelaide, 20 April 2005.
- 1175 JC, *Submission SFO 25*, 13 April 2005.
- 1176 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.
- 1177 See, eg, *Criminal Law (Sentencing) Act 1988* (SA) s 7A(1); *Sentencing Act 1997* (Tas) s 81A(1), (2). See also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(2). See also Crimes (Sentencing) Bill 2005 (ACT) cl 48.
- 1178 *Crimes Act 1900* (ACT) s 343.
- 1179 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27.
- 1180 *Ibid* s 26.
- 1181 *Ibid* s 26.
- 1182 *Crimes Act 1900* (ACT) s 343; *Sentencing Act 1995* (NT) s 106A. See also Crimes (Sentencing) Bill 2005 (ACT) cl 47.
- 1183 See *Sentencing Act 1995* (NT) s 106A.
- 1184 *Sentencing Act 1991* (Vic) s 95A(3)(a).
- 1185 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26; *Sentencing Act 1997* (Tas) s 81A; *Crimes Act 1900* (ACT) s 340(b); *Sentencing Act 1995* (NT) s 106A. See also Crimes (Sentencing) Bill 2005 (ACT) cl 47.
- 1186 *R v Dang* [1999] NSWCCA 42, [25].
- 1187 Crimes (Sentencing) Bill 2005 (ACT) cl 49.
- 1188 Law Society of South Australia, *Submission SFO 37*, 22 April 2005 (emphasis added).
- 1189 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.501]; A Ashworth, 'Victim Impact Statements and Sentencing' (1993) *The Criminal Law Review* 498, 501.
- 1190 *Sentencing Act 1995* (WA) s 25(2).
- 1191 *Sentencing Act 1995* (NT) s 106B(5A).
- 1192 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(4)(b).
- 1193 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
- 1194 Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005.
- 1195 *Sentencing Act 1991* (Vic) s 95D; *Crimes Act 1900* (ACT) s 343(3); *Sentencing Act 1995* (NT) s 106B(9). See also *Sentencing Act 1997* (Tas) ss 81A(7), 81(4) (if offender challenges truth of information in statement court may require it to be proved in like manner as if it were to be received at trial); Crimes (Sentencing) Bill 2005 (ACT) cl 53(3), (4).
- 1196 *Sentencing Act 1991* (Vic) s 95B(2); *Sentencing Act 1995* (WA) s 26(2). See also *Justice Rules 2003* (Tas) r 54G.
- 1197 *Crimes (Sentencing Procedure) Regulation 2000* (NSW) reg 11(6). See also Crimes (Sentencing) Bill 2005 (ACT) cl 51(6).
- 1198 Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005.
- 1199 Queensland Legal Aid, *Consultation*, Brisbane, 2 March 2005.
- 1200 Victim Support Service Inc, *Consultation*, Adelaide, 20 April 2005.
- 1201 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
- 1202 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 29(3); *Crimes Act 1900* (ACT) s 343(1)(b); *Sentencing Act 1995* (NT) s 106B(6).
- 1203 Queensland Legal Aid, *Consultation*, Brisbane, 2 March 2005.
- 1204 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30; *Criminal Law (Sentencing) Act 1988* (SA) s 7A(1), (2); *Sentencing Act 1997* (Tas) s 81A(2), (2A), (3); *Justice Rules 2003* (Tas) r 54I. However, the ALRC was informed in consultations that South Australian magistrates allow verbal statements: Victim Support Service Inc, *Consultation*, Adelaide, 20 April 2005.

- 1205 *Sentencing Act 1995* (WA) s 25(1); *Sentencing Act 1995* (NT) s 106B(8). See also *Sentencing Act 1991* (Vic) s 95A(2)(b); Crimes (Sentencing) Bill 2005 (ACT) cl 52(1)(b).
- 1206 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30A; *Sentencing Act 1991* (Vic) s 95F; *Criminal Law (Sentencing) Act 1988* (SA) s 7A(3); *Justice Rules 2003* (Tas) r 54D. See also Crimes (Sentencing) Bill 2005 (ACT) cl 52(1)(c).
- 1207 Attorney-General's Department Government of South Australia, *Victim Impact Statement: Information and Form*. See also Victim Support Service Inc, *Consultation*, Adelaide, 20 April 2005.
- 1208 J Baptie, 'The Effect of the Provision of Victim Impact Statements in the Local Courts of New South Wales' (2004) 7 *The Judicial Review* 73, 75.
- 1209 New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), Recs 6, 7, 9.
- 1210 *Nicholls v The Queen* (1991) 53 A Crim R 455, 458.
- 1211 See *Justice Rules 2003* (Tas) r 54B(1).
- 1212 *Sentencing Act 1991* (Vic) s 95C; *Crimes Act 1900* (ACT) s 343(2)(b); *Sentencing Act 1995* (NT) s 106B(8)(a). See also Crimes (Sentencing) Bill 2005 (ACT) cl 53(2)(b).
- 1213 See *Magistrates Court Rules 1992* (SA) r 41.06(i); *Supreme Court Criminal Rules 1992* (SA) r 19.01.
- 1214 *Sentencing Act 1991* (Vic) s 95C.
- 1215 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(5); *Sentencing Act 1995* (WA) s 26 (1).
- 1216 Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005; Queensland Legal Aid, *Consultation*, Brisbane, 2 March 2005.
- 1217 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
- 1218 K Warner, *Consultation*, Hobart, 13 April 2005.
- 1219 Victim Support Service Inc, *Consultation*, Adelaide, 20 April 2005.
- 1220 See, eg, *Gene Technology Act 2000* (Cth) s 14; *Environmental Protection (Sea Dumping) Act 1981* (Cth) s 9.
- 1221 Inspector of Custodial Services Western Australia, *Consultation*, Perth, 19 April 2005.
- 1222 Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.
- 1223 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), [14.22].
- 1224 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.401].
- 1225 See Chs 28, 29.
- 1226 R Fox, *Victorian Criminal Procedure: State and Federal Law* (11th ed, 2002), [9.2.44].
- 1227 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.406].
- 1228 See *Sentencing Act 1991* (Vic) pt 6 div 2; *Penalties and Sentences Act 1992* (Qld) s 15; *Corrective Services Act 2000* (Qld) s 245; *Sentencing Act 1995* (WA) ss 20–22; *Criminal Law (Sentencing) Act 1988* (SA) s 8; *Sentencing Act 1997* (Tas) ss 81–83, 87; *Crimes Act 1900* (ACT) pt 15, div 15.2; *Sentencing Act 1995* (NT) pt 6 div 2. See also Crimes (Sentencing) Bill 2005 (ACT) pt 4.2.
- 1229 See *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 86, 88–89, 66(1), 68–69, 78, 80–81; *Crimes (Sentencing Procedure) Regulation 2005* (NSW) reg 15.
- 1230 JC, *Submission SFO 25*, 13 April 2005; Welfare Rights Centre Inc (Queensland), *Submission SFO 29*, 15 April 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 1231 Welfare Rights Centre Inc (Queensland), *Submission SFO 29*, 15 April 2005.
- 1232 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
- 1233 *Sentencing Act 1991* (Vic) s 96(1); *Penalties and Sentences Act 1992* (Qld) s 15; *Sentencing Act 1995* (WA) s 20(1); *Criminal Law (Sentencing) Act 1988* (SA) s 8(1); *Sentencing Act 1997* (Tas) s 82(1); *Crimes Act 1900* (ACT) s 363(1); *Sentencing Act 1995* (NT) s 105. See also Crimes (Sentencing) Bill 2005 (ACT) cl 41(1).
- 1234 See, eg, *Sentencing Act 1991* (Vic) s 96(2); *Sentencing Act 1995* (WA) s 20(2a), (3).
- 1235 See Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 106.
- 1236 See *Crimes Act 1914* (Cth) s 20AB(1A).
- 1237 For example, *Criminal Law (Sentencing) Act 1988* (SA); *Sentencing Act 1995* (NT).
- 1238 *Sentencing Act 1991* (Vic) s 96(3).
- 1239 *Crimes Act 1900* (ACT) s 362. See also Crimes (Sentencing) Bill 2005 (ACT) cl 41(3), (4) (report to be prepared by assessor).

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- 1240 *Corrective Services Act 2000* (Qld) s 245(1).
- 1241 *Sentencing Act 1995* (WA) s 22(1)(a), (2).
- 1242 *Sentencing Act 1991* (Vic) s 96(1); *Crimes Act 1900* (ACT) s 363(1); *Sentencing Act 1995* (NT) s 105. See also Crimes (Sentencing) Bill 2005 (ACT) cl 41(b).
- 1243 *Sentencing Act 1991* (Vic) s 98(1); *Corrective Services Act 2000* (Qld) s 245(3)(a) (within 28 days); *Sentencing Act 1997* (Tas) s 87(1) (to be filed with court no later than the time directed by the court).
- 1244 See *Sentencing Act 1995* (WA) s 22(1)(b) (as soon as practicable and in any event within 21 days).
- 1245 *Criminal Law (Sentencing) Act 1988* (SA) s 8(2)(a).
- 1246 Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005.
- 1247 Corrective Services Ministers' Conference and Conference of Correctional Administrators, *Standard Guidelines for Corrections in Australia* (2004): Standard Guidelines for Community Corrections, [1.2].
- 1248 *Sentencing Act 1995* (WA) s 22(3); *Criminal Law (Sentencing) Act 1988* (SA) s 8(3); *Sentencing Act 1997* (Tas) s 82; *Crimes Act 1900* (ACT) s 363(2). See also Crimes (Sentencing) Bill 2005 (ACT) cl 44.
- 1249 Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005.
- 1250 *Sentencing Act 1991* (Vic) s 97; *Sentencing Act 1997* (Tas) s 83; *Crimes Act 1900* (ACT) s 364; *Sentencing Act 1995* (NT) s 106. See also Crimes (Sentencing) Bill 2005 (ACT) cl 42.
- 1251 *Criminal Law (Sentencing) Act 1988* (SA) s 8(1).
- 1252 *Sentencing Act 1995* (WA) s 21. See also *Sentencing Act 1997* (Tas) s 82(2).
- 1253 *Crimes Act 1900* (ACT) s 364(1)(k)(ii).
- 1254 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 106.
- 1255 JC, *Submission SFO 25*, 13 April 2005.
- 1256 Corrective Services Ministers' Conference and Conference of Correctional Administrators, *Standard Guidelines for Corrections in Australia* (2004): Standard Guidelines for Community Corrections, [1.2].
- 1257 Ibid: Standard Guidelines for Community Corrections, [1.3], [1.5].
- 1258 *Majors v The Queen* (1991) 54 A Crim R 334, 337. In New South Wales, such allegations are noted as being unsubstantiated: see Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005.
- 1259 *R v Qutami* (2001) 127 A Crim R 369, [58]–[59].
- 1260 *R v Niketic* [2002] NSWCCA 425, [4].
- 1261 See, eg, *Sentencing Act 1995* (WA); *Sentencing Act 1995* (NT).
- 1262 *Sentencing Act 1991* (Vic) s 99(a).
- 1263 Ibid s 99(b); *Criminal Law (Sentencing) Act 1988* (SA) s 8(5); *Sentencing Act 1997* (Tas) s 88; *Crimes Act 1900* (ACT) s 366. See also Crimes (Sentencing) Bill 2005 (ACT) cl 46.
- 1264 *Criminal Law (Sentencing) Act 1988* (SA) s 8(6).
- 1265 *Corrective Services Act 2000* (Qld) s 245(8).
- 1266 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 106.
- 1267 See, eg, *Sentencing Act 1995* (NT).
- 1268 *Sentencing Act 1991* (Vic) s 98(2); *Corrective Services Act 2000* (Qld) s 245(4); *Criminal Law (Sentencing) Act 1988* (SA) s 8(4); *Crimes Act 1900* (ACT) s 365. See also Crimes (Sentencing) Bill 2005 (ACT) cl 45.
- 1269 *Sentencing Act 1995* (WA) s 22(5). See also *Corrective Services Act 2000* (Qld) s 245(6), (7) (court may order that report not be shown to convicted person and that copy of report is to be returned to the court before the end of the proceedings); *Sentencing Act 1997* (Tas) s 87 (unless court otherwise orders, author of report must provide copy of report to parties).
- 1270 Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005.
- 1271 *Crimes Act 1900* (ACT) s 365. Compare, however, Crimes (Sentencing) Bill 2005 (ACT) cl 45 (copy of report to be made available to parties at least two working days before the offender is to be sentenced).
- 1272 *Sentencing Act 1991* (Vic) s 98(2); *Sentencing Act 1997* (Tas) s 87(3).
- 1273 *Corrective Services Act 2000* (Qld) s 245(5).
- 1274 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 106.
- 1275 New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), Rec 2.
- 1276 Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005.
- 1277 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
- 1278 Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.

15. A Sentence Indication Scheme

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Should federal offenders be able to obtain an indication of sentence prior to final determination of the matter? If so, what type of sentence indication should be given, at what stage should it be available, and what process should be used to determine the facts or opinions upon which it is based? [IP 29, Q 11–5]

Background

15.1 A sentence indication scheme entails a judicial officer, prior to the commencement of a trial, advising the defendant of the sentence, or the type or range of sentences, that the defendant is likely to receive if he or she pleads guilty to the offence. One purpose of sentence indication is to ensure that a defendant is in a position to make an informed decision in relation to a plea.¹²⁷⁹ There are different models of sentence indication schemes. In some, a dedicated hearing is held to determine a sentence indication; in others, sentence indication forms part of a wider hearing concerned with pre-trial issues.¹²⁸⁰

Pilot sentence indication scheme in New South Wales

15.2 One example of the dedicated hearing model is the pilot sentence indication scheme that commenced in the New South Wales District Court in 1993. The stated aims of the scheme were to encourage guilty pleas, decrease the number of trials before the District Court, dispose of matters more quickly in the interests of justice, and reduce trial costs and trial preparation time.¹²⁸¹

15.3 Under the scheme, a District Court judge could give an indication of the sentence the judge might impose if the person were to plead guilty. Sentence indication hearings were held on the application of the defendant and were conducted in open court, subject to express powers to make suppression orders. The hearing in essence proceeded as a provisional guilty plea, following which the indication was given.

15.4 If the defendant accepted the indicative sentence, he or she was arraigned¹²⁸² and the formal sentence—reflecting the indicative sentence—was passed. If the defendant rejected the indicative sentence, the matter was set down for trial before another judge who was not told the outcome of the sentence indication hearing, unless the defendant elected to do so. Both the prosecutor and the defendant had the right to appeal against a sentence imposed after acceptance of an indicative sentence.¹²⁸³

15.5 The scheme was terminated in January 1996. The New South Wales Bureau of Crime Statistics and Research concluded that the scheme was not achieving its objectives.¹²⁸⁴ Further, the evidence suggested that those who pleaded guilty at a sentence indication hearing were treated more leniently than those who pleaded guilty at committal,¹²⁸⁵ which was in conflict with principles laid down by the New South Wales Court of Criminal Appeal in *R v Warfield*:

If it was not previously clear, it should now be made very clear that, although those who plead guilty following a sentence indication hearing may expect some discount for that utilitarian benefit, they should not expect as much leniency as those who plead at an earlier stage and who do so as a result of their contrition.¹²⁸⁶

Other forms of sentence indication

15.6 Other forms of sentence indication exist in Victoria, Tasmania, the Australian Capital Territory (ACT), the United Kingdom and New Zealand. In addition, particular models for sentence indication have been canvassed by the New South Wales Law Reform Commission (NSWLRC); the Royal Commission on Criminal Justice, chaired by Viscount Runciman in the United Kingdom (the Runciman Royal Commission); and more recently by the New Zealand Law Commission (NZLC).

15.7 The sentence indication schemes in Victoria, Tasmania, the ACT and New Zealand form part of a wider hearing concerned with pre-trial issues.¹²⁸⁷ Under these

schemes, sentence indications are generally limited to an indication of the type of sentence, for example custodial or non-custodial.¹²⁸⁸

Issues and problems

Should there be a sentence indication scheme?

15.8 Considerable support has been expressed for sentence indication schemes. In 2000, the Standing Committee of Attorneys-General recommended that consideration be given to introducing a system of sentence indication,¹²⁸⁹ and in 2002 the United Kingdom Government stated its intention to introduce sentence indications to encourage early guilty pleas.¹²⁹⁰ In 2005, the NZLC recommended the adoption of a particular model of sentence indication as a part of pre-trial processes.¹²⁹¹ Academics have also supported it.¹²⁹²

15.9 In addition, a number of stakeholders during the course of the ALRC's current inquiry expressed support for the introduction of an appropriately structured sentence indication scheme.¹²⁹³ The view was expressed that such a scheme would potentially benefit defendants and victims, as well as the criminal justice system itself by preventing both 'last-minute' guilty pleas and unnecessary trials, thereby saving court costs and time. The Criminal Bar Association of Victoria submitted that there were particular benefits associated with resolving federal matters given that:

trials prosecuted by the Commonwealth Director of Public Prosecutions are frequently long and complex. Mostly, they are circumstantial cases. Often these cases involve serious drug importations or serious fraud. As a result the cases are expensive at all levels—to the prosecution, the defence, and in court time.¹²⁹⁴

15.10 One prosecutor expressed the view that the threat of imprisonment was of great concern to many defendants but if they knew they were going to receive a sentence other than imprisonment they would be more prepared to plead guilty.¹²⁹⁵

15.11 Some stakeholders expressed the view that there would be judicial resistance to sentence indications.¹²⁹⁶ Objections to sentence indication schemes include that they give insufficient regard to the concerns of victims, create significant and unjustified inducements to plead guilty, and cause ethical difficulties for defendants and their lawyers.¹²⁹⁷ Although the Commonwealth Director of Public Prosecutions (CDPP) supported the adoption of a sentence indication scheme in principle, it noted that the introduction of such a system would need to be carefully handled in order to minimise 'judge-shopping' by defendants, and it stated that there was a risk that seeking a sentence indication would 'simply become another step in the criminal justice process that defence lawyers felt obliged to pursue even if there was little likelihood of their client pleading guilty'.¹²⁹⁸

15.12 Professors Arie Freiberg and John Willis have stated that any sentence indication process should not place defendants under a greater pressure to plead guilty than they already face.¹²⁹⁹ One federal offender expressed opposition to sentence indication schemes on the basis that they would induce innocent people to plead

guilty.¹³⁰⁰ However, a legal practitioner expressed the view that the risk of inducing a guilty plea already exists by virtue of the fact that a guilty plea can attract a discount.¹³⁰¹ The NZLC has expressed a similar view:

the giving of a sentence indication cannot in itself be criticised as exerting undue pressure on a defendant. In the absence of a sentence indication, defence counsel would be expected to advise their client of the likely sentence or range of sentences; an indication from a judge is merely providing the same advice in more accurate form, thus enabling the defendant to enter a plea in full knowledge of the consequences.

In fact, the real concern relates not to the sentence indication in itself but rather to the sentencing discount that is integral to it.¹³⁰²

15.13 If there were to be a sentence indication scheme, a number of issues would arise in relation to determining its key features. These matters are considered in the following sections.

When should indication be sought and given?

15.14 The view was expressed in consultations and submissions that any sentence indication should be given quite early in criminal proceedings in order to encourage timely guilty pleas.¹³⁰³ For example, Professors Kathy Mack and Sharyn Roach Anleu submitted that an indication should be sought well before trial and that a defendant should be allowed to have only one sentence indication.¹³⁰⁴

15.15 There was some support for an indication to be given only at the request of the defendant,¹³⁰⁵ although in 2005 the NZLC recommended that there should be judicial discretion to give a sentence indication when requested by either prosecution or defence counsel. The NZLC stated that an indication might be sought by the prosecution in order to make a decision as to appropriate charges to be laid.¹³⁰⁶

Where should indication take place?

15.16 In most schemes, sentence indications take place in open court. The NZLC has recommended that status hearings—which are the hearings in which sentence indications are given—be held in public and open to the media.¹³⁰⁷

15.17 Courts have been critical of sentence indications given in private in a judge's chambers. In *R v Marshall*, the Victorian Supreme Court stated that any arrangement in private between judge and counsel in relation to plea and sentence was objectionable, and weakened public confidence in the administration of justice.¹³⁰⁸ Some stakeholders expressed the view that sentence indication should not happen behind closed doors¹³⁰⁹ and should occur in the presence of the defendant.¹³¹⁰ The CDPP submitted that:

it would be important to make sure that any discussion would take place in court, and not in Judges' private chambers. The proceedings should be transcribed. This would

discourage any possible criticism that the process was not transparent or that ‘secret deals’ were being struck.¹³¹¹

15.18 The Runciman Royal Commission proposed that a ‘sentence canvass’ would normally take place in the judge’s chambers with both sides represented by counsel. A shorthand writer was also to be present.¹³¹²

What should be indicated?

15.19 One issue that arises is what the subject matter of any indication should be. The options are for a judicial officer to give an indication of:

- the type of sentencing option to be imposed—for example, whether it is custodial or non-custodial; or
- the type of sentencing option to be imposed, with a general indication of severity—for example, a ‘short term of imprisonment’, or ‘imprisonment in the range of three to five years’; or
- the type of sentencing option to be imposed and the specific quantum of the sentence—for example, ‘four years’ imprisonment’.

15.20 In 2004, the NZLC proposed that sentence indications should normally be limited to type of sentence rather than quantum.¹³¹³ However, in 2005 the NZLC recommended that an indication should generally specify the type and quantum of penalty that will be imposed if the defendant were to plead guilty at that time as well as the likely type and quantum of penalty that would be imposed if the defendant were to be convicted following a defended hearing or trial.¹³¹⁴

15.21 The model proposed by the Runciman Royal Commission allowed the judge, on the defendant’s request, to indicate the highest sentence that the judge would impose on the facts as known.¹³¹⁵

15.22 One legal practitioner expressed the view that a sentence indication scheme should indicate the type and quantum of sentence.¹³¹⁶ Another expressed the view that it would be desirable for a judicial officer to give an indication of the range of sentence based on the available facts.¹³¹⁷ Some stakeholders expressed the view that defendants would want to be given an indication of quantum of sentence.¹³¹⁸

15.23 Other issues that are relevant to the subject matter of an indication are: (a) whether a judicial officer should indicate the sentence or type of sentencing option that the defendant would be likely to receive if he or she pleaded guilty at that point in time, or whether it should be an indication of the sentence or type of sentencing option that the defendant would be likely to receive upon conviction after trial, or both; and (b) whether any discount to be given because of the guilty plea should be specified at the sentence indication hearing.

15.24 In 1987, the NSWLRC canvassed the idea of sentence indication as an alternative to plea-bargaining, although it made no final recommendations in this regard. The NSWLRC posed the question whether, upon the parties requesting an indication as to the likely nature of the penalty to be imposed *upon conviction after trial*, the court should, in its discretion, be entitled to give such an indication.¹³¹⁹ The suggestion that the sentence indication should be in relation to the likely penalty upon conviction after trial was to counter any notion that the indication itself should act as an inducement to plead guilty.¹³²⁰

15.25 In contrast, in 2004, the NZLC proposed that a court giving a sentence indication should not make any reference to the likely penalty if the defendant were to be convicted after a defended hearing or trial.¹³²¹ However, as noted above, in 2005 the NZLC recommended that a sentence indication should make reference to both the likely penalty if the accused were to be convicted after a defended hearing or trial, as well as the penalty that would be imposed if a plea of guilty were to be entered at that time.¹³²²

15.26 The NZLC stated that, in the interests of transparency, a judicial officer should specify as part of the sentence indication the discount included within the indicative sentence on account of the guilty plea.¹³²³ The NZLC recommended that whenever a sentence indication is given it should include the standard advice that an indication is not intended to undermine the defendant's right to require the prosecution to prove its case.¹³²⁴

15.27 Professors Mack and Roach Anleu submitted that a sentence indication should be explicitly based on the offender and the offence, with no suggestion of additional leniency as part of the indication process or threat of greater sentence after trial.¹³²⁵

Upon what information should an indication be based?

15.28 Another issue that was identified in submissions was that it would be necessary to ensure that all relevant facts and circumstances were made known to a judicial officer prior to a sentence indication being given.¹³²⁶

15.29 One legal practitioner expressed the view that judicial officers in the Northern Territory may be disinclined to adopt a sentence indication scheme because they would need all relevant information before them in order to give an indication of sentence.¹³²⁷

15.30 Stakeholders also expressed the view that there should be a judicial discretion to refuse to give an indication, including where many factual matters were in dispute.¹³²⁸ One legal practitioner also expressed the view that, where the matters in dispute were few, a judicial officer should have the option of giving alternative indications depending on the ultimate determination of those facts.¹³²⁹

15.31 Stakeholders submitted that the information upon which an indication should be based included a statement of agreed facts, witness statements, parts of the committal record accepted for the purposes of indication, the defendant's antecedent criminal history, oral testimony if required, and information about any co-defendant.¹³³⁰ These categories of information are consistent with the information utilised in the New South Wales pilot scheme.¹³³¹ Some particular categories of information—namely the defendant's antecedent criminal history and a summary of facts—are also consistent with the information utilised in the sentence indication scheme that operates in New Zealand in the summary jurisdiction,¹³³² as well as the information proposed to be used in the model advanced by the Runciman Royal Commission.¹³³³

15.32 Under the model proposed by the Runciman Royal Commission, the absence of a pre-sentence report would not normally rule out a sentence indication.¹³³⁴ The NZLC recommended that an indication may be given subject to information still to be provided by way of a pre-sentence report or victim impact statement but that a sentence indication should not be given at all or should be confined to a sentence range if the type of sentence is likely to be affected by material in a pre-sentence report or a victim impact statement or if there is otherwise insufficient information to give an indication.¹³³⁵ It has also recommended that:

Where an indication is given and results in a guilty plea, and subsequent information leads to a different view as to the appropriate sentence, the defendant should always be given the opportunity to withdraw his or her plea.¹³³⁶

Who should give the indication and impose sentence?

15.33 One legal practitioner expressed the view that where a person accepted a sentence indication the same judicial officer who gave the indication should pass sentence because he or she would be best placed to ascertain and deal with any discrepancy between the facts presented at the sentence indication hearing and any further facts presented on sentence.¹³³⁷ This is consistent with the model recommended by the NZLC,¹³³⁸ and with the pilot sentence indication scheme that operated in New South Wales.

15.34 However, it was submitted that where a person did not accept a sentence indication the matter should be listed for hearing or trial before another judicial officer because the first judicial officer may have heard information during the sentence indication hearing that would render it difficult for him or her to preside over any hearing in an unbiased way.¹³³⁹

15.35 Stakeholders also expressed support for the proposition that if a person does not plead guilty after the indication and is later convicted, whether after entering a plea of guilty or after trial, the indicative sentence should not be binding on another judge.¹³⁴⁰

Appeals

15.36 Another issue that arises is whether there should be a right of appeal against a sentence imposed after acceptance of an indicative sentence. Under the pilot scheme in

New South Wales, both the prosecution and the defence had the right to appeal in these circumstances. However, the court was more reluctant to interfere with a sentence imposed after an indication hearing on an appeal by the prosecution because upholding the appeal would expose a defendant to greater jeopardy than that normally associated with prosecution appeals.¹³⁴¹

15.37 The NZLC has said:

there is a concern about the injustice that might result if a defendant pleads guilty on the basis of a sentence indication, and the sentence is then overturned following a Crown appeal on the grounds that it is manifestly inadequate. The injustice arises from the fact the defendant altered his or her position in the expectation of a sentence that is different from the one eventually imposed.

We are ... of the view that this concern can be managed in practice. If a sentence indication is in line with a prosecution submission ... it would likely be in only exceptional circumstances that a court would look favourably on a subsequent Crown appeal. If a Crown appeal is upheld, we agree with the approach of the New South Wales Supreme Court: the defendant should have the right to file an appeal against conviction, have his or her guilty plea vacated, and the case remitted back ... for trial.¹³⁴²

ALRC's views

A federal sentence indication scheme

15.38 The ALRC presently favours the adoption of a sentence indication scheme for federal defendants and thus proposes that federal sentencing legislation make provision for a defendant in a federal criminal matter to obtain an indication of sentence prior to final determination of the matter. The ALRC is mindful of the abandonment of the pilot sentence indication scheme that operated for a brief period in New South Wales. However, other sentence indication schemes appear to operate successfully.¹³⁴³

15.39 The potential benefits flowing from a sentence indication scheme include: the timely resolution of sometimes complex matters; minimising the trauma to victims of having to appear in court; savings in time and money as a result of preventing 'last-minute' guilty pleas and avoiding unnecessary trials; and lessening the anxiety of defendants by reducing the time between charge and disposition.

15.40 The ALRC considers that there is no reason in principle to limit the availability of a sentence indication scheme to defendants charged with particular categories of federal offences—such as indictable offences. Indeed, where an defendant is charged with a typically less serious summary offence that is punishable by a term of imprisonment not exceeding 12 months, it is plausible that he or she may receive an indicative sentence of a non-custodial sentencing option. In such circumstances, any anxiety on the part of the defendant about facing a term of imprisonment could be

alleviated and could thus encourage an early guilty plea, thereby avoiding an unnecessary hearing.

Features of the sentence indication scheme

Where and when indication to take place

15.41 Having regard to the desirability for transparency in sentencing and the need to maintain public confidence in the administration of the federal criminal justice system, the ALRC is of the view that any sentence indication should occur in the presence of the defendant and in open court, subject to express powers of the court to make suppression orders. In addition, the proceedings of the sentence indication hearing should be transcribed or otherwise placed on the court record.

15.42 Whether a sentence indication is to comprise part of a wider hearing concerned with pre-trial issues or whether it should be the subject of a dedicated hearing will depend, to a large degree, on the nature of the offence that is the subject of a charge. It may be that an indication for a simple summary offence could be given as part of a wider hearing dealing with pre-trial issues. However, the ALRC agrees with the views expressed by one prosecutor that a dedicated hearing is warranted where a sentence indication is sought in relation to a serious indictable offence.¹³⁴⁴

15.43 Given that a main aim of a sentence indication scheme is to identify guilty pleas at an early stage, any indication should be sought well before the hearing or trial.

Indication to be discretionary

15.44 The ALRC is of the view that any sentence indication scheme must be premised on the basis that it may not always be appropriate or possible for a sentence indication to be given. A judicial officer should retain a discretion to refuse to give an indication. In particular, the indication should be given only if there is adequate information before the court on which to base the indication, and it should not be given if the choice of sentencing option is likely to be materially affected by the contents of a pre-sentence report.

Subject matter of indication

15.45 The sentence indication should be limited to the choice of sentencing option and a general indication of severity or sentencing range. An indication of quantum presupposes that all relevant information is before the court at the time of indication and does not cater for the fact that a judicial officer may need a measure of flexibility to adjust an indicative sentence in order to accommodate any additional information that may come to light at the time of sentencing.

15.46 In order to increase the likelihood that the scheme will prevent last-minute guilty pleas and unnecessary trials, the indication should be given in relation to the likely sentence that the defendant would receive if he or she pleaded guilty at that point in time, rather than the likely sentence if the defendant were found guilty after a

contested hearing. The latter course of action has the practical disadvantage of providing a defendant only with a hypothetical worst-case scenario—which may be inaccurate in any event because the court giving the indication is not in a position to anticipate all the evidence that might be adduced in a contested hearing.

15.47 Because the indication should be limited to the choice of sentencing option and a general indication of severity, it is unnecessary for a judicial officer to specify the precise discount given for pleading guilty at that stage of the proceedings. A specification of discount for a guilty plea only has meaning in the context of a defendant knowing the quantum of sentence that he or she would have received in the absence of a plea.

15.48 Accordingly, the ALRC is of the view that in giving the indication the court must take into account, but must not state, the discount that would be given to the defendant for pleading guilty at that stage of the proceedings. However, when the court comes to sentence the defendant formally, it should specify any discount that it has given on account of the guilty plea.¹³⁴⁵

Minimising the potential to induce guilty pleas improperly

15.49 In order to minimise the potential for a sentence indication to induce an innocent defendant to plead guilty, the ALRC supports the adoption of the following safeguards:

- An indication should be given only at the defendant's request. The ALRC is presently inclined to the view that it is inappropriate for the prosecution to use the sentence indication scheme as a vehicle for charge bargaining since this might coerce a defendant into pleading guilty.
- The court should issue standard advice before any indication is given to the effect that the indication does not derogate from the defendant's right to require the prosecution to prove its case beyond reasonable doubt.

Minimising the potential for excessively lenient sentences

15.50 One of the reasons given for the failure of the pilot scheme in New South Wales was that defendants who pleaded guilty at a sentence indication appeared to be treated with greater leniency than defendants who pleaded guilty at committal. In order to safeguard against this, the ALRC is of the view that federal sentencing legislation should make it clear that an indication must be based on the same purposes, principles and factors relevant to sentence and the same factors relevant to the administration of the criminal justice system that would apply to sentencing.¹³⁴⁶

15.51 Further, the ALRC's proposal for the establishment of a federal sentencing database will, over time, promote consistency in indicative sentences by providing judicial officers with up-to-date information on federal sentences.¹³⁴⁷

Countering 'judge-shopping'

15.52 In order to address the concern that sentence indication schemes may encourage 'judge-shopping', the ALRC is of the view that federal sentencing legislation should make it clear that a defendant is entitled to one sentence indication only in respect of an offence.

When sentencing is to take place and before whom

15.53 In the event that a defendant accepts an indicative sentence, the defendant should be given only a short period in which to enter a guilty plea. A defendant may need a short adjournment in which to consider, and receive advice about, the indicative sentence but excessive delay would compromise the scheme's goal of promoting the timely disposition of criminal matters.

15.54 In addition, where a defendant accepts an indicative sentence the judicial officer who gave the indication should be the one who passes sentence. This has the advantage of ensuring integrity in the outcome because if new information comes to light in the short interval between the giving of the indicative sentence and the passing of the formal sentence, the judicial officer who gave the indication will be best placed to assess how that information affects the indicative sentence.

Action where indicative sentence is rejected

15.55 Where a defendant rejects the indicative sentence, the ALRC considers that the matter should be set for hearing or trial before another judicial officer and the indicative sentence should not be binding on that judicial officer. This approach was also supported in consultations and submissions.

Appeals

15.56 Finally, the ALRC is of the view that where a sentence is imposed following a guilty plea that has been entered after a sentence indication, the rights of the prosecution and the defence to appeal against sentence should be retained. However, a defendant may suffer injustice where a prosecution appeal against sentence is upheld, since the defendant will have pleaded guilty in the expectation that he or she would receive a certain sentence or type of sentence. To protect the defendant's interests in these circumstances, the ALRC favours an approach that would allow the defendant to withdraw the guilty plea where a prosecution appeal against sentence is upheld.

Proposal 15-1 Federal sentencing legislation should make provision for a defendant in a federal criminal matter to obtain an indication of sentence prior to final determination of the matter. The essential elements of such a scheme should include the following:

- (a) an indication should be given only at the defendant's request, with judicial discretion to refuse an indication;
- (b) the indication must be sought well before the hearing or trial;
- (c) the defendant should be entitled to one sentence indication only;
- (d) the court should issue standard advice before any indication is given, to the effect that the indication does not derogate from the defendant's right to require the prosecution to prove its case beyond reasonable doubt;
- (e) the indication should occur in the presence of the defendant and in open court, subject to express powers of the court to make suppression orders;
- (f) the proceedings of the sentence indication hearing must be transcribed or otherwise placed on the court record;
- (g) the indication must be based on the same purposes, principles and factors relevant to sentencing and the same factors relevant to the administration of the criminal justice system that would apply in the absence of the indication;
- (h) the indication should be limited to the choice of sentencing option and a general indication of severity or sentencing range;
- (i) the indication should be given only if there is adequate information before the court, and should not be given if the choice of sentencing option is likely to be materially affected by the contents of a pre-sentence report;
- (j) in giving the indication, the court must take into account, but must not state, any discount that would be given to the defendant for pleading guilty at that stage of the proceedings;
- (k) the defendant should be given a short time in which to decide whether to enter a guilty plea on the basis of the indicative sentence;

- (l) where the defendant accepts the indicative sentence, the judicial officer who gave the indication should be the one who passes sentence;
- (m) where the defendant rejects the indicative sentence, the matter should be set for hearing or trial before another judicial officer and the indicative sentence should not be binding on that judicial officer; and
- (n) the rights of the prosecution and the defence to appeal against sentence should be retained but, where a prosecution appeal against sentence is upheld, the defendant should be given the opportunity to withdraw the guilty plea.

- 1279 New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency*, NZLC R89 (2005), [304].
- 1280 Sentence indication schemes are discussed in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [11.66]–[11.83].
- 1281 New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 November 1992, 9791 (G West).
- 1282 Arraignment is the process by which a person committed for trial is read the indictment and asked to plead guilty or not guilty.
- 1283 See J Willis, 'The Sentence Indication Hearing' (1997) 7 *Journal of Judicial Administration* 98, 99–100; A Freiberg and J Willis, 'Sentence Indication' (2003) 27 *Criminal Law Journal* 246, 251.
- 1284 D Weatherburn, E Matka and B Lind, *Sentence Indication Scheme Evaluation* (1995) New South Wales Bureau of Crime Statistics and Research, iii, 29.
- 1285 *Ibid*, iii, 29.
- 1286 *R v Warfield* (1994) 34 NSWLR 200, 209.
- 1287 In Victoria and Tasmania sentence indications can be given during contest mentions; in the ACT they can be given during case management hearings; and in New Zealand they can be given during status hearings, which are modelled on the Victorian contest mention hearings. Contest mentions and case management hearings are aimed at resolving cases and determining and defining contested issues.
- 1288 A Freiberg and J Willis, 'Sentence Indication' (2003) 27 *Criminal Law Journal* 246, 252–254; New Zealand Law Commission, *Reforming Criminal Pre-trial Processes*, Preliminary Paper 55 (2004), [216]. See also *Criminal Justice Act 2003* (UK) sch 3 cl 6, amending the *Magistrates' Courts Act 1980* (UK).
- 1289 Standing Committee of Attorneys-General, *Deliberative Forum on Criminal Trial Reform* (2000), Rec 22.
- 1290 Lord Chancellor's Department, *Justice for All*, White Paper (2002), 12.
- 1291 New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency*, NZLC R89 (2005), ch 8; Rec 50. See also New Zealand Law Commission, *Reforming Criminal Pre-trial Processes*, Preliminary Paper 55 (2004), [251]–[252].
- 1292 A Freiberg and J Willis, 'Sentence Indication' (2003) 27 *Criminal Law Journal* 246, 259.
- 1293 K Mack and S Roach Anleu, *Submission SFO 16*, 7 April 2005; Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005; T Glynn SC, *Consultation*, Brisbane, 2 March 2005; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Chief Justice M Black & Others, *Consultation*, Melbourne, 30 March 2005; Justice M Weinberg, *Consultation*, Sydney, 8 June 2005.
- 1294 Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005.
- 1295 Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005.
- 1296 Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005; M Johnson, *Consultation*, Darwin, 27 April 2005.
- 1297 A Freiberg and J Willis, 'Sentence Indication' (2003) 27 *Criminal Law Journal* 246, 248; J Willis, 'The Sentence Indication Hearing' (1997) 7 *Journal of Judicial Administration* 98, 107–109.
- 1298 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 1299 A Freiberg and J Willis, 'Sentence Indication' (2003) 27 *Criminal Law Journal* 246, 258.

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- 1300 JC, *Submission SFO 25*, 13 April 2005.
- 1301 T Glynn SC, *Consultation*, Brisbane, 2 March 2005.
- 1302 New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency*, NZLC R89 (2005), [313]–[314]. Discounts for guilty pleas are discussed in Ch 11.
- 1303 New South Wales Public Defenders Office, *Consultation*, Sydney, 22 September 2004; K Mack and S Roach Anleu, *Submission SFO 16*, 7 April 2005.
- 1304 K Mack and S Roach Anleu, *Submission SFO 16*, 7 April 2005.
- 1305 Ibid. See also New Zealand Law Commission, *Reforming Criminal Pre-trial Processes*, Preliminary Paper 55 (2004), [251].
- 1306 New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency*, NZLC R89 (2005), [320]; Rec 50.
- 1307 Ibid, Rec 54.
- 1308 *R v Marshall* [1981] VR 725, 732.
- 1309 Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005; Justice M Weinberg, *Consultation*, Sydney, 8 June 2005. See also Northern Territory Legal Aid Commission, *Consultation*, Darwin, 27 April 2005.
- 1310 K Mack and S Roach Anleu, *Submission SFO 16*, 7 April 2005. See also A Freiberg and J Willis, ‘Sentence Indication’ (2003) 27 *Criminal Law Journal* 246, 258.
- 1311 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 1312 *Report of the Royal Commission on Criminal Justice* (1993), [7.51].
- 1313 New Zealand Law Commission, *Reforming Criminal Pre-trial Processes*, Preliminary Paper 55 (2004), [251].
- 1314 New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency*, NZLC R89 (2005), Rec 50.
- 1315 *Report of the Royal Commission on Criminal Justice* (1993), [7.50].
- 1316 T Glynn SC, *Consultation*, Brisbane, 2 March 2005.
- 1317 Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005.
- 1318 Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005. See also Justice M Weinberg, *Consultation*, Sydney, 8 June 2005.
- 1319 New South Wales Law Reform Commission, *Procedure From Charge to Trial: Specific Problems and Proposals*, DP 14 (1987), 496.
- 1320 P Byrne, ‘Sentence Indication Hearings in New South Wales’ (1995) 19 *Criminal Law Journal* 209, 211. The pilot scheme introduced in New South Wales differed from the scheme tentatively suggested by the NSWLRC in that it provided for an indication of sentence in the event that the defendant pleaded guilty.
- 1321 New Zealand Law Commission, *Reforming Criminal Pre-trial Processes*, Preliminary Paper 55 (2004), [251].
- 1322 New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency*, NZLC R89 (2005), Rec 50. Compare, however, New Zealand Law Commission, *Reforming Criminal Pre-trial Processes*, Preliminary Paper 55 (2004), [251].
- 1323 New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency*, NZLC R89 (2005), [315]–[317].
- 1324 Ibid, Rec 50.
- 1325 K Mack and S Roach Anleu, *Submission SFO 16*, 7 April 2005.
- 1326 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; K Mack and S Roach Anleu, *Submission SFO 16*, 7 April 2005.
- 1327 M Johnson, *Consultation*, Darwin, 27 April 2005.
- 1328 K Mack and S Roach Anleu, *Submission SFO 16*, 7 April 2005; T Glynn SC, *Consultation*, Brisbane, 2 March 2005. See also New Zealand Law Commission, *Reforming Criminal Pre-trial Processes*, Preliminary Paper 55 (2004), [251]; New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency*, NZLC R89 (2005), Rec 50; A Freiberg and J Willis, ‘Sentence Indication’ (2003) 27 *Criminal Law Journal* 246, 258.
- 1329 T Glynn SC, *Consultation*, Brisbane, 2 March 2005.
- 1330 K Mack and S Roach Anleu, *Submission SFO 16*, 7 April 2005.

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- 1331 J Willis, 'The Sentence Indication Hearing' (1997) 7 *Journal of Judicial Administration* 98, 99–100; A Freiberg and J Willis, 'Sentence Indication' (2003) 27 *Criminal Law Journal* 246, 251. Other information used in the pilot scheme included a draft indictment and submissions on sentence.
- 1332 New Zealand Law Commission, *Reforming Criminal Pre-trial Processes*, Preliminary Paper 55 (2004), [216].
- 1333 *Report of the Royal Commission on Criminal Justice* (1993), [7.52].
- 1334 *Ibid*, [7.52].
- 1335 New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency*, NZLC R89 (2005), Rec 50.
- 1336 *Ibid*, Rec 50.
- 1337 T Glynn SC, *Consultation*, Brisbane, 2 March 2005.
- 1338 New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency*, NZLC R89 (2005), Rec 50. See also New Zealand Law Commission, *Reforming Criminal Pre-trial Processes*, Preliminary Paper 55 (2004), [251].
- 1339 T Glynn SC, *Consultation*, Brisbane, 2 March 2005. See also Justice M Weinberg, *Consultation*, Sydney, 8 June 2005; A Freiberg and J Willis, 'Sentence Indication' (2003) 27 *Criminal Law Journal* 246, 258.
- 1340 K Mack and S Roach Anleu, *Submission SFO 16*, 7 April 2005. See also Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.
- 1341 *R v Glass* (1994) 73 A Crim R 299; *R v Warfield* (1994) 34 NSWLR 200.
- 1342 New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency*, NZLC R89 (2005), [339]–[340]. See also K Mack and S Roach Anleu, *Submission SFO 16*, 7 April 2005.
- 1343 A Freiberg, *Submission SFO 12*, 4 April 2005.
- 1344 Commonwealth Director of Public Prosecutions, *Consultation*, Melbourne, 31 March 2005.
- 1345 Discounts for guilty pleas are discussed in Ch 11.
- 1346 See the discussion in Chs 4–6 on purposes, principles and factors relevant to sentencing and Ch 11 on the factors relevant to the administration of the criminal justice system.
- 1347 See Ch 22.

16. Reconsideration of Sentence

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Reconsideration of sentence in absence of error

In what circumstances should a court be able to reconsider a sentence passed on a federal offender? For example, should a court be able to re-sentence an offender based on new information or a fundamental change in circumstances that occurred after sentencing? Who should be able to initiate a reconsideration of sentence? [IP 29, Q 8–6]

Is there a need to amend the provisions dealing with the sentence of a federal offender who fails to comply with his or her undertaking to provide future cooperation with law enforcement agencies? [IP 29, Q9–2]¹³⁴⁸

Background

16.1 Reconsideration of sentence may arise either in the absence of any error by the court that imposed the sentence—which is considered in this section—or because of an error made by the court—which is considered in the following section. In either case, a sentence may potentially be reconsidered by the court that imposed the sentence, by an appellate court,¹³⁴⁹ or by the executive exercising the prerogative power to pardon or remit a sentence.¹³⁵⁰

Reconsideration by original court

16.2 As a general rule, a court does not have power to review, rehear, amend or set aside any judgment or order once it has passed into the court record, other than by way

of appeal.¹³⁵¹ The rule is based on the principle that it is desirable to have finality of litigation.¹³⁵²

16.3 However, sentencing legislation allows courts that impose sentences to re-sentence offenders in certain situations in the absence of any error by the court. One such situation is exemplified by Part IB of the *Crimes Act 1914* (Cth), which allows a court to re-sentence an offender who has breached conditions imposed by a sentencing order or who has failed to comply with a sentence.¹³⁵³

16.4 Another situation is illustrated by the sentencing legislation of Queensland and Western Australia, which allow a court to re-sentence an offender where the court had reduced an offender's sentence because of an undertaking by the offender to cooperate with law enforcement authorities and the offender has failed to comply with that undertaking.¹³⁵⁴ In contrast, under Part IB of the *Crimes Act*, where a federal offender has had a sentence reduced because of an undertaking to cooperate with the authorities and subsequently fails to comply with that undertaking, the prosecution's avenue of redress is by way of appeal.¹³⁵⁵

16.5 Other circumstances in which a sentence might potentially be reconsidered in the absence of error by a court are: (a) where there is new information relating to events occurring after sentence, such as post-sentence cooperation with the authorities; or (b) where there has been a fundamental change in the circumstances of the offender after sentencing, such as deterioration in health. The *Crimes Act* does not empower courts to reconsider sentences in these circumstances. However, some state and territory legislation provides courts with the power to review community service orders or community based orders on the grounds that it would be in the interests of justice to do so having regard to circumstances that have arisen since the order was made;¹³⁵⁶ or on the basis that the offender is not able to comply with the order because his or her circumstances have materially altered since the order was made.¹³⁵⁷ Similarly, the sentencing legislation of the ACT and the Northern Territory allows a court to reconsider a home detention order on the basis of changed circumstances since sentencing.¹³⁵⁸

16.6 Courts in the United States are empowered to reduce sentences based on evidence of post-sentence cooperation, including where an offender has provided substantial assistance:

- in investigating or prosecuting another person within one year after sentencing; or
- which involved information not known to the offender until one year or more after sentencing; or

- which involved information the usefulness of which could not reasonably have been anticipated by the offender until more than one year after sentencing and where the offender promptly provided that information after its usefulness became reasonably apparent.¹³⁵⁹

Reconsideration by appellate court

16.7 Appellate courts can consider facts that have arisen after sentencing when they re-sentence an offender after allowing a sentencing appeal. However, the power of an appellate court to treat new information relating to events occurring after sentence as a ground of appeal is restricted. At common law, evidence of post-sentence cooperation is not a basis for reduction of sentence on appeal.¹³⁶⁰ Generally speaking, the task of an appellate court is to ascertain whether a trial judge made an error on the basis of the material before him or her.¹³⁶¹ An appellate court may not receive fresh evidence in relation to evidence of events occurring after sentence because the evidence is incapable of demonstrating appealable error by a sentencing judge, unless the evidence sheds new light on material before the judge at the time of sentencing or brings before the court facts that were in existence at the time of the imposition of the sentence but were not known to the sentencing judge.¹³⁶²

16.8 However, it is not always easy to draw a distinction between events occurring after sentence that show the true significance of facts in existence at the time of sentence, and events occurring after sentence that do not have that effect.¹³⁶³ For example, where an offender's health or life expectancy was a relevant factor at the time of sentencing, an appellate court has allowed evidence to be led of the fact that since sentence was passed the offender's health has deteriorated, rendering the effect of imprisonment on the offender harsher than could have been anticipated when sentence was passed.¹³⁶⁴

Reconsideration by the executive

16.9 The executive prerogative to pardon or remit a sentence is rarely exercised. However, the power is most likely to be exercised where there are compassionate grounds to do so, or as a reward for some form of exceptional behaviour in prison, or for post-sentence cooperation that was not taken into account in sentencing.¹³⁶⁵

Issues and problems

Reconsideration by courts or executive?

16.10 Where a sentence falls to be reconsidered because of new information relating to events occurring after sentence or because of a fundamental change in the circumstances of an offender, an issue arises concerning the most appropriate forum in which to undertake that reconsideration. The common law position is that the review of a sentence in the light of subsequent events is the proper province of the executive government and not an appellate court.¹³⁶⁶ However, opposing views have been expressed.

16.11 In *R v C*, the majority of the South Australia Court of Criminal Appeal held that the court should not reduce a sentence on the basis of post-sentence cooperation provided by the offender, although they acknowledged that the assistance provided by the offender warranted a reduction in sentence and that if the assistance had been provided before the imposition of sentence, the sentence would have been reduced. The Court stated that it would set an undesirable precedent if the court were to intervene, and that any reduction should be made by the exercise of the executive prerogative of mercy. It said that to allow fresh evidence on appeal in such circumstances would make it difficult to put an end to the sentencing process.¹³⁶⁷ Perry J dissented, stating that the exceptional circumstances of the case rendered it appropriate for the court, rather than the executive, to review and reduce the sentence. He said that the exceptional circumstances included that the post-sentencing cooperation was considerable, resulted in the offender being subjected to a harsher regime in prison, and seriously jeopardised his safety.¹³⁶⁸

16.12 The Law Society of South Australia expressed the view that the process of obtaining relief through the exercise of the prerogative of mercy is long and arbitrary. The Law Society expressed support for empowering courts to reconsider a sentence based on new information or fundamental change of circumstances, such as development of ill health, serious accident in prison, or serious assault in prison. The Law Society gave an example of an offender who had been rendered disabled because of a prison assault. It submitted that a reconsideration of sentence ought to be able to be initiated by the parties, the Commonwealth, or the court of its own motion.¹³⁶⁹

16.13 Some federal offenders, including one who was diagnosed with cancer within months of incarceration, expressed support for a court to be able to reconsider a sentence based on new evidence (including evidence of events occurring after sentence), or a fundamental change in circumstances following sentence.¹³⁷⁰

Failure to comply with undertaking to cooperate

16.14 Under s 21E of the *Crimes Act*, the Commonwealth Director of Public Prosecutions (CDPP) may institute an appeal against a sentence that has been reduced on the basis of an undertaking to cooperate only where an offender has failed without reasonable excuse to comply with the undertaking.¹³⁷¹ The CDPP must consider that it is in the interests of the administration of justice to institute an appeal.¹³⁷² Accordingly, an offender who promises future cooperation may enjoy the benefits of a reduced sentence notwithstanding that he or she does not comply with that undertaking. This may happen if the offender has a reasonable excuse for the failure to comply, or if the CDPP declines to institute an appeal.

16.15 Another issue arises from the fact that an offender needs to be ‘under sentence’ in order for the CDPP to institute an appeal under s 21E. The section could thus lead to a situation in which an offender who has received a generous reduction for promised

cooperation could breach the undertaking with impunity if the reduced sentence has expired. The Law Society of South Australia submitted that this situation was very much a case of shutting the door after the horse has bolted.¹³⁷³

16.16 The CDPP submitted that these deficiencies could be remedied by a new statutory scheme for reconsideration of sentence.

The CDPP is of the view that it would be appropriate to introduce a legislative scheme to replace section 21E which would ensure that the CDPP is able to bring the matter back before the Court in cases where an undertaking of assistance by an offender had not been honoured in whole or in part.

Currently, this mechanism is by way of an appeal. Another option would be to introduce a legislative regime which would enable the CDPP to make an application to bring the offender back before the court in which the offender was sentenced, for re-sentencing. In the CDPP's view, the most appropriate forum for reconsideration of the matter is the sentencing court and not an appeal court. This is because the exercise of re-sentencing the offender requires a re-examination of all the facts and circumstances of the case, including the penalty given at the original sentence, the specified discount, the terms of the undertaking given by the offender, the quality of any assistance actually delivered in furtherance of the undertaking, and the reasons for the failure to comply with the undertaking. In our opinion, it is not necessary for this to be carried out on appeal.¹³⁷⁴

Options for reform

16.17 One option for reform is expressly to empower the original sentencing court to reconsider a sentence that has been reduced on the basis of an undertaking to provide cooperation with the authorities where that undertaking has not been fulfilled. Such a reform would replace the current mechanism of appeal in this regard.

16.18 Another option for reform is to broaden the grounds for reconsideration of a federal sentence by empowering a court to reconsider a sentence that involves evidence that would not be caught by the fresh evidence rules in relation to an appeal. Those situations would include:

- where there is new information relating to exceptional events occurring after sentence, such as post-sentence cooperation with the authorities; or
- where there has been a fundamental change in the circumstances of the offender after sentencing, involving facts that do not shed new light on material before the judge at the time of sentencing or which were not in existence at the time of the imposition of the sentence.

16.19 An alternative to the preceding option is to leave reconsideration of sentence in these situations to the executive, in the exercise of its prerogative power to pardon or remit a sentence.

ALRC's views***Re-sentencing after breach***

16.20 The ALRC is of the view that the existing power of a court to reconsider a federal sentence should be preserved where an offender has failed to comply with that sentence or has breached the conditions imposed by a sentencing order.¹³⁷⁵ This power should be exercisable by the original court, whether differently constituted or not.

Failure to comply with undertaking to cooperate

16.21 The ALRC considers that federal sentencing legislation should empower a court that imposes a federal sentence, whether or not differently constituted, to reconsider a sentence where the court reduced the sentence because the offender undertook to cooperate with the authorities and the offender failed to comply with that undertaking within a reasonable time. Reconsideration by the court that imposed the sentence should replace the current mechanism in Part IB of the *Crimes Act*, which requires the CDPP to appeal against the inadequacy of the sentence. The proposed approach is consistent with the position in Queensland and Western Australia. The ALRC agrees with the reasons advanced by the CDPP that the original sentencing court, rather than an appellate court, is the most appropriate forum in which to reconsider a sentence where an offender has failed to comply with an undertaking to cooperate. In such circumstances, an appellate court would not be dealing, as it customarily does, with an error made by the court below.

16.22 Additionally, the ALRC is of the view that, where a sentence has been reduced because of an undertaking to cooperate and the offender fails to comply with the undertaking, the CDPP should be able to institute proceedings for reconsideration of the sentence irrespective of whether the offender had a reasonable excuse. The CDPP should be able to institute such proceedings whenever it considers it to be in the interests of justice to do so. There may well be circumstances in which an offender should not retain the full benefit of a reduced sentence, even though he or she had reasonable grounds for failing to cooperate. This proposal is consistent with the approach taken in sentencing legislation in Western Australia and the ACT.¹³⁷⁶

16.23 The ALRC is also of the view that the CDPP's ability to institute re-sentencing proceedings should not be restricted to circumstances in which an offender is 'under sentence'. Where the CDPP considers that it is in the interests of justice to do so, the CDPP should be able to initiate re-sentencing proceedings against an offender whose reduced sentence has expired where that offender has failed to comply with an undertaking to cooperate. Re-sentencing proceedings should be commenced within a reasonable time after non-compliance.

New information or fundamental change in circumstances

16.24 The ALRC does not currently support a wider power to reconsider a sentence, such as where there is new information relating to exceptional events occurring after sentence, or where there has been a fundamental change in the circumstances of an offender after sentencing. Adopting such an approach significantly detracts from the goal of promoting finality of the sentencing process. The ALRC is of the view that where a sentence is to be reconsidered on these grounds, it is more appropriately dealt with by an application for the exercise of the executive prerogative to pardon or remit a sentence. This might be done on compassionate grounds or as a reward for post-sentence cooperation or other form of exceptional behaviour.

16.25 However, as discussed in Chapter 7, the ALRC supports a court having power to reconsider the time and manner in which a fine is to be paid, taking into account changes to an offender's financial circumstances after sentencing. The existence of such a power does not detract from the finality of the sentencing process because the court may reconsider only the mechanics of payment, not the quantum of the fine.

Proposal 16–1 Federal sentencing legislation should empower a court that imposes a federal sentence, whether differently constituted or not, to reconsider the sentence where:

- (a) an offender fails to comply with a sentence or breaches the conditions imposed by a sentencing order (as currently provided); or
- (b) the court reduced the sentence because the offender undertook to cooperate with the authorities and the offender failed to comply with that undertaking within a reasonable time, regardless of whether the offender had a reasonable excuse for non-compliance. Such proceedings must be initiated by the Commonwealth Director of Public Prosecutions within a reasonable time after non-compliance and only if the Director is satisfied that the interests of justice will be served by re-sentencing.

Correction of errors

Should federal legislation expressly set out a court's powers to correct errors in the sentencing of federal offenders? If so, what type of errors should a court be empowered to correct, at whose instigation, and what procedure should be adopted for making such corrections? [IP 29, Q 8–7]

Background

16.26 Sentencing is a complex procedure. Complications can arise in the calculation of sentences where a court sentences a federal offender for multiple offences and, in particular, where an offender is sentenced to imprisonment for both federal and state or territory offences.¹³⁷⁷ Ascertaining the commencement date of a sentence may involve arithmetic calculations aimed at giving credit for time spent in pre-sentence custody, and at giving effect to a court's decision to impose concurrent, consecutive, or partly consecutive sentences. Other calculations arise in the process of setting non-parole periods and ascertaining the date on which a federal offender will be eligible to be released on parole. In the case of joint offenders, allowance has to be made for the fact that a court is not empowered to fix a single non-parole period in respect of both federal and state or territory sentences of imprisonment.¹³⁷⁸ From time to time, judicial officers make technical errors in calculating a sentence, giving rise to a need for a mechanism to redress such errors promptly.

16.27 The common law rule is that, subject to rules of court, a judicial officer may only correct a sentence before it has 'passed into record'. However, there is no clearly defined point at which that may be said to have happened.¹³⁷⁹ Superior courts have an inherent jurisdiction—generally reflected in rules of court¹³⁸⁰—to vary a judgment or order even after it has been passed or entered, so that it states correctly what the court decided and intended.¹³⁸¹

16.28 The power to correct sentences under Part IB of the *Crimes Act* is limited. The court is given an express power to correct sentencing errors concerning the failure to fix, or to properly fix, a non-parole period or the making of a recognizance release order.¹³⁸² An application to correct this type of error can be made by the Attorney-General, the CDPP or the federal offender, and a court may deal with the application notwithstanding that the court is differently constituted from the way it was when the person was sentenced. However, there is no express power in Part IB to correct sentencing orders that are not in conformity with the law; nor is there express power to correct 'slip' errors.

16.29 In contrast, some state and territory sentencing legislation gives courts express power to correct errors in sentencing by way of variation, amendment or rescission. For example, courts in some jurisdictions are expressly given the power to reopen sentencing hearings¹³⁸³ and to make corrections where sentences have been imposed contrary to law;¹³⁸⁴ or where the court has failed to impose a sentence that the court legally should have imposed;¹³⁸⁵ or where the sentence imposed by the court was based on an error of fact.¹³⁸⁶ Provisions that confer on a court the power to correct sentencing errors of a substantive nature typically state that the parties must be given an opportunity to be heard,¹³⁸⁷ and that rights of appeal remain unaffected.¹³⁸⁸ Some provisions allow a court the discretion not to reopen a sentencing hearing where it is of

the view that the matter would be dealt with more appropriately by a proceeding on appeal.¹³⁸⁹

16.30 Courts in some jurisdictions are also given express powers to correct technical errors; clerical errors; or errors arising from an accidental slip or omission or a material miscalculation of figures or a material mistake in the description of any person, thing or matter.¹³⁹⁰ State sentencing laws allow an application to correct a slip error to be made by the court acting on its own initiative¹³⁹¹ or on an application of the parties to the proceedings.¹³⁹² In Victoria, a court may correct slip errors without requiring the parties to the proceedings to be given an opportunity to be heard, unless the interests of justice require it in the particular case.¹³⁹³ In Western Australia a court must ensure that all parties and relevant authorities are notified of the correction of any clerical or slip error.¹³⁹⁴

16.31 The ALRC has been informed that one of the circumstances in which the executive prerogative to remit a sentence may be exercised is where a court has incorrectly applied sentencing laws, with the result that a prisoner's effective sentence is different from that intended by the court.¹³⁹⁵

Issues and problems

16.32 Stakeholders—including prosecutors, legal practitioners and academics—expressed broad support in consultations and submissions for federal legislation to expressly set out a court's powers to correct errors in the sentencing of federal offenders.¹³⁹⁶ One federal offender also supported such a power, but submitted that the power to correct errors should remain with an appellate court rather than be conferred on the sentencing court.¹³⁹⁷ Another federal offender was opposed to such a provision.¹³⁹⁸

16.33 The CDPP submitted that:

Apart from section 19AH of the *Crimes Act 1914* it has been necessary to rely on State/Territory law and/or common law to correct errors that have occurred in sentencing. The inclusion of a general Commonwealth provision to correct errors where sentences are not imposed in conformity with the law or there is an accidental slip or omission would be a very helpful addition for the prosecution to assist the court. Such a provision may, of course, benefit a defendant and, in our view, should be available at the instigation of the court, the prosecution or the defendant.¹³⁹⁹

16.34 The Law Society of South Australia submitted that:

The legislation ought to set out a court's powers to correct errors in sentencing federal offenders. The types of errors include technical error, arithmetic errors, the omission to fix a non-parole period, mutual error of fact, ... error of law such as the maximum penalty available.

A simple procedure available would be to enable an application to be made to the sentencing court.¹⁴⁰⁰

16.35 The New South Wales Legal Aid Commission supported a provision that enabled the court to reopen a sentencing hearing, such as the provision in the New South Wales sentencing legislation, which was said to allow for flexibility.¹⁴⁰¹

ALRC's views

16.36 Having regard to the views expressed in consultations and submissions, and to relevant provisions in state and territory sentencing legislation, the ALRC considers that federal sentencing legislation should expressly set out a court's powers to correct errors in the sentencing of federal offenders. The inclusion in federal legislation of express powers to correct errors may increase the likelihood that errors will be corrected, that they will be corrected expeditiously, and that unnecessary appeals will be avoided. There is a strong public interest in ensuring that correct sentences are imposed on federal offenders.

16.37 The types of errors that should be able to be corrected by a sentencing court should include slip errors. But they should also include errors of a more substantive nature, such as where:

- the court has imposed a sentence or a sentence-related order contrary to law;
- the court has failed to impose a sentence or a sentence-related order that is required to be made by law, including a failure to fix or properly to fix a non-parole period; and
- the sentence included an order that was based on or contained an error of fact.

16.38 The ALRC considers that redressing the incorrect application of sentencing laws is a matter that is properly undertaken by a court, rather than by the exercise of the executive prerogative to pardon or remit a sentence. A legislative provision that expressly invests a court with the power to correct sentencing errors may have the advantage of encouraging judicial, as opposed to executive, correction.

16.39 A distinction should be made between slip errors and errors of a more substantive nature, because the different nature of these errors justifies the adoption of different procedures for correction. In the case of slip errors, a correction need not be carried out in open court, unless a court considers it necessary in the interests of justice. A court should be required to notify the parties to the proceedings and any relevant authorities of the fact that a correction has been made. An offender should not be required to be present for the correction of a slip error.¹⁴⁰² The power to correct slip errors should be able to be initiated by the court on its own motion, or by any party to the proceedings or the Attorney-General of Australia.

16.40 The procedures to correct errors of a more substantive nature should be consistent with the principles of open justice and procedural fairness. This is especially important where a party disputes the existence of an error. Accordingly, the procedure for correction of such errors should be carried out in open court and only after the parties to the proceedings have been given an opportunity to be present and to be heard. However, the court should be able to make the correction in the offender's absence if the offender consents and the court gives its permission.¹⁴⁰³ The reopening of a sentencing hearing is one way of ensuring adherence to open justice and procedural fairness.

16.41 The ability to seek correction of a substantive error in sentencing should not infringe a party's right to appeal a sentence; and the court that passed the sentence should retain the discretion to decline to vary, amend or rescind a sentence where it considers the matter may be dealt with more appropriately on appeal.

16.42 It would be preferable for the judicial officer who imposed the original sentence to conduct the re-sentencing hearing, but it should be open to a court to constitute itself differently on re-sentencing, as the need arises. This is consistent with the position in Queensland and the Northern Territory to the extent that a court is empowered to reopen a sentencing hearing regardless of whether the court is constituted differently to the court that originally passed sentence.¹⁴⁰⁴

Proposal 16–2 Federal sentencing legislation should expressly set out a court's power to correct 'slip' errors that may occur in sentencing a federal offender. The power should be exercisable either by the court on its own motion or on the application of any party to the proceedings or the Attorney-General of Australia. The court must ensure that the parties to the proceedings and the relevant authorities are notified of the correction, but the correction need not be carried out in open court unless the court otherwise directs.

Proposal 16–3 Federal sentencing legislation should expressly empower a court, whether differently constituted or not, to reopen a sentencing hearing to allow it to vary, amend or rescind a sentence where:

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

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

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- 1348 Sentencing of offenders who undertake to cooperate is discussed in Ch 11.
 - 1349 Appellate review is discussed in Ch 20.
 - 1350 The executive prerogative to pardon or remit a sentence is discussed in Ch 25.
 - 1351 *Jovanovic v The Queen* (1999) 106 A Crim R 548, [15].
 - 1352 *Bailey v Marinoff* (1971) 125 CLR 529, 539. There are exceptions for the correction of errors arising from an accidental slip or omission, and for orders made *ex parte*.
 - 1353 *Crimes Act 1914* (Cth) ss 20A(5)(a)(i), (c)(ic), (c)(i); 20AC(6)(b). Breach of sentence and conditions imposed by sentence is discussed in Ch 17. See also *Crimes Act 1914* (Cth) s 20AA (power to discharge or vary conditions of recognizance).
 - 1354 *Penalties and Sentences Act 1992* (Qld) s 188; *Sentencing Act 1995* (WA) s 37A.
 - 1355 *Crimes Act 1914* (Cth) s 21E. See also *Crimes Act 1900* (ACT) s 358; Crimes (Sentencing) Bill 2005 (ACT) cl 136.
 - 1356 *Crimes (Administration of Sentences) Act 1999* (NSW) s 115(2)(b); *Crimes Act 1900* (ACT) s 412.
 - 1357 *Sentencing Act 1991* (Vic) s 46; *Penalties and Sentences Act 1992* (Qld) ss 120, 121; *Sentencing Act 1997* (Tas) s 35. See also *Sentencing Act 1995* (NT) s 35.
 - 1358 *Rehabilitation of Offenders (Interim) Act 2001* (ACT) s 24(1)(b). Compare *Sentencing Act 1995* (NT) 1995 s 47, which authorises a court to quash the original sentence of imprisonment.
 - 1359 *Federal Rules of Criminal Procedure* 18 USC (Appendix) (US) r 35(b).
 - 1360 See, eg, *R v Henry* (1992) 28 NSWLR 348, 353; *R v Willard* (2001) 120 A Crim R 450, 455. Compare *R v Rostom* [1996] 2 VR 97, 101 (evidence of post-sentence cooperation allowed).
 - 1361 *R v Dornig* (1981) 27 SASR 481, 488.
 - 1362 *R v C* [2004] SASC 244, [13]–[15], [32]; *R v Smith* (1987) 44 SASR 587, 588.
 - 1363 *R v C* [2004] SASC 244, [19].
 - 1364 See *Ibid*, [20]; *R v Babic* [1998] 2 VR 70; *R v McLachlan* (2004) 8 VR 403.
 - 1365 Attorney-General’s Department, *Correspondence*, 20 October 2004.
 - 1366 *R v Munday* [1981] 2 NSWLR 177, 178.
 - 1367 *R v C* [2004] SASC 244, [2]–[3], [32]–[36], [144].
 - 1368 *Ibid*, [133]–[134].
 - 1369 Law Society of South Australia, *Submission SFO 37*, 22 April 2005; Law Society of South Australia, *Consultation*, Adelaide, 21 April 2005.
 - 1370 JC, *Submission SFO 25*, 13 April 2005; WT, *Submission SFO 23*, 11 April 2005; PS, *Submission SFO 21*, 8 April 2005.
 - 1371 See also *Penalties and Sentences Act 1992* (Qld) s 188(2)(b) (court may reopen proceedings where offender fails to comply with undertaking without reasonable excuse).
 - 1372 *Crimes Act 1914* (Cth) s 21E(2).
 - 1373 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
 - 1374 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
 - 1375 See Proposal 17–2 (expansion of court’s powers on re-sentencing for breach of suspended sentence).
 - 1376 See *Sentencing Act 1995* (WA) s 37A; *Crimes Act 1900* (ACT) s 358. See also Crimes (Sentencing) Bill 2005 (ACT) cl 136.
 - 1377 Department of Justice Western Australia, *Submission SFO 35*, 21 April 2005.
 - 1378 *Ibid*; *Crimes Act 1914* (Cth) s 19AJ.

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- 1379 *Jovanovic v The Queen* (1999) 106 A Crim R 548, [35]. See also *R v Lapa (No 2)* (1995) 80 A Crim R 398, 402.
- 1380 See, eg, *Supreme Court Rules 1970* (NSW) r 20.10; *Supreme Court (Criminal Procedure) Rules 1998* (Vic) r 1.14.
- 1381 *Jovanovic v The Queen* (1999) 106 A Crim R 548, [20].
- 1382 *Crimes Act 1914* (Cth) s 19AH.
- 1383 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 43; *Penalties and Sentences Act 1992* (Qld) s 188; *Sentencing Act 1995* (NT) s 112. See also *Crimes (Sentencing) Bill 2005* (ACT) cl 61.
- 1384 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 43(1)(a); *Penalties and Sentences Act 1992* (Qld) s 188(1)(a); *Sentencing Act 1995* (WA) s 37(1); *Sentencing Act 1997* (Tas) s 94(2), (3)(a); *Sentencing Act 1995* (NT) s 112(1)(a). See also *Crimes (Sentencing) Bill 2005* (ACT) cl 61(1)(a).
- 1385 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 43(1)(b); *Penalties and Sentences Act 1992* (Qld) s 188(1)(b); *Sentencing Act 1997* (Tas) s 94(2), (3)(b); *Sentencing Act 1995* (NT) s 112(1)(b). See also *Crimes (Sentencing) Bill 2005* (ACT) cl 61(1)(b).
- 1386 *Penalties and Sentences Act 1992* (Qld) s 188(1)(c); *Sentencing Act 1997* (Tas) s 94(2), (3)(c).
- 1387 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 43(2); *Penalties and Sentences Act 1992* (Qld) s 188(3)(a); *Sentencing Act 1995* (WA) s 37(2); *Sentencing Act 1997* (Tas) s 94(4); *Sentencing Act 1995* (NT) s 112(2)(a). See also *Crimes (Sentencing) Bill 2005* (ACT) cl 61(3).
- 1388 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 43(4); *Penalties and Sentences Act 1992* (Qld) s 188(6); *Sentencing Act 1995* (WA) s 37(4); *Sentencing Act 1995* (NT) s 112(5), (6). See also *Crimes (Sentencing) Bill 2005* (ACT) cl 61(6).
- 1389 See, eg, *Sentencing Act 1995* (NT) s 112(1).
- 1390 *Sentencing Act 1991* (Vic) s 104A(1)(i)–(iv); *Sentencing Act 1995* (WA) s 37(3); *Criminal Law (Sentencing) Act 1988* (SA) s 9A. See also *Federal Rules of Criminal Procedure* 18 USC (Appendix) (US) r 35(a) (correction of ‘arithmetical, technical or other clear error’).
- 1391 *Sentencing Act 1991* (Vic) s 104A(1); *Sentencing Act 1995* (WA) s 37(3).
- 1392 *Sentencing Act 1991* (Vic) s 104A(1).
- 1393 *Ibid* s 104A(4).
- 1394 *Sentencing Act 1995* (WA) s 37(3).
- 1395 Attorney-General’s Department, *Correspondence*, 20 October 2004.
- 1396 Law Society of South Australia, *Submission SFO 37*, 22 April 2005; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; New South Wales Legal Aid Commission—Criminal Law Division, *Consultation*, Sydney, 22 September 2004; A Freiberg, *Submission SFO 12*, 4 April 2005; K Warner, *Consultation*, Hobart, 13 April 2005.
- 1397 JC, *Submission SFO 25*, 13 April 2005.
- 1398 LD, *Submission SFO 9*, 10 March 2005.
- 1399 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 1400 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
- 1401 New South Wales Legal Aid Commission—Criminal Law Division, *Consultation*, Sydney, 22 September 2004.
- 1402 In United States Federal District Courts an offender must be present during sentencing but is not required to be present at a sentence correction hearing. See *Federal Rules of Criminal Procedure* 18 USC (Appendix) (US) r 43(a)(4). See also Proposal 13–1.
- 1403 See Ch 13 on presence of offender.
- 1404 *Penalties and Sentences Act 1992* (Qld) s 188(1); *Sentencing Act 1995* (NT) s 112(1). Compare *Sentencing Act 1997* (Tas) s 94(4).

17. Breach of Sentencing Orders

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Introduction

What should be the consequences of failing to comply with an order for a non-custodial sentence, such as a fine or a community service order? Should failure to comply with a non-custodial order ever result in a custodial sentence? [IP 29, Q 7–7]

What should be the consequences of failing to comply with an order for an alternative custodial sentence, such as home detention or periodic detention? What options should be available for dealing with a federal offender who is unable, due to a reasonable cause or excuse, to comply with an alternative custodial sentence? [IP 29, Q 7–9]

What options should be available to the court in the event of a breach [of a recognizance release order]? [IP 29, Q 9–7, part]

17.1 Federal sentencing orders can be breached in a variety of ways. For example, a federal offender may breach his or her sentence by failing to comply with a condition of release, failing to report to a periodic detention centre, or failing to pay a fine. This chapter examines the circumstances in which a court can deal with a breach of a federal sentencing order and the action it can take on such breach. It also examines the state and territory procedures for dealing with breaches of sentencing orders that are picked up and applied to federal offenders.

Power of court to deal with breach of sentencing order

Background

17.2 Part IB of the *Crimes Act 1914* (Cth) contains a number of provisions that enable the court that sentenced a federal offender—whether differently constituted or not—to deal with a breach of a sentencing order. Section 20A deals with failure to comply with an order for conditional discharge or release and failure to comply with a recognizance release order. Section 20AC deals with breaches of state and territory sentencing orders picked up by s 20AB and applied in the sentencing of federal offenders.

17.3 Neither s 20A nor s 20AC empower the court to deal with breaches of sentencing orders in circumstances where the offender has a reasonable excuse for the breach, such as illness. The inability to deal with such breaches received some publicity in 2004 in relation to the sentence of periodic detention imposed on Mr Rene Rivkin, who had been found guilty of insider trading.¹

17.4 In addition, Part IB does not permit review of sentencing orders even if they are no longer appropriate, such as when an offender's circumstances have materially altered since the sentence was imposed.² In contrast, some state and territory legislation gives courts the power to review certain sentencing orders when it appears that they may no longer be appropriate.³ For example, sentencing legislation in the Northern Territory provides that a court may have regard to circumstances that have arisen or become known after sentencing when reviewing a home detention order.⁴ The issue of reconsideration of sentence in the absence of error is dealt with in Chapter 16 of this Discussion Paper.

17.5 It is unknown how many federal offenders breach their sentencing orders. However, as at 23 March 2004, 12 out of 48 federal offenders serving sentences of periodic detention were in breach of their orders.⁵ In 2003–04, the Commonwealth Director of Public Prosecutions (CDPP) dealt with two breaches of sentencing orders pursuant to ss 20A and 20AC of the *Crimes Act*.⁶

Issues and problems

17.6 The question that arises is whether courts should be empowered to deal with breaches of sentences imposed pursuant to ss 19B, 20(1) or 20AB(1) where the offender has a reasonable cause or excuse for the breach. The CDPP submitted that federal sentencing legislation should be amended to enable a court to deal with matters where an offender was unable to comply with a sentence or order.⁷

ALRC's views

17.7 The ALRC is of the view that federal sentencing legislation should be amended to enable the court that sentenced a federal offender, whether differently constituted or not, to deal with all breaches of sentences imposed pursuant to ss 19B, 20(1) or 20AB(1) of the *Crimes Act*, regardless of whether the offender has a reasonable cause or excuse for the breach. It is fundamental to the legitimacy of the federal criminal justice system that judicial officers are empowered to hear and determine proceedings with respect to breaches of orders imposed by the court. The fact that a federal offender has a reasonable cause or excuse for a breach will no doubt be an important issue in determining the outcome of breach proceedings. However, it should not bar the court from dealing with the breach and making orders that are appropriate in all of the circumstances of the case. The ALRC considers that judicial officers should be given broad and flexible powers to respond to breaches of sentencing orders, given the variety of circumstances that could explain or excuse the breach.

Proposal 17–1 Federal sentencing legislation should empower a court to deal with all breaches of a sentencing order, regardless of whether the offender has a reasonable cause or excuse for the breach.

Consequences of breach of a sentencing order**Background**

17.8 Part IB of the *Crimes Act* outlines the action that a court may take if a federal offender breaches a sentencing order without reasonable excuse.⁸ If a federal offender breaches an order for conditional discharge, the court may revoke the order and re-sentence the offender for the original offence, or take no action.⁹ If a federal offender breaches an order for conditional release made pursuant to s 20(1)(a), or a state or territory sentencing order picked up and applied pursuant to s 20AB, the court may impose a pecuniary penalty not exceeding 10 penalty units; revoke the order and re-sentence the offender for the original offence; or take no action.¹⁰

17.9 If a federal offender breaches a recognizance release order the court may: impose a monetary penalty not exceeding \$1,000; extend the period of supervision to a period not greater than five years; revoke the order and impose an alternative sentencing option under s 20AB; revoke the order and imprison the person for that part of the sentence that the person had not served at the time of release from custody; or take no action.¹¹ Further, the recognizance may be forfeited under s 20A(7). As discussed in Chapter 2, the ALRC considers that the term ‘recognizance release order’ should be replaced with the term ‘conditional suspended sentence’.¹² Conditional suspended sentences are discussed further in Chapter 7.

17.10 If a court revokes an original sentencing order and re-sentences the offender, the court is required to take into account, in addition to any other matters, the fact that the

original order was made, anything done under the order, and any other order made in respect of the original offence or offences.¹³

Issues and problems

17.11 In IP 29, the ALRC asked whether the court's statutory powers to deal with breaches of federal sentencing orders were appropriate or whether further powers were needed. The ALRC also queried whether there should be any limitations on the court's power to re-sentence an offender upon breach of a sentencing order.¹⁴

17.12 A number of stakeholders indicated that courts should be entitled to impose custodial sentences on offenders who breached federal sentencing orders.¹⁵ The Australian Taxation Office (ATO) submitted that custodial sentences should be imposed for wilful or deliberate non-compliance with sentencing orders, or where there is no other suitable sentencing option available in dealing with an offender following breach.¹⁶ Correctional Services in the Northern Territory submitted that the consequences of a breach of a federal sentencing order should be the same as the consequences for breach of a state or territory sentencing order.¹⁷

17.13 Some stakeholders also expressed concern about the inflexibility of the consequences of breach of a recognizance release order. The Law Society of South Australia submitted that a federal offender in breach of a recognizance release order should ordinarily be required to serve a period of full-time imprisonment but that the court should have the discretion to impose a lesser term of imprisonment than that initially specified in the order.¹⁸ Similarly, the CDPP submitted that greater flexibility was needed to enable courts dealing with breaches of recognizance release orders to impose sentences of imprisonment of a lesser duration than the sentence of imprisonment initially imposed.¹⁹ As noted in IP 29, there has also been judicial criticism of the inflexibility of breach procedures for recognizance release orders.²⁰

17.14 Another issue that arises is the inability to enforce a 'monetary penalty' imposed under s 20A(5)(c)(ia) for breach of a recognizance release order. Section 3 of the *Crimes Act* provides that a reference in the Act to a 'fine' includes reference to a 'pecuniary penalty' (other than particular specified pecuniary penalties). Accordingly, pecuniary penalties imposed on offenders who have breached orders for conditional discharge imposed pursuant to s 20(1) of the Act, or who have breached state or territory sentencing orders imposed pursuant to s 20AB, can be enforced as fines.²¹ However, because s 20A(5)(c)(ia) refers to a 'monetary penalty', not a 'pecuniary penalty', such a penalty cannot be enforced as a fine.

ALRC's views

17.15 The ALRC is of the view that federal sentencing legislation should continue to specify the consequences of breach of a federal sentencing order. This will ensure that

the procedures for dealing with federal offenders who breach their sentencing orders, and the powers that can be exercised by the court when dealing with such a breach, are uniform and do not vary depending on the state or territory in which the federal offender is serving his or her sentence.

17.16 The ALRC considers that courts should retain their current powers to deal with breaches of sentencing orders, but that it is desirable to enable judicial officers to vary the original order where appropriate. This will provide courts with added flexibility to tailor orders made when dealing with breach to an offender's individual circumstances. In particular, the ALRC supports an amendment to federal sentencing legislation that would allow a court to deal with a breach of a suspended sentence by imposing a lesser period of imprisonment than that originally imposed. For example, when dealing with a breach of a suspended sentence, it may be appropriate to impose a lesser period of imprisonment than that originally imposed if the breach occurred close to the completion of the sentence, after a long period of compliance with the order.

17.17 In addition, it is undesirable that a 'monetary penalty' imposed on breach of a recognizance release order is unenforceable, and federal sentencing legislation should rectify this anomaly.

Proposal 17–2 Federal sentencing legislation should provide that, in addition to its existing powers, a court dealing with a breach of a sentencing order may vary the order if satisfied of the breach. In particular, the court should be given the power to order that a federal offender who has breached a wholly or partially suspended sentence of imprisonment be imprisoned for a lesser period than that originally imposed.

Proposal 17–3 Federal sentencing legislation should be amended to ensure that any order imposing a monetary penalty for breach of a recognizance release order is enforceable.

Procedure for enforcement action following breach

What concerns arise in relation to enforcing alternative sentencing orders or fines against federal offenders? How might these concerns be addressed? [IP 29, Q 12–5]

Background

17.18 State and territory sentencing options that are picked up and applied to federal offenders are administered by state or territory corrective services agencies and officers.²² However, any breach of such an order must be dealt with by the court that

passed the sentence, whether differently constituted or not.²³ In contrast, state and territory administrative bodies are often empowered to deal with breaches of sentencing orders made in relation to state or territory offenders.

Issues and problems

17.19 The *Australian Constitution* precludes a non-judicial body from exercising federal judicial power. The adjudication of a breach of a sentencing order involves the exercise of federal judicial power and this power must thus be exercised by a court in accordance with Chapter III of the *Constitution*.

17.20 Many stakeholders involved in administering federal sentences expressed dissatisfaction with existing procedures for dealing with breaches of federal sentencing orders.²⁴ In consultations and submissions, the ALRC was informed that: there was a lack of knowledge about how to deal with federal offenders who had breached sentencing orders;²⁵ delays were experienced when breaches were referred to the CDPP;²⁶ and the procedures for dealing with such breaches were cumbersome and resource intensive. In addition, it was submitted that delay in dealing with a breach of a federal sentencing order had the potential to place those involved in supervising federal offenders and the community at risk.²⁷

17.21 The New South Wales Department of Corrective Services provided the ALRC with a helpful case study that demonstrated the protracted nature of the procedure for dealing with breach of federal sentencing orders.²⁸ This case study noted that upon becoming aware of a breach of a sentencing order imposed on one particular federal offender, Community Offender Services (COS) filed a breach report with the New South Wales Parole Board. COS was then advised that the Board lacked the jurisdiction to deal with the matter. However, after contacting the CDPP about the breach, COS was informed that it may be possible for the New South Wales Parole Board to deal with the breach and that this would be investigated further. Approximately one month later, the CDPP informed COS that the New South Wales Parole Board lacked the jurisdiction to deal with the breach. The CDPP then required COS to amend its original breach report to comply with the CDPP's legal requirements, swear the breach report before a magistrate, have the matter listed for hearing, serve the breach notice on the offender, and prepare and file an affidavit of service. Once listed, the matter was adjourned on a number of occasions before it was finalised some six months after the initial breach.

Options for reform

17.22 For constitutional reasons, the options for dealing with a breach of a federal sentencing order are limited. While some stakeholders expressed the view that breach procedures for federal offenders should be the same as those for state and territory offenders,²⁹ this is not constitutionally possible where a state or territory administrative

body deals with the breaches. For the same reason, it would not be possible for the proposed Federal Parole Board to deal with breaches of federal sentencing orders.

17.23 An option that could circumvent these difficulties, and streamline the breach procedure, would be to encourage the use of self-executing orders at the time of sentencing. These orders, sometimes referred to as ‘guillotine orders’, would become operational on a nominated date if a particular event had not occurred. Self-executing orders are ordinarily used in civil proceedings where parties are ordered to take certain steps to progress the proceedings and one party has been persistently dilatory or recalcitrant in its approach to the litigation. Self-executing orders are a case-management tool designed to enforce compliance with court orders and to reduce the costs associated with litigation.

17.24 Another option would be to attempt to reform the current procedures for dealing with breaches of federal sentencing orders to ensure that breaches are dealt with expeditiously and efficiently.

ALRC’s views

17.25 Self-executing orders are rarely, if ever, appropriate in the context of criminal proceedings, and courts sentencing federal offenders should not make such orders at the time of sentencing. The consequences of a breach of a federal sentencing order can be severe—including the deprivation of liberty—and should not occur automatically. There are many reasons why an offender may breach a sentencing order, some of which may excuse or mitigate the breach. The consequences of a breach of a federal sentencing order should not be predetermined, and judicial officers should deal with breaches only after they have occurred to allow an appropriate response in light of all the circumstances of the case.

17.26 The current procedures for dealing with breaches of sentencing orders should be revised. Submissions and consultations revealed widespread uncertainty about the procedures to be followed upon breach of a federal sentencing order. This confusion could be minimised by the development and widespread dissemination of a protocol outlining the steps to be taken when a federal offender breaches a sentencing order. The proposed Office for the Management of Federal Offenders should develop this protocol in consultation with the CDPP and the state and territory corrective services authorities involved in the administration of federal sentencing orders.

<p>Proposal 17–4 The proposed Office for the Management of Federal Offenders, in consultation with the Commonwealth Director of Public Prosecutions and state and territory corrective services authorities, should develop a protocol outlining the procedures to be followed by state and territory correctional authorities and prosecutors when a federal offender breaches a sentencing order.</p>
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Fine enforcement

Responsibility for fine enforcement

Background

17.27 In Chapter 7, the ALRC proposes amendments to federal sentencing legislation aimed at minimising the risk of fine default.³⁰ However, in the event of default, s 15A(1) of the *Crimes Act* provides that the law of a state or territory relating to the enforcement of a fine applies to a federal offender to the extent that it is not inconsistent with federal law, and with certain modifications made by s 15A.³¹ Each state and territory has its own fine enforcement options.³² Section 15A(1AA) lists the various state and territory penalties for fine default that can be applied to offenders who fail to pay fines imposed for federal offences.

17.28 There is no available data on how many federal offenders are ordered to pay fines or how many federal offenders fail to pay their fines. In addition, the extent to which state and territory enforcement processes are used to enforce fines imposed on federal offenders is unknown.

17.29 In some jurisdictions, administrative bodies enforce state fines;³³ in others, state and territory fines are enforced through the courts.³⁴ It is not possible for state or territory administrative bodies to impose penalties for fine default on federal offenders because to do so would involve the exercise of federal judicial power.

17.30 For the reasons explained above, only judicial bodies can exercise federal judicial power, and thus s 15A(1AA) of the *Crimes Act* provides that *a court* must impose a penalty on a federal offender who fails to pay a fine. However, s 15A(1ACA) enables an officer of a state or territory court to impose a penalty for fine default where the law of the state or territory allows the officer to exercise the court's powers and the court retains effective control and supervision of the exercise of jurisdiction.³⁵

Issues and problems

17.31 The Attorney-General's Department (AGD) submitted that the federal fine enforcement regime was problematic because state and territory administrative bodies could not enforce federal fines and it was resource intensive to return to the court to obtain orders to enforce the payment of federal fines.³⁶ The ATO commented that differences in the resources allocated to fine enforcement in different jurisdictions, and differences in the enforcement options available across the jurisdictions, meant that federal fines were enforced inconsistently.³⁷

Options for reform

17.32 The AGD suggested that federal fines might be enforced more efficiently if the court were to make conditional, or self-executing, orders at the time of sentencing. For

example, a court could order a federal offender to pay a fine by a particular date, in default of which the offender would be required to perform a certain amount of community service. This would obviate the need to relist a matter before the court if the offender failed to pay his or her fine.

17.33 Another option for reform in this area would be the establishment of an entirely different scheme for the collection of federal fines. Some commentators have suggested that this could be achieved by using the tax system to collect fines from offenders by establishing a scheme similar to the existing Higher Education Contribution Scheme (HECS).³⁸ The ATO submitted that responsibility for the enforcement of federal fines should be vested in a federal agency to ensure consistency in enforcement action.³⁹

ALRC's views

17.34 There is a paucity of information regarding federal fines and federal fine enforcement. The ALRC lacks basic data on the number of federal offenders who are fined, the rate of federal fine default, the extent of success of federal fine enforcement action, or the number of matters involving federal fine default that are heard and determined by the courts. Accordingly, the ALRC has been unable to ascertain whether the current procedures for fine enforcement are defective and in need of reform or whether the establishment of a separate federal fine enforcement system is practicable or desirable. However, in view of the criticisms of the current system expressed in some submissions and consultations, the ALRC would support any move towards a thorough review of this area, including the possibility of using the tax system to collect federal fines.

Imprisonment for fine default

Background

17.35 Section 15A(1) of the *Crimes Act* picks up and applies state and territory laws dealing with the time in which a fine is to be paid. In a number of jurisdictions offenders are given 28 days to pay a fine.⁴⁰ However, in some jurisdictions courts have the power to order that a fine be paid immediately, in default of which an offender can be imprisoned.⁴¹ In Western Australia a court that has imposed a fine on an offender can, in some circumstances, order that the offender be imprisoned until the fine is paid.⁴²

17.36 Section 15A(1) also picks up and applies state and territory laws regarding imprisonment for fine default. All states and territories have fine enforcement schemes that enable penalties other than imprisonment—such as garnisheeing of wages, seizing property, or performing community service—to be imposed on fine defaulters.⁴³ However, all these schemes enable imprisonment to be imposed as a final option for fine default.⁴⁴

17.37 The term of imprisonment for a fine defaulter is generally determined by application of a formula that converts the outstanding fine into a number of days of imprisonment.⁴⁵ For example, in Victoria one day of imprisonment must be served for each outstanding penalty unit (\$100) or part of a penalty unit and in New South Wales one day of imprisonment must be served for each outstanding \$120 or part of \$120.⁴⁶ However, most jurisdictions also have a maximum period of imprisonment that can be imposed on a fine defaulter. This maximum period varies: in New South Wales and the Northern Territory it is three months,⁴⁷ in South Australia and the ACT it is six months,⁴⁸ in Victoria and Queensland it is two years,⁴⁹ and in Western Australia it is the statutory term of imprisonment (if any) provided for the offence.⁵⁰ There is no maximum period of imprisonment for fine default in Tasmania.

17.38 In its 1988 report, *Sentencing of Federal Offenders* (ALRC 44), the ALRC expressed the view that imprisonment for fine default was a harsh and inappropriate enforcement mechanism where the default was not wilful.⁵¹

Issues and problems

17.39 An issue that arose in a number of consultations was the enforcement of fines imposed on unlawful non-citizens.⁵² In jurisdictions that allow a period of time for the payment of a fine (such as the Northern Territory), unlawful non-citizens are sometimes removed from Australia by officers of the Department of Immigration and Multicultural and Indigenous Affairs during the period allowed for payment. Accordingly, these fines could not be enforced unless the offender was apprehended again on returning to Australia. This problem is exacerbated by the fact that many unlawful non-citizens committed fishing offences, and imprisonment is not a sentencing option for offences under the *Fisheries Management Act 1991* (Cth). Accordingly, a question arises whether offenders should be allowed a period of time within which to pay a fine or whether courts sentencing federal offenders should have the power to order that a fine is to be paid immediately, in default of which an offender may be imprisoned.

17.40 Another problem relates to the disparate periods of imprisonment that can be imposed for fine default in different jurisdictions. As mentioned above, all jurisdictions have a method of converting outstanding fines, or hours of community service imposed in default of payment of a fine, into periods of imprisonment. These methods vary between jurisdictions. In *Djou v Commonwealth Department of Fisheries*, Roberts-Smith J commented that:

there is an obvious unfairness and inconsistency involved where either the range of fines ordinarily imposed or the period of default imprisonment (for similar monetary amounts) vary significantly from one Australian jurisdiction to another.⁵³

17.41 The AGD submitted that the consequences of fine default for federal offenders should, as far as possible, be automatic to ensure that offenders are aware from the outset of the action that will be taken if the fine is not paid. The AGD also submitted that imprisonment should remain an option of last resort for offenders who default on fines because, without the threat of imprisonment, there is insufficient motivation for offenders to pay their fines.⁵⁴

ALRC's views

17.42 The ALRC remains of the view that imprisonment is an inappropriate *immediate* response to fine default, particularly where an offender lacks the means to pay the fine in question. As a matter of principle, all federal offenders should be given a reasonable opportunity to pay any fine imposed by a court. The fact that federal offenders who are also unlawful non-citizens may be removed from Australia by executive action during the period allowed for the payment of the fine does not provide a satisfactory reason to derogate from the principle that imprisonment is an inappropriate initial response to fine default.

17.43 The ALRC considers that it is desirable to seek greater consistency in the default periods of imprisonment imposed on federal offenders who fail to pay their fines. While the formulae used in the states and territories to determine default periods of imprisonment vary slightly, these variations are unlikely to cause large disparities in default periods of imprisonment between jurisdictions. Of greater concern are the significant disparities in the maximum periods of default imprisonment. These disparities could cause federal offenders who have failed to pay fines of similar magnitude to receive substantially different penalties in different jurisdictions.

17.44 For this reason, the ALRC considers that federal sentencing legislation should specify a maximum period of imprisonment that can be served by a federal offender for fine default. Fines imposed for federal offences can be substantial. After surveying the various state and territory maxima, the ALRC has concluded that 12 months should be the maximum period of imprisonment that a federal offender can be ordered to serve in default of a federal fine. While the setting of a maximum period of imprisonment is somewhat arbitrary, a ceiling of 12 months imprisonment will reduce the disparities in the maximum periods of imprisonment for fine default in the states and territories, although still providing a real deterrent to fine default by offenders. State and territory maxima that are lower than 12 months should continue to apply.

17.45 For the reasons explained above in relation to breach of sentencing orders imposed pursuant to ss 19, 20 and 20AB of the *Crimes Act*, the ALRC does not consider it desirable that courts pronounce the consequences of fine default at the time of sentencing. There may be legitimate reasons or extenuating circumstances for default and federal fine defaulters can be dealt with in established and comprehensive fine enforcement schemes that provide a wide variety of penalties.

Proposal 17–5 Federal sentencing legislation should provide that, where a fine has been imposed on a federal offender, the offender may not be imprisoned for failure to pay the fine until such time as he or she has been given a reasonable opportunity to pay.

Proposal 17–6 Federal sentencing legislation should provide that the maximum period of imprisonment to be served by a federal offender for failing to pay a fine is 12 months.

- 1 This is discussed in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [12.35].
- 2 Attorney-General's Department, *Correspondence*, 18 October 2004.
- 3 See, eg, *Crimes (Administration of Sentences) Act 1999* (NSW) s 115(2)(b); *Sentencing Act 1991* (Vic) s 46; *Penalties and Sentences Act 1992* (Qld) ss 120, 121; *Sentencing Act 1997* (Tas) s 35; *Crimes Act 1900* (ACT) s 412; *Rehabilitation of Offenders (Interim) Act 2001* (ACT) s 24; *Sentencing Act 1995* (NT) s 47.
- 4 *Sentencing Act 1995* (NT) s 47.
- 5 Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 2004, 28220 (Question No 2852).
- 6 Commonwealth Director of Public Prosecutions, *Annual Report 2003–2004* (2004), 31.
- 7 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
- 8 This issue is discussed in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [7.96]–[7.97].
- 9 *Crimes Act 1914* (Cth) s 20A(5)(a).
- 10 *Ibid* ss 20A(5)(b), 20AC(6).
- 11 *Ibid* s 20A(5)(c).
- 12 See Proposal 2–3.
- 13 *Crimes Act 1914* (Cth) ss 20A(6), 20AC(7).
- 14 Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [7.95], [7.129]–[7.135].
- 15 LD, *Submission SFO 9*, 10 March 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005.
- 16 Australian Taxation Office, *Submission SFO 18*, 8 April 2005.
- 17 Correctional Services Northern Territory, *Submission SFO 14*, 5 April 2005.
- 18 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
- 19 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005. See also Commonwealth Director of Public Prosecutions, *Consultation*, Hobart, 14 April 2005.
- 20 *Kay v Hickey* [2002] TASSC 108, [4]–[5], [12]; Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [9.73].
- 21 Fine enforcement is discussed further below.
- 22 This issue is discussed in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), Ch 12.
- 23 *Crimes Act 1914* (Cth) s 20AC(6).
- 24 Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005; Department of Corrective Services Queensland, *Consultation*, Brisbane, 3 March 2005; Correctional Services Northern Territory and Parole Board of the Northern Territory, *Consultation*, Darwin, 27 April 2005; Offenders Aid and Rehabilitation Services South Australia, *Consultation*, Adelaide, 20 April 2005.
- 25 Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005.

- 26 Correctional Services Northern Territory and Parole Board of the Northern Territory, *Consultation*, Darwin, 27 April 2005; Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005.
- 27 Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005.
- 28 Ibid.
- 29 Offenders Aid and Rehabilitation Services South Australia, *Consultation*, Adelaide, 20 April 2005; Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005.
- 30 See Proposals 7–1 and 7–2.
- 31 Fine enforcement is discussed further in Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [12.40]–[12.45].
- 32 See *Fines Act 1996* (NSW) pt 4; *Sentencing Act 1991* (Vic) pt 3 div 4; *State Penalties Enforcement Act 1999* (Qld); *Fines Penalties and Infringement Notices Enforcement Act 1994* (WA); *Criminal Law (Sentencing) Act 1988* (SA) pt 9; *Sentencing Act 1997* (Tas) pt 6; *Magistrates Court Act 1930* (ACT) pt 3.9 div 3.9.2; *Fines and Penalties (Recovery) Act 2002* (NT) pt 5.
- 33 For example, fines in New South Wales are enforced by the State Debt Recovery Office: *Fines Act 1996* (NSW) s 113; fines in Queensland are enforced by the State Penalties Enforcement Registry: *State Penalties Enforcement Act 1999* (Qld) s 7; fines in Tasmania are enforced by the Fines Enforcement Unit of the Department of Justice: Tasmania Department of Justice, *Fines Enforcement* Tasmania Department of Justice <www.justice.tas.gov.au/fines> at 20 September 2005.
- 34 Fines in South Australia are enforced by the Fines Payment Unit located within the Magistrates Court of South Australia: *Criminal Law (Sentencing) Act 1988* (SA) div 3; fines in Victoria are enforced by the courts: *Sentencing Act 1991* (Vic) s 62; fines in Western Australia are enforced by the Fine Enforcement Registry of the Court of Petty Sessions: *Fines Penalties and Infringement Notices Enforcement Act 1994* (WA) s 6; fines in the Northern Territory are enforced by the Fines Recovery Unit located within the Local Court: *Fines and Penalties (Recovery) Act 2002* (NT) s 27; fines in the ACT are enforced by the court: *Magistrates Court Act 1930* (ACT) div 3.9.2.
- 35 This arrangement complies with the High Court's decision in *Harris v Caladine* (1991) 172 CLR 84 regarding the delegation of federal judicial power.
- 36 Attorney-General's Department, *Submission SFO 52*, 7 July 2005.
- 37 Australian Taxation Office, *Submission SFO 18*, 8 April 2005.
- 38 B Chapman and others, *Rejuvenating Financial Penalties: Using the Tax System to Collect Fines* (2003) Centre for Economic Policy Research.
- 39 Australian Taxation Office, *Submission SFO 18*, 8 April 2005.
- 40 *Fines Act 1996* (NSW) s 7; *Criminal Law (Sentencing) Act 1988* (SA) s 61; *Sentencing Act 1995* (NT) s 19.
- 41 *Penalties and Sentences Act 1992* (Qld) s 182A; *Sentencing Act 1997* (Tas) ss 44(1)(a), 47(1)(c).
- 42 *Sentencing Act 1995* (WA) s 58.
- 43 See, eg, *Sentencing Act 1991* (Vic) s 62; *Sentencing Act 1997* (Tas) s 47; *Magistrates Court Act 1930* (ACT) div 3.9.2; *Fines and Penalties (Recovery) Act 2002* (NT).
- 44 *Fines Act 1996* (NSW) s 87; *Sentencing Act 1991* (Vic) s 62(10)(b); *State Penalties Enforcement Act 1999* (Qld) s 119; *Fines Penalties and Infringement Notices Enforcement Act 1994* (WA) s 53; *Criminal Law (Sentencing) Act 1988* (SA) s 71; *Sentencing Act 1997* (Tas) s 47(c); *Magistrates Court Act 1930* (ACT) s 154D; *Sentencing Act 1995* (NT) s 26(3)(c).
- 45 See, eg, *Magistrates Court Act 1930* (ACT) s 154D(2); *Fines and Penalties (Recovery) Regulations 2001* (NT) reg 15.
- 46 *Fines Act 1996* (NSW) s 90; *Sentencing Act 1991* (Vic) s 63.
- 47 *Fines Act 1996* (NSW) s 90; *Fines and Penalties (Recovery) Act 2002* (NT) s 88; *Sentencing Act 1995* (NT) s 26(3)(c).
- 48 *Criminal Law (Sentencing) Act 1988* (SA) s 71(2)(b); *Magistrates Court Act 1930* (ACT) s 154D.
- 49 *Sentencing Act 1991* (Vic) s 63(1); *Penalties and Sentences Act 1992* (Qld) s 184.
- 50 *Sentencing Act 1995* (WA) s 59.
- 51 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [144].
- 52 Commonwealth Director of Public Prosecutions, *Consultation*, Darwin, 28 April 2005; Law Society of the Northern Territory, *Consultation*, Darwin, 29 April 2005; Northern Territory Legal Aid Commission, *Consultation*, Darwin, 27 April 2005.
- 53 *Djou v Commonwealth Department of Fisheries* (2004) 29 WAR 216, 229.
- 54 Attorney-General's Department, *Submission SFO 52*, 7 July 2005.

18. Judicial Specialisation

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Introduction

18.1 Most federal criminal offences are currently prosecuted in state and territory courts in accordance with state and territory criminal procedures.¹⁴⁵⁹ Only a small number of criminal and quasi-criminal matters are heard in federal courts such as the Federal Court of Australia, the Family Court of Australia or the Federal Magistrates Court.¹⁴⁶⁰

18.2 In some state and territory magistrates' courts there are special arrangements in place to deal with federal matters, for example, magistrates who specialise in the area. In general terms, however, federal offences are heard and determined by state and territory courts in the same way as any other matter—they are listed alongside state or territory matters and are dealt with by the judicial officer who is listed to preside over the court on that day.¹⁴⁶¹ A number of submissions and consultations noted that this can give rise to problems as federal law becomes increasingly complex and diverges from state and territory law.¹⁴⁶²

18.3 This chapter examines the issue of judicial specialisation, both in state and territory courts and in the federal courts, and makes two proposals designed to ensure that courts at all levels are equipped to deal efficiently and effectively with the sentencing of federal offenders.

Specialisation in state and territory courts

Is there a role for greater specialisation of state and territory judicial officers in the trial and sentencing of persons charged or convicted of federal offences? If so, how might this best be achieved? [IP 29, Q 10–9]

Background

18.4 There are a number of special arrangements in place across Australia for dealing with federal criminal matters, although these arrangements are limited to summary matters in magistrates courts. In New South Wales, for example, the vast majority of federal matters are dealt with by magistrates who specialise in such matters. In Brisbane, the Magistrates Court deals with federal matters as a specialty jurisdiction. In Tasmania, the Launceston Magistrates Court sets aside one day a month to deal with federal matters.¹⁴⁶³

Issues and problems

Complexity

18.5 A number of submissions and consultations discussed the increasing complexity of federal criminal law.¹⁴⁶⁴ In his submission, John Champion SC noted the increasing complexity in areas such as cybercrime and other transnational crime, as well as the possibility of an increase in terrorism cases in the future.¹⁴⁶⁵ The Australian Securities and Investments Commission (ASIC) noted the need for specialist experience and expertise in the extremely complex areas of corporate and financial services law.¹⁴⁶⁶ It was also noted that federal criminal trials can be complex and time-consuming and can be particularly difficult for juries.¹⁴⁶⁷

Divergence

18.6 Submissions and consultations also noted that the enactment of the *Criminal Code Act 1995* (Cth), with its new principles of criminal responsibility, means that federal criminal law is diverging in significant and fundamental ways from state and territory criminal law. The Code is giving rise to new jurisprudence and the need for specialist expertise.¹⁴⁶⁸ In addition, changes at the state and territory level, for example, the introduction of majority jury verdicts in some states,¹⁴⁶⁹ have created further divergence between federal and state criminal law and procedure. The issue of divergence is not limited to hearing and trial procedure. Part IB of the *Crimes Act* establishes a sentencing regime specific to federal offenders and, if the proposals put forward in this Discussion Paper are implemented, new sentencing legislation will establish a unique framework of objects, purposes, principles and factors particular to federal sentencing.¹⁴⁷⁰

Specialisation

18.7 Consultations and submissions were divided on whether there should be greater specialisation among state and territory judicial officers in the trial and sentencing of persons charged or convicted of federal offences. In support it was noted that greater specialisation in federal sentencing may enable judicial officers to gain a better understanding of the particular requirements of the federal regime.¹⁴⁷¹

18.8 However, other stakeholders noted that the volume of federal criminal matters may dictate the degree of specialisation that is possible within a particular court. Some judicial officers commented that it would be impractical to have greater specialisation in federal matters because there are insufficient resources for judges to specialise either on particular days or in particular types of matters,¹⁴⁷² and that this is a particular issue in Western Australia because of geographical factors.¹⁴⁷³ The Office of the Commonwealth Director of Public Prosecutions (CDPP) in the Northern Territory did not support magistrates specialising in federal matters and preferred a rotational system.¹⁴⁷⁴

18.9 Other submissions stated that there is no need for specialisation. A view was expressed that judicial education, rather than specialisation by particular judicial officers, is the way to promote consistency in the sentencing of federal offenders.¹⁴⁷⁵ A second view was that there is no need for specialisation in relation to federal offences because judicial officers are familiar with comparable state offences.¹⁴⁷⁶

Options for reform

18.10 The magistrates courts in New South Wales, Queensland and Tasmania, discussed above, provide a number of different models of specialisation in federal criminal matters, including specialist judicial officers and dedicated court days. Both methods allow a more sustained focus on, and an accretion of experience in, federal matters.

18.11 A further option would be for state and territory courts to establish specialist panels of judicial officers to deal with federal criminal matters. Specialist panels of judges have been established in the larger registries of the Federal Court of Australia in areas such as intellectual property, taxation, trade practices, human rights, admiralty and industrial law. Cases within these areas are randomly allocated to a judge on the specialist panel. Judges nominate the panels on which they would like to sit.¹⁴⁷⁷

ALRC's views

18.12 The ALRC is of the view that the increasing divergence between federal criminal law and state and territory criminal law—in particular, federal sentencing law—means that some degree of specialisation among state and territory judicial officers would be desirable where possible and practicable. However, the ALRC recognises that the nature and volume of federal criminal matters vary significantly between courts and that a high degree of specialisation—for example, setting aside

whole court days or allowing particular judicial officers to specialise in federal criminal matters—may not be practicable in all state and territory courts.

18.13 To allow maximum flexibility, the ALRC proposes that state and territory courts consider implementing some degree of specialisation in hearing and determining federal criminal matters where this is practicable having regard to the nature and volume of the court's caseload. This may include the setting aside of particular days, or parts of a day, to hear all federal matters together; or the establishment of specialist panels of judicial officers to deal with federal criminal matters.

Proposal 18-1 State and territory courts should promote specialisation in the hearing and determination of federal criminal matters by whatever means is most appropriate for those courts, where this is practicable having regard to the nature and volume of their caseloads.

Original jurisdiction of the federal courts

Should the jurisdiction of federal courts be expanded to deal more generally with federal criminal matters? If so, should such jurisdiction be extended: to trials and appeals; to all federal criminal matters or a limited class of them; or to lower or higher courts in the federal hierarchy? [IP 29, Q 3–1]

18.14 Original jurisdiction refers to the power of a court to adjudicate a matter at first instance, rather than on appeal from another court. In relation to criminal matters, it generally refers to the hearing of a summary matter or the holding of a trial in an indictable matter and imposing sentence in those cases where the offender pleads guilty or is found guilty. As noted above, original jurisdiction in federal criminal matters is currently exercised by state and territory courts in nearly all cases.

18.15 While some consultations and submissions supported the existing jurisdictional arrangements, others proposed change to address problems such as the complexity of federal criminal law and sentencing and the increasing divergence between federal and state criminal law. These proposals ranged from the establishment of an entirely separate federal criminal court system—in which the Federal Magistrates Court (FMC) would hear summary matters at first instance and deal with committal proceedings for indictable offences, and the Federal Court of Australia (FCA) would hear appeals and try indictable offences—to a limited increase in the jurisdiction of the FCA to deal with specific criminal offences.

Retaining the existing jurisdictional arrangements

18.16 The Inspector of Custodial Services in Western Australia, Richard Harding, expressed the view that broad justice could be achieved in relation to federal offenders by relying on state and territory courts, if federal minimum standards were put in place.¹⁴⁷⁸

18.17 The New South Wales Legal Aid Commission and Victoria Legal Aid both expressed support for the existing arrangements. This was on the basis that state and territory courts have substantial accumulated experience in dealing with federal criminal matters, but federal courts are essentially civil courts and lack the skills and experience to adjudicate criminal cases properly. Due to the relatively small number of federal criminal cases, these organisations were of the view that it would take federal courts many years to develop expertise in the criminal area.¹⁴⁷⁹

18.18 The New South Wales Bar Association also supported leaving jurisdiction with state courts on the basis of their accumulated experience and the fact that there was insufficient workload to justify establishing a separate federal system.¹⁴⁸⁰

Creating a separate federal criminal court system

18.19 In the 1980 interim report, *Sentencing of Federal Offenders* (ALRC 15), one ALRC commissioner suggested the establishment of a completely separate federal criminal court system.¹⁴⁸¹ Under this proposed framework, federal magistrates courts would undertake the bulk of federal criminal matters, including committal proceedings for indictable offences; and a single judge of the FCA—or a newly created intermediate level court—would hear appeals from these courts and try indictable offences. A Full Court of the Federal Court would hear appeals from that Court, with the High Court being the final court of appeal.

18.20 However, the majority of commissioners in that report rejected the option of an entirely separate federal criminal court system, recommending instead that the jurisdiction of the FCA be expanded to cover appeals against conviction and sentence in federal criminal matters.¹⁴⁸² This was on the basis that the existing arrangements had withstood the tests of time, convenience and economics and that the added expense of establishing a separate federal criminal court system could not be justified because of

the low numbers of relevant Federal offenders scattered throughout the country, and the need which our criminal justice tradition imposes to deal promptly with criminal matters once initiated.¹⁴⁸³

18.21 Since ALRC 15, the federal judicial system has been significantly expanded with the establishment of the FMC. Jurisdiction has been conferred on the FMC in relation to certain family law matters and a variety of other federal civil matters¹⁴⁸⁴ but not in relation to criminal matters. One option for reform would be to expand the jurisdiction of the FMC to hear federal summary matters at first instance and deal with committal proceedings for federal indictable offences.

18.22 Currently, the FMC is comprised of 31 magistrates. It has a permanent presence in Sydney, Parramatta, Newcastle, Melbourne, Brisbane, Townsville, Adelaide, Launceston, Canberra and Darwin and the Court also conducts circuits to other regional and metropolitan locations.¹⁴⁸⁵ By contrast, in 2004, the Local Court in New South Wales alone had over 130 magistrates, as well as 26 acting magistrates, working out of 165 locations throughout the state.¹⁴⁸⁶

18.23 The relatively small number of federal magistrates and their limited geographic distribution were two of the major difficulties identified in consultations and submissions with expanding the original jurisdiction of the FMC to deal effectively with federal criminal matters. A magistrate in Western Australia noted, for example, that the FMC would have difficulty dealing with the geographic area of a state like Western Australia without travelling long distances.¹⁴⁸⁷ Currently, the FMC does not have a permanent presence in Western Australia. Others noted that it would take an immense increase in resources to provide equitable access to the Court throughout Australia, including remote communities.¹⁴⁸⁸

18.24 In consultations and submissions, there was some in-principle support expressed for expanding the jurisdiction of the FMC and the FCA to establish a separate federal criminal court system.¹⁴⁸⁹ Members of the Victorian Bar noted that federal criminal cases are increasing in number and complexity and that the developing jurisprudence around the Commonwealth *Criminal Code* requires federal trials and specialist judges.¹⁴⁹⁰

18.25 However, a number of submissions and consultations expressed the view that, in practice, an entirely separate federal criminal court system was not viable for resource reasons.¹⁴⁹¹ ASIC pointed out that establishing a separate system would require: the appointment of additional magistrates and judges with appropriate commercial and criminal experience; the use of juries; and additional court facilities throughout Australia. ASIC commented that careful consideration would need to be given to the question of whether the benefits of an expanded federal criminal court structure would outweigh the practical difficulties involved.¹⁴⁹²

18.26 In addition, consultations and submissions noted that the FMC is currently a court of exclusively civil jurisdiction—approximately 80 per cent of its work is in family law—and that there would be a need to recruit a large number of magistrates with criminal law experience if the jurisdiction of the Court were to be expanded.¹⁴⁹³ Such expansion would also require the development of court rules and procedures appropriate in the criminal context.

18.27 Concern was also expressed that the objects of the FMC—to operate as informally as possible, to use streamlined procedures, and to make use of appropriate dispute resolution processes¹⁴⁹⁴—were not appropriate in relation to criminal matters.

It was noted that the essential mission of the FMC to provide a ‘cheaper, simpler, and faster method of dealing with less complex civil matters that would otherwise be heard by the Family Court or the Federal Court’¹⁴⁹⁵ might be undermined by an expansion of jurisdiction into the criminal area.

Joint matters and accrued jurisdiction

18.28 ASIC also noted that there would be a significant restriction on the use of federal courts in ASIC matters because many matters involved offenders charged with both federal and state offences. The *Australian Constitution* imposes limits on the extent to which the jurisdiction of the federal courts can be expanded because federal courts cannot be invested with state jurisdiction.¹⁴⁹⁶ This is likely to give rise to some difficulty for the federal courts in dealing with offenders charged with both federal and state offences—unless the state offences fall within the accrued jurisdiction of the federal court.¹⁴⁹⁷

18.29 In his submission, Professor Arie Freiberg noted that there was little information available about the number of joint trials and that this would impact to some extent on the viability of investing federal courts with criminal jurisdiction.¹⁴⁹⁸

18.30 The CDPP has provided the ALRC with data on the number of CDPP prosecutions involving both federal and state charges for the five-year period 2000–04. In that period just over 400 joint federal/state matters were prosecuted by the CDPP at first instance.¹⁴⁹⁹ Although it is not possible to say whether all these matters would be heard by the FMC if the original jurisdiction of that Court were expanded, it does indicate that, in a substantial number of cases each year, decisions would have to be made about whether to:

- proceed with the state and federal charges in a state court (assuming that state courts retained concurrent original jurisdiction in federal criminal matters);
- split the charges and proceed with state and federal charges in different courts; or
- attempt to bring all the charges within the accrued jurisdiction of the FMC.

18.31 The doctrine of accrued jurisdiction was originally developed in relation to the jurisdiction of the High Court but was expanded in the 1980s in a number of cases dealing with the civil jurisdiction of the FCA. The doctrine allows a federal court to deal with questions that would normally fall outside the jurisdiction of the court—for example, a question arising under state law—where it is attached to and not severable from a federal matter, such as where the questions arise out of common transactions and facts. In these circumstances the issues of state law are determined in the exercise of federal jurisdiction.¹⁵⁰⁰

18.32 While the doctrine was developed in the context of civil matters, it has been cast broadly and there is no reason to suppose that it could not also be applied in relation to

criminal jurisdiction vested in a federal court. The doctrine relies on the scope of the term ‘matter’ as used in the *Constitution*, and the term clearly includes criminal matters.¹⁵⁰¹ A ‘matter’ in the criminal context for the purposes of accrued jurisdiction might, for example, include all offences arising out of the same criminal enterprise. The policy justifications underlying the doctrine apply equally in the criminal context, that is, to avoid multiplicity of proceedings by enabling federal courts to do complete justice between the parties without regard to sterile jurisdictional disputes.

18.33 If the doctrine were to develop in this way, some portion of joint matters could be heard in federal courts, although the limits of the doctrine in this context would need to be developed by the courts over time.

Expanding the original jurisdiction of the Federal Court of Australia

Background

18.34 Section 19 of the *Federal Court of Australia Act 1976* (Cth) provides that the FCA has such original jurisdiction as is vested in it by laws made by the Australian Parliament. A broad, almost exclusively civil, jurisdiction has been conferred on the FCA by over 150 federal statutes. A more general civil jurisdiction has been conferred on the FCA in matters arising under a law of the Commonwealth by s 39B(1A)(c) of the *Judiciary Act 1903* (Cth), but this provision expressly excludes general jurisdiction in relation to criminal matters.

18.35 The FCA has, however, been granted a limited summary jurisdiction in relation to federal criminal matters by various federal statutes.¹⁵⁰² In the intellectual property area, for example, the FCA has concurrent jurisdiction with the state and territory courts to deal with a range of offences under the *Copyright Act 1968* (Cth), although it appears that such proceedings are only rarely brought in the FCA.

18.36 One recent development of interest is the proposal to create new indictable criminal offences for serious cartel behaviour under the *Trade Practices Act 1974* (Cth).¹⁵⁰³ Currently, cartel conduct—conduct between competitors designed to limit competition in the markets in which they operate—is prohibited by Part IV of the *Trade Practices Act*, but the FCA is limited to imposing civil penalties. It is possible that the proposed amendment could confer jurisdiction on the FCA to impose criminal sanctions. At present there is no provision in the *Federal Court of Australia Act* for criminal juries, but this would be necessary if the FCA were to be invested with original jurisdiction to try federal indictable offences because s 80 of the *Constitution* requires such trials to be by jury.¹⁵⁰⁴

Issues and problems

18.37 In consultations and submissions support was expressed for this kind of limited expansion of the original jurisdiction of the FCA. This was on the basis that some

federal offences would be better dealt with by the FCA because of the Court's existing expertise in relation to complex underlying legislation, for example, in the areas of taxation, corporations and trade practices law.¹⁵⁰⁵ The FCA's existing jurisdiction in relation to breaches of Part IV of the *Trade Practices Act* means that the Court is familiar with the complexities and impact of anti-competitive behaviour in the market and would be well placed to adjudicate any criminal proceedings in this area.

18.38 While some concerns were raised about the limited criminal law experience of FCA judges,¹⁵⁰⁶ Justice Mark Weinberg noted in response that of the 44 judges on the FCA, at least a quarter have brought significant criminal law experience to the court from previous positions, for example, as Supreme Court judges.¹⁵⁰⁷ In addition, some judges have ongoing criminal law experience through joint appointments to other courts including the Supreme Courts of the ACT, Norfolk Island and Fiji.

18.39 Concern was also expressed that the predominance of civil matters dealt with by the Court influences the way the Court deals with those criminal matters that do come before it, for example, by excessive reliance on affidavit evidence.¹⁵⁰⁸ In consultations with judges and officers of the FCA, it was acknowledged that a review of court rules and procedures would be required in the event of expanded criminal jurisdiction.¹⁵⁰⁹ Such a review would have to consider such issues as the need for committal proceedings, the use of juries in indictable matters, bail, security and the handling of prisoners.¹⁵¹⁰

ALRC's views

18.40 In considering the most appropriate jurisdictional arrangements for Australian courts it is difficult, if not impossible, to consider jurisdiction in relation to sentencing in isolation. At first instance, where sentencing follows a hearing or trial, the sentencing process relies heavily on the information put forward at the hearing or trial. It is not practicable to consider the conferral of jurisdiction to sentence in isolation from the conferral of jurisdiction to hear the case. For this reason, the discussion below largely deals with these issues together.

Creating a separate federal criminal court system

18.41 It is arguable that the establishment of an entirely separate federal criminal court system would lead to more effective and efficient sentencing of federal offenders. Because of the constitutional constraints on federal courts articulated in *Re Wakim*,¹⁵¹¹ such courts would deal exclusively with federal matters, leading to a high level of expertise in such matters. The internal cohesion of the courts could also be used to encourage the exchange of ideas, information and precedents on federal sentencing.

18.42 However, the ALRC is of the view that the establishment of a separate federal criminal court system is not viable given the existing state and territory infrastructure and the very substantial resources that would be required to, for example, expand the jurisdiction of the FMC to deal with federal criminal matters. In order for such court structures to be effective, they would need to be accessible across Australia. The

number and geographic dispersal of magistrates in New South Wales give some indication of the resources necessary to achieve this in a country the size of Australia. The ALRC is not presently persuaded of the need to duplicate the existing infrastructure of state and territory courts at the federal level in this way.

18.43 In addition, the ALRC is of the view that other proposals put forward in this Discussion Paper will go a long way towards addressing issues of consistency and better decision making in the sentencing of federal offenders on a more cost-effective basis than a major expansion of the federal court structure. These proposals include the conferral of appellate jurisdiction on the FCA, discussed in Chapter 20.

Expanding the original jurisdiction of the Federal Court of Australia

18.44 The ALRC is of the view that the state and territory courts deal effectively with a great range of complex matters under federal, state and territory laws. However, in relation to particular offences such as the proposed offence of serious cartel conduct, the ALRC can see merit in the argument that the FCA is in a stronger position to deal with the matter at first instance. Such matters are not only complex. They are matters in which the FCA has extensive experience given the Court's existing jurisdiction in relation to civil enforcement. The FCA works regularly with the underlying legislation and with the kind of expert evidence necessary in such cases in order to show, for example, the impact of anti-competitive behaviour on the market.

18.45 For similar reasons, the ALRC has formed the preliminary view that the original jurisdiction of the FCA should be expanded to hear and determine proceedings in relation to nominated federal offences, where the subject matter of the offences is closely allied to the existing civil jurisdiction of the Court. Criminal jurisdiction would be conferred on the FCA on the basis of the Court's experience in applying complex underlying legislation and in dealing with the relevant facts and evidence in areas such as taxation, corporations and trade practices. A detailed review of offence provisions would be necessary to identify appropriate provisions.

18.46 The ALRC is of the view that jurisdiction to deal with such offences should be invested concurrently in the FCA and the state and territory courts to ensure that joint federal/state matters involving such offences can be heard together in the state courts where necessary. The conferral of concurrent jurisdiction will mean that, in most cases, the prosecuting authorities will be able to choose whether to proceed in the FCA or in a state or territory court. The success of the FCA in exercising jurisdiction in this class of federal criminal matters is then likely to depend on its ability to attract cases by virtue of the efficiency with which it deals with cases and the quality of its decision making.

Proposal 18-2 The Australian Parliament should expand the original jurisdiction of the Federal Court of Australia to hear and determine proceedings in relation to nominated federal offences whose subject matter is closely allied to the existing civil jurisdiction of the Federal Court, in areas such as taxation, trade practices and corporations law. This original jurisdiction should be concurrent with that of state and territory courts.

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- 1459 Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [3.24]–[3.39].
 - 1460 For example, all these courts have power to impose sanctions for contempt of court: *Federal Court of Australia Act 1976* (Cth) s 31; *Family Law Act 1975* (Cth) s 35; *Federal Magistrates Act 1999* (Cth) s 17.
 - 1461 National Judicial College of Australia, *Correspondence*, 26 April 2005; National Judicial College of Australia, *Correspondence*, 9 May 2005.
 - 1462 J Champion SC, *Submission SFO 46*, 29 April 2005; Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; WT, *Submission SFO 23*, 11 April 2005.
 - 1463 National Judicial College of Australia, *Correspondence*, 26 April 2005.
 - 1464 J Champion SC, *Submission SFO 46*, 29 April 2005; Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; WT, *Submission SFO 23*, 11 April 2005; T Glynn SC, *Consultation*, Brisbane, 2 March 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005.
 - 1465 J Champion SC, *Submission SFO 46*, 29 April 2005.
 - 1466 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.
 - 1467 Chief Justice M Black & Others, *Consultation*, Melbourne, 30 March 2005; Justice M Weinberg, *Consultation*, Sydney, 8 June 2005; Confidential, *Consultation*, Melbourne, 31 March 2005.
 - 1468 J Champion SC, *Submission SFO 46*, 29 April 2005; Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005. Chapter 2 of the Model Criminal Code, which sets out the principles of criminal responsibility, has to date been adopted only at the federal level and in the ACT. The Criminal Code Reform (Criminal Responsibility Reform) Bill (No 2) 2005 (NT), currently before the Northern Territory Legislative Assembly, will, if passed, incorporate the Model Criminal Code principles into the Northern Territory Criminal Code.
 - 1469 See, eg, *Juries Act 2000* (Vic) s 46; *Juries Act 1927* (SA) s 57.
 - 1470 See, in particular, Chs 2, 4, 5 and 6.
 - 1471 Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005; Welfare Rights Centre Inc (Queensland), *Submission SFO 29*, 15 April 2005; Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; WT, *Submission SFO 23*, 11 April 2005.
 - 1472 Confidential, *Consultation*, Melbourne, 31 March 2005; Justice R Atkinson, *Consultation*, Brisbane, 2 March 2005.
 - 1473 Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.
 - 1474 Commonwealth Director of Public Prosecutions, *Consultation*, Darwin, 28 April 2005.
 - 1475 Law Society of the Northern Territory, *Consultation*, Darwin, 29 April 2005.
 - 1476 Queensland Legal Aid, *Consultation*, Brisbane, 2 March 2005.
 - 1477 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000), [7.23].
 - 1478 Inspector of Custodial Services Western Australia, *Consultation*, Perth, 19 April 2005.
 - 1479 New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Victoria Legal Aid, *Submission SFO 31*, 18 April 2005.
 - 1480 New South Wales Bar Association, *Consultation*, Sydney, 2 September 2004.
 - 1481 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [155]–[159] (Professor Duncan Chappell).
 - 1482 *Ibid*, Rec 65.
 - 1483 *Ibid*, [153].
 - 1484 J Crawford and B Opeskin, *Australian Courts of Law* (4th ed, 2004) 122–123.
 - 1485 Federal Magistrates Court of Australia, *Federal Magistrates Court of Australia Website* <<http://www.fmc.gov.au/>> at 6 September 2005.

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- 1486 Attorney General's Department (NSW), *NSW Local Courts Website* <<http://www.lawlink.nsw.gov.au/lc.nsf/pages/index>> at 6 September 2005.
- 1487 Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.
- 1488 Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; Department of Immigration and Multicultural and Indigenous Affairs, *Submission SFO 49*, 10 May 2005.
- 1489 Australian Taxation Office, *Submission SFO 18*, 8 April 2005; WT, *Submission SFO 23*, 11 April 2005; Law Society of South Australia, *Consultation*, Adelaide, 21 April 2005; T Glynn SC, *Consultation*, Brisbane, 2 March 2005; New South Wales Public Defenders Office, *Consultation*, Sydney, 22 September 2004.
- 1490 Members of the Victorian Bar, *Consultation*, Melbourne, 31 March 2005.
- 1491 Australian Taxation Office, *Submission SFO 18*, 8 April 2005; J Willis, *Submission SFO 20*, 9 April 2005.
- 1492 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.
- 1493 A Freiberg, *Submission SFO 12*, 4 April 2005; Chief Justice M Black & Others, *Consultation*, Melbourne, 30 March 2005.
- 1494 *Federal Magistrates Act 1999* (Cth) s 3.
- 1495 J Crawford and B Opeskin, *Australian Courts of Law* (4th ed, 2004), 121.
- 1496 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.
- 1497 The same issue does not arise in relation to territory offences.
- 1498 A Freiberg, *Submission SFO 12*, 4 April 2005.
- 1499 Commonwealth Director of Public Prosecutions, *Correspondence*, 4 May–2 September 2005.
- 1500 *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 562.
- 1501 *R v Murphy* (1985) 158 CLR 596, 617–618.
- 1502 See, eg, *Trade Practices Act 1974* (Cth) s 163; *Copyright Act 1968* (Cth) ss 132(7), 133A(3), 135AT; *Workplace Relations Act 1996* (Cth) s 412(1).
- 1503 P Costello (Treasurer), 'Criminal Penalties for Serious Cartel Behaviour' (Press Release, 2 February 2005).
- 1504 Sections 39–41 of the *Federal Court of Australia Act 1976* (Cth) do address jury trials but these provisions apply only to civil suits.
- 1505 Chief Justice M Black & Others, *Consultation*, Melbourne, 30 March 2005; WT, *Submission SFO 23*, 11 April 2005.
- 1506 M Johnson, *Consultation*, Darwin, 27 April 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005.
- 1507 Chief Justice M Black & Others, *Consultation*, Melbourne, 30 March 2005; Justice M Weinberg, *Consultation*, Sydney, 8 June 2005.
- 1508 Law Society of South Australia, *Consultation*, Adelaide, 21 April 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005.
- 1509 Chief Justice M Black & Others, *Consultation*, Melbourne, 30 March 2005.
- 1510 Attorney-General's Department, *Consultation*, Canberra, 16 March 2005.
- 1511 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

19. Other Measures to Promote Better Sentencing

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Introduction

19.1 Chapter 18 considered judicial specialisation as one means of promoting better sentencing decisions in relation to federal offenders. This chapter considers other measures that may promote better sentencing decisions at the federal level, including the requirement that courts give reasons for their sentencing decisions, prosecutorial assistance to the courts, the establishment of a federal sentencing council, and the education of judicial officers and others involved in the federal criminal justice system.

Reasons for decision

Should judicial officers always be required to give and record sufficient reasons when sentencing a federal offender? Should it matter whether the offence is prosecuted summarily or on indictment; whether the order is for a sentence of imprisonment or otherwise; or which court makes the order? What matters should be addressed in those reasons, and how should best practice be promoted among judicial officers? [IP 29, Q 10–5]

19.2 Currently, federal sentencing legislation expressly requires the giving of reasons in limited circumstances. Under s 17A(2) of the *Crimes Act 1914* (Cth), where a sentence of imprisonment is imposed for a federal offence the court is required to explain why no sentence other than imprisonment is appropriate, and to cause those reasons to be entered into the records of the court.

19.3 At common law, the obligation to give reasons is considered a normal incident of the judicial process¹⁵¹² and ‘is of the essence of the administration of justice’.¹⁵¹³ Reasons for decisions are not required in every case,¹⁵¹⁴ for example, where a decision is ‘too plain for argument’, or where the reasons for a procedural decision are clear from the context or from the preceding exchanges with the parties or their representatives.¹⁵¹⁵

Should reasons be required in every case?

19.4 There was strong support in consultations and submissions for the giving and recording of reasons in sentencing federal offenders.¹⁵¹⁶ A number of submissions expressed the view that the giving and recording of reasons would aid consistency and transparency of decision making,¹⁵¹⁷ as well as enable comparison with other sentences in like cases.¹⁵¹⁸ It has also been argued that if judges were required to give reasons for their sentencing decisions, appeals against sentence would be less likely.¹⁵¹⁹ Two submissions expressed the view that reasons should be required in relation to summary and indictable offences,¹⁵²⁰ and another supported the giving of reasons for indictable offences alone.¹⁵²¹

19.5 However, there are arguments against compelling the courts to give reasons in every case. For example, such a requirement might affect the timely disposition of cases, resulting in increased cost and delay.¹⁵²² In its 1988 report, *Sentencing* (ALRC 44), the ALRC noted that requiring courts to give reasons in every case could create backlogs, particularly in courts of summary jurisdiction with heavy workloads.¹⁵²³ It has also been argued that requiring courts to give reasons in every case is unnecessary because: most courts give reasons in appropriate cases even in the absence of a requirement to do so; reasons only assist the development of the law in a

small number of cases; and the absence of reasons does not amount to a denial of natural justice.¹⁵²⁴

19.6 One submission expressed the view that there was no real problem in this area and that requiring the giving and recording of reasons in legislation was unnecessary and ineffective.¹⁵²⁵

Form and content of reasons

19.7 Sentencing decisions are either given orally—and recorded in court transcripts—or in writing. Because access to court transcripts is often restricted for privacy reasons, it has been argued that, where a sentencing decision establishes a binding legal principle, it should be provided in a written judgment to ensure widespread access to the decision.¹⁵²⁶

19.8 There is little guidance available on the content of reasons for courts' sentencing decisions. ALRC 44 expressed doubt about the need for detailed reasons for sentences imposed for minor offences that are dealt with by courts of summary jurisdiction.¹⁵²⁷ The ALRC recommended more extensive requirements for the giving and recording of reasons in relation to the decisions of superior courts.¹⁵²⁸

ALRC's views

Should reasons be required in every case?

19.9 The giving and recording of reasons for sentencing decisions is likely to lead to better sentencing over time. The giving of reasons requires a more structured and considered approach to sentencing decisions. A statement of reasons provides evidence that the court has considered the correct principles and applied them properly. Transparency of judicial decision making is important for the maintenance of public confidence in the judiciary and the federal criminal justice system. In addition, reasons have the potential to promote consistency by allowing comparison between like cases and serving as precedents for future decisions.

19.10 For these reasons the ALRC is of the view that federal sentencing legislation should require reasons to be given in every case, whether the sentence relates to a summary or indictable offence. The requirement should not be limited to situations in which a sentence of imprisonment is imposed.

Form and content of reasons

19.11 However, due regard must be had to the heavy workload of many courts and the need to ensure the timely and efficient disposal of federal criminal matters. The ALRC does not propose that written reasons for sentencing decisions must be provided in every case. In many cases—for example, in courts of summary jurisdiction dealing with minor offences—it will be sufficient if the reasons for the courts' sentencing decisions are provided orally and recorded in the court transcripts.

19.12 The content of a court's reasons for its sentencing decision will depend on the nature and circumstances of the offence and the sentencing order that is imposed. However, there are some essential matters that should always be addressed in the court's reasons. In particular, the reasons should explain the choice of sentencing option and the severity of the sentence imposed. The ALRC is also of the view that the requirement in s 17A(2) of the *Crimes Act*—namely, that the court must explain why no sentence other than imprisonment is appropriate when imposing a sentence of imprisonment—should be retained.

Proposal 19–1 Federal sentencing legislation should require a court to state its reasons for decision when sentencing a federal offender for an indictable or summary offence. The reasons may be given in writing or read into the records of the court but in either case should be adequate to explain the choice of sentencing option and the severity of the sentence imposed.

Role of prosecutors

What is the appropriate role of prosecuting authorities in promoting consistency in the sentencing of federal offenders, for example, by providing the court with information relevant to that task? [IP 29, Q 10–6]

Background

19.13 Assistance provided by prosecuting authorities to the courts may also contribute to better sentencing decisions. Prosecutors, including the Commonwealth Director of Public Prosecutions (CDPP), have a general duty to assist the court to avoid appealable error.¹⁵²⁹ At common law, the positive duty to assist the court is derived from the prosecuting authorities' statutory right to appeal against sentence.¹⁵³⁰ The duty has been said to include adequate presentation of the facts; an appropriate reference to any special principles of sentencing that might reasonably be thought to be relevant to the case in hand; and a fair testing of the defendant's case so far as it appears to require it.¹⁵³¹ A failure by a prosecutor to fulfil this duty can impact on a crown appeal on sentence.¹⁵³²

19.14 There is some uncertainty about how precise a prosecutor should be in making submissions on sentence. One view is that while it is proper and desirable for the prosecution to make submissions about sentencing principles, and even about the type of sentence, it is inappropriate and undesirable for the prosecution to go further and make submissions about either the range or the quantum of a sentence.¹⁵³³ However,

the prosecution may assist the court by making submissions as to the range of sentences that could be said to be open to the court in the circumstances.¹⁵³⁴

19.15 The CDPP has developed administrative guidelines on the role of the CDPP at sentencing. These guidelines make clear that the role of the prosecutor in the sentencing process is: to be fair; to ensure that the penalty imposed is appropriate in all the circumstances of the case; not to focus on ensuring that the maximum penalty is imposed; and to remain dispassionate. The guidelines note that it is a matter for the prosecutor to decide whether to address on penalty and, if so, what matters to cover.¹⁵³⁵ The guidelines also indicate matters that may be relevant when a prosecutor is considering whether to address on sentence, or is addressing on sentence when a defendant is unrepresented.¹⁵³⁶ The CDPP's guidelines are not currently publicly available.

19.16 In practice, the CDPP provides a great deal of assistance to the court when dealing with Part IB of the *Crimes Act*. This has involved the provision of the relevant sections of the legislation and an explanation of them in the form of written submissions, as well as information on comparable sentences derived from the CDPP's internal database.¹⁵³⁷

Issues and problems

19.17 A number of submissions and consultations discussed the role of prosecuting authorities in promoting better sentencing of federal offenders. In general, there was strong support for the prosecuting authorities' role in providing assistance to the court.¹⁵³⁸ The Australian Taxation Office (ATO) submitted that prosecuting authorities had a role in providing the court with information relevant to sentencing, including the offender's antecedent criminal history, relevant precedents, and information on the prevalence and impact of the type of offence committed.¹⁵³⁹ The CDPP considered that there is a role for the prosecution in addressing the court on penalty and quantum,¹⁵⁴⁰ although there appear to be variations in the practices of regional offices in this regard. Others, including Professor Arie Freiberg, expressed the view that prosecutors should not make submissions to the court on the quantum of the sentence.¹⁵⁴¹ One stakeholder considered that prosecutors should be removed entirely from the sentencing process.¹⁵⁴²

19.18 A further issue for consideration is whether the role of the prosecutor should be formalised, perhaps in the *Prosecution Policy of the Commonwealth*,¹⁵⁴³ or in standards such as *Directions on the Commonwealth's Obligation to Act as a Model Litigant*.¹⁵⁴⁴

ALRC's views

19.19 Prosecutors do have an important role in assisting the courts in sentencing federal offenders. The CDPP's practice of providing the court with relevant legislative provisions and information on precedents and comparable sentences is particularly useful where state and territory judicial officers do not deal with federal criminal matters on a regular basis. This kind of information is likely to assist the courts to

avoid error by providing guidance on whether the proposed sentence is within the usual range imposed in like cases in the past, and in deciding whether any departure from that range is justifiable. The CDPP is in a unique position to provide this information because, unlike the state and territory courts, the CDPP focuses almost entirely on federal criminal matters and keeps detailed records on such matters across all jurisdictions. The ALRC is of the view that the CDPP should continue its practice of providing detailed information to the court when dealing with federal offences.

19.20 In addition, in Chapter 21 the ALRC proposes the development of a national sentencing database to ensure that the sort of information currently available to the CDPP on the sentencing of federal offenders is made more widely available to judicial officers, prosecutors and defence lawyers in federal criminal matters.

19.21 Most submissions and consultations did not comment on whether the role of the CDPP at sentencing should be further formalised, for example, in the *Prosecution Policy of the Commonwealth* or in standards such as *Directions on the Commonwealth's Obligation to Act as a Model Litigant*. While the current CDPP practice appears to be satisfactory, in the interests of transparency the CDPP should consider making its administrative guidelines on the role of the prosecutor in sentencing publicly available.

Proposal 19–2 The Commonwealth Director of Public Prosecutions should continue its practice of providing courts with detailed information with respect to the sentencing of federal offenders.

Establishment of a federal sentencing council

Is there a need to establish a federal sentencing council to promote better and more consistent decisions in the sentencing of federal offenders? What functions should such a body have, and how should it be structured and constituted?
[IP 29, Q 10–8]

Background

19.22 A third measure that may promote better sentencing decisions is the establishment of a sentencing commission or council to advise on matters related to sentencing. In recent years, governments have established a number of such sentencing bodies. The objectives of these bodies usually include the promotion of consistency in sentencing, but their constitutions and functions vary greatly.

19.23 At present, there is no sentencing commission or advisory council at the federal level in Australia; however, both New South Wales and Victoria have established sentencing councils at the state level.¹⁵⁴⁵ Broadly speaking, these councils are constituted by persons with experience in community issues affecting courts, senior academics, members of support or advocacy groups for victims of crime (or persons who have expertise in matters associated with victims of crime), at least one prosecution lawyer and one defence lawyer, and others with experience in the operation of the criminal justice system.¹⁵⁴⁶

19.24 The functions of the state sentencing councils include advising the government—or stating their views to the courts—on guideline judgments; advising and consulting with the government in relation to offences suitable for standard non-parole periods and their proposed length; conducting research and disseminating information on sentencing matters, either to the government or to the judiciary and other interested persons; and consulting with government departments, other interested persons or bodies and the general public on sentencing matters.¹⁵⁴⁷

19.25 Although the Australian state sentencing councils have only advisory and research functions, similar bodies in overseas jurisdictions have rule-making powers and a more direct impact on individual cases. For example, the main function of sentencing councils in the United States and the United Kingdom is the development and promulgation of sentencing guidelines.¹⁵⁴⁸

19.26 ALRC 44 recommended the establishment of a sentencing council within the Australian Institute of Criminology (AIC).¹⁵⁴⁹ It was envisaged that the major function of the sentencing council would be to provide judicial officers with comprehensive information in order to promote consistency in the sentencing of federal offenders. In addition, the proposed sentencing council was to: advise the Attorney-General on the need for particular programs relating to punishment and sentencing; monitor sentencing practices; provide information on a systematic basis to the public through its own publications and through the mass media; and provide education programs to judicial officers. The proposed sentencing council was also to review maximum prison terms and to provide advice on new non-custodial sentencing options, and the impact of punishment on young offenders.

Issues and problems

19.27 There was significant interest in the establishment of a federal sentencing council in consultations and submissions.¹⁵⁵⁰ There was some disagreement about the role such a body should perform—ranging from research only,¹⁵⁵¹ to research and the provision of advice,¹⁵⁵² to a broader role including the oversight of the federal sentencing system, the preparation of guidelines and the consideration of mitigating and aggravating factors.¹⁵⁵³ However, although there was some judicial interest in the establishment of such a council, there was also concern that its functions may be seen as interfering with the independence of judicial officers.¹⁵⁵⁴

19.28 Commentators have expressed support for sentencing councils on the basis that, being one step removed from political processes, councils can provide more objective information to legislators and courts on how the sentencing process should develop. It is also said that councils can recommend changes to make sentencing more socially defensible and scientifically based.¹⁵⁵⁵ Others arguments in favour of sentencing councils include that they: allow greater community input into sentences;¹⁵⁵⁶ address the need for research to gauge public perceptions about crime and punishment; promote the development of sentencing principles; and ensure that the media receives accurate information about sentencing policy and practice.¹⁵⁵⁷

19.29 Arguments against sentencing councils are that: they displace parliament in determining an appropriate sentencing framework; their advice to courts on sentencing guidelines and principles is an unacceptable interference with the role of the courts and has the potential to interfere with the exercise of judicial discretion;¹⁵⁵⁸ they may place the courts under moral pressure to assimilate the council's views and to determine sentences according to statistical norms rather than individual circumstances;¹⁵⁵⁹ and they represent unnecessary bureaucracy.¹⁵⁶⁰

ALRC's views

19.30 In general it is undesirable to propose the establishment of new government agencies unless there is a compelling case to do so, particularly where new functions can be performed effectively by existing agencies. In order to justify the establishment of a federal sentencing council it would be necessary to show that the functions to be performed by the council were necessary at the federal level and were not being, or could not be, performed by other bodies. The ALRC has come to the preliminary view that the three primary functions of sentencing councils—research, advice and rule making—are currently being performed by other bodies, will be performed by other bodies if the proposals in this Discussion Paper are implemented, or are not needed in the federal criminal justice system.

19.31 In Chapter 22 the ALRC proposes that the Australian Government establish an Office for the Management of Federal Offenders (OMFO).¹⁵⁶¹ The functions of the OMFO include oversight of federal offenders, liaising with the states and territories, and providing advice to the Australian Government in relation to federal offenders and relevant aspects of the federal criminal justice system.¹⁵⁶² As the OMFO will be responsible for overseeing these aspects of the federal sentencing system, there is no need for this function to be performed by another new federal body.

19.32 In addition, the ALRC has proposed the establishment of a national sentencing database to provide detailed information on sentencing of federal offenders to judicial officers, prosecutors, defence lawyers and others.¹⁵⁶³

19.33 The AIC is the principal national body for conducting research and disseminating information on crime and criminal justice, including in relation to sentencing. The AIC conducts research in order to provide advice to the Australian Government and other key stakeholders (such as law enforcement agencies and community organisations) to support the formulation of evidence-based policy. The ALRC is of the view that it is not necessary to establish another body to conduct research when this function is capable of being undertaken by an existing and well-respected research body.

19.34 Finally, some of the other functions undertaken by sentencing councils—such as the provision of advice on guideline judgments and factors that aggravate and mitigate sentence—will not be necessary if the relevant proposals in this Discussion Paper are implemented.¹⁵⁶⁴ For these reasons the ALRC has formed the view that it is not necessary to establish a sentencing council at the federal level in Australia.

Education

Do judicial officers, legal practitioners and others involved in the federal criminal justice system require further education and training in relation to the law applicable to the sentencing of federal offenders? If so, how should this training be delivered? [IP 29, Q 16–3]

19.35 A further measure that may promote better sentencing in relation to federal offenders is the education of judicial officers and others who are involved in the federal criminal justice system. This section considers judicial education; the development of a bench book on federal sentencing; the education of prosecutors, other legal practitioners and court services officers about federal sentencing; and university education about the federal criminal justice system.

Judicial officers

19.36 As discussed in Chapter 18, most federal criminal offences are prosecuted in state and territory courts. While there is some measure of specialisation in some courts dealing with federal criminal matters, this is not possible in many courts because of the relatively small number of federal criminal matters being heard. Generally, federal matters are listed alongside state or territory matters and are dealt with by the judicial officer who is listed to preside over the court on that day. Federal sentencing involves the application of a distinct sentencing regime and this can give rise to problems if the regime is not well understood.

19.37 In consultations, the National Judicial College of Australia (NJCA) confirmed that judicial education on federal sentencing is included in its general sentencing modules.¹⁵⁶⁵ The NJCA advised that in 2004 and 2005 three programs included

exercises involving sentencing for federal offences.¹⁵⁶⁶ There are also modules on the application of the *Criminal Code* (Cth).

19.38 Apart from the NJCA, it is not known precisely to what extent judicial education bodies offer training in relation to the sentencing of federal offenders. However, there appears to be a lack of emphasis in existing judicial education about the federal criminal justice system and federal sentencing law in particular.

19.39 The cases discussed in IP 29 indicate that judicial officers do occasionally misapply the provisions of Part IB of the *Crimes Act* or fail to apply relevant provisions at all.¹⁵⁶⁷ This was confirmed in consultations.¹⁵⁶⁸ To the extent that federal law picks up and applies the sentencing laws of the states and territories, there have been a number of cases in which judicial officers have misapplied those laws as well.

19.40 Submissions and consultations also identified a number of problem areas that might be addressed through judicial education. These included difficulties in explaining the application of the *Crimes Act* to judicial officers who were used to applying the relevant state or territory sentencing legislation;¹⁵⁶⁹ judicial reluctance in applying the requirement to specify reduction in sentence on the basis of promised cooperation by a federal offender, as required by s 21E of the *Crimes Act*;¹⁵⁷⁰ and failure to use plain language in explaining sentences to offenders, especially in relation to Indigenous offenders.¹⁵⁷¹ Some submissions supported enhanced judicial education on the sentencing of federal offenders.¹⁵⁷²

19.41 The ALRC is of the view that regular training should be provided to judicial officers in relation to the sentencing of federal offenders. There is a need for such training, in particular, because of the complex nature of the interaction between the *Crimes Act* and state and territory sentencing legislation. Training should be provided on federal sentencing law in general, as well as on the problem areas identified above.

19.42 The NJCA is well placed, in consultation with other judicial education bodies, to develop and deliver appropriate training modules for judicial officers on the sentencing of federal offenders. Consultation with other judicial education bodies is intended to ensure a coordinated and consistent approach to these issues across Australia.

Proposal 19–3 The National Judicial College of Australia, in consultation with other judicial education bodies, should provide regular training to judicial officers in relation to the sentencing of federal offenders.

Bench books

19.43 A bench book outlines what judicial officers ‘may need to know, understand and do on a day-to-day basis’ in the form of a practice manual.¹⁵⁷³ Bench books provide guidance only and are not intended to lay down or develop the law.

19.44 Bench books in some jurisdictions include a section on federal criminal law. For example, in New South Wales, the *Criminal Trial Courts Bench Book* prepared by the Judicial Commission of New South Wales contains a section on the *Criminal Code* (Cth). Both the *Queensland Supreme and District Courts Bench Book*¹⁵⁷⁴ and the *South Australian Magistrates’ Bench Book*¹⁵⁷⁵ contain a section on Commonwealth offences. The *Victorian Sentencing Manual* published by the Judicial College of Victoria also contains some commentary on federal sentencing.¹⁵⁷⁶

19.45 Some states now have bench books that deal with ethical, gender and cultural issues. The *Aboriginal Benchbook for Western Australian Courts* (Aboriginal Benchbook) is a pilot project initiated by the National Indigenous Cultural Awareness Committee of the Australian Institute of Judicial Administration (AIJA).¹⁵⁷⁷ The objectives of the Aboriginal Benchbook are to assist judicial officers in understanding cross-cultural issues that may arise in criminal proceedings involving Aboriginal and Torres Strait Islander (ATSI) people, and to serve as a model or template for adaptation and application in other Australian jurisdictions.¹⁵⁷⁸ The Aboriginal Benchbook is currently specific to Western Australia and contains no commentary on ATSI federal offenders.

19.46 In Queensland, the *Equal Treatment Benchbook* has adopted parts of the Aboriginal Benchbook and contains a number of commentaries on Indigenous culture, communication and involvement in the criminal justice system.¹⁵⁷⁹ In addition, it contains sections covering justice and equity, ethnic diversity in Queensland, religion, family diversity, oaths and affirmations, effective communications in court proceedings, disability, self-represented parties, children, gender, sexuality and gender identity.

19.47 In the United Kingdom, the Judicial Studies Board’s *Equal Treatment Bench Book* contains sections covering equality before courts and tribunals, minority ethnic communities, belief systems, children, disability, gender inequality and sexual orientation.¹⁵⁸⁰

19.48 There are currently no bench books on federal criminal law or federal sentencing law. As noted in the preceding section, there have been difficulties with the application of Part IB of the *Crimes Act*, and with the intersection between federal sentencing legislation and state and territory sentencing legislation.

19.49 In addition, there are no bench books at the federal level dealing with special categories of offenders, such as young offenders, ATSI offenders or offenders from culturally and linguistically diverse backgrounds. As discussed in Chapters 27 to 29,

special categories of offenders are strongly represented in the federal offender population. There is also judicial recognition of the need to alert judicial officers to issues relating to Australia's racial and cultural diversity.¹⁵⁸¹ Other states and territories are yet to develop an Aboriginal Benchbook on the basis of the Western Australian model.

ALRC's views

19.50 In the ALRC's view, a bench book providing guidance on federal sentencing legislation would increase judicial officers' familiarity with, and understanding of, federal sentencing law, and thus promote better sentencing decisions. The complexity of federal sentencing law and the continued reliance of the federal criminal justice system on state and territory laws make it desirable for the proposed bench book to give guidance on the interaction between federal sentencing legislation and state and territory laws.

19.51 The need to raise awareness of cross-cultural issues among the judiciary has been canvassed in a number of previous reports.¹⁵⁸² Because special categories of offenders are strongly represented in the federal offender population, the ALRC considers that the proposed bench book on federal sentencing should include commentaries on issues concerning equal treatment of all persons, including issues of the type addressed in the Queensland's *Equal Treatment Benchbook* and the Aboriginal Benchbook.

19.52 The Aboriginal Benchbook is an appropriate model for the development of similar bench books in other jurisdictions because it addresses communication barriers faced by ATSI defendants and specific cross-cultural issues relating to pre-trial procedures, criminal proceedings and sentencing. The Aboriginal Benchbook is currently confined to issues relevant to ATSI communities in Western Australia. Since there are regional differences between ATSI communities in terms of language, religion, social organisation and culture,¹⁵⁸³ judicial education bodies should be involved in developing such bench books in other jurisdictions. In doing so, consultations with relevant state or territory courts would assist in identifying issues specific to the sentencing of ATSI federal offenders in each jurisdiction.

Proposal 19-4 The National Judicial College of Australia, in consultation with other judicial education bodies, should develop a bench book providing general guidance for judicial officers on federal sentencing law. The bench book should indicate how federal sentencing law interacts with relevant state and territory law in each jurisdiction, and should include commentary on equal treatment and the sentencing of Aboriginal and Torres Strait Islander peoples.

Prosecutors

19.53 The CDPP runs in-house advocacy training programs for its prosecutors. In 2003–04, the CDPP conducted four in-house advocacy courses around Australia.¹⁵⁸⁴ The CDPP also conducts in-house legal training to ensure that its lawyers comply with their continuing legal education requirements.¹⁵⁸⁵ Other Commonwealth prosecuting authorities, such as the ATO and the Australian Securities and Investments Commission (ASIC), also have internal training programs.¹⁵⁸⁶ It is not known to what extent these programs include training in relation to the sentencing of federal offenders.

19.54 As discussed above, as a matter of practice prosecutors provide substantial assistance to the courts regarding sentencing in federal criminal matters. The ALRC considers that prosecutorial assistance to the courts could benefit from the CDPP and other Commonwealth prosecuting authorities developing and enhancing their programs to train prosecutors in relation to the federal criminal justice system, including the sentencing of federal offenders and the role of prosecutors in sentencing. In particular, these training programs should address how federal sentencing legislation interacts with the relevant state or territory law in each jurisdiction.

Proposal 19–5 The Commonwealth Director of Public Prosecutions and other Commonwealth prosecuting authorities should develop and enhance their programs to train prosecutors in relation to the federal criminal justice system, including the sentencing of federal offenders and the role of prosecutors in sentencing. This training should indicate how federal sentencing legislation interacts with relevant state or territory law in each jurisdiction.

Legal practitioners

19.55 As noted in IP 29, there are currently a number of service providers of continuing legal education and practical legal training, including legal professional associations, university law schools, practical legal training institutions, private companies and law firms.¹⁵⁸⁷ IP 29 raised the issue of whether legal practitioners involved in the federal criminal justice system require further education and training in relation to the law applicable to the sentencing of federal offenders and, if so, how this might be provided.

19.56 Most practical legal training courses include units on criminal law. It is difficult to conduct a comprehensive survey of continuing legal education courses due to the large number of organisations offering these services, however, in New South Wales a number of courses have included a component on the federal criminal justice system and federal sentencing law.

19.57 ALRC 44 noted that although the primary focus of sentencing education should be judicial officers, education programs for other groups might also have a beneficial impact on sentencing.¹⁵⁸⁸ The ALRC remains of the view that better training for all those working in the federal criminal justice system is likely to lead to better sentencing of federal offenders. The ALRC proposes that legal education providers in each state and territory provide training to legal practitioners in this area.

Proposal 19–6 Providers of continuing legal education and practical legal training in each state and territory should offer training to legal practitioners in relation to the federal criminal justice system. This training should indicate how federal sentencing legislation interacts with relevant state or territory law in each jurisdiction.

Court services officers

19.58 Court services officers (also known as court officers) are responsible for liaising with and advising the public on legal procedures and practices relevant to the court.¹⁵⁸⁹ Once a matter reaches the court, court services officers are usually the first point of contact for persons accused of a federal offence. One of their main roles is to assist individual offenders to understand relevant court procedures by providing information, and by recommending appropriate options, resources or services both internal and external to the courts. They also coordinate and manage cases as matters progress through the courts.

19.59 There are a number of courses around Australia that prepare graduates for employment in court administration. A small number of course outlines indicate that such courses include examination of issues concerning ATSI people.¹⁵⁹⁰ Other courses include elective subjects on cross-cultural communication,¹⁵⁹¹ gender issues,¹⁵⁹² or juvenile justice.¹⁵⁹³

19.60 As discussed in Chapters 27 to 29, certain categories of offenders merit special assistance and protection. These include young federal offenders; federal offenders with a mental illness or intellectual disability; women offenders; offenders with family and dependants; ATSI offenders; offenders from culturally and linguistically diverse backgrounds; offenders with a drug addiction; and offenders with problem gambling.

19.61 Some categories of offenders may experience particular difficulty in understanding court processes. For example, ATSI offenders and offenders from culturally and linguistically diverse backgrounds may experience difficulties due to inadequate English language skills or cross-cultural communication barriers. The need for interpreters in federal criminal matters is discussed in Chapter 29 but court services

officers may also be able to assist by identifying the needs of special categories of offenders and providing these offenders with relevant information and support.

19.62 It is the ALRC's view that, having regard to the problems faced by special categories of offenders in understanding court procedures, their need for information regarding the availability of options, resources and services, and the important role that court services officers play in providing offenders with information and assistance, training should be provided to court services officers in relation to issues relevant to special categories of federal offenders.

19.63 Since the options, resources and services available to special categories of offenders are often specific to the jurisdiction in which the offenders are sentenced—for example, eligibility criteria for drug courts differ between jurisdictions—the ALRC considers that such training should be provided by the relevant state or territory court.

Proposal 19–7 State and territory courts should provide training to court services officers in relation to issues relevant to special categories of federal offenders.

University law courses

Should university law schools place greater emphasis in their programs on the federal criminal justice system and sentencing law, including federal sentencing law? [IP 29, Q 16–4]

19.64 Very few law schools in Australia offers courses on the federal criminal justice system or on sentencing law more generally.¹⁵⁹⁴ All undergraduate law degrees offer criminal law as a core subject in the curriculum; however, the primary emphasis in these courses is on the principles of criminal responsibility in the context of state and territory offences. A number of university law schools offer advanced criminal law and criminology as elective subjects in an undergraduate degree. Many of these place greater emphasis on sentencing than do compulsory core courses. Two law schools offer courses on federal criminal law,¹⁵⁹⁵ and another offers a course in advanced criminal law, which includes consideration of federal criminal law.¹⁵⁹⁶

19.65 A few universities offer Masters of Laws degrees by coursework that include units relevant to federal criminal law or federal sentencing. Three university law schools offer postgraduate subjects on sentencing, most of which include consideration of federal legislation and federal sentencing laws.¹⁵⁹⁷ One Masters course also includes a subject on federal criminal law, including federal sentencing law.¹⁵⁹⁸

19.66 This brief survey of university law school curricula reveals that there is a relative lack of emphasis on the federal criminal justice system and federal sentencing law in university law programs.

19.67 To ensure that future practitioners and future judicial officers have a better foundational knowledge about the federal criminal justice system and federal sentencing law, the ALRC proposes that Australian university law schools should place greater emphasis on the federal criminal justice system and federal sentencing law. This increased emphasis should be applied to both their undergraduate and postgraduate programs, in order to enhance an understanding of issues specific to the federal criminal justice system, and to encourage greater specialisation in this area by future practitioners and future judicial officers.

Proposal 19–8 University law schools in Australia should place greater emphasis on the federal criminal justice system and federal sentencing law in their undergraduate and postgraduate programs.

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 - 1513 H Gibbs, 'Judgment Writing' (1993) 67 *Australian Law Journal* 494, 494.
 - 1514 *Pettitt v Dunkley* [1971] 1 NSWLR 376, 386; *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 666–667.
 - 1515 M Kirby, 'On the Writing of Judgments' (1990) 64 *Australian Law Journal* 691, 694.
 - 1516 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005; JC, *Submission SFO 25*, 13 April 2005; LD, *Submission SFO 9*, 10 March 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; Welfare Rights Centre Inc (Queensland), *Submission SFO 29*, 15 April 2005.
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 - 1519 F Rinaldi, 'The Role of a Trial Judge's Report in Sentence Appeals' (1980) 4 *Criminal Law Journal* 28, 39.
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 - 1521 LD, *Submission SFO 9*, 10 March 2005.
 - 1522 B Beaumont, 'Contemporary Judgment Writing: The Problem Restated' (1999) 73 *Australian Law Journal* 743, 745.
 - 1523 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [163].
 - 1524 M O'Loughlen, 'Whether Courts Must Give Reasons for Decision' (1999) 73 *Australian Law Journal* 630, 633.
 - 1525 A Freiberg, *Submission SFO 12*, 4 April 2005.
 - 1526 M Kirby, 'On the Writing of Judgments' (1990) 64 *Australian Law Journal* 691, 693.
 - 1527 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [163].
 - 1528 *Ibid*, [164].
 - 1529 *R v Tait* (1979) 24 ALR 473, 477; Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (1998) <<http://www.cdpp.gov.au/Prosecutions/Policy/Default.aspx>> at 6 October 2004; Attorney-General's Department, *Legal Services Directions: Directions on the Commonwealth's*

- Obligation to Act as a Model Litigant Attorney-General's Department <www.law.gov.au/olsc> at 13 October 2004.
- 1530 See, eg, *R v McKeown* [1940] QSR 202, 214.
- 1531 *R v Tait* (1979) 24 ALR 473, 477.
- 1532 See *Ibid*; *R v Jermyn* (1985) 2 NSWLR 194; *R v Howlett* (1997) 97 A Crim R 153.
- 1533 J Willis, 'Some Aspects of the Prosecutor's Role at Sentencing' (1996) 6 *Journal of Judicial Administration* 38, 47.
- 1534 *R v Casey* (1986) 20 A Crim R 191, 196.
- 1535 There is an exception in the case of major prosecutions.
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- 1537 Commonwealth Director of Public Prosecutions, *Consultation*, Sydney, 16 September 2004; New South Wales Bar Association, *Consultation*, Sydney, 2 September 2004; Commonwealth Director of Public Prosecutions, *Consultation*, Darwin, 28 April 2005.
- 1538 Australian Taxation Office, *Submission SFO 18*, 8 April 2005; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; LD, *Submission SFO 9*, 10 March 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; New South Wales Bar Association, *Consultation*, Sydney, 2 September 2004.
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- 1540 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
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- 1544 Attorney-General's Department, *Legal Services Directions: Directions on the Commonwealth's Obligation to Act as a Model Litigant Attorney-General's Department* <www.law.gov.au/olsc> at 13 October 2004.
- 1545 A sentencing council was proposed in Queensland but the Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2005 (Qld) failed to pass through the Queensland Parliament: Queensland, *Parliamentary Debates*, Legislative Assembly, 29 September 2005, 3046. The establishment of a sentencing advisory council in Tasmania has been raised in the Tasmania Law Reform Institute's issues paper on sentencing: K Warner, *Sentencing—Issues Paper No 2* (2002) Tasmania Law Reform Institute, 133; Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [10.66].
- 1546 *Sentencing Act 1991* (Vic) s 108F. New South Wales has an express requirement that the Sentencing Commission be chaired by a retired judicial officer, and that the Commission include persons with expertise or experience in law enforcement: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100I, sch 1A cl 2.
- 1547 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100J; *Sentencing Act 1991* (Vic) s 108C(1). Not all the stated functions are performed by each sentencing council.
- 1548 *Sentencing Reform Act of 1984* 28 USC (US) s 994; (United States Sentencing Commission); *Minnesota Statutes 2004* s 244.09(5), (7), (11) (Minnesota Sentencing Guidelines Commission); *Criminal Justice Act 2003* (UK) s 170 (Sentencing Guidelines Council).
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- 1561 Proposal 22–3.
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- 1563 See Proposal 21–1.
- 1564 See Chs 6 and 21.
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20. Consistency and the Appellate Process

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Introduction

20.1 A major issue for this Inquiry—as it was for the ALRC in its 1980 interim report, *Sentencing of Federal Offenders*¹⁵⁹⁹ (ALRC 15)—is consistency in the sentencing of federal offenders. In 1980, the ALRC expressed the view that:

A Commonwealth law is a national law. A breach of this law by a person anywhere in Australia should be attended by generally similar consequences, ranging from decisions to charge and prosecute to the punishment imposed following a conviction ... the uniform treatment of Federal offenders, wherever prosecuted and convicted in Australia, is an integral part of the fairness which should prevail in the imposition of punishment.¹⁶⁰⁰

20.2 On the information available to the ALRC, which is discussed further below, there is evidence of inconsistency between jurisdictions in the length of head sentences and non-parole periods imposed for the same category of federal crime.

20.3 One of the primary mechanisms for achieving consistency in judicial decision making is appellate review. In this chapter the ALRC examines the appellate structure applicable to federal criminal matters in Australia and proposes that appellate jurisdiction in such matters be conferred on the Federal Court of Australia in order to promote greater consistency in the sentencing of federal offenders.

Evidence of inconsistency

Is there evidence of inconsistency in the exercise of judicial discretion in the sentencing of federal offenders, either among judicial officers within a particular jurisdiction or between jurisdictions? [IP 29, Q 10–1]

Background

20.4 It is a fundamental principle of the criminal law and the sentencing process that like cases should be treated in a like, or consistent, manner. As Mason J stated in *Lowe v The Queen*:

Just as consistency in punishment—a reflection of the notion of equal justice—is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community.¹⁶⁰¹

20.5 The issue of consistency in sentencing may arise in a number of contexts, for example:

consistency of the same sentencer in treating like offenders in like cases; or the consistency of different judges within the same jurisdiction in dealing with like situations, or the consistency with which like cases are disposed of in different localities within a jurisdiction or between jurisdictions.¹⁶⁰²

20.6 In this chapter, the ALRC is primarily concerned with consistency in sentencing of federal offenders between jurisdictions. However, consistency at other levels, for example within jurisdictions, is also desirable and the proposals in this and the following chapter are intended to contribute to a more consistent approach to federal sentencing at all levels.

20.7 The New South Wales Sentencing Council has noted that, in working towards greater consistency, it is consistency of approach rather than consistency of outcome that should be the goal.¹⁶⁰³ Consistency of approach means ‘ensuring that account is taken of the same factors and that similar weight is given to those factors’.¹⁶⁰⁴ Many of the proposals in other parts of this Discussion Paper are intended to promote a more consistent approach to sentencing federal offenders, for example, the proposed reforms to set out the purposes, principles and factors to be taken into account in the federal sentencing process.¹⁶⁰⁵

20.8 However the Sentencing Council also noted that significant variations in outcomes in like cases may indicate inconsistency of approach.¹⁶⁰⁶ For this reason the ALRC has been working with a number of agencies to collect and analyse available data on the sentencing outcomes for federal offenders sentenced to a term of imprisonment in each Australian jurisdiction. As foreshadowed in IP 29, the Australian Institute of Criminology (AIC) has analysed data about federal prisoners provided by the Attorney-General's Department, as well as data collected by the Australian Bureau of Statistics (ABS).¹⁶⁰⁷ Despite limitations on data availability and comparability, a number of useful conclusions can be drawn.

Limitations on data

20.9 The information made available to the AIC was collected primarily as a case management tool to assist the Attorney-General's Department in administering the sentences of federal prisoners. For this reason it is limited to those federal offenders sentenced to full-time custody. In addition, the data is categorised by broad types of offence rather than specific offences. It should also be noted that the patterns of offending for some federal offence categories differ across states and territories. For example, there is strong representation of fisheries offenders in Queensland and Western Australia, and of migration offenders in Western Australia and the Northern Territory.¹⁶⁰⁸ With these limits in mind, the AIC has identified a number of interesting trends relevant to this Inquiry.

Comparison of federal prisoner population and Australian prisoner population

20.10 The AIC analysis indicates that the federal prisoner population tends to receive longer head sentences when compared with the Australian prisoner population as a whole.¹⁶⁰⁹ The median sentence for federal prisoners (84 months) was more than double the median sentence for prisoners across Australia (38 months).¹⁶¹⁰ This may indicate that federal crime overall involves more serious criminality than state/territory crime.

20.11 Federal prisoners are also likely to remain in prison longer than Australian prisoners.¹⁶¹¹ 'Time expected to serve' is a measure of how long a prisoner is expected to remain in prison before being released, assuming the prisoner is released on the date he or she first becomes eligible. Generally speaking, it is a measure of the total sentence for those cases where there is a fixed sentence without a non-parole period, and a measure of the non-parole period where one is included in the sentence. The median time expected to serve for federal prisoners is approximately double that of the general Australian prison population.¹⁶¹²

Comparison of federal prisoner populations across jurisdictions

20.12 To take one broad category of offences, that is, offences under the *Crimes Act 1914* (Cth), there is significant variation between jurisdictions in the head sentences imposed—ranging from a median of 18 months in Tasmania to 36 months in Queensland.¹⁶¹³

20.13 The median time expected to serve for *Crimes Act* offences is longer in Victoria (18 months), New South Wales (15 months) and Tasmania (14 months) than other jurisdictions (ranging from 9 months in South Australia to 11 months in the ACT). However, given that the *Crimes Act* includes a wide range of different offences, it is unclear whether this is the result of differences in sentencing for similar offences, or differences in the nature of offences being committed in each jurisdiction. The median time expected to serve for federal prisoners in relation to *Crimes Act* offences across Australia is 12 months.¹⁶¹⁴

20.14 The variation in head sentences between jurisdictions is greater in relation to drug offences—ranging from a median of 71 months in South Australia to 216 months in the Northern Territory, although the figures in relation to drug offences reflect the small number of cases in the Northern Territory.¹⁶¹⁵ The median time expected to serve for drug offences ranges from 46 months in South Australia to 150 months in the Northern Territory. The median time expected to serve for federal prisoners in relation to drug offences across Australia is 66 months.¹⁶¹⁶

20.15 *Social Security Act 1991* (Cth) offences attract significantly longer head sentences in Queensland than in other jurisdictions. This is particularly significant given the over-representation of these offences in Queensland compared with other jurisdictions.¹⁶¹⁷ However, the median time expected to serve for such offences is shorter in Queensland than many other jurisdictions. This is the result of a relatively small number of cases involving short non-parole periods.¹⁶¹⁸ One possible explanation may be that Queensland courts tend to sentence people to imprisonment for less severe *Social Security Act* offences than other jurisdictions, but compensate for this with relatively short non-parole periods.

20.16 The AIC's analysis of the ratio of non-parole period to head sentence imposed on federal offenders also shows significant variations between jurisdictions and is discussed further in Chapter 9.

Submissions and consultations

20.17 The AIC analysis was consistent with anecdotal evidence of inconsistency in many submissions and consultations.¹⁶¹⁹ For example, the Australian Securities and Investments Commission (ASIC) submitted that there were differences in the sentencing patterns between jurisdictions. It suggested that in jurisdictions in which there is a higher cost of living, such as New South Wales and Victoria, lower sentences may be awarded for fraud involving a relatively small sum of money than in other jurisdictions, such as Tasmania.¹⁶²⁰ The Australian Taxation Office (ATO) observed that there was inconsistency in the sentencing of federal offenders for taxation related offences both between jurisdictions and within the same jurisdiction. Both ASIC and the ATO cited the importance of consistency in regulating and enforcing national schemes such as those established under corporations and taxation laws. As a federal

regulator, ASIC noted that the deterrent effect of ASIC enforcement action could be reduced if there was a perception that particular results were peculiar to certain jurisdictions.¹⁶²¹

20.18 The Melbourne Office of the Commonwealth Director of Public Prosecutions (CDPP) also noted that magistrates in country areas tended to be tougher than city magistrates because they had a different sense of community.¹⁶²² Professor Arie Freiberg referred to anecdotal evidence that sentencing in Queensland is more punitive than, for example, Victoria, although he also noted that it was unclear whether this applies to federal offences.¹⁶²³ In consultation, the Prisoners' Legal Service and others suggested that in Queensland women can be sentenced to imprisonment for a \$10,000 social security fraud, while they may not receive a prison sentence for the same offence in Victoria or Western Australia.¹⁶²⁴

Previous reports

20.19 Due to the relative lack of Australian research, other inquiries have not been able to furnish conclusive evidence of inconsistency in sentencing.¹⁶²⁵ However, on the basis of available evidence a number of inquiries concluded that there was a strong indication that unjustified disparity in sentencing did exist. In its 1988 report, *Sentencing*, the Victorian Sentencing Committee examined the research that had been conducted on disparity in sentencing in Victoria and concluded that there were discrepancies in the sentences passed by courts.¹⁶²⁶ In 1980, ALRC 15 concluded that there was a strong possibility that the differing rates at which offenders were sentenced to imprisonment throughout Australia reflected differing judicial attitudes towards punishment.¹⁶²⁷

ALRC's views

20.20 Accurately documenting inconsistency in the sentencing of federal offenders would require evidence of systematic and substantial variation in sentences for like cases.¹⁶²⁸ As noted above, the limitations of existing data do not allow detailed comparisons of this kind. The proposed federal sentencing database, discussed in Chapter 21, should in time address the lack of data. However, on the basis of the information available to the ALRC at this time there are strong indications of disparity between jurisdictions in the length of head sentences and non-parole periods imposed for the same category of federal crime and in the time federal offenders expect to serve in prison.

20.21 A significant number of consultations and submissions expressed the view that an expansion of the criminal jurisdiction of the federal courts was likely to lead to greater consistency in the sentencing of federal offenders.¹⁶²⁹ This chapter will, therefore, consider whether there should be changes to the allocation of appellate jurisdiction in federal criminal matters and, if so, how this is likely to impact on consistency in the sentencing of federal offenders.

Appellate jurisdiction

Should the jurisdiction of federal courts be expanded to deal more generally with federal criminal matters? If so, should such jurisdiction be extended: to trials and appeals; to all federal criminal matters or a limited class of them; or to lower or higher courts in the federal hierarchy? [IP 29, Q3–1]

20.22 In *Wong v The Queen*, Gleeson CJ expressed the view that one of the reasons for giving a court jurisdiction to hear appeals against sentence is to secure consistency in sentencing.¹⁶³⁰ Appeals in relation to sentence are generally allowed on the basis of an error of fact or law by the sentencing judge, or where the sentence is ‘unreasonable or plainly unjust’, that is, manifestly inadequate or manifestly excessive.¹⁶³¹

20.23 Sir Ivor Richardson, a past President of the New Zealand Court of Appeal, has stated that that Court has three functions: to correct errors made in the lower courts, to enunciate and harmonise the law, and to ensure consistency of approach to the administration of justice throughout the country.¹⁶³²

20.24 The same is true of intermediate appellate courts in Australia. Each state and territory has a court of appeal or court of criminal appeal that performs these functions in relation to their respective jurisdictions. These courts form the apex of the state and territory court hierarchies. They hear appeals in relation to federal criminal matters as well as state and territory criminal matters. In most cases, an appeal lies from these courts, with special leave, to the High Court of Australia.

20.25 While courts of appeal and courts of criminal appeal work to ensure consistency within their jurisdictions, they cannot contribute directly to national consistency because their decisions are not binding in other jurisdictions. However, the principle of comity is intended to encourage a degree of uniformity across the jurisdictions. As Street CJ has stated:

where a Commonwealth statute has been construed by the ultimate appellate court within any State or Territory, that construction should, as a matter of ordinary practice, be accepted and applied by the courts of other states or territories so long as it is permitted to stand unchanged either by the court of origin, or the High Court. The risk of differing interpretation amongst the States is thus negated and, in practical terms, a uniform application of Commonwealth laws throughout Australia is assured.¹⁶³³

20.26 However, there are limits to the extent to which the principle of comity can ensure consistency between jurisdictions. A court in one jurisdiction may depart from the decision of an intermediate appellate court in another jurisdiction if it is of the view

that the decision is plainly wrong.¹⁶³⁴ In addition, the New South Wales Public Defenders Office noted in consultations that some state appellate judges are reluctant to consider decisions from other jurisdictions.¹⁶³⁵ In several other consultations the comment was made that comparative material from other jurisdictions is not considered very helpful where there is significant disparity in sentencing outcomes between jurisdictions.¹⁶³⁶

Appellate jurisdiction of the High Court of Australia

20.27 The High Court has very wide jurisdiction, stemming from s 73 of the *Australian Constitution*, to hear appeals in matters of federal, state and territory criminal law. It is at this point in the appellate process that a national perspective is brought to bear in relation to sentencing.

20.28 However, appeals to the High Court may be brought only with special leave¹⁶³⁷ and the Court traditionally has been reluctant to grant leave to appeal against sentence. The Court has stated that special leave will be granted only where the case involves some question of law or principle of general importance, or where there has been a gross violation of the principles governing the exercise of the judicial discretion in imposing sentence.¹⁶³⁸ The Court has made quite clear that it is not a court of criminal appeal¹⁶³⁹ and it will not grant special leave to appeal simply because, for example, a sentence appears to the Court to be excessive.¹⁶⁴⁰ While conflicting decisions in different state courts may justify a grant of special leave, the High Court is unlikely to grant leave if it considers the decision under challenge to be correct or not attended with sufficient doubt to warrant reconsideration.¹⁶⁴¹

20.29 In consultations, Richard Edney noted that in the past the High Court was reluctant to hear sentencing appeals but that since 1990, in particular, the Court has been more involved in developing Australian sentencing principles.¹⁶⁴² While the High Court does have an important role to play in developing sentencing principles for Australian courts, this role has a national focus—supervising federal, state and territory sentencing—rather than a specifically federal focus.

20.30 In the 15 years since the introduction of Part IB into the *Crimes Act*, the ALRC has identified 12 appeals to the High Court in which the primary matter under consideration was the sentencing of a federal offender,¹⁶⁴³ and approximately twice that number of appeals in relation to the sentencing of a state or territory offender. While some decisions of the High Court in state and territory sentencing matters may contribute to the development of general principles relevant to the sentencing of federal offenders, many will be limited in their application to specific legislation of the relevant jurisdiction. The relatively small number of sentencing appeals heard by the High Court and the fact that the Court has made clear that it does not have the same role as a court of criminal appeal mean that the Court is unlikely to play a central role in ensuring national consistency in the sentencing of federal offenders.

20.31 In submissions it was also noted that appeals to the High Court are very costly and time consuming.¹⁶⁴⁴

Appellate jurisdiction of the Federal Court of Australia

20.32 Section 24(1)(c) of the *Federal Court of Australia Act 1976* (Cth) provides that the Federal Court of Australia (FCA) may hear and determine appeals from state and territory courts exercising federal jurisdiction in such cases as are provided by any other Act, other than appeals from a Full Court of a state or territory Supreme Court. The section could accommodate a situation in which decisions in federal criminal matters were made at first instance in state and territory courts, and appeals from those decisions were brought to the FCA. Section 25 provides that the appellate jurisdiction of the Court shall be exercised by a Full Court—generally three judges—except in a number of specific situations, such as where the appeal is from a court of summary jurisdiction.

20.33 Section 24(1)(b) of the Act provides that the FCA may hear and determine appeals from territorial supreme courts, and the FCA currently exercises that jurisdiction in relation to criminal matters on appeal from the Supreme Court of Norfolk Island. Until 2002, the Court exercised similar jurisdiction in relation to matters on appeal from the Supreme Court of the ACT and until 1986, from the Supreme Court of the Northern Territory. Section 24(1)(b) now expressly excludes appeals from the ACT and the Northern Territory because these jurisdictions have established their own intermediate appellate courts.

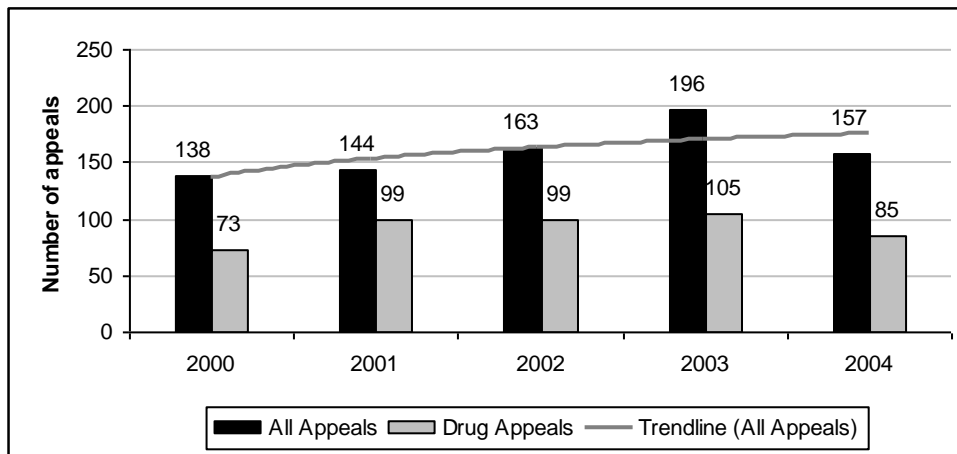
20.34 Support was expressed in consultations and submissions for investing the FCA with broader jurisdiction to hear appeals in federal criminal matters on the basis that it would improve consistency in the administration of federal criminal law.¹⁶⁴⁵ Under such arrangements, judicial officers in state and territory courts exercising federal jurisdiction would be bound by appellate decisions of the FCA according to the doctrine of precedent. The FCA, exercising appellate jurisdiction, could legitimately focus on principles of federal sentencing law, including consistency.

Potential workload

20.35 The channels of appeal to the state and territory courts of appeal and courts of criminal appeal vary significantly and it is difficult to identify precisely which appeals would go to the FCA if that Court were invested with general appellate jurisdiction in federal criminal matters. However, in seeking to gain a better understanding of the Court's potential workload, the ALRC has examined data provided by the CDPP. In the five-year period 2000–2004, there were 798 defence and prosecution appeals to the state and territory courts of appeal and criminal appeal across Australia involving federal offences, that is, on average around 160 cases per year (see Figure 20.1 below). Only a very small number were in relation to summary matters.¹⁶⁴⁶

20.36 The composition of appeals by offence type and jurisdiction are also noteworthy. In 2004 there were 157 appeals to the state and territory courts of appeal and courts of criminal appeal in federal criminal matters. Of these, 54 per cent related to drugs, 22 per cent to fraud and 10 per cent to corporations matters. New South Wales accounted for the largest proportion of federal criminal appeals in that year (47 per cent), while other jurisdictions representing a significant proportion of such appeals included Victoria (20 per cent), Western Australia (16 per cent) and Queensland (14 per cent).

Figure 20.1: Federal criminal appeals to state and territory courts of appeal and courts of criminal appeal, 2000–2004



20.37 These proportions have not been static over time. For example, the combined percentage of fraud and corporations appeals has risen steadily from 21 per cent in 2000 to 32 per cent in 2004, while the percentage of drug appeals has fallen from a peak of 69 per cent in 2001 to 54 per cent in 2004.

Nature of the appeal

20.38 The High Court has noted that there are many types of appeal:

In a variety of legal contexts, courts still recognise that ‘appeal’ has at least four different meanings. It may mean an appeal in the true sense, an appeal by rehearing on the evidence before the trial court, an appeal by way of rehearing on the evidence before the trial court and such further evidence as the appellate court admits pursuant to a statutory power to do so, and an appeal by way of a hearing de novo. Which of these meanings the term ‘appeal’ has depends on the context of the term, the history of the legislation, the surrounding circumstances, and sometimes an express direction as to what the nature of the appeal is to be.¹⁶⁴⁷

20.39 Professor Arie Freiberg expressed the view that if the FCA were to have broader appellate jurisdiction in criminal matters, appeals should be on the basis of error and not by way of rehearing de novo.¹⁶⁴⁸ In a rehearing de novo, the appellate court hears the matter afresh—not as a true appeal of an earlier decision, but as the exercise of original jurisdiction for the second time.¹⁶⁴⁹ In the civil context, the FCA has held that appeals to the FCA are by way of rehearing, but that this does not alter the fact that the task of the Court on appeal is the correction of error in the courts below.¹⁶⁵⁰ In its 2001 report, *The Judicial Power of the Commonwealth* (ALRC 92), the ALRC noted that:

The Federal Court's statutory powers give it a discretion to act beyond the constraints normally imposed by a strict appeal. As mentioned above, ss 27 and 28 give the Federal Court power in an appeal to draw inferences of fact, receive further evidence, set aside a jury verdict, order a new trial, and give such judgment as in all the circumstances the Court sees fit.¹⁶⁵¹

20.40 In that Report the ALRC recommended that legislation conferring appellate jurisdiction on the FCA should clearly specify the nature of the appeal to be undertaken by the Court.¹⁶⁵² This issue will need to be given further consideration in relation to any proposed grant to the FCA of general appellate jurisdiction in federal criminal matters.

Expertise in criminal law matters

20.41 A further issue raised in consultations was whether the FCA was well placed to exercise appellate jurisdiction in federal criminal matters, given its limited experience with such matters at first instance. In consultations, judges and officers of the FCA noted that, if the criminal jurisdiction of the Court were significantly expanded, the Court would probably establish a panel of judges with relevant experience to hear federal criminal matters.¹⁶⁵³ The Court has established panels in other areas of the law requiring particular expertise such as intellectual property, corporations, taxation and admiralty and maritime law.

20.42 As discussed in Chapter 18, a significant proportion of FCA judges have experience in the criminal law area through past appointments or current joint appointments to courts exercising criminal jurisdiction. In addition, the FCA exercises original jurisdiction in relation to a limited number of summary criminal matters and appellate jurisdiction in relation to criminal appeals from Norfolk Island.

20.43 The Tasmanian Office of the CDPP was of the view that it was essential that the FCA should have a trial jurisdiction as well as an appellate role.¹⁶⁵⁴ As discussed in Chapter 18, the ALRC is of the view that the original jurisdiction of the FCA should be expanded to deal with nominated federal offences whose subject matter is closely allied to the existing civil jurisdiction of the FCA, such as complex taxation, trade practices and corporations matters. An expansion of this kind would allow the Court to

build further expertise in relation to federal criminal matters at first instance, including in relation to indictable matters.

Joint matters and accrued jurisdiction

20.44 Concern was also expressed in consultations and submissions about constitutional limitations on the exercise of appellate jurisdiction by the FCA in relation to matters involving both federal and state offences. In his submission, Professor Arie Freiberg expressed the view that the fewer joint matters there were, the stronger the case for federal courts to be given criminal jurisdiction.¹⁶⁵⁵

20.45 On the basis of data provided by the CDPP, the ALRC estimates that in the five-year period 2000–2004 there were 49 appeals to state courts of appeal or courts of criminal appeal across Australia involving both federal and state offences, that is, about 10 cases per year. This figure includes both defence and prosecution appeals.¹⁶⁵⁶ The number of joint matters on appeal is much smaller than the number of joint matters at first instance because not every matter is taken on appeal and, in those cases that are appealed, the appeal is often limited to a state/territory issue or a federal issue. The 10 cases a year mentioned above refer to cases in which both state/territory and federal matters were raised in the same appeal.

20.46 It is possible that some of these joint matters would fall within the accrued jurisdiction of the FCA. In relation to those that did not fall within the accrued jurisdiction of the Court, for example, where the federal and state charges did not arise out of common transactions and facts, any appeal in relation to the state matter would have to be brought separately in the state court of appeal or court of criminal appeal.

Exclusive or concurrent jurisdiction

20.47 If the FCA were granted a general appellate jurisdiction in federal criminal matters, it would be necessary to consider whether the FCA should exercise that jurisdiction on an exclusive basis, that is, whether the appellate federal jurisdiction currently exercised by the state and territory courts of appeal and courts of criminal appeal would be removed and vested in the FCA. Alternatively, this jurisdiction could remain with state and territory courts and be invested in the FCA on a concurrent basis. In these circumstances the parties could choose whether to appeal to a state or territory court or to the FCA.

20.48 Vesting concurrent appellate jurisdiction in federal criminal matters in state and territory courts and the FCA is unlikely to give rise to greater consistency in sentencing of federal offenders. Indeed, it may lead to greater inconsistency as parties seek to exploit real or perceived differences between the courts through the two alternative avenues of appeal. It would also introduce two, possibly conflicting, sources of authority for the lower courts in the states and territories.

20.49 In ALRC 92 the ALRC noted that:

A number of adverse consequences flow from a situation in which two intermediate appellate courts ... reach different conclusions on the same legal question. In particular, inconsistency:

- creates injustice in individual cases because it offends against the principle that like cases should be treated alike;
- makes it difficult for legal practitioners to give correct and reliable advice to clients;
- increases costs and delays in disposing of cases, occasionally requiring five judge appellate benches or a High Court decision; and
- damages perceptions about the administration of justice and the reputation of courts generally.¹⁶⁵⁷

Appeal by leave or as of right

20.50 In considering the grant of general appellate jurisdiction to the FCA it will also be necessary to consider whether access to appeal should be by right or by leave of the Court. Section 24(1A) of the *Federal Court of Australia Act* provides that an appeal shall not be brought to the FCA from an interlocutory judgment of a state or territory court exercising federal jurisdiction without leave of the Court. Other appeals are by right.

20.51 The situation is different in most states and territories, except the ACT. In general, appeals to state and territory courts of appeal or courts of criminal appeal against *conviction* are by right in relation to questions of law and by leave in relation to questions of fact, or mixed fact and law. Defence appeals on *sentence* generally require leave,¹⁶⁵⁸ although in some jurisdictions, prosecution appeals do not.¹⁶⁵⁹

20.52 A right of appeal in relation to conviction and sentence is provided to ensure that defendants may seek review in order to remedy any errors made at trial. Article 14 of the United Nations *International Covenant on Civil and Political Rights 1966*¹⁶⁶⁰ provides that 'Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law'. The United Nations Human Rights Committee has indicated that the right of access to such review is not absolute in the sense that it may require the applicant to satisfy certain requirements.¹⁶⁶¹ However, if leave to appeal were required, it would be important to ensure that the criteria for leave are reasonable and appropriate, and directed to excluding cases without merit.

ALRC's views

20.53 In 1980, the majority of ALRC commissioners recommended that the jurisdiction of the FCA be expanded to cover appeals against conviction and sentence in federal criminal matters.¹⁶⁶² ALRC 15 recommended that appeals to the full court of

the state and territory supreme courts or courts of criminal appeal should lie instead to the FCA because this would promote uniformity and consistency in dealing with federal offenders.¹⁶⁶³

20.54 In the context of the current Inquiry, the ALRC has formed the preliminary view that there remains a significant weakness in the appellate structure in relation to the sentencing of federal offenders. Currently, there is no appellate court, other than the High Court, ensuring consistency in the sentencing of federal offenders nationally. The state and territory courts of appeal and courts of criminal appeal do not have the jurisdiction to perform this role and it appears that the principle of comity, which might promote some degree of national consistency, may not always be put into practice.

20.55 The High Court has an important role to play in settling national sentencing principles but, given the special leave requirements and the breadth of the High Court's workload, it is unlikely that High Court decisions on the sentencing of federal offenders will play a central role in promoting national consistency, except in very broad terms. In addition, the ALRC remains of the view that appeals in relation to federal sentencing:

can appropriately be decided at a lower level [than the High Court] in the Australian judicial hierarchy, which nonetheless enjoys the advantages of being a superior Federal Court able to reflect a uniform and national approach to the sentencing of Federal offenders.¹⁶⁶⁴

20.56 While the current Inquiry is primarily concerned with the sentencing of federal offenders, it does not appear feasible to separate jurisdiction to deal with appeals on sentence from jurisdiction to deal with appeals against conviction. It was noted in consultations that appellate courts need to have the capacity to deal with both appeals against conviction and appeals against sentence.¹⁶⁶⁵ The issues and evidence relevant to each type of appeal are often closely related and it would be an inefficient use of resources to have the matters heard in different courts. An expansion of the original jurisdiction of the FCA, in accordance with the proposal in Chapter 18, will ensure that the FCA has appropriate experience of trial procedure in criminal matters—including the role of the jury—to assist it in the exercise of appellate jurisdiction in relation to appeals against conviction.

20.57 If the jurisdiction of the FCA were expanded to deal with federal criminal matters on appeal, the ALRC believes that the nature of the appeal to be undertaken by the Court should be specified in legislation. The ALRC is interested in hearing the views of stakeholders on the content of any such provision.

20.58 The ALRC would support the establishment of a panel of judges to deal with criminal matters. A panel would ensure that judges with relevant expertise were involved in the consideration of criminal matters at first instance and on appeal and would also encourage consistent appellate decision making by the Court.

20.59 The ALRC has formed the preliminary view that the appellate jurisdiction of the FCA should be exclusive, in order to promote consistency and to avoid the possibility of two separate lines of authority developing on particular issues. The small number of joint matters taken on appeal each year—and the possibility that some of these matters may fall within the accrued jurisdiction of the FCA—means that this is not a major issue necessitating the retention of appellate jurisdiction by state courts. For those joint matters that do not fall within the accrued jurisdiction of the FCA, it will, however, be necessary to split the state issues from the federal issues on appeal and to pursue each separately in different courts. This is likely to be less of a problem in the future because, as discussed in Chapter 18, there is a growing trend towards running separate trials in state/territory and federal matters.

20.60 ALRC 15 recommended that appeals to the FCA in federal criminal matters should be as of right for a period of five years for the purpose of assessing the need for a requirement of leave to appeal. The need for leave to appeal was to be reviewed in light of experience, the number of cases coming to the Court on appeal, and any demonstrated improvement in consistency in sentencing federal offenders. The ALRC was then of the view that the numbers of appeals would be relatively small because the state appeal procedures would need to be exhausted and because of the usual issues of cost and risk associated with appeals.¹⁶⁶⁶

20.61 In the context of the current Inquiry, the ALRC would be interested in receiving further information and submissions on whether the leave requirements that exist in most states and territories—that is, appeal as of right in relation to a question of law on conviction and appeal with leave in other circumstances—are effective, appropriate and fair. In addition, the ALRC would be interested in receiving feedback on whether the criteria for leave should be set out in legislation or Rules of Court. The use of a non-exhaustive list of criteria may improve the accessibility and clarity of the law, and may assist parties to assess their chances of success. The ALRC notes that a further safeguard might be to require applications for leave to appeal to be heard by a Full Court of the FCA.

Proposal 20-1 The Australian Parliament should confer general appellate jurisdiction on the Federal Court of Australia in federal criminal matters in respect of both appeals against conviction and appeals against sentence. This appellate jurisdiction should be exclusive of that of state and territory courts.

1599 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980).

1600 *Ibid.*, [151].

1601 *Lowe v The Queen* (1984) 154 CLR 606, 610–611.

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- 1602 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [1.220].
- 1603 New South Wales Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court* (2005), 11.
- 1604 Ibid, 11. This view was endorsed by the High Court in *Johnson v The Queen* (2004) 205 ALR 346, [26]. See also *Markarian v The Queen* (2005) 215 ALR 213, [27].
- 1605 See, eg, Chs 4, 5 and 6.
- 1606 New South Wales Sentencing Council, *How Best to Promote Consistency in Sentencing in the Local Court* (2005), 11.
- 1607 See Appendix 1.
- 1608 Appendix 1, [58]–[60].
- 1609 See Appendix 1, Figure A1.21 and accompanying text. ‘Head sentence’ is the total or maximum sentence a prisoner is serving. This is referred to as the ‘aggregate sentence’ in Appendix 1 and includes time a person may spend on conditional release from prison.
- 1610 See Appendix 1, Figure A1.21 and accompanying text.
- 1611 See Appendix 1, Figure A1.29 and accompanying text.
- 1612 See Appendix 1, Figure A1.31 and accompanying text.
- 1613 See Appendix 1, Figure A1.23 and accompanying text.
- 1614 See Appendix 1, Figure A1.33 and accompanying text.
- 1615 See Appendix 1, Figure A1.22 and accompanying text.
- 1616 See Appendix 1, Figure A1.32 and accompanying text.
- 1617 See Appendix 1, Figure A1.24 and accompanying text.
- 1618 See Appendix 1, Figure A1.34 and accompanying text.
- 1619 A Freiberg, *Consultation*, Melbourne, 30 March 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005; Criminal Bar Association of Victoria, *Submission SFO 45*, 29 April 2005; Law Society of the Northern Territory, *Consultation*, Darwin, 29 April 2005; Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005; National Judicial College of Australia, *Consultation*, Canberra, 17 March 2005; New South Wales Public Defenders Office, *Consultation*, Sydney, 22 September 2004; Prisoners’ Legal Service and others, *Consultation*, Brisbane, 4 March 2005; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; Victoria Legal Aid, *Submission SFO 31*, 18 April 2005; Welfare Rights Centre Inc (Queensland), *Submission SFO 29*, 15 April 2005.
- 1620 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.
- 1621 Australian Taxation Office, *Submission SFO 18*, 8 April 2005; Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.
- 1622 Commonwealth Director of Public Prosecutions, *Consultation*, Melbourne, 31 March 2005.
- 1623 A Freiberg, *Submission SFO 12*, 4 April 2005.
- 1624 Prisoners’ Legal Service and others, *Consultation*, Brisbane, 4 March 2005.
- 1625 See, eg, New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), [1.11]; Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [156].
- 1626 Victorian Sentencing Committee, *Sentencing* (1988), [4.4.25]–[4.4.26], [4.4.30].
- 1627 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [162]–[166].
- 1628 See New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), [1.11].
- 1629 A Freiberg, *Submission SFO 12*, 4 April 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005; PS, *Submission SFO 21*, 8 April 2005; WT, *Submission SFO 23*, 11 April 2005; Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; J Champion SC, *Submission SFO 46*, 29 April 2005; Department of Immigration and Multicultural and Indigenous Affairs, *Submission SFO 49*, 10 May 2005; Chief Justice M Black & Others, *Consultation*, Melbourne, 30 March 2005.
- 1630 *Wong v The Queen* (2001) 207 CLR 584, 591.
- 1631 *House v The King* (1936) 55 CLR 499, 505.
- 1632 I Richardson, ‘The Courts and Access to Justice’ (2000) 31 *Victoria University of Wellington Law Review* 163.
- 1633 *R v Abbaderis* [1981] 1 NSWLR 530, 542. See also *R v Parsons* [1983] 2 VR 499; *R v Gardiner* (1979) 27 ALR 140.
- 1634 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492.

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- 1635 New South Wales Public Defenders Office, *Consultation*, Sydney, 22 September 2004.
- 1636 Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005; Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005.
- 1637 *Judiciary Act 1903* (Cth) s 35.
- 1638 *Lowe v The Queen* (1984) 154 CLR 606.
- 1639 *Liberato v The Queen* (1985) 159 CLR 507, 509; *Mickelberg v The Queen* (1989) 167 CLR 259, 274; *Griffiths v The Queen* (1989) 167 CLR 372, 396.
- 1640 *Lowe v The Queen* (1984) 154 CLR 606, 608.
- 1641 Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, ALRC 92 (2001), [19.100]–[19.112].
- 1642 M Bagaric and R Edney, *Consultation*, Melbourne, 1 April 2005.
- 1643 These cases are: *Johnson v The Queen* (2004) 205 ALR 346; *Putland v The Queen* (2004) 218 CLR 174; *Weininger v The Queen* (2003) 212 CLR 629; *Wong v The Queen* (2001) 207 CLR 584; *R v Olbrich* (1999) 199 CLR 270; *Postiglione v The Queen* (1997) 189 CLR 295; *Vanit v The Queen* [1997] 190 CLR 378; *Savvas v The Queen* (1995) 183 CLR 1; *Kesavarajah v The Queen* (1994) 181 CLR 230; *Hookham v The Queen* (1994) 181 CLR 450; *Leeth v Commonwealth* (1991) 174 CLR 455; *R v Shrestha* (1991) 173 CLR 48.
- 1644 WT, *Submission SFO 23*, 11 April 2005.
- 1645 A Freiberg, *Submission SFO 12*, 4 April 2005; Australian Taxation Office, *Submission SFO 18*, 8 April 2005; WT, *Submission SFO 23*, 11 April 2005; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; A Freiberg, *Consultation*, Melbourne, 30 March 2005; Chief Justice M Black & Others, *Consultation*, Melbourne, 30 March 2005.
- 1646 Commonwealth Director of Public Prosecutions, *Correspondence*, 4 May–2 September 2005, appeals data. These figures do not correlate with the figures provided in the CDPP *Annual Reports* because the ALRC requested that withdrawn matters be included in the figures to give a more accurate estimation of the workload the FCA might expect if the proposals in this Discussion Paper are implemented.
- 1647 *Eastman v The Queen* (2000) 203 CLR 1, 40 (McHugh J).
- 1648 A Freiberg, *Submission SFO 12*, 4 April 2005.
- 1649 *Southwell v Specialised Engineering Services Pty Ltd* (1990) 70 NTR 6.
- 1650 *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424.
- 1651 Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, ALRC 92 (2001), [17.22].
- 1652 *Ibid*, Rec 17–1.
- 1653 Chief Justice M Black & Others, *Consultation*, Melbourne, 30 March 2005.
- 1654 Commonwealth Director of Public Prosecutions, *Consultation*, Hobart, 14 April 2005.
- 1655 A Freiberg, *Submission SFO 12*, 4 April 2005.
- 1656 Commonwealth Director of Public Prosecutions, *Correspondence*, 4 May–2 September 2005, joint matters data.
- 1657 Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, ALRC 92 (2001), [20.153].
- 1658 *Criminal Appeal Act 1912* (NSW) s 5; *Crimes Act 1958* (Vic) s 567; *Criminal Code Act 1899* (Qld) s 668D; *Criminal Law Consolidation Act 1935* (SA) s 352; *Criminal Code Act* (NT) s 410. In Western Australia, leave is required in relation to all appeals from superior courts: *Criminal Appeals Act 2004* (WA) s 27. In Tasmania appeal against conviction is by right in relation to questions of law and by leave in relation to questions of fact, or mixed fact and law. Appeal by the defence or prosecution on sentence is by right: *Criminal Code Act 1924* (Tas) s 401. In the ACT leave is required only in relation to appeals from interlocutory judgments of the Supreme Court: *Supreme Court Act 1933* (ACT) s 37E.
- 1659 *Criminal Appeal Act 1912* (NSW) s 5D; *Crimes Act 1958* (Vic) s 567A; *Criminal Code Act 1899* (Qld) s 669A; *Criminal Code Act* (NT) s 414.
- 1660 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976).
- 1661 *United Nations Human Rights Committee General Comment 13: Article 14*, UN Doc HRI/GEN/1/Rev.7 (1984).

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- 1662 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), Rec 65.
1663 Ibid, [435].
1664 Ibid, [434].
1665 Justice M Weinberg, *Consultation*, Sydney, 8 June 2005.
1666 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [436].

21. Other Measures to Promote Consistent Sentencing

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Introduction

21.1 The previous chapter examined the available data and concluded that there was evidence of significant inconsistency in the sentencing of federal offenders between jurisdictions. Because one of the primary mechanisms for achieving consistency in judicial decision making is appellate review, the ALRC proposed that appellate jurisdiction in federal criminal matters be conferred on the Federal Court of Australia.

21.2 This chapter examines other methods for promoting national consistency in the sentencing of federal offenders, including guideline judgments, grid sentencing and mandatory sentencing. While the ALRC does not propose the use of any of these methods, it does propose that the Australian Government, in consultation with the Australian Institute of Criminology (AIC) and the Australian Bureau of Statistics (ABS), continue to work towards establishing a comprehensive national database on

the sentences imposed on federal offenders for use by judicial officers, prosecutors and defenders in federal criminal matters.

21.3 In considering these issues, the ALRC recognises that the principle of consistency needs to be balanced with the other principles of sentencing—namely, proportionality, parsimony, totality and individualised justice. In particular, the need to promote consistency in sentencing should be balanced with the maintenance of judicial discretion to ensure that sentences are individualised and proportionate to both the circumstances of the offence and of an individual offender;¹⁶⁶⁷ in other words, that the ‘punishment fits the crime’.

21.4 Consultations and submissions expressed strong support for the retention of broad judicial discretion in sentencing federal offenders.¹⁶⁶⁸ While some opposed any approach that might curtail discretion,¹⁶⁶⁹ others were of the view that broad guidance in relation to the exercise of that discretion was appropriate.¹⁶⁷⁰

National sentencing database

Should a comprehensive national database be established on the sentences of federal offenders, for use by judges, prosecutors and defenders in federal criminal matters? Does the database operated by the Judicial Commission of New South Wales provide an appropriate model? [IP 29, Q 10–7]

Background

21.5 Sentencing databases promote consistency by informing the exercise of the court’s sentencing discretion. They assist courts by helping to determine the appropriateness of sentences handed down in individual cases.¹⁶⁷¹ In particular, databases are intended to assist the court in deciding whether a proposed sentence ‘is in any way inside or outside the normal range of penalties imposed for similar offences in past cases’.¹⁶⁷²

21.6 Currently, there is no generally available database in relation to sentences imposed on federal offenders. The Commonwealth Director of Public Prosecutions (CDPP) has an extensive database that is used for various in-house purposes, including providing comparative sentencing information to the courts, but the information is not otherwise publicly available.

21.7 Sentencing databases have been established in New South Wales, Victoria, Tasmania and the ACT. In New South Wales, the Judicial Commission of New South Wales has established the Judicial Information Research System (JIRS) in relation to New South Wales cases. JIRS is an online source of primary, secondary and statistical reference material for judicial officers, the courts, the legal profession and government agencies. JIRS contains some sentencing data for the past 10 years on federal criminal

matters dealt with in New South Wales courts where the federal offence is the primary offence.¹⁶⁷³

21.8 The Victorian Department of Justice operates a similar sentencing information system, 'Judicial Officers' Information Network' (JOIN), which holds relevant data provided by the courts, with links to legislation, cases and statistics.¹⁶⁷⁴ In Tasmania, NiuMedia Pacific publishes the Tasmanian Sentencing Database. The database contains over 4,500 Comments on Passing Sentence (COPS) and details of sentences handed down by the Supreme Court from 1989 to date.¹⁶⁷⁵ In the ACT, the Supreme Court has developed a sentencing database to allow comparative reporting, data cross-referencing and the collection of statistics on types of crimes.¹⁶⁷⁶ The database is now available to the legal profession.¹⁶⁷⁷ In other states and territories, certain sentencing remarks are published on the relevant courts' websites.¹⁶⁷⁸

21.9 In consultations, the National Judicial College of Australia (NJCA) advised that it has received funding from the Attorney-General's Department (AGD) to conduct a pilot study on establishing a federal sentencing database in consultation with the CDPP, using data supplied by the CDPP, based on the JIRS model. The pilot study will include consultation with judicial officers about the parameters of the project.¹⁶⁷⁹

Issues and problems

21.10 The NJCA noted in a recent paper that judicial officers participating in its professional development programs have commented adversely on the disparity in the sentencing of federal offenders and positively on the benefits of computer-based sentencing databases to the administration of justice.¹⁶⁸⁰ Inconsistency may lead to individual injustice, but also has the potential to impact adversely on public confidence in the law, especially in relation to federal offences, because of the expectation that there will be parity of sentencing for like cases across Australia.¹⁶⁸¹

21.11 The NJCA also noted that failure to ensure consistency may result in prosecuting authorities expending unnecessary resources in appealing against inadequate sentences and in loss of revenue where courts impose inappropriately low fines.¹⁶⁸² In addition, if the proposed national sentencing database were made available to defence lawyers, defendants would have access to more accurate and reliable evidence about the likely sentencing range for an offence, which may reduce the expenditure of court resources on unnecessarily contested cases or appeals.¹⁶⁸³

21.12 The establishment of a national database on the sentencing of federal offenders received overwhelming support in consultations and submissions.¹⁶⁸⁴ However, a concern was raised regarding the source of the data to be included, with one submission suggesting that the establishment of the database should be carried out by an independent body or contracted out.¹⁶⁸⁵ Professor Arie Freiberg suggested that the

AIC should be involved in the establishment of the national database, provided it received adequate funding for that purpose.¹⁶⁸⁶

ALRC's views

21.13 The ALRC considers that an on-going federal sentencing database should be established. A sentencing database allows meaningful comparisons between sentences across jurisdictions and provides the judiciary with reliable, accessible and up-to-date information that can help to ensure that sentences are appropriate and consistent.¹⁶⁸⁷

21.14 In addition to data collected by the CDPP, the database should utilise information collected by state and territory courts. Bearing in mind that the CDPP does not prosecute all federal offences, and that regulators such as the Australian Securities and Investments Commission (ASIC) and the Australian Taxation Office (ATO) also routinely conduct prosecutions for minor federal offences,¹⁶⁸⁸ the Australian Government should consult with regulators in order to obtain comprehensive data on sentences imposed for federal offences.

21.15 The development of the database should be undertaken in consultation with both the AIC and the ABS, given the AIC's position as a national crime and criminal justice research agency and the ABS's role as Australia's official statistical organisation.

21.16 Technology such as that developed by the Judicial Commission of New South Wales should be utilised in developing the federal sentencing database. There has been favourable judicial comment on the usefulness of JIRS in judicial decision making,¹⁶⁸⁹ and commentary suggesting that such databases have provided judges with up-to-date information and have had a real impact on judicial consideration of the appropriate range of sentences to be imposed.¹⁶⁹⁰

21.17 The following information, currently included in the JIRS database, should also be included in a federal sentencing database: the type and quantum of sentence imposed, including head sentence and non-parole period, and relevant characteristics of the offence and the offender that have been taken into account in imposing the sentence.

21.18 Judicial officers, prosecutors and defence lawyers in federal criminal matters should have access to the database. This will promote consistency in sentencing by judicial officers, reduce uncertainty as to the likely outcome of cases, and provide the basis for improved advice to defendants.

Proposal 21-1 In order to promote consistency in the sentencing of federal offenders, the Australian Government, in consultation with the Australian Institute of Criminology and the Australian Bureau of Statistics, should continue to develop a comprehensive national database on the sentences imposed on all federal offenders. The database should include information on the type and quantum of sentences imposed and the characteristics of the offence and the offender that have been taken into account in imposing the sentence. The data should be made widely available for use by judicial officers, prosecutors and defence lawyers in federal criminal matters.

Guideline judgments

To the extent that the *Australian Constitution* permits, should courts develop guideline judgments in relation to federal offences? Which courts, if any, should have this role? [IP 29, Q 10–4]

Background

21.19 Guideline judgments are generally judgments delivered by an appellate court in the context of a particular case, but they go beyond the points raised in the particular appeal to suggest a sentencing scale, or appropriate starting point, for the *category* of crime before the court. They may identify the main aggravating and mitigating factors for the offence, or indicate how particular types of sanction are to be used in relation to that type of offence.

21.20 Alternatively, guideline judgments may indicate relevant sentencing considerations without specifying a range or starting point, or they may deal with issues of general principle such as the effect of guilty pleas on sentencing. Guideline judgments are not binding rules, but they are persuasive for trial courts in subsequent cases and should only be departed from ‘in accordance with a reasoned and justifiable exercise of discretion’.¹⁶⁹¹

21.21 Guideline judgments differ from traditional appellate judgments in a number of ways. They frequently deal with a category of offence or a type of offender, rather than an offence and offender in a particular case.¹⁶⁹² In addition, they provide an opportunity to evaluate current sentencing practice and to suggest new approaches.¹⁶⁹³

21.22 New South Wales, Victoria, Western Australia and South Australia have legislation authorising higher or appellate courts to give a guideline judgment on their

own motion.¹⁶⁹⁴ In some states, the Attorney-General or other parties may request that courts deliver guidelines without the need for a relevant appeal.¹⁶⁹⁵ Federal legislation does not provide for guideline judgments and, for reasons explained below, it may not be able to do so in some circumstances.

Issues and problems

21.23 The advantages of guideline judgments are said to be that they foster consistency while retaining judicial discretion; accommodate special or exceptional cases while serving the aims of rehabilitation, denunciation and deterrence; allow a judge to respond to all the circumstances of a case; result in fewer appeals by the prosecution; and lower pressure on the executive arm of government to respond to media attention.¹⁶⁹⁶ On the other hand, the potential disadvantages of guideline judgments include erosion of judicial discretion, and the possibility of greater use of imprisonment due to a new emphasis on establishing exceptional circumstances to justify departure from a guideline.¹⁶⁹⁷

21.24 Regardless of the merits of guideline judgments, *Wong v The Queen*¹⁶⁹⁸ appears to have cast doubt on their constitutional validity at the federal level in certain circumstances. In *Wong*, the High Court overturned a guideline judgment concerning the sentences appropriate for couriers and others with a minor role in the importation of heroin under the *Customs Act 1901* (Cth). The guideline, issued by the New South Wales Court of Criminal Appeal, consisted of five levels related to the quantity of the drug involved, and a range of penalties was suggested for each level.¹⁶⁹⁹

21.25 On appeal to the High Court, Gaudron, Gummow and Hayne JJ held that because the guidelines elevated the quantity of the narcotic to a position of primacy, they were inconsistent with the sentencing factors listed in s 16A of the *Crimes Act*.¹⁷⁰⁰ The Court also considered issues arising from Chapter III of the *Australian Constitution*. Gaudron, Gummow and Hayne JJ stated that if judicial guidelines had any binding effect on future cases—for example, if departure from the guidelines would attract close scrutiny by an appellate court—they would begin ‘to pass from the judicial to the legislative’.¹⁷⁰¹ In their joint judgment, a key distinction was drawn

between a court articulating the principles which do, or should, underpin the determination of a particular sentence and the publication of the expected or intended results of future cases. Articulation of applicable principle is central to the reasoned exercise of jurisdiction in the particular matters before the court. By contrast, the publication of expected or intended results of future cases is not within the jurisdiction or the powers of the court.¹⁷⁰²

21.26 Gaudron, Gummow and Hayne JJ stated that if the guidelines were not intended to have any binding effect on future cases, their purpose was unclear.¹⁷⁰³ Kirby J reserved for future consideration the issue of whether it is possible to formulate sentencing guidelines consistently with the *Constitution*, noting that much will depend upon the way in which guidelines are expressed and the manner in which they are used.¹⁷⁰⁴

21.27 Some commentators have suggested that *Wong* casts doubt on the constitutional validity of guideline judgments in general.¹⁷⁰⁵ Others argue that the decision is confined to numerical guidelines of the kind considered in that case.¹⁷⁰⁶ For example, Professor Kate Warner has suggested that the joint judgment in *Wong* expresses

no difficulty with guideline judgments that lack a quantitative element and merely indicate relevant sentencing considerations without establishing a starting point or developing a range.¹⁷⁰⁷

21.28 It has also been argued that the High Court has expressed clear support for a more minimal approach, involving largely descriptive guidelines that either set out relevant factors to be taken into account in assessing the seriousness of an offence or articulate the type of punishment that should ordinarily be imposed.¹⁷⁰⁸

21.29 To the extent that the decision in *Wong* does leave scope for guideline judgments in federal criminal matters, it is also necessary to consider whether guideline judgments should be delivered by a single court whose jurisdiction extends across all states and territories, such as the Federal Court of Australia, or whether they should be delivered by individual state and territory appellate courts. While the criminal jurisdiction of the Federal Court is currently very limited, the ALRC proposes in Chapter 20 that general appellate jurisdiction be conferred on the Court in federal criminal matters. If this proposal were implemented, it would seem logical that the Federal Court be responsible for delivering guideline judgments in such matters. A number of submissions supported this approach.¹⁷⁰⁹

21.30 Alternatively, state and territory appellate courts could deliver guideline judgments in relation to federal offences (as in *Wong*) if they were accepted and applied by the courts of other states and territories as a matter of judicial comity. This might be feasible in relation to federal offences that are prevalent in a particular jurisdiction, such as drug importation offences in New South Wales, illegal fishing in Queensland and Western Australia, and people smuggling in Western Australia and the Northern Territory.¹⁷¹⁰ This might be justified on the basis that, where federal offences are more prevalent in a particular jurisdiction, the courts of that jurisdiction have greater experience and expertise in those fields.

ALRC's views

21.31 The ALRC is not opposed to guideline judgments in principle and does not consider that all guidelines necessarily would be invalid in the federal context. A number of submissions expressed support for the development of guideline judgments as a useful tool for promoting consistency in sentencing federal offenders.¹⁷¹¹

21.32 However, the High Court's decision in *Wong* has created a climate of uncertainty around guideline judgments, which does not provide a firm foundation for

law reform in this area. The High Court's decision in *Wong* did not consider whether non-numerical guideline judgments could be constructed in a manner that is constitutionally valid, nor did it define the particular features that would render them valid. Consequently, the validity of each guideline judgment would have to be determined on a case-by-case basis, at least until further decisions of the High Court clarified the issue.

21.33 Other issues also arise in relation to guideline judgments in federal sentencing matters. If guideline judgments were to be delivered by state and territory appellate courts, there may be some reluctance by judicial officers to consider decisions from other jurisdictions.¹⁷¹² The proposed conferral of jurisdiction on the Federal Court of Australia would help to address this issue.

21.34 In addition, it is not constitutionally possible in the federal context for the Attorney-General or another party to request that courts deliver 'guidelines' in the absence of a relevant appeal because the giving of advisory opinions is inconsistent with the exercise of federal judicial power. Any federal scheme would, therefore, be more limited than those currently in place in New South Wales and South Australia. A relevant case would have to arise before it was possible to issue a guideline judgment.

21.35 On this basis, while the ALRC has made a range of other proposals in this Discussion Paper to promote consistency in sentencing of federal offenders, it does not propose to recommend the use of guideline judgments in relation to federal criminal matters at this time.

Grid sentencing

Should legislation structure the sentencing discretion in relation to federal offenders, for example by specifying ... sentencing grids? Does structuring the sentencing discretion in legislation raise any concerns? [IP 29, Q 10–3]

Background

21.36 Grid sentencing is one of many legislative methods for promoting consistency in sentencing. Grid guideline systems establish presumptive sentences or sentencing ranges according to various combinations of offender and offence characteristics. They are normally prescribed in legislation or regulations. Judges are permitted to depart from the guidelines provided express reasons are given, but in practice their discretion is constrained by factors such as the breadth of the sentencing ranges set down and the variety of circumstances under which departures are permitted.

21.37 There are currently no grid sentencing schemes in Australia. The closest that an Australian jurisdiction has come is the sentencing matrix that was debated in Western Australia in the late 1990s. The matrix was promoted as providing greater

accountability, transparency and consistency in the sentencing process.¹⁷¹³ The scheme was to be introduced in three stages.¹⁷¹⁴ The legislation for the first two stages was enacted in November 2000, but legislation for the third stage was rejected by the state's Legislative Council by a narrow margin.¹⁷¹⁵ The matrix was widely criticised and the legislation was eventually repealed.¹⁷¹⁶ It has been argued that the matrix raised constitutional issues because it interfered with the independence of the courts.¹⁷¹⁷

21.38 There are a number of grid sentencing schemes in operation in the United States, which serve as possible models for greater legislative involvement in promoting consistency in sentencing, and as warnings of the disadvantages of such schemes.

Issues and problems

21.39 Arguments in favour of grid sentencing schemes include that they enhance consistency in sentencing and that they allow administrators to predict more accurately the effect of changes to sentencing legislation.¹⁷¹⁸ There is some evidence that the Federal Sentencing Guidelines in the United States have had modest success in reducing overall disparity in sentencing.¹⁷¹⁹ However, the success of the Guidelines has been uneven in that some types of cases have shown no improvement in consistency, or improvement in some cities only. Furthermore, there is evidence that regional sentencing disparity has increased under the Guidelines, particularly in drug trafficking, immigration and robbery cases.¹⁷²⁰

21.40 Arguments against grid sentencing schemes include that they redistribute discretion so that decisions by police and prosecuting authorities become increasingly important.¹⁷²¹ Shifting discretion from the courts to the prosecutorial process in this way is considered undesirable because prosecutors 'generally lack the experience of judges and have many considerations acting upon their decisions other than achieving the goal of uniform sentences'.¹⁷²²

21.41 It is also argued that grid sentencing has the potential to erode individualised justice, and results in decisions that are too severe when considered in light of the circumstances of individual offenders.¹⁷²³ Restrictions placed on judicial discretion by grid sentencing schemes may thus have contributed to an increase in the rate of imprisonment in the United States.¹⁷²⁴

21.42 Other criticisms include that the schemes: rarely deal with non-custodial sentencing options or encourage broader use of such options;¹⁷²⁵ indirectly discriminate against certain groups; are overly complex; and focus too much on retribution to the exclusion of other aims of sentencing.¹⁷²⁶

21.43 In consultations and submissions, there was considerable resistance to the introduction of grid sentencing in Australia.¹⁷²⁷

Possible constitutional constraints

21.44 One element of sentencing grids has been found to be unconstitutional in the United States.¹⁷²⁸ In 2004, the United States Supreme Court struck down the practice of increasing a sentence based on aggravating factors that have not been admitted by the defendant or proved to the satisfaction of a jury. This was on the basis that the constitutional rights to due process and trial by jury entitle a defendant to have any fact (other than the fact of a prior conviction) that increases the prescribed statutory maximum penalty for a crime submitted to a jury and proven beyond a reasonable doubt.

21.45 It is a matter of debate whether similar issues might arise under the *Australian Constitution*. Section 80 requires trial by jury for any federal offence that is tried on indictment but there is no direct parallel for the guarantee of due process in Australian law.¹⁷²⁹ In *Cheng v The Queen*,¹⁷³⁰ the majority of the High Court declined to re-open *Kingswell v The Queen*,¹⁷³¹ which held that where the factual matters required to determine the range of penalties are not elements of the offence, these factual matters can be determined by a judge rather than a jury without contravening s 80.¹⁷³²

21.46 It would appear that, provided the facts that determine the range of penalties are not elements of the offence, grid sentencing legislation that requires a judge to determine those facts would be constitutionally valid. However, a constitutional issue may arise where the legislation allows a judge to determine facts that are relevant to sentencing for an indictable offence where those facts constitute elements of the offence.

ALRC's views

21.47 With careful drafting, the constitutional issues surrounding grid sentencing might be avoided in Australia. However, the ALRC does not favour the establishment of a grid-sentencing scheme in relation to the sentencing of federal offenders. Grid sentencing inappropriately prioritises consistency over individualised justice.¹⁷³³ By minimising consideration of the circumstances of the individual offender, grid sentencing has the potential to result in injustice. Similar views were expressed in submissions.¹⁷³⁴

21.48 Furthermore, as demonstrated by the United States experience, restricting judicial discretion by grid sentencing may have the consequence of shifting discretion from the courts to the prosecutorial process to an inappropriate degree. The ALRC is of the view that this is undesirable because decisions of police and prosecutors are less transparent, accountable and contestable than judicial decisions.

Mandatory sentencing

Background

21.49 Mandatory sentencing is another legislative method for promoting consistency in sentencing. In mandatory sentencing ‘the Parliament, by legislation, sets a particular sentence, or a minimum as well as a maximum sentence, for a particular offence’.¹⁷³⁵

21.50 Mandatory sentencing schemes at the state and territory level in Australia have included the Western Australian ‘three strikes’ legislation and the Northern Territory’s mandatory minimum imprisonment laws for property offenders. These regimes were controversial and much criticised.¹⁷³⁶ Although these regimes are no longer in operation, some state legislation still provides for mandatory penalties.¹⁷³⁷ These mandatory sentencing laws apply to state offences and therefore have no application to the sentencing of federal offenders.

21.51 At the federal level, only one Act—the *Migration Act 1958* (Cth)—provides for mandatory minimum head sentences. Under s 233C of the Act, the court is required to impose a head sentence of at least five years imprisonment for the offence of people smuggling—at least eight years if the conviction is for a repeat offence—unless it can be proven on the balance of probabilities that the offender was under the age of 18 years when the offence was committed. In addition, the court is required to fix a minimum non-parole period of three years, or five years if the conviction is for a repeat offence. Fixed mandatory minimum non-parole periods are discussed in Chapter 9.

Issues and problems

21.52 Mandatory minimum sentences do not in themselves raise difficulties under the *Australian Constitution*, but mandatory sentencing schemes may do so in some circumstances. For example, a constitutional challenge might be raised if the scope and severity of the scheme were such that the sentencing discretion effectively passed from the judiciary to the legislative arm of government. This might occur if courts were effectively left without any discretion regarding the sentence to be imposed.¹⁷³⁸

21.53 Arguments in favour of mandatory sentencing include that it: creates greater consistency by avoiding unduly lenient or harsh sentences; increases certainty in sentencing for courts, prosecutors and defendants; provides greater deterrence due to the severity of the sentences; reduces repeat offending by incarcerating offenders; and increases transparency.¹⁷³⁹

21.54 However, mandatory sentencing has been the subject of considerable criticism. It is argued that these schemes: escalate sentence severity; are unable to take account of the particular circumstances of the case; and redistribute discretion so that decisions by the police and prosecuting authorities become increasingly important.¹⁷⁴⁰ Some critics

also claim that mandatory sentencing fails to deter criminal behaviour; leads to greater inconsistency;¹⁷⁴¹ and has a profound discriminatory impact on certain groups.¹⁷⁴² In addition, many commentators have argued that mandatory sentencing schemes contravene a number of accepted sentencing principles and international human rights standards,¹⁷⁴³ including: the principle of proportionality; the requirement that the detention of young people should be a last resort and for the shortest appropriate time; and the requirement that sentences should be reviewable by a higher court.¹⁷⁴⁴ A number of United Nations committees have expressed concerns over mandatory sentencing generally, and the schemes in the Northern Territory and Western Australia in particular.¹⁷⁴⁵

21.55 In consultations and submissions, there was strong opposition to mandatory sentencing amongst those who commented on the issue.¹⁷⁴⁶ Reasons cited for the opposition included its inflexibility; the fact that in some cases imposition of a mandatory penalty arises not from the circumstances of the instant offence but from an earlier offence for which the offender has already been punished; the increased necessity for jury trials; lack of public confidence in the law due to the perceived injustice of mandatory sentences; escalation of sentencing severity; and discrimination against disadvantaged offenders.

21.56 There has been consistent opposition to mandatory sentencing by commentators,¹⁷⁴⁷ and by government bodies and committees that have examined the issue.¹⁷⁴⁸

21.57 Only the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) expressed support for s 233C of the *Migration Act*. In its submission, DIMIA stated that s 233C:

was added to the Act in order to make it clear to people smugglers that people smuggling is a serious offence, and that by offending against people smuggling provisions under the Act, smugglers *will* incur a substantial custodial sentence. That is, people smugglers would no longer be free to return to their home country after a brief stay in an Australian prison.

It appears that section 233C has operated very effectively in deterring people smuggling activities since its inclusion in the Act.¹⁷⁴⁹

ALRC's views

21.58 In the ALRC's view, prescribing mandatory terms of imprisonment for any federal offence is generally incompatible with sound practice and principle in this area. Mandatory sentencing has the potential to offend against the principles of proportionality, parsimony and individualised justice.¹⁷⁵⁰ In particular, the ALRC considers that the judiciary should retain its traditional sentencing discretion to enable justice to be done in individual cases.

21.59 While the imposition of substantial penalties may be appropriate in relation to offences like people smuggling, the ALRC would prefer that the legislature not

prejudge the appropriate *minimum* penalty in legislation without regard to the facts of individual cases.

21.60 The maintenance of individualised justice and broad judicial discretion are essential attributes of our criminal justice system, outweighing the potential deterrent effect that mandatory sentencing might have. The ALRC thus proposes that the Australian Government take steps to ensure that federal criminal offence provisions do not prescribe mandatory minimum terms of imprisonment.

Proposal 21-2 The Australian Government should review federal criminal offence provisions and seek appropriate amendments to ensure that no mandatory minimum term of imprisonment is prescribed for any federal offence.

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- Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; Welfare Rights Centre Inc (Queensland), *Submission SFO 29*, 15 April 2005; M Johnson, *Consultation*, Darwin, 27 April 2005; Law Society of the Northern Territory, *Consultation*, Darwin, 29 April 2005; Deputy Chief Magistrate E Woods, *Consultation*, Perth, 18 April 2005.
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- 1701 *Ibid*, [80].
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- 1704 *Ibid*, [144]–[149].
- 1705 See, eg, R Johns, *Sentencing Law: A Review of Developments in 1998–2001* (2002) NSW Parliament, 38.
- 1706 See, eg, K Warner, ‘The Role of Guideline Judgments in the Law and Order Debate in Australia’ (2003) 27 *Criminal Law Journal* 8; J Anderson, ‘“Leading Steps Aright”: Judicial Guideline Judgments in New South Wales’ (2004) 16(2) *Current Issues in Criminal Justice* 140; New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 November 2001, 19298 (B Debus—Attorney General).
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22. Administration of Federal Offenders

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Introduction

22.1 The Terms of Reference require the ALRC to examine whether current arrangements provide an efficient, effective and appropriate regime for the administration of federal offenders. Issues Paper 29 *Sentencing of Federal Offenders*¹⁷⁵¹ (IP 29) examined the administrative arrangements in place at the federal level, and between the Australian Government and the states and territories, in relation to the management of federal offenders.

22.2 The arrangements by which the Australian Government relies exclusively on the states and territories to accommodate and supervise federal offenders work reasonably well in practice and make effective and efficient use of existing resources. However, the ALRC believes that these arrangements do not fully discharge the Australian Government's responsibilities in this area. In particular, the Government does not have enough information about federal offenders, either individually or as a group, to develop effective and appropriate policies or to achieve a suitable level of oversight of individual offenders. The ALRC proposes that the Australian Government take a more active role in the administration of federal offenders by establishing an Office for the Management of Federal Offenders within the Attorney-General's Department (AGD).

22.3 The ALRC has also formed the view that the existing arrangements by which the Attorney-General or departmental delegate make parole decisions in relation to federal offenders can be improved. This issue is discussed further in Chapter 23.

Role of the Australian Government

Should the Australian Government play a more active role in managing federal offenders? What role, if any, should the Attorney-General's Department perform? [IP 29, Q12–1]

Background

22.4 As discussed in Chapters 3 and 18, the ALRC has considered on a number of occasions whether it is appropriate and viable to establish a completely separate federal criminal justice system in pursuit of the goal of inter-jurisdictional equality between federal offenders. Such a system would include federal criminal courts, a federal corrective services agency and federal prisons. However, given existing state and territory infrastructure, the relatively small number of federal offenders, and the geographic dispersal of federal offenders across Australia, it has become clear that it is not viable to establish a completely separate federal system.¹⁷⁵²

22.5 The Australian Government relies exclusively on the states and territories to accommodate federal offenders sentenced to a term of imprisonment and federal prisoners held on remand. In addition, the states and territories administer and supervise federal offenders sentenced to alternative custodial orders, such as periodic and home detention, and non-custodial orders such as community service orders, as well as federal offenders released on parole or licence subject to supervision orders. They also enforce the collection of fines imposed for federal offences on behalf of the Australian Government.¹⁷⁵³

22.6 The Australian Government plays an active role in managing particular administrative aspects of the sentences of some federal offenders, for example, making decisions in relation to parole or release on licence, and the transfer of prisoners interstate and overseas. However, the Australian Government plays only a limited role in the day-to-day administration of federal offenders¹⁷⁵⁴ and does not, as a matter of course, monitor federal offenders or maintain a complete record of all federal offenders.¹⁷⁵⁵

22.7 The Corrective Services Ministers' Conference (CSMC) meets once a year to consider problems relating to prisons and community based corrections. The CSMC comprises all state and territory ministers responsible for corrections, together with the relevant minister from New Zealand. The Australian Government is not a member of the CSMC but the Minister for Justice and Customs is invited to attend. A meeting of the Corrective Services Administrators' Conference (CSAC), comprising the heads of

corrective service agencies in each jurisdiction and officers in charge of community based corrective services, is also held once a year, usually about a month before the CSMC. The Australian Government, represented by the AGD, has observer status at these meetings.¹⁷⁵⁶

Issues and problems

22.8 The ALRC met with corrective services agencies in most states and territories to discuss the existing arrangements.¹⁷⁵⁷ It was generally acknowledged that the arrangements whereby the states and territories administer the sentences imposed on federal offenders are satisfactory. However, reservations were expressed in a number of areas. Although there was general satisfaction with the working arrangements between the states and territories and the Australian Government, a number of jurisdictions expressed the view that communication and liaison could be improved. Concern was also expressed about federal/state funding arrangements, complexity in administering the sentences of joint offenders, and enforcement of sentencing and parole orders.¹⁷⁵⁸

22.9 The Queensland Department of Corrective Services expressed the view that, although it could provide detailed information on federal offenders in Queensland, it seemed odd that the Australian Government did not have Australia-wide information on federal offenders readily available.¹⁷⁵⁹ The Department noted that better communication between federal and state authorities had the potential to improve service delivery through informed, consistent decision making; to enhance research and assessment capabilities; and to minimise duplication and inconsistency.¹⁷⁶⁰

22.10 The Department of Justice in Western Australia noted that the Department's relationship with the AGD is limited to federal prisoners who are coming up for parole, and that the relationship is a fairly passive one. The Department acknowledged that sometimes mistakes were made in releasing federal offenders on parole and it noted delays in dealing with breach of parole by federal offenders. While more active engagement on these issues was possible and there was a willingness to share information with the Australian Government in relation to federal offenders, the Department cautioned that there would be a point at which this could become onerous. The Department also stated that, as corrections has traditionally been an area of state and territory responsibility, there could be sensitivities if the Australian Government were to become more actively involved.¹⁷⁶¹

22.11 Corrections Victoria expressed support for the Australian Government taking a more pro-active role:

It would assist the better management of federal prisoners within the Victorian prison system for the Commonwealth to provide a better managed point of reference for the distribution of relevant information and the provision of assistance to State administrators and prison managers.¹⁷⁶²

22.12 Corrections Victoria also noted that it would welcome assistance for federal offenders with special needs.¹⁷⁶³

22.13 A number of stakeholders expressed the view that the limited post-sentence involvement of the Australian Government with federal offenders was unacceptable,¹⁷⁶⁴ particularly given the Government's responsibility for making parole decisions.¹⁷⁶⁵ In other consultations and submissions it was noted that the Australian Government has a responsibility to ensure that all federal offenders are treated in a way that is consistent with international standards and Australia's obligations in international law.¹⁷⁶⁶

ALRC's views

22.14 It appears from consultations and submissions that the practical arrangements by which states and territories accommodate and supervise federal offenders on behalf of the Australian Government work reasonably well and make effective and efficient use of existing resources. The ALRC does not propose any major structural change to these arrangements. However, the ALRC has formed the view that the arrangements would operate more smoothly and deliver better outcomes if the Australian Government played a more active role in the administration of federal offenders.

22.15 The ALRC strongly endorses the position put in a number of submissions and consultations that the Australian Government has a responsibility to ensure that all federal offenders are treated in a manner that is consistent with international standards and Australia's international obligations. Although the states and territories may fulfil these obligations adequately on behalf of the Australian Government, there is no monitoring mechanism in place to ensure that this is so. The ALRC also believes that, as a matter of principle, the polity that proscribes conduct through the criminal law should maintain some oversight of the sentences imposed for breaches of those laws.

22.16 At present, the Australian Government maintains records about those federal offenders with whom the AGD is likely to have some active involvement, for example, those who receive a full-time custodial sentence with a specified non-parole period. But the Government does not have ready access to information about the vast majority of federal offenders who are given non-custodial sentences, nor about young federal offenders who are dealt with in the juvenile justice systems of the states and territories in accordance with s 20C of the *Crimes Act 1914* (Cth).

22.17 This lack of information about federal offenders post-sentence has the potential to impede the development of sound evidence-based criminal law policy. For example, how is the Australian Government to know whether the penalties imposed for breach of federal criminal law are appropriate and effective if it has no information on the sentences of the majority of federal offenders? In the course of the current Inquiry, the ALRC itself encountered difficulties in developing proposals in a range of areas due to the lack of publicly available data.

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

22.19 The ALRC is therefore of the view that the Australian Government should take a more active role in relation to federal offenders. The particular areas in which it should take further action are identified throughout this Discussion Paper and many are drawn together below in relation to the role of the proposed Office for the Management of Federal Offenders. The goals of this involvement should be: to enhance policy development in relation to relevant aspects of the federal criminal justice system; to assist the states and territories to administer sentences imposed on federal offenders more effectively; and to ensure that federal offenders are treated in conformity with Australia's international obligations and relevant standard minimum guidelines.

22.20 The ALRC also considers that the Australian Government should become a full participating member of the CSMC and the CSAC. Federal offenders are the responsibility of the Australian Government, and the states and territories provide corrective services in relation to those offenders on behalf of the Australian Government. The Australian Government should be actively involved in these regular opportunities for inter-jurisdictional discussion and policy development.

Proposal 22–1 The Australian Government should take a more active role in monitoring federal offenders in order to:

- (a) enhance policy development in relation to the federal criminal justice system;
- (b) assist the states and territories to administer sentences imposed on federal offenders more effectively; and
- (c) ensure that federal offenders are treated in conformity with Australia's international obligations and relevant standard minimum guidelines.

Proposal 22–2 The Australian Government should negotiate with the states and territories to ensure that the relevant Australian Government minister is made a participating member of the Corrective Services Ministers' Conference and that the Australian Government becomes a participating member of the Corrective Services Administrators' Conference.

Office for the Management of Federal Offenders

Should a body, such as an inspectorate or office of federal offenders, be established to oversee the management of sentences being served by federal offenders? If so, what functions should such a body have, and how should it be structured and constituted? [IP 29, Q12–4]

Establishment of the OMFO

Background

22.21 Currently, the National Law Enforcement Policy Branch of the Criminal Justice Division in the AGD has responsibility for the administration of federal offenders. The Branch performs the following roles in relation to federal offenders:

- the grant and revocation of parole and release on licence;
- processing requests from offenders on parole to travel overseas;
- processing applications for the exercise of the executive prerogative (pardons, remission of fines and sentences); and
- interstate and international transfers of prisoners.¹⁷⁶⁷

22.22 Each of the states and territories has a department responsible for corrective services infrastructure and administration. In Western Australia and Victoria there are also bodies established to oversee the delivery of corrective services within those jurisdictions.

22.23 The Office of the Inspector of Custodial Services in Western Australia was established in 1999 and is the only custodial inspectorate in Australia that possesses statutory autonomy and direct access to the state parliament. The Office provides independent external scrutiny of the standards and operational practices of custodial services in the state. The Office carries out regular inspections of all prisons in the state and conducts thematic reviews of prison services. The Office is required to pass on individual prisoner complaints to the Western Australian Ombudsman.¹⁷⁶⁸

22.24 The Victorian Corrections Inspectorate was established on 1 July 2003 to monitor the performance of both public and private correctional service providers in the state, conduct specific investigations, and manage the Official Prison Visitors Scheme. The Inspectorate provides advice—independently of Corrections Victoria—on correctional issues and developments to the Secretary of the Victorian Department of Justice.¹⁷⁶⁹ The Victorian Ombudsman handles complaints from individual prisoners.

22.25 In New South Wales, the Office of the Inspector-General of Corrective Services, which was established by the *Crimes (Administration of Sentences) Act 1999* (NSW), was abolished in 2003. The New South Wales Ombudsman now handles complaints relating to the New South Wales Department of Corrective Services.

Issues and problems

22.26 Throughout this Discussion Paper the ALRC has identified areas in which the Australian Government should be engaged more actively in relation to federal offenders. These areas include the establishment of a comprehensive case management database for federal offenders;¹⁷⁷⁰ the development of memoranda of understanding with the states and territories in relation to federal offenders;¹⁷⁷¹ the evaluation of state and territory sentencing options and pre-release schemes for application to federal offenders;¹⁷⁷² active engagement with states and territories in relation to young federal offenders and offenders with a mental illness or intellectual disability;¹⁷⁷³ and the provision of secretariat support to the proposed Federal Parole Board.¹⁷⁷⁴ Currently, few if any resources are dedicated to performing these tasks at the federal level.

22.27 There was significant support in consultations and submissions for establishing a body at the federal level with responsibility for overseeing federal offenders, with some support for the establishment of an independent inspectorate.¹⁷⁷⁵

22.28 However the New South Wales Department of Corrective Services expressed the view that establishing such a body could duplicate existing state resources.¹⁷⁷⁶ Corrections Victoria noted that the role and responsibilities of such a body would have to be carefully framed to ensure it did not hinder the effective management of federal offenders by state correctional authorities.¹⁷⁷⁷

ALRC's views

22.29 In a previous report, *Sentencing* (ALRC 44), the ALRC recommended that a federal prison coordinator be appointed to monitor the conditions under which federal prisoners are held and to report to the Australian Government.¹⁷⁷⁸ Given the range of tasks identified in this Discussion Paper that require further attention from the Australian Government, the ALRC believes that something more than a federal prison coordinator is now needed. The ALRC proposes the establishment of an Office for the Management of Federal Offenders (OMFO).

22.30 In developing a proposed model for the OMFO, the ALRC has carefully considered the concerns expressed by the New South Wales Department of Corrective Services and Corrections Victoria in relation to the role and responsibilities of the Office. The functions that the ALRC has identified for the OMFO do not duplicate functions already performed by the states and territories. They reflect the federal interest in federal offenders and the need for the Australian Government to take a more

active role in relation to those offenders. Some of the functions are designed to assist and support the states and territories in delivering corrective services to federal offenders more effectively. Some are designed to ensure that the Australian Government better fulfils its obligations in relation to individual federal offenders, and to federal offenders as a group. Others are intended to ensure that the Australian Government is in a stronger position to develop federal criminal law policy and procedure on the basis of sound evidence.

22.31 The ALRC has considered the need for an independent inspectorate along the lines of the Office of the Inspector of Custodial Services in Western Australia. A number of the proposed functions of the OMFO do involve a level of oversight of the procedures and conditions imposed on federal offenders in state and territory correctional systems. However, the ALRC has formed the preliminary view that the Office should work with state and territory corrective services agencies on the basis of negotiated memoranda of understanding, rather than play the role of inspector, to ensure appropriate and effective delivery of corrective services in relation to those federal offenders.

22.32 The ALRC is also of the view that, given the case management and liaison roles envisaged for the OMFO, it would be appropriate to locate that Office within the AGD. This will help to minimise costs through shared corporate services. The OMFO should report to the Minister for Justice and Customs, who has portfolio responsibility for criminal law and federal offenders.

Proposal 22–3 The Australian Government should establish an Office for the Management of Federal Offenders (OMFO) within the Attorney-General’s Department to monitor and report on all federal offenders, regardless of the sentence imposed. The OMFO should report to the Minister for Justice and Customs.

Functions of the OMFO

22.33 One of the primary functions proposed for the OMFO is the establishment and maintenance of a comprehensive national case management database in relation to all federal offenders, discussed below. This database is intended to provide the basis for many of the other functions proposed for the Office and will allow the Office to track each federal offender from the first appearance in court to the end of the sentence.

22.34 Another important role for the OMFO will be increased liaison with states and territories, beginning with the negotiation of a memorandum of understanding (MOU) with each state and territory setting out the roles and responsibilities of each party to the agreement. The ALRC is of the view that the relationship between the OMFO and the states and territories should be underpinned by legislation but that the detail of the

working arrangements should be settled by negotiation to establish good working relationships and minimise the duplication of roles and responsibilities.

22.35 This relationship should be developed further through active membership of the CSMC and the CSAC, which have been described above. The OMFO would be responsible for briefing the minister in relation to these meetings. One of the reasons for becoming more involved in these fora, and for increased interaction with state and territory corrective services more generally, is to allow the OMFO to monitor progress towards achieving compliance with national standards, including the *Standard Guidelines for Corrections in Australia* and the *Standards for Juvenile Custodial Facilities*. Importantly, the Australian Government should place itself in a position to report, first hand, that the treatment of federal offenders in Australia complies with Australia's international obligations.¹⁷⁷⁹

22.36 This active engagement with the states and territories should include the provision of advice on the sentencing, administration and release of federal offenders. In submissions, a number of states and territories stated that further assistance in this regard would be helpful, particularly in relation to joint offenders.¹⁷⁸⁰ The OMFO should provide training to state and territory corrective services officers and others in relation to issues affecting federal offenders and joint offenders.

22.37 In addition, the ALRC proposes that the OMFO become more actively involved in the provision of information to federal offenders themselves, including information in relation to sentence, parole, transfer and complaint mechanisms. While individual complaints from offenders may continue to be dealt with through existing mechanisms—such as Official Visitors programs, the Commonwealth Ombudsman and state and territory ombudsmen—the OMFO will also have a role in resolving complaints from federal offenders through, for example, working with state and territory corrective services agencies in relation to issues raised by federal offenders.

22.38 Another important role proposed for the OMFO is to provide secretariat support to the Federal Parole Board.¹⁷⁸¹ Currently parole and release on licence casework is performed by the National Law Enforcement Policy Branch of the AGD, but this workload will increase significantly if the proposal to abolish automatic parole in Chapter 23 is implemented. There will also be additional work related to the establishment, membership and meetings of the Federal Parole Board.

22.39 The following functions currently undertaken by the National Law Enforcement Policy Branch should also be transferred to the OMFO, with the Federal Parole Board involved as appropriate:

- processing requests from offenders on parole to travel overseas;¹⁷⁸²

- processing applications for the exercise of the executive prerogative (pardons, remission of fines and sentences);¹⁷⁸³ and
- interstate and international transfers of prisoners.¹⁷⁸⁴

22.40 In a number of areas, state and territory laws are picked up and applied to the sentencing of federal offenders by provisions of the *Crimes Act 1914* (Cth) and the *Judiciary Act 1903* (Cth). These state and territory laws should be kept under scrutiny by the Australian Government to ensure that they are and remain appropriate in relation to federal offenders. In particular, the OMFO should have responsibility for providing advice to the Australian Government on whether state and territory sentencing options and pre-release schemes should be picked up and applied in relation to federal offenders.¹⁷⁸⁵

22.41 In a number of places in this Discussion Paper, the ALRC has suggested that federal minimum standards or nationally agreed guidelines should be developed in relation to federal offenders. These areas include victim impact statements and pre-sentence reports,¹⁷⁸⁶ as well as in broader areas such as the treatment of young federal offenders,¹⁷⁸⁷ and federal offenders with a mental illness or intellectual disability.¹⁷⁸⁸ If minimum standards or guidelines are put in place, it will be necessary for the OMFO to monitor the implementation of those standards and guidelines and to work with states and territories towards better compliance. The OMFO will also have an increased role in monitoring and managing young federal offenders and offenders with a mental illness or intellectual disability on an individual basis.

22.42 Finally, the OMFO should also be responsible for providing policy advice to the Australian Government in relation to federal offenders and relevant aspects of the federal criminal justice system.

Proposal 22–4 The functions and powers of the OMFO should be negotiated with the states and territories, and should include the following:

- (a) maintaining an up-to-date case management database in relation to all federal offenders;
- (b) providing secretariat support to the proposed Federal Parole Board;
- (c) liaising with the states and territories in relation to federal offenders, including special categories of offenders;

- (d) participating as a full member of the Corrective Services Administrators' Conference and the Australasian Juvenile Justice Administrators and providing support for the relevant federal minister in relation to active participation in the Corrective Services Ministers' Conference;
- (e) monitoring progress towards compliance with the *Standard Guidelines for Corrections in Australia* and the *Standards for Juvenile Custodial Facilities* in relation to federal offenders, and liaising with the states and territories in relation to those standards;
- (f) ensuring that the treatment of federal offenders complies with Australia's international obligations;
- (g) providing advice to the states and territories in relation to the sentencing, administration and release of federal offenders, in particular in relation to joint offenders;
- (h) providing advice to federal offenders about the administration of their individual sentences, including information about interstate and international transfer;
- (i) providing advice to the Australian Government on the interstate and international transfer of federal offenders in individual cases;
- (j) providing general policy advice to the Australian Government in relation to federal offenders and relevant aspects of the federal criminal justice system;
- (k) providing advice to the Australian Government about funding, including priorities for special programs for federal offenders;
- (l) providing advice to the Australian Government about state and territory compliance with federal minimum standards in relation to victim impact statements and pre-sentence reports;
- (m) providing advice to the Australian Government in relation to state and territory sentencing options and pre-release schemes, including whether they should be picked up and applied in relation to federal offenders; and

- (n) performing all of the above in relation to young federal offenders and federal offenders with a mental illness or intellectual disability.

Memoranda of understanding with states and territories

Are the arrangements between the Australian Government and the states and territories in relation to the administration of federal offenders satisfactory?
[IP 29, Q 12–2]

Background

22.43 Section 3B of the *Crimes Act 1914* (Cth) provides that the Governor-General may make arrangements with the governors of the states and the governments or administrators of the territories for state and territory officers to administer sentences imposed on federal offenders and for state and territory correctional facilities and procedures to be made available. Arrangements are in place with each state and territory in relation to the following matters:

- state and territory facilities being made available to carry out state and territory sentencing options that are picked up and applied to federal offenders by the *Crimes Act*;
- state and territory officers exercising powers and performing functions in order to carry out such sentencing options imposed on federal offenders;
- state and territory officers exercising the powers and performing the functions of probation officers under the *Crimes Act*; and
- state and territory facilities being made available and state and territory officers exercising powers and performing functions in relation to persons with a mental illness or intellectual disability accused of a federal offence.¹⁷⁸⁹

22.44 Section 21F(1)(b) of the *Crimes Act* provides that the Governor-General may make arrangements with the governors of the states and the governments or administrators of the territories for state and territory officers to perform the functions of parole officers under Part IB. There are currently no arrangements in place under this section.

22.45 The ALRC has been advised that it is unnecessary to have legal arrangements in place under s 21F(1)(b) or s 3B for state and territory officers to perform the functions and exercise the powers of parole officers in relation to federal offenders. This is because s 120 of the *Australian Constitution* requires the states to make provision for the punishment of persons convicted of a federal offence, and parole is now clearly

established as part of the punishment of a convicted offender. Probation, on the other hand, may be imposed in cases where no conviction is recorded.¹⁷⁹⁰ The s 3B arrangements ensure that the states and territories will provide probation services in these and other circumstances.¹⁷⁹¹

22.46 The ALRC has been advised that this is also why the s 3B arrangements are limited to state and territory sentencing options that are picked up and applied to federal offenders, and why they do not make reference to the states and territories providing facilities and exercising functions and powers in relation to full-time custodial orders. Section 120 of the *Constitution* requires the states to provide these services.¹⁷⁹²

Options for reform

22.47 These legal arrangements formalise the relationship between the Australian Government and the states and territories with respect to the provision of corrective services to federal offenders. However, they include no detail about the services to be delivered, such as minimum standards for the treatment of federal offenders, access by the Australian Government to federal offenders, or reporting requirements. In this Discussion Paper, the ALRC proposes that the Australian Government take a more active role in overseeing federal offenders and in monitoring the delivery of corrective services by states and territories in relation to federal offenders. If these proposals are implemented, it will be necessary to set out in more detail the expectations and obligations of the parties to these arrangements.

22.48 One example of where arrangements of this sort have been put in place is the MOUs between Centrelink and state and territory corrective services agencies in relation to the provision of services to prisoners. The MOUs are not legally binding but are intended to set out the roles and responsibilities of the parties, including Centrelink's access to prisoners, release of information to Centrelink, and the provision of certain information and services to prisoners.¹⁷⁹³

ALRC's views

22.49 Section 120 of the *Constitution* and the Australian Parliament's other constitutional powers provide a firm basis for Australian Government legislation in relation to federal offenders. However, the ALRC is of the view that the detail of the arrangements between the Australian Government and the states and territories should be set out in MOUs negotiated with the states and territories. These MOUs should reflect the balance of responsibilities between the Australian Government and the states and territories, recognising that the Australian Government is ultimately responsible for the treatment and welfare of federal offenders and that states and territories are responsible for delivering corrective services to federal offenders.

22.50 Some of the issues that should be addressed in the MOUs include: the regular provision of data on federal offenders by the states and territories to the Australian Government; access by the OMFO to federal offenders; arrangements for dealing with parole of federal offenders including the provision of reports to the proposed Federal Parole Board; notification about changes to relevant state and territory legislation (for example, legislation dealing with sentencing options and pre-release schemes); minimum standards for the treatment of federal offenders; and reporting requirements.

Proposal 22–5 The proposed OMFO should develop memoranda of understanding with the states and territories to improve the sharing of information, and the coordination and provision of corrective services in relation to federal offenders.

Funding arrangements

Background

22.51 Under the *Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations*, the fiscal arrangements in Australia rely to a significant extent on the redistribution of funds from the Australian Government to the states and territories. This is because the Australian Government raises more revenue than it outlays, and the states and territories outlay more money than they raise. These funds are redistributed in two ways: through untied grants—largely made up of the Goods and Services Tax (GST) revenue payments—which the states and territories can spend as they choose; and through specific purpose payments (SPPs), which must be spent on the purposes for which they are given.¹⁷⁹⁴ In 2005–06, GST revenue payments to the states and territories are expected to total around \$37.3 billion and SPPs around \$19.1 billion.¹⁷⁹⁵

22.52 The GST revenue payments are distributed to the states and territories on the basis of Commonwealth Grants Commission (CGC) advice and are the largest single intergovernmental transfer. CGC advice is based on the principles of horizontal fiscal equalisation, which is defined as follows:

State governments should receive funding from the Commonwealth such that, if each made the same effort to raise revenue from its own sources and operated at the same level of efficiency, each would have the capacity to provide services at the same standard.¹⁷⁹⁶

22.53 The CGC calculates the relative share of the GST revenue that each state and territory receives based on a range of factors including the cost of services that impact on state and territory budgets. The GST revenue is not distributed to meet the cost of those services directly. Rather, the cost of services is part of the calculation used to decide, on the basis of relativities, what proportion of the GST revenue is paid to each state and territory.

22.54 One of the services taken into consideration in the CGC's calculation is the provision of corrective services. In calculating the relative cost of corrective services in each state and territory a number of special factors are taken into account including, for example, the number of high and low risk prisoners in each jurisdiction, the number of Indigenous Australian prisoners in each jurisdiction, and the number of federal prisoners in each jurisdiction.

22.55 Apart from untied GST revenue payments, funds also flow from the Australian Government to the states and territories by way of SPPs. The Australian Government makes SPPs to the states, territories and local government as a financial contribution to areas of state responsibility in pursuit of its own specified objectives. SPP agreements often include agreed national objectives. The majority of SPPs are subject to conditions such as general policy requirements, requirements that payments be expended for a specific purpose only, and reporting of financial and performance information. However, in making these payments, the Australian Government does not seek to take over responsibility for state functions.¹⁷⁹⁷

22.56 It is also possible for grants to be made to the states and territories from funding provided to Australian Government departments. For example, in 2003–04 the AGD provided funding to the states and territories for the provision of legal aid services in federal matters (\$54.7 million). Funding in relation to such services is provided by way of an SPP or a departmental administered grant in order to allow the Australian Government to exercise some policy control over the way the money is spent, in this case, to allow the Australian Government to set priorities in relation to the federal cases that are funded by legal aid. In addition, the AGD administers an 'expensive criminal case' fund to be used in exceptional circumstances.¹⁷⁹⁸

Issues and problems

22.57 In consultations with the states and territories there was some disquiet expressed about the funding arrangements in relation to federal offenders. The Department of Justice in Western Australia expressed the view that the states and territories should be able to claim the costs associated with federal offenders directly from the Australian Government, and noted that a claim had been made in 2000 when there was a spike in the number of federal offenders in Western Australia. The Department explained that in jurisdictions with smaller populations, such as Western Australia, the impact of a spike in the numbers of federal offenders on the state budget could be significant.

22.58 In addition, the Department noted that federal offenders often had special needs that were expensive to meet. Many federal offenders, for example, were from overseas and had special dietary and other requirements. In addition, international drug smugglers and terrorists required high levels of security that were also expensive to provide.¹⁷⁹⁹ Corrections Victoria noted that it would welcome assistance for federal offenders with special needs.¹⁸⁰⁰ The Department of Corrective Services Queensland

noted that the current funding arrangements do not take into consideration the cost of supervising and providing services to federal offenders serving their sentences in the community.¹⁸⁰¹

22.59 In the negotiations leading up to the CGC 2004 review of state revenue sharing relativities, New South Wales argued that federal offenders should be weighted more heavily in the CGC calculations because a higher proportion of federal offenders were imprisoned for drug offences and this raised health and security problems in prisons, requiring specialist services. The Northern Territory presented evidence that there were additional costs associated with federal offenders for a number of reasons, including the growing number of non-Australian citizen offenders (in particular Indonesians) with specific health and cultural needs. The CGC accepted that the states and territories faced higher costs in relation to federal offenders given their specialist medical and other needs and agreed to assess the cost of federal offenders at six per cent above average costs.¹⁸⁰²

ALRC's views

22.60 In this Discussion Paper, the ALRC proposes a significant increase in the involvement of the Australian Government with the administration of federal offenders. The ALRC is also of the view that the Australian Government should exert more influence to ensure that federal offenders are treated in a way that is consistent with national minimum standards and Australia's international obligations. One powerful mechanism for exercising greater policy control in areas of state service delivery is to fund those services through tied grants—either through SPPs or departmental administered grants.

22.61 The ALRC notes that in the area of legal aid, funding is provided by way of tied grants to state and territory legal aid bodies for the provision of legal aid in relation to federal matters. A different approach has been taken in relation to the provision of corrective services to federal offenders by state and territory corrective services agencies. The ALRC also notes the arguments put to the CGC that federal offenders have special needs that impose a higher cost on state and territory budgets than state and territory offenders. It is arguable that funding in the corrective services area could be provided by way of tied grants.

22.62 Nevertheless, the ALRC recognises that the provision of funding to the states and territories by way of SPPs or departmental administered grants comes at a cost in terms of administration. A change in the funding arrangements may not be necessary if the Australian Government's policy goals can be promoted through other means, for example, through MOUs with the states and territories as discussed above. For this reason, the ALRC proposes that the OMFO should keep these matters under review and provide advice to the Australian Government as the need arises.

22.63 However, the ALRC is of the view that the OMFO should be established with the capacity to fund special programs with respect to federal offenders, for example, to

assist where there is a spike in the numbers of federal offenders in a particular jurisdiction. This will promote better working relationships between the Australian Government and the states and territories and will help to ensure that states and territories see the Australian Government as an active partner in the administration of federal offenders.

Proposal 22–6 The OMFO should provide advice to the Australian Government on federal–state funding arrangements in relation to federal offenders. The OMFO should have the capacity to fund special programs with respect to federal offenders, as the need arises.

Key performance indicators

Should key performance indicators be used to monitor the sentencing, imprisonment, administration and release of federal offenders? If so, what indicators should be used? How should key performance indicators be developed so that meaningful comparisons can be made between the treatment of federal offenders and equivalent state and territory offenders? [IP 29, Q 16–2]

Background

22.64 Performance measurement can provide governments with indicators of their performance over time; make performance more transparent, allowing assessment of whether program objectives are being met; help clarify government objectives and responsibilities; inform the wider community about government service performance; encourage ongoing performance improvement; and promote analysis of the relationships between agencies and between programs, allowing governments to coordinate policies within and across agencies.¹⁸⁰³

22.65 All Commonwealth agencies are required to publish performance information in key accountability documents such as Portfolio Budget Statements and annual reports.¹⁸⁰⁴ Performance information is published in relation to outcomes and outputs. Outcome performance relates to the specific impact that an agency's outputs have had on the community. Output performance relates to an agency's efficiency in executing its responsibilities.¹⁸⁰⁵ Key performance indicators help illustrate how an organisation has performed in terms of outcomes and outputs.

22.66 The AGD reports against an outcome and output structure in each annual report. This structure includes Outcome 2 'Coordinated federal criminal justice, security and emergency management activity for a safer Australia', and Output 2.1 'Policy advice

on, and program administration and regulatory activities associated with, the Commonwealth's domestic and international responsibilities for criminal justice and crime prevention, and meeting Australia's obligations in relation to extradition and mutual assistance'. The Criminal Justice Division of the AGD is responsible for Output 2.1.

22.67 In its 2003–04 *Annual Report*, the AGD reported in very general terms on those functions it undertakes in relation to federal offenders, including numbers of decisions on parole and release on licence, interstate transfers, permission to travel overseas and applications for the exercise of the executive prerogative of mercy. More detail was provided in relation to international transfer of prisoners.¹⁸⁰⁶

22.68 More detailed key performance indicators in the corrective services context are used by state and territory corrective services agencies,¹⁸⁰⁷ the Productivity Commission,¹⁸⁰⁸ and the Victorian Corrections Inspectorate.¹⁸⁰⁹ Other sources of guidelines and standards that might form the basis of key performance indicators in this area include the *Standards for Juvenile Custodial Facilities*¹⁸¹⁰ and the *Standard Guidelines for Corrections in Australia*.¹⁸¹¹

ALRC views

22.69 As mentioned above, the ALRC proposes that the Australian Government take a more active role in relation to federal offenders, including scrutiny of the services provided on behalf of the Australian Government by the states and territories. This is because the Australian Government is ultimately responsible for the treatment and welfare of federal offenders, even though states and territories deliver corrective services in relation to those offenders.

22.70 The ALRC considers that the OMFO should develop key performance indicators to monitor the provision of corrective services by the states and territories in relation to federal offenders. The MOUs between the OMFO and the states and territories, discussed above, should address the provision of information by the states and territories against these key performance indicators. This information will allow the OMFO to identify significant differences between jurisdictions and potential problems in the administration of the sentences imposed on federal offenders. The information might also be used to identify areas of special need requiring further funding, as discussed above. The OMFO should also develop key performance indicators in relation to the Federal Parole Board.

22.71 The OMFO should report against these indicators annually. This will ensure that both the Australian Parliament and community are provided with information on the treatment and welfare of federal offenders on a regular basis.

Proposal 22–7 The OMFO should develop key performance indicators to monitor the administration and release of federal offenders. The OMFO should report publicly against these indicators on an annual basis.

Australian Government information on federal offenders

National case management database

Should comprehensive national data be collected on persons charged or convicted of a federal offence, and the sentences imposed on federal offenders? If so, what data should be collected, who should collect it, and how should it be disseminated? [IP 29, Q 16–1]

Background

22.72 The AGD maintains a federal prisoner database, which contains information about current federal prisoners including age, sex, the state or territory where the prisoner is housed, and broad categories of offence (drugs, social security, migration and people smuggling, illegal fishing, *Crimes Act 1914*, bankruptcy, financial, and other). The database is a case management tool set up to assist the AGD to administer those elements of the sentences of federal offenders for which the Department has responsibility, for example, release on parole. There is no historical data on individual prisoners because their details are deleted from the system when they have completed their sentences.¹⁸¹²

22.73 The AGD produces monthly statistics on the federal prisoner population including: the number of federal prisoners at the end of each month and whether they are in full-time custody or on periodic or home detention; the number of new prisoners each month including the offence type, sentence type and the maximum and minimum period of imprisonment; and the number of prisoners released from prison each month organised by offence type. The information in the AGD database, together with Australian Bureau of Statistics (ABS) data, provided the basis for the analysis of federal prisoners by the Australian Institute of Criminology (AIC), set out in Appendix 1.

22.74 The Office of the Commonwealth Director of Public Prosecutions (CDPP) also collects data on federal offenders. The CDPP maintains an in-house electronic database known as the ‘case reporting and information management system’, in which details of prosecutions conducted by the CDPP are recorded. Information stored on the database includes details of charges and the sentences imposed, as well as details relating to

parameters such as the amount of drug imported or money defrauded. Prosecutors draw on this sentencing information when making submissions to courts on sentence.¹⁸¹³

22.75 States and territories hold information on all offenders within their jurisdiction, including federal offenders. In the Northern Territory, for example, the Integrated Justice Information System (IJIS) database contains information on prisoners as well as offenders serving their sentences in the community and juvenile offenders. It is possible to identify federal offenders in these categories from the database.¹⁸¹⁴ In Queensland, the recently established Integrated Offender Management System (IOMS) can also be used to identify federal offenders serving custodial or community based sentences.¹⁸¹⁵ Victoria is in the process of moving from the Prisoner Information Management System (PIMS) to the E*Justice system. Corrections Victoria noted in its submission that while it could easily identify federal prisoners from its database, federal offenders serving alternative sentences under Victorian legislation could be identified only by a manual search.¹⁸¹⁶

Issues and problems

22.76 In consultations, the AGD noted that it was in the process of upgrading its case management database to allow better collection of information and search capability. The Department explained that it would be possible to collect more detailed information about federal offenders—for example, identifying Aboriginal and Torres Strait Islander offenders—if this was required but that currently this information is not collected in a systematic way.¹⁸¹⁷ The AGD does have a collection field labelled ‘nationality’, but information in this field is collected on the basis of self-identification and not in every case.

22.77 There was significant support for a more comprehensive database being established at the federal level.¹⁸¹⁸ In consultations, the AGD acknowledged that better information at the national level would assist in the development of federal criminal law policy, but noted that establishing a national database would involve a high degree of cooperation between jurisdictions.¹⁸¹⁹

22.78 The AIC noted that the AGD currently collects basic information in relation to federal prisoners and that, if more detailed information were required, it would be important to make strategic decisions about what other information would assist in policy development and research. For example, information about ethnic origin of federal offenders is likely to be of interest to the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA), as well as to the AIC and the AGD.¹⁸²⁰

22.79 The AIC noted that the current AGD field of ‘nationality’ was not a standard ABS collection field and expressed the view that it would be better to collect information in a way that is consistent with national standards. The AIC noted, however, that the ABS classification of offenders on the basis of ‘most serious offence’ was not entirely satisfactory as it could obscure other criminal patterns and links between offences such as drug importation, illegal fishing and people smuggling.¹⁸²¹

22.80 The National Centre for Crime and Justice Statistics (NCCJS) in the ABS is working on standardising the collection of information in the crime and justice area, for example, ensuring that police use Aboriginal and Torres Strait Islander indicators in their records.¹⁸²²

ALRC's views

22.81 Currently, the AGD case management database does not contain information about the large majority of federal offenders, including offenders sentenced to community based orders and young federal offenders. It does not provide a comprehensive picture of the federal offender population. Nor does it systematically identify offender characteristics that may be valuable in developing federal criminal law policy, for example, whether offenders are Aboriginal or Torres Strait Islanders.

22.82 The ALRC believes that the Australian Government should become more closely involved in overseeing federal offenders, including federal offenders with a mental illness or intellectual disability and young federal offenders. The current database does not provide enough information to allow this to happen.

22.83 The ALRC is of the view, therefore, that the AGD case management database should be expanded to include all federal offenders regardless of the sentence imposed. The AGD should systematically collect sufficient information about federal offenders to provide a sound basis for federal criminal law policy development and research and to allow the Australian Government to exercise appropriate oversight of the sentences imposed on federal offenders and the way those sentences are administered.

22.84 The information to be collected should be identified in consultation with other stakeholders and experts in data collection and analysis such as the AIC, the ABS and the National Judicial College of Australia. As far as possible, information should be collected in ways that are consistent with national standards to facilitate exchange of information and research. The ALRC notes that any such exchange will have to be conducted within the framework of the *Privacy Act 1988* (Cth).

22.85 This information will have to be collected from a range of sources, including the states and territories. This flow of information should be one of the issues addressed in the MOUs with states and territories discussed above. It is also an area in which the Australian Government should work closely with states and territories to ensure that each jurisdiction can readily provide information about federal offenders.

22.86 In Chapter 21 the ALRC proposes the establishment of a national sentencing database to provide the courts and others with information to help ensure consistency in the sentencing of federal offenders. While this database is intended to be established separately from the AGD case management database and for different purposes, it would be sensible to ensure that, as far as possible, the databases are compatible and

that information collected is not duplicated. For this reason, the ALRC proposes that, in establishing the offender case management database, the OMFO work with the National Judicial College of Australia and others involved with the sentencing database project.

Proposal 22–8 The OMFO should develop a comprehensive national database for the case management of all federal offenders and for collecting data to inform policy advice in relation to the federal criminal justice system. The database should be developed in consultation with the Australian Institute of Criminology, the Australian Bureau of Statistics, the National Judicial College of Australia and the states and territories, and should include information relevant to the offender, the offence and sentence, sentence administration, and parole and release.

Statistical information on federal offenders

Background

22.87 The ABS is Australia's national statistical organisation, established to assist and encourage informed decision making, research and discussion within governments and the community.¹⁸²³ The NCCJS, within the ABS, includes three statistical units that are governed by separate Boards of Management. The National Criminal Courts Statistics Unit and the National Corrective Services Statistics Unit are jointly funded and managed by the ABS, the AGD and the states and territories. These units produce a number of statistical publications in relation to offences and offenders in Australia including *Criminal Courts* and *Prisoners in Australia* (both issued annually) and *Corrective Services* (issued quarterly).¹⁸²⁴

22.88 *Criminal Courts* provides statistics on the administration of criminal justice in the courts across Australia. The publication includes information on the characteristics of defendants, including age and sex, as well as information on offence and sentence imposed.

22.89 *Prisoners in Australia* provides statistics on all prisoners in custody on 30 June each year. The statistics are derived from information collected by the ABS from corrective services agencies in each state and territory. The publication includes information on the characteristics of prisoners, including age, sex and legal status, as well as on the nature of the offence with which the person was charged or convicted. The publication also provides details of the type and length of sentences being served.

22.90 *Corrective Services* provides statistics on adults in corrective services custody or serving community based orders in Australia. The publication includes information on offenders including sex, Indigenous status, type of custody, legal status and sentence type; the number of sentenced persons received into corrective services custody each month; and the number of federal prisoners.

Issues and problems

22.91 In each of the three publications, data is analysed in a number of ways, including by jurisdiction. Most of the information is not disaggregated to identify federal offenders. *Corrective Services* does, however, include a table, based on information obtained from the AGD, identifying the number of federal prisoners in full-time custody.

22.92 The data in these publications is also presented by reference to ‘principal offence’ or ‘most serious offence’. These offences are not identified precisely but by offence category only. The offence categories are based on the Australian Standard Offence Classification (ASOC) and the National Offence Index (NOI), which set out descriptions of broad categories of offence. Neither ASOC nor NOI specifically identify federal offences. Although some sub-categories of offence are limited to federal offences, others include both federal and state offences.

22.93 The ABS *National Information Development Plan for Crime and Justice Statistics*,¹⁸²⁵ developed through consultation with the Australian Government, state and territory agencies and non-government organisations, identifies statistical priorities as they relate to crime and justice for the next three years. The plan acknowledges that there are currently gaps, deficiencies and overlaps in information needed by stakeholders.¹⁸²⁶

ALRC’s views

22.94 The ALRC considers that one significant gap in available data is information on federal offenders. The ALRC proposes that the ABS collection of crime and justice statistics should distinguish between federal offenders and state and territory offenders. Accurate statistical information in relation to federal offenders is essential to the development of federal criminal law policy. The Commonwealth is a separate criminal law jurisdiction and this is not adequately reflected in current ABS crime and justice publications.

22.95 In drawing a distinction between federal and state or territory offenders, it may also be necessary to identify joint offenders, that is, offenders charged or convicted of both federal and state or territory offences.

22.96 In consultations with state and territory corrective services agencies it became apparent that distinguishing federal offenders from state and territory offenders is relatively easy in some jurisdictions and more difficult in others with different data collection procedures and systems. It will be necessary to work with these jurisdictions to ensure that information on federal offenders is readily accessible. There are likely to be transitional difficulties in collecting disaggregated data from the state and territory

courts, but the ALRC believes that this issue is important and that the difficulties should be confronted and addressed.

22.97 The ALRC understands that these issues are already under consideration by the National Criminal Courts Statistics Unit and the National Corrective Services Statistics Unit.¹⁸²⁷ The ABS and AGD should make the collection of information about federal offenders a priority in the next review of the *National Information Development Plan for Crime and Justice Statistics*, which is scheduled to be completed before 2008.

Proposal 22–9 The Australian Bureau of Statistics should disaggregate the data contained in its *Prisoners in Australia*, *Criminal Courts* and *Corrective Services* publications in order to distinguish between federal offenders, state and territory offenders, and joint offenders.

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 - 1752 However, an expansion of the jurisdiction of the Federal Court of Australia in federal criminal matters is proposed in Chs 18 and 20.
 - 1753 Enforcement of fines is discussed in Ch 17.
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 - 1755 Attorney-General's Department, *Consultation*, Sydney, 31 August 2004; Australian Institute of Criminology, *Consultation*, Canberra, 1 October 2004.
 - 1756 Attorney-General's Department, *Attorney-General's Department Website* <<http://www.ag.gov.au/>> at 27 October 2004.
 - 1757 Department of Corrective Services New South Wales, *Consultation*, Sydney, 15 September 2004; Corrections Victoria and Adult Parole Board Victoria, *Consultation*, Melbourne, 31 March 2005; Department of Corrective Services Queensland, *Consultation*, Brisbane, 3 March 2005; Department of Justice Western Australia, *Consultation*, Perth, 18 April 2005; ACT Corrective Services, *Consultation*, Canberra, 1 October 2004; Correctional Services Northern Territory and Parole Board of the Northern Territory, *Consultation*, Darwin, 27 April 2005.
 - 1758 Corrections Victoria, *Submission SFO 48*, 2 May 2005; Department of Corrective Services Queensland, *Submission SFO 27*, 14 April 2005; Department of Justice Western Australia, *Consultation*, Perth, 18 April 2005; Correctional Services Northern Territory and Parole Board of the Northern Territory, *Consultation*, Darwin, 27 April 2005. Enforcement of sentencing orders is discussed in Ch 17. Enforcement of parole orders is discussed in Ch 24.
 - 1759 Department of Corrective Services Queensland, *Consultation*, Brisbane, 3 March 2005.
 - 1760 Department of Corrective Services Queensland, *Submission SFO 27*, 14 April 2005.
 - 1761 Department of Justice Western Australia, *Consultation*, Perth, 18 April 2005.
 - 1762 Corrections Victoria, *Submission SFO 48*, 2 May 2005.
 - 1763 Ibid.
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 - 1765 Confidential, *Submission SFO 8*, 8 March 2005.
 - 1766 Inspector of Custodial Services Western Australia, *Consultation*, Perth, 19 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005.
 - 1767 Attorney-General's Department, *Submission SFO 52*, 7 July 2005.
 - 1768 Office of the Inspector of Custodial Services (WA), *Office of the Inspector of Custodial Services Website* <<http://www.custodialinspector.wa.gov.au/>> at 25 November 2004.
 - 1769 Victorian Department of Justice, *Annual Report 2003–04* (2003), 52.
 - 1770 Discussed below.
 - 1771 Discussed below.

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- 1772 See Chs 7, 25
 1773 See Chs 27, 28.
 1774 See Ch 23.
 1775 Confidential, *Submission SFO 8*, 8 March 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; PS, *Submission SFO 21*, 8 April 2005; JC, *Submission SFO 25*, 13 April 2005; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; Justice Action, *Consultation*, Sydney, 14 September 2004; Inspector of Custodial Services Western Australia, *Consultation*, Perth, 19 April 2005; Offenders Aid and Rehabilitation Services South Australia, *Consultation*, Adelaide, 20 April 2005.
 1776 Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005.
 1777 Corrections Victoria, *Submission SFO 48*, 2 May 2005.
 1778 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [238].
 1779 See Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [3.1]–[3.7].
 1780 Correctional Services Northern Territory, *Submission SFO 14*, 5 April 2005; Department of Corrective Services Queensland, *Submission SFO 27*, 14 April 2005; Corrections Victoria, *Submission SFO 48*, 2 May 2005.
 1781 See Ch 23.
 1782 See Ch 24.
 1783 See Ch 25.
 1784 See Ch 26.
 1785 See Chs 7, 25.
 1786 See Ch 14.
 1787 See Ch 27.
 1788 See Ch 28.
 1789 See, eg, *Commonwealth of Australia Gazette—Special (Arrangement under Section 3B of the Crimes Act 1914 of the Commonwealth of Australia between the Commonwealth of Australia and NSW)*, 12 November 1990, No S293.
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23. Release on Parole or Licence

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Introduction

23.1 There are several ways in which federal offenders serving custodial sentences may be released into the community before their sentence is complete. A prisoner may be released on parole, on licence, or under a pre-release scheme. An offender may also be granted a temporary leave of absence or, in exceptional circumstances, may be released by the Governor-General exercising the executive prerogative. In many cases conditions are attached to the release of an offender from custody. A number of issues were raised in the course of consultations and in response to questions in ALRC Issues Paper 29 *Sentencing of Federal Offenders* (IP 29)¹⁸²⁸ and these are considered here and in the following chapters. The most significant changes proposed in this chapter are the establishment of a Federal Parole Board to make decisions in relation to parole of federal offenders, and the abolition of automatic parole.

Federal Parole Board

Federal Parole Board to be established

Is the Commonwealth Attorney-General, or his or her delegate in the Attorney-General's Department, the most appropriate person to make decisions in relation to parole and release on licence of federal offenders? Should this function be delegated to state and territory parole boards or should an independent federal body be established to carry out this function? [IP 29, Q13–3]

Background

23.2 Part IB of the *Crimes Act 1914* (Cth) currently provides that where a discretion exists in relation to the release of a federal offender on parole or licence, that discretion is to be exercised by the Attorney-General.¹⁸²⁹ The authority to grant or refuse release on parole or licence, and to set conditions in relation to that release, has been delegated to senior officers of the Attorney-General's Department (AGD).¹⁸³⁰ Release on parole occurs following the expiry of the non-parole period set by the court. Release on licence may occur before the end of the non-parole period, but only in exceptional circumstances. The former Attorney-General, the Hon Daryl Williams AM QC, established a federal Parole Panel to assist the delegate in complex or potentially controversial cases. Although the Parole Panel provides advice to the delegate, the Panel does not have any independent powers to make decisions in relation to parole of federal offenders.

23.3 This contrasts with the arrangements in the states and territories where the authority to make decisions in relation to parole for the vast majority of offenders lies with an independent parole board or equivalent body.¹⁸³¹ There are limited exceptions to these arrangements in some jurisdictions, for example, in relation to offenders serving an indefinite or life sentence where the authority to grant or refuse release on parole lies with the state Governor or the responsible minister.¹⁸³²

23.4 In all jurisdictions, the executive retains a long-standing prerogative, discussed in Chapter 25, to release an offender from custody at any time, including before the end of the non-parole period set by the court.

Issues and problems

23.5 State and territory parole bodies are established as independent statutory authorities and are not subject to direction from the responsible minister, or the state or territory government. This helps to ensure that their decisions are made on the basis of legislative criteria, rather than on the basis of expedient political considerations.

23.6 In consultations and submissions there was almost universal support for the principle that decisions in relation to parole should be made by a body independent of the executive.¹⁸³³ This was on the basis that, because such decisions affect an

individual's liberty, they should be made, and be seen to be made, through an independent, transparent and accountable process and in accordance with high standards of procedural fairness.

23.7 In a number of consultations it was suggested that this was also desirable from the executive's point of view because it allows the executive an appropriate distance from decisions in individual cases.¹⁸³⁴ The Sentence Administration Board of the ACT noted that while parole authorities may at times come under pressure from the media and others in relation to their decisions, that pressure is potentially greater on politicians. The importance of due process and transparency of decision making was also emphasised.¹⁸³⁵ Attention was drawn to the 1987 case of Mr Rex Jackson, a former New South Wales Minister for Corrective Services, who was convicted of accepting bribes in relation to release of offenders on licence.¹⁸³⁶

23.8 Depending on the constitution of the parole board, there is also scope for involving a wider range of expertise, as well as members of the community, in the decision-making process. The benefits of a varied membership received some support in consultations.¹⁸³⁷

Options for reform

23.9 There are two principal options for reform in this area: to establish a federal parole board as an independent statutory authority or to delegate decision-making authority in relation to federal offenders to state and territory parole authorities.

23.10 There was some support for delegating this role to state and territory parole authorities as this would take advantage of existing administrative structures, procedures and expertise, including working arrangements with state and territory corrective services agencies.¹⁸³⁸ In consultations, all states and territories expressed the view that, given the small number of federal offenders, the state and territory parole authorities would be able to absorb the extra workload with relative ease, although some extra funding might be necessary.¹⁸³⁹

23.11 Concern was expressed, however, about state and territory parole authorities having to apply new and different procedures in relation to federal offenders, and about the possibility that there would be inconsistency in decision making across jurisdictions.¹⁸⁴⁰

23.12 Support was expressed for the establishment of a federal parole board on the basis that it would lead to greater inter-jurisdictional equality and consistent decision making.¹⁸⁴¹ While the AGD did not support the establishment of a federal parole board, the Department was strongly of the view that this role should be performed at the federal level for reasons of consistency and appropriate political responsibility.¹⁸⁴²

ALRC's views

23.13 The ALRC is of the view that the existing arrangements whereby the Attorney-General or departmental delegate make parole decisions in relation to federal offenders are not appropriate. Because such decisions affect an individual's liberty, they should be made, and be seen to be made, through transparent and accountable processes, in accordance with high standards of procedural fairness and independently of the political arm of the executive. The current arrangements lack adequate transparency and independence. In addition, the ALRC is of the view that the decision-making process would be improved through the involvement of relevant specialists and community members.

23.14 While delegating parole decision-making authority to the states and territories appears to be a convenient solution to these problems, it is not the outcome preferred by the ALRC for two reasons. First, having carefully examined the various procedures of the state and territory parole authorities, the ALRC is of the view that not all procedures meet appropriate levels of transparency and fairness. In particular, the ALRC is concerned that a number of state and territory authorities are not bound by the rules of natural justice and that their decisions are not subject to judicial review.¹⁸⁴³

23.15 Secondly, the ALRC agrees with the AGD that responsibility for release of federal offenders into the community prior to the expiration of their sentence should reside at the federal level. The ALRC is generally of the view, as discussed in Chapter 22, that the Australian Government should take a more active role in the administration of federal offenders. The ALRC has, therefore, formed the preliminary view that the Australian Government should establish its own Federal Parole Board as an independent statutory authority to make decisions in relation to parole of federal offenders. The Board's decisions should be final and not subject to the responsible minister's approval.

23.16 The ALRC has formed a different view in relation to release on licence. Release on licence may be granted at any time during an offender's sentence of imprisonment and whether or not a non-parole period has been set. It is expressly limited to exceptional circumstances:¹⁸⁴⁴

Exceptional circumstances are intended to cover matters that occur, usually post-sentence, that significantly affect an offender's circumstances such as extensive cooperation with law enforcement agencies or development of a serious medical condition which cannot be adequately treated within the prison system.¹⁸⁴⁵

23.17 The ALRC is of the view that decisions of this kind are more closely related to the exercise of the executive prerogative, given that an offender may be released before the end of the non-parole period set by a court, and that such decisions are appropriately made by the responsible minister. However, in order to increase the transparency of the process, the ALRC proposes that the minister exercise the discretion to release on licence following the receipt of advice from the Federal Parole Board. The Board's advice should include the conditions it considers appropriate to

impose in the licence. The minister should, however, be at liberty to accept or reject the Board's advice.

23.18 The proposed Office for the Management of Federal Offenders (OMFO), which is discussed in Chapter 22, would be ideally placed to provide secretariat support to the Federal Parole Board, given the proposed responsibilities of the OMFO for federal offender case management and liaison with state and territory corrective services agencies. The OMFO should not, however, be represented on the Board to ensure independence from the executive of the Board's decision-making processes.

23.19 In relation to the composition and constitution of the Board, the ALRC is of the view that members of the Federal Parole Board should be appointed for a fixed term. The chair and deputy chair of the Board should be legally qualified and have a sound understanding of the rules of natural justice. Other members should have relevant expertise, for example, in the areas of psychology, psychiatry and social work. Men and women should be represented. This is particularly important at the federal level because women are significantly over-represented in the federal prison population when compared to the prison population generally.¹⁸⁴⁶ There should be at least one Aboriginal or Torres Strait Islander member. A number of members should be drawn from the community at large.

23.20 Members should be empanelled to form a quorum of at least five to hear and determine parole matters. The chair or deputy chair should be involved in all meetings and decisions of the Board. Other members should be involved in decisions of the Board requiring their particular expertise. The Board should meet as often as necessary to deal with the business of the Board.

Proposal 23-1 The Australian Government should establish a Federal Parole Board as an independent statutory authority to make decisions in relation to parole and to provide advice to the responsible minister in relation to release on licence of federal offenders. Members of the Board should be appointed for fixed terms and should include a legally qualified chair and deputy chair and members with relevant expertise, for example, in the areas of psychology, psychiatry and social work. Men and women should be represented and there should be at least one Aboriginal or Torres Strait Islander member. Members should be empanelled to form a quorum of at least five to hear and determine parole matters. The proposed Office for the Management of Federal Offenders (OMFO) should provide secretariat support to the Board but should not be represented on the Board.

Procedures of Federal Parole Board

What information should be available to the authority making decisions on parole and release on licence of federal offenders? How should that information be obtained and presented? Should federal offenders have the opportunity to appear personally to make submissions in relation to these decisions? Should legal representation be available? [IP 29, Q13–5]

Background: Appearance before parole authority and related issues

23.21 Currently, the Attorney-General, or his or her delegate in the AGD, makes parole decisions solely on the basis of written reports and information.¹⁸⁴⁷ While the written information and reports available to the Attorney-General or delegate are similar to those available to state and territory parole authorities, there is no opportunity for the offender to appear before the Attorney-General or delegate at any stage.

23.22 The ALRC held consultations with the parole authorities in every jurisdiction except Western Australia. The procedures of the state and territory parole authorities vary widely, but offenders appear regularly before the authorities in New South Wales, Victoria, Queensland, South Australia, Tasmania and the ACT. In some jurisdictions the parole authority interviews every offender eligible for parole, and in others the parole authority interviews an offender only if it is considering refusing release on parole. The offender has a right to appear and to make submissions in New South Wales and the ACT if the parole authority is considering refusing release on parole,¹⁸⁴⁸ and may appear in the other jurisdictions with leave of the parole authority. New South Wales is the only jurisdiction to hold these hearings in public.

23.23 In New South Wales, South Australia and the ACT, the offender has a right to be legally represented before the parole authority. In addition, in New South Wales the offender may be represented by any other person and in the ACT the offender may be represented by another person with the consent of the parole authority.¹⁸⁴⁹ In Queensland, an offender may be represented by an agent, but that agent must not be a lawyer.¹⁸⁵⁰ In the other jurisdictions there is no legislative provision for representation.

Issues and problems: Appearance before parole authority and related issues

23.24 In New South Wales, release on parole is granted in about half the matters considered at public hearings—which are those matters in which the Board is considering refusing release on parole.¹⁸⁵¹ This suggests that the Board receives additional and important information from personal representations made by the offender, or his or her representative, at the review hearing. There was strong support for this practice among those parole authorities that do allow offenders to appear, as well as other organisations. This was on the basis that the process allows greater procedural fairness and transparency; that it provides a more accessible process for

offenders with an intellectual disability or limited literacy or language skills; and that important information can be obtained through meeting and talking to the offender that is unlikely to be included in written reports. In addition, it allows parole authorities to put issues to the offender for response, without providing the offender with copies of sensitive written reports from, for example, psychiatrists and victims.¹⁸⁵²

23.25 Only one parole authority expressed the view that allowing offenders to appear was unnecessary¹⁸⁵³ and the AGD was unclear how a personal appearance would improve the decision-making process.¹⁸⁵⁴

23.26 In a number of jurisdictions the geographic dispersal of offenders wishing to appear is a significant issue for parole authorities. In New South Wales offenders appear by video link. In Victoria and Queensland they appear personally or by video link. In South Australia offenders appear personally or by video link and the parole authority also travels to remote regions on occasion. While a number of parole authority members expressed the view that personal appearances were preferable, there was general support for the use of video link where necessary. It was recognised that the use of video link was cost-effective and avoided the security issues arising from the transport of offenders from one location to another. The Prisoners' Legal Service Inc, however, cautioned that the use of video link in relation to Aboriginal or Torres Strait Islander offenders, offenders with a first language other than English, or offenders with an intellectual disability, may cause distress or confusion in some circumstances.¹⁸⁵⁵

23.27 A number of organisations expressed support for allowing legal or other representation before parole authorities.¹⁸⁵⁶ This was on the basis that offenders frequently lack the skills to put their case fully and clearly, and that legal representation may assist offenders to articulate their submissions and to focus the discussion on relevant matters. On the other hand, in Victoria legal representation is not generally allowed because it has the potential to slow the deliberations of the parole authority in an unacceptable way.¹⁸⁵⁷ The Law Society of South Australia made a particular point in relation to Aboriginal or Torres Strait Islander offenders, emphasising the need to allow them the opportunity to be accompanied or represented before parole authorities by an elder or other community member.¹⁸⁵⁸

ALRC views: Appearance before parole authority and related issues

23.28 The ALRC has formed the view that federal sentencing legislation should provide that federal offenders have an opportunity to appear before the Federal Parole Board where the Board is of the opinion that the information currently before it does not justify releasing the person on parole or licence. The Board should not make a decision in these circumstances until it has given the offender the opportunity to appear and to provide further information and respond to submissions and reports before the Board.

23.29 Geographic dispersal is an even greater issue in relation to federal offenders than in relation to state and territory offenders. While an appearance in person before the Board would be ideal, the ALRC is of the view that the use of video link facilities, which are already available in four jurisdictions, will be necessary to address the distance issues. In some instances, Board members may also consider travelling to the relevant corrective services facility to interview an offender.

23.30 The ALRC is of the view that federal offenders appearing before the Board should be allowed legal or other representation. This will help to ensure that the rules of natural justice are adhered to; that the offender has an adequate opportunity to make submissions and respond to matters raised in the hearing; and that offenders with a mental health issue, an intellectual disability, or literacy or language issues will be adequately supported during the process. Representation before the Board might include, for example, an Aboriginal or Torres Strait Islander community member for an Aboriginal or Torres Strait Islander offender or an advocate or support worker for an offender with a mental illness or intellectual disability.

23.31 The ALRC is also of the view that, where an offender is unable to speak and understand the English language sufficiently to follow and participate in the proceedings, the provision of an interpreter is vital to ensure that the offender understands the parole process and can make submissions if he or she chooses to do so.

Background: Powers and procedures of the Federal Parole Board

23.32 Parole authorities rely on a range of information when making their decisions and when determining what conditions to attach to parole orders or licences. This information generally includes the offender's antecedent criminal history; the court's sentencing remarks; any appeal court judgment; correctional history and incident reports; correctional program participation reports; an assessment of residential and employment plans following release; any medical, psychiatric or psychological reports; and submissions from the offender. In some jurisdictions information from victims is also made available to the parole authority.

23.33 Although the relevant information is usually provided to the parole authority as a matter of course, most authorities have the power to require people to attend meetings of the authority and to produce information and documents where necessary.¹⁸⁵⁹

23.34 Only the Tasmanian Parole Board currently publishes its decisions online.¹⁸⁶⁰ The New South Wales Parole Board is the only jurisdiction to hold parole hearings in public and will provide copies of transcripts on request.¹⁸⁶¹ In consultations, one parole authority noted that holding parole hearings in private encouraged less formality and a more honest and comprehensive exchange of information with the offender, including information relating to personal and private matters.¹⁸⁶²

ALRC's views: Powers and procedures of the Federal Parole Board

23.35 The ALRC is of the view that the Federal Parole Board should have access to the same sort of information and reports currently considered by state and territory parole boards. The ALRC understands that an appropriate range of written information and reports is currently provided to the AGD as a matter of administrative procedure. The Federal Parole Board should, however, be given the power to require the production of information and to require persons to appear before it, where necessary, for the purpose of carrying out its functions.

23.36 Having discussed the parole authority procedures with authorities in five states and two territories, the ALRC is of the view that a valuable exchange of information may be encouraged between the parole authority and the offender where hearings are held in private. However, in some circumstances (such as controversial cases) it may be of benefit to hold the hearing in public. For this reason the ALRC is of the view that the Federal Parole Board should have the discretion to hold hearings in public or in private. In order to promote transparency and to provide the basis for judicial review, the Federal Parole Board should be required to publish a statement of reasons for its decisions.

23.37 The Board should also be required to prepare an annual report on its operations for consideration by the relevant minister and for tabling in the Australian Parliament.

Proposal 23-2 Federal sentencing legislation should provide that:

- (a) federal offenders have an opportunity to appear before the proposed Federal Parole Board where the Board is of the opinion that the information currently before it does not justify releasing the person on parole or licence;
- (b) federal offenders are allowed legal or other representation before the Board;
- (c) federal offenders have the benefit of an appropriately qualified interpreter where necessary;
- (d) the Board has access to the same information and reports currently considered by state and territory parole boards and that it has power to require the production of such information;

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| (e) | the Board has power to require persons to appear before it for the purpose of carrying out its functions; |
| (f) | the Board publish reasons for its decisions; and |
| (g) | the Board publish an annual report on its operations, which must be tabled in the Australian Parliament. |

Review of decisions of Federal Parole Board

<p>What further provision, if any, should be made for review or appeal of decisions relating to parole and release on licence of federal offenders? [IP 29, Q13–6]</p>
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Background

23.38 The decisions of parole authorities are decisions of an administrative character, which directly affect the liberty of individuals. For this reason it is essential to ensure that the decision-making process adheres to high standards of procedural fairness and transparency. One of the ways this can be achieved is by allowing decisions to be reviewed by an agency external to the original decision-making body. Such review falls into two broad categories:

- Merits review, where the reviewer steps into the shoes of the original decision maker and remakes the decision on the basis of the merits of the case. Review of this kind is undertaken by the executive.
- Judicial review, where a court examines whether a decision was made lawfully. Judicial review is intended to ensure that decision makers use correct reasoning and follow correct procedures. The court does not, generally, remake the decision on the basis of its view of the merits of the case.¹⁸⁶³

23.39 At the federal level, external review of the merits of decisions about release on parole or licence is not available, but it is possible to seek judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). There have been very few such applications for review.

23.40 In Victoria, Western Australia and the Northern Territory, the parole authorities are not subject to merits review or judicial review.¹⁸⁶⁴ In New South Wales, there is a limited right of review by the Court of Criminal Appeal where the offender, the state Attorney General or the state Director of Public Prosecutions alleges that the decision

was made on the basis of false, misleading or irrelevant information.¹⁸⁶⁵ In other jurisdictions, decisions of the parole authorities are subject to judicial review but not to merits review.

23.41 The New South Wales Law Reform Commission, in its 1996 report on sentencing, was of the view that merits review of the decisions of the New South Wales Parole Board was not appropriate and that ‘the community-dominated Board should remain the forum in which the public interest is determined’.¹⁸⁶⁶ The ALRC did not receive any submissions in support of merits review for parole-related decisions.

ALRC’s views

23.42 The ALRC has formed the view that decisions of the proposed Federal Parole Board should be subject to the rules of natural justice and to review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Because these decisions directly affect the liberty of individuals it is essential to ensure that decision makers use correct reasoning and follow correct procedures.

23.43 The ALRC has formed the preliminary view that decisions of the Federal Parole Board should not be subject to merits review. Establishment of the Board, as proposed above, can be expected to improve the quality of decision making in this area and to bring a new level of transparency and procedural fairness to the federal process.

23.44 The Administrative Appeals Tribunal (AAT)—the independent body established to conduct merits review of a broad range of administrative decisions made by the Australian Government and its agencies—does not currently have jurisdiction to review decisions in the criminal law context. Review of decisions relating to parole would be a significant departure from the existing scope of the AAT’s work.

23.45 In addition, the relationship between a parole authority and an offender is an ongoing one in those cases where the authority makes a decision not to grant release on parole at a particular time. Parole authorities generally revisit their decisions on a periodic basis in order to give the offender the opportunity to meet the criteria for release by, for example, undertaking a rehabilitation program. The ALRC is of the view that where the Federal Parole Board makes a decision to refuse release on parole, the federal offender should have the right to have the decision reconsidered by the Board periodically.

Proposal 23-3 Decisions of the proposed Federal Parole Board should be subject to the rules of natural justice and to review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). These decisions should not be subject to merits review but where the Board makes a decision to refuse release on parole, the federal offender should have the right to have the decision reconsidered by the Board periodically.

Parole decision

Automatic parole to be abolished

Under what circumstances, if any, should automatic parole be provided to federal offenders? [IP 29, Q13–2]

Background

23.46 Currently, where a federal offender has been sentenced to more than three years and less than 10 years imprisonment, the Attorney-General or delegate must grant parole at the end of the non-parole period.¹⁸⁶⁷ This means, in effect, that parole is automatic for those prisoners sentenced to between three and 10 years imprisonment, unless the prisoner is still serving a state or territory sentence when the federal non-parole period expires.¹⁸⁶⁸ Where the sentencing court imposes a term of imprisonment of more than six months and less than three years, the court is required to make a recognizance release order rather than set a non-parole period.¹⁸⁶⁹ In these circumstances, an offender is automatically released at the end of any pre-release period set by the court.

23.47 The large majority of federal offenders are sentenced to less than 10 years imprisonment and so are eligible for automatic parole or release.¹⁸⁷⁰ Appendix 1 indicates that 33 per cent of federal prisoners who were in custody on 13 December 2004 had received sentences of more than 10 years. On that basis, approximately two-thirds of federal prisoners were eligible for automatic parole or release.

23.48 In New South Wales, parole is automatic where an offender is sentenced to less than three years and in South Australia parole is automatic where an offender is sentenced to less than five years.¹⁸⁷¹ In other jurisdictions release on parole is always discretionary.

Issues and problems

23.49 In consultations, the AGD indicated that automatic parole was problematic in some circumstances. For example, where the Department receives reports from state or territory corrective services agencies in relation to an offender eligible for automatic parole and the reports do not support release of the offender on parole, there is no

discretion to refuse to release the offender. The only response the Attorney-General or delegate can make to such reports is to impose appropriate conditions in the parole order.¹⁸⁷²

23.50 Another problem area identified by the AGD is where offenders commit a further offence while serving a sentence of imprisonment but have not been sentenced at the time they become eligible for release on automatic parole. Again, there is no discretion to refuse release on parole.¹⁸⁷³

23.51 Finally, the AGD noted that, where a federal offender becomes eligible for automatic parole but is also serving a sentence for a state or territory offence, the Attorney-General or delegate must make the order but it does not come into effect until the offender is eligible to be released for the state or territory offence.¹⁸⁷⁴

23.52 There was some support for automatic parole in consultations and submissions on the basis that it provides certainty of release date for the offender and the offender's family; it eliminates political pressure on parole authorities in relation to the length of time served; and it ensures timely release of offenders.¹⁸⁷⁵

23.53 On the other hand, the use of discretionary parole was strongly supported on the basis that it provides an incentive to participate in rehabilitation programs and to address offending behaviour; assists with the management of offenders in custody; and encourages the development of post-release plans.¹⁸⁷⁶ In addition, the fact that most federal offenders are eligible for automatic parole was identified as one cause of friction between federal offenders and state and territory offenders in custody.¹⁸⁷⁷

23.54 During passage through Parliament of the *Crimes Legislation Amendment Act (No 2) 1989* (Cth)—which introduced Part IB into the *Crimes Act*—the Opposition stated that parole should never be automatic. The Shadow Attorney-General expressed the view that discretionary parole was important because the prospect of release on parole operated to keep order in prisons.¹⁸⁷⁸

ALRC's views

23.55 In 1988, the ALRC recommended that parole should be granted automatically at the end of the non-parole period in relation to all sentences except life sentences.¹⁸⁷⁹ At that time, the application of remissions under state and territory law to both head sentences and non-parole periods was causing confusion and disquiet because of the disparity between the sentences imposed by the court and the sentences actually served. Automatic parole was recommended as one element in a raft of recommendations intended to enhance 'truth in sentencing' and ensure that offenders served their custodial sentences in accordance with the orders imposed by the courts.

23.56 Given the limited use now made of remissions in all jurisdictions, the ALRC has reconsidered the issues and has formed the view that automatic parole should no longer be available in relation to federal offenders. The ALRC is persuaded by the consultations and submissions that indicated that the use of discretionary parole supports a range of positive outcomes for offenders and for the community. In addition, the determination of parole by an independent Federal Parole Board, as proposed above, will provide a degree of protection against tardiness in releasing offenders on parole.

23.57 In Chapter 9, the ALRC has proposed that courts be required to set non-parole periods in relation to sentences of imprisonment of 12 months or more.¹⁸⁸⁰ This means that the proposed Federal Parole Board would be required to exercise its discretion in relation to the release of all offenders serving sentences of 12 months or more.

Proposal 23-4 Federal sentencing legislation should repeal the provisions granting automatic parole to federal offenders.

Guidance for parole decision makers

Should the criteria taken into consideration in granting or refusing parole and release on licence for federal offenders be made public? If so, should they be set out in Part IB of the *Crimes Act 1914* (Cth)? What criteria should be included? [IP 29, Q13–4]

Background

23.58 Part IB of the *Crimes Act* does not provide any guidance on decision making in relation to parole. In consultations, the AGD indicated that the Department has internal guidelines in the form of a manual but that the content of the manual was not on the public record.¹⁸⁸¹

23.59 In most other jurisdictions the relevant legislation specifies criteria and information that the parole authority must consider in making its decisions.¹⁸⁸² In Victoria and Queensland the parole authorities have published lists of the criteria and information they consider in making their decisions.¹⁸⁸³ There is some divergence in these criteria between jurisdictions.

Issues and problems

23.60 The New South Wales Law Reform Commission has noted that without clear and public criteria for parole decisions

it is difficult for prisoners to know exactly by what criteria their applications will be assessed, and how they have been specifically applied in each case. This hampers

attempts to address factors relevant to the decision in their applications and their behaviour in prison.¹⁸⁸⁴

23.61 There was support for the development and publication of federal criteria in consultations and submissions, although there was some divergence of views about whether or not it would be appropriate to include these criteria in federal sentencing legislation.¹⁸⁸⁵ This support was justified on the basis that such criteria alert offenders to the issues they need to address, assist with procedural fairness and the production of reasons for decisions, and serve to inform the community at large of the roles and responsibilities of parole authorities.¹⁸⁸⁶

23.62 A number of parole authorities noted that setting the criteria out in the legislation will not assist offenders—who are unlikely to be familiar with the legislative provisions—and that it was more important for the parole authority and corrective services agencies to ensure that offenders were informed about these issues.¹⁸⁸⁷ The Parole Board of South Australia makes prison visits and the Parole Board of Tasmania runs a Parole Awareness Program to facilitate this flow of information.¹⁸⁸⁸

ALRC's views

23.63 The ALRC considers that it would be desirable for federal sentencing legislation to set out some guidance for the Federal Parole Board in making parole-related decisions. A number of elements underpin good administrative decision making, that is, decision making that is 'consistent and equitable as between individuals in similar situations'.¹⁸⁸⁹ These include clear guidelines for decision makers, which set out the criteria upon which the decision-making discretion is to be based. Publication of guidelines assists both individuals affected by decisions and the general community to understand the basis upon which decisions are made, and contributes to the transparency of the decision-making process.

23.64 The ALRC is of the view that this guidance should be provided in two ways:

- a general framework provision setting out the purposes of parole; and
- a provision setting out a non-exhaustive list of factors that the Board must consider, where they are relevant and known to the Board, in making parole-related decisions.

23.65 The ALRC has developed this approach in parallel with the purposes, principles and factors relevant to sentencing as described in Chapters 4, 5 and 6. The list of factors to be taken into consideration by the Board is non-exhaustive and is intended to be distinct from, but consistent with, the purposes of parole. This approach is intended

to provide guidance to decision makers while allowing adequate scope for the exercise of discretion in individual cases.

23.66 The ALRC has developed the list of relevant purposes and factors based on criteria set out in state and territory legislation, information received in consultations and submissions, and further research. Factor (f) in Proposal 23–6 was developed to address the issue that very short parole periods, while drawing on limited state and territory corrective services resources, may not achieve the purposes of parole. Factor (g) on immigration removal or deportation is discussed further below. The ALRC is interested in receiving feedback on the proposed provisions.

23.67 The ALRC notes the view expressed in some consultations and submissions that including this sort of information in legislation will not assist federal offenders. The ALRC is of the view, however, that it is appropriate to set this guidance out in legislation to provide a clear framework for decision making and judicial review of decision making. The legislative provisions should also provide the basis of information supplied to offenders by the Federal Parole Board, the OMFO, and state and territory corrective services agencies.

Proposal 23-5 Federal sentencing legislation should state that the purposes of parole are:

- (a) the reintegration of the offender into the community;
- (b) the rehabilitation of the offender; and
- (c) the protection of the community.

Proposal 23-6 Federal sentencing legislation should specify a non-exhaustive list of factors that the Federal Parole Board must consider when determining a parole matter, where the factors are relevant and known to the Board. In particular, the factors should include:

- (a) whether releasing the offender on parole is likely to assist the offender to adjust to lawful community life;
- (b) the likelihood that the offender will comply with the conditions of the parole order;
- (c) the offender’s conduct while serving his or her sentence;
- (d) the risk to the community of releasing the offender on parole;
- (e) the likely effect on the victim, or victim’s family, of releasing the offender on parole;

- (f) that the parole period be of sufficient length to achieve the purposes of parole; and
- (g) any special circumstances of the case, including the likelihood that the offender will be subject to removal or deportation upon release.

Removal or deportation while on parole

Is the law and practice in relation to federal offenders who are subject to deportation upon release from custody satisfactory? [IP 29, Q13–12]

Background

23.68 Section 19AK of the *Crimes Act* provides that a court is not precluded from fixing a non-parole period merely because the offender is, or may be, liable to be deported from Australia.

23.69 As a matter of practice, offenders who are non-citizens and subject to a removal or deportation order are removed or deported by the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) when they become eligible to be released from custody.¹⁸⁹⁰

Issues and problems

23.70 It has been suggested that this situation is unsatisfactory because the period of release on parole is part of the sentence imposed on the offender and, if the offender is removed or deported at the end of the non-parole period, he or she is not being required to serve his or her entire sentence, including time in the community under supervision.¹⁸⁹¹

23.71 The New South Wales Parole Board's *Operating Guidelines* state that, in considering the grant of parole in relation to an offender liable to removal or deportation, the Board must consider the following factors:

- (a) whether a definite decision has been made by the Department of Immigration;
- (b) whether the offender has adequately addressed the offending behaviour;
- (c) whether the offender would otherwise be released to parole in Australia if not subject to deportation;
- (d) the seriousness of the offence;
- (e) the risk to the community in the country of deportation;

- (f) the duration of the period to be served on parole;
- (g) the fact that supervision of the parole order is highly unlikely to occur.¹⁸⁹²

23.72 The New South Wales Department of Corrective Services has indicated that this matter is under active consideration by the Corrective Services Administrators' Conference (CSAC) and the Corrective Services Ministers' Conference (CSMC). In May 2005, CSMC endorsed a New South Wales resolution proposing the establishment of a working party to consider the issue. The draft resolution stated that legislation should ensure that

offenders liable to be deported upon release from custody ... may only be granted parole when the public interest in releasing the offender from custody for compassionate or other reasons (without supervision in the community and without any means of enforcing compliance with parole conditions by enabling revocation of parole for non-compliance) outweighs the public interest in protecting the community by refusing parole until appropriate supervision and enforcement arrangements can be made.¹⁸⁹³

23.73 In its submission, DIMIA described its role in relation to non-citizen offenders sentenced to a period of imprisonment as being:

- to identify non-citizens liable to removal or deportation on completion of their sentence and bring this to the attention of the individual and prison authorities;
- to ensure non-citizens in prison have lawful immigration status during their prison sentence; and
- to ensure that in doing this the non-citizen is not prevented from participating in rehabilitative schemes such as work or study release.¹⁸⁹⁴

23.74 DIMIA stated that it would not remove or deport an offender while that person was serving a sentence in custody. However, non-citizen offenders liable to removal or deportation are taken into immigration detention when their period of custody ends. Such offenders are able to participate in leave of absence schemes, such as work or study release, because these do not bring the period of custody to an end. However, pre-release schemes, such as release to home detention, do bring the period of custody to an end and an offender would be transferred to immigration detention at this time. DIMIA noted that the purpose of removal is to protect the Australian community.¹⁸⁹⁵

23.75 It was argued in the High Court case of *Shrestha*¹⁸⁹⁶ that offenders who are liable to deportation on release from custody should never be granted a non-parole period or released on licence. The High Court rejected this blanket approach, but stated that where an offender would almost certainly be deported upon release from custody, this factor should be taken into account by the court in fixing a non-parole period and should also be taken into account by the parole authority in considering whether the offender should actually be released on parole or licence. This was not the only relevant factor, however. The High Court also stated that the parole authority should

consider other factors such as the likelihood of rehabilitation and any other mitigating factors such as the offender's cooperation with authorities.¹⁸⁹⁷

ALRC's views

23.76 The ALRC supports the establishment of a working party to consider this issue further. In the interim, the ALRC is of the view that the approach adopted by the High Court in *Shrestha* is appropriate and that the fact that an offender is likely to be subject to removal or deportation upon release is one of the factors that should be considered by the Federal Parole Board in deciding whether or not to grant a parole order to a non-citizen federal offender.¹⁸⁹⁸

23.77 The ALRC is of the view that the approach adopted by the New South Wales Parole Board in its *Operating Guidelines*, discussed above, is also appropriate and, in particular, that the risk to the community in the country to which the offender would be removed or deported should also be considered.

23.78 In order to ensure that the Federal Parole Board has accurate information in relation to non-citizen federal offenders, the ALRC also proposes that the OMFO should liaise with DIMIA on these issues.

Proposal 23-7 Federal sentencing legislation should provide that the fact that an offender is likely to be subject to removal or deportation upon release is one of the factors to be considered by the proposed Federal Parole Board in deciding whether or not to grant a parole order to a federal offender. [See Proposal 23-6]

Proposal 23-8 The proposed OMFO should liaise with the Department of Immigration and Multicultural and Indigenous Affairs to ensure that the Office holds accurate information on the immigration status of non-citizen federal offenders.

Parole order and conditions

Term of a federal parole order or licence

Is the law and practice in relation to parole of federal offenders satisfactory? In particular, is the fact that a parole order may expire before the end of an offender's head sentence problematic? [IP 29, Q13-1]

Background

23.79 Part IB of the *Crimes Act* provides that, except in relation to federal offenders sentenced to life imprisonment, the maximum length of the period to be served on parole or licence is five years.¹⁸⁹⁹ In relation to offenders sentenced to life imprisonment and released on parole or licence, the Attorney-General or delegate decides the length of the parole or licence period. This is normally at least five years and may be longer.¹⁹⁰⁰ Where the balance of an offender's sentence at the end of the non-parole period is more than five years, the parole or licence period may expire before the end of the offender's head sentence.

23.80 Except in Tasmania,¹⁹⁰¹ state and territory legislation generally provides that the period to be served on parole runs from the date of release on parole until the expiry of the offender's sentence.¹⁹⁰² There is some variation among the states and territories in relation to indeterminate and life sentences.

23.81 In his submission, Professor Arie Freiberg commented that federal law was not satisfactory in this regard, and that a parole order should not expire before the end of the head sentence.¹⁹⁰³

ALRC's views

23.82 The ALRC has formed the view that, except in relation to federal offenders sentenced to life imprisonment, a federal parole or licence period should run from the day an offender is released on parole or licence until the expiry of the offender's head sentence. Limiting the length of the parole or licence period to five years means that, in some cases, the last part of a sentence is simply disregarded: it is served neither in custody nor in the community. The proposed approach ensures that the sentence is served completely.

23.83 While some conditions attached to the parole order or licence may be varied during this period, for example, in relation to the level of supervision, the standard conditions discussed below—that the offender be of good behaviour and not commit any offence—should apply for the entire parole or licence period.

23.84 In relation to federal offenders sentenced to life imprisonment, the length of a parole period should be decided by the Federal Parole Board and the length of a licence period should be decided by the relevant minister.

Proposal 23-9 Federal sentencing legislation should provide that:

- (a) except in relation to an offender sentenced to life imprisonment, a parole or licence period should commence on the day the offender is released on parole or licence and end on the day the offender's sentence expires; and
- (b) in relation to an offender sentenced to life imprisonment:

- (i) a parole period should commence on the day the offender is released on parole and end on a day determined by the Federal Parole Board; and
- (ii) a licence period should commence on the day the offender is released on licence and end on a day determined by the relevant minister.

Parole or licence conditions

Should some or all of the conditions available for release on parole or release on licence be set out in federal legislation? Should the relevant authority retain the current discretion to specify any conditions considered appropriate to the individual federal offender? [IP 29, Q13–7]

Background

23.85 Under Part IB of the *Crimes Act*, certain conditions set out in the legislation attach automatically to release on parole and release on licence. These are that offenders must be of good behaviour and that they must not violate any law during the parole period or the period of release on licence.¹⁹⁰⁴ The Attorney-General or departmental delegate has a wide discretion to attach any other conditions to the release, but the only other condition set out in the *Crimes Act* is that offenders may be subject to supervision and that, if so, offenders must obey all reasonable directions from their supervisor.

23.86 An offender cannot be released on parole unless he or she agrees in writing to the conditions to which the parole order is subject, although this requirement is not imposed in relation to release on licence.¹⁹⁰⁵

23.87 Legislation in the states and territories generally sets out the standard conditions to be imposed on all offenders released on parole and makes some provision for additional conditions to be imposed. In Tasmania, however, the terms and conditions of the order are left entirely to the Parole Board.¹⁹⁰⁶ The standard parole conditions vary between jurisdictions but include, for example, that the offender must be of good behaviour and not commit any offence; that the offender is subject to a period of supervision; and that the offender must not travel out of the jurisdiction without permission.¹⁹⁰⁷

23.88 In some jurisdictions the additional conditions are also set out in legislation.¹⁹⁰⁸ They include, for example, requirements about where offenders may reside; requirements to facilitate rehabilitation, such as undertaking approved educational or training courses; and requirements to prevent offenders from contacting victims.

Issues and problems

23.89 In consultations, the AGD noted that there was a need to clarify the scope of the conditions that can be imposed on federal offenders. The Department explained that it was required to set conditions in parole orders and licences relating to offenders who transferred to Australia under the International Transfer of Prisoners Scheme, discussed in Chapter 26, and in relation to joint offenders. In relation to joint offenders, the Department was unclear whether it was limited to imposing conditions in relation to the federal offence. In addition it was unclear about the scope of conditions it could impose in relation to offenders transferred to Australia from other countries where the offences committed may have been of a different nature to the federal offences with which the Department is usually concerned.¹⁹⁰⁹

23.90 There was widespread support in consultations and submissions for ensuring that parole authorities retain a wide discretion to impose conditions that are appropriate to the individual offender.¹⁹¹⁰ But there was also some support for defining the scope of the conditions to promote clarity, consistency and transparency.¹⁹¹¹

ALRC's views

23.91 The ALRC is of the view that federal sentencing legislation should set out the standard conditions imposed on federal offenders released on parole or licence. These conditions should be that the offender be of good behaviour and that the offender not commit any further offences while on parole or release on licence. The standard conditions should apply for the entire parole or licence period. While federal sentencing legislation should make provision for supervision of the offender in some circumstances, this condition should not be included in the standard conditions as it will not be necessary in every case and will not always apply for the entire length of the parole or licence period.

23.92 The Federal Parole Board should be given a wide discretion to impose any other conditions that it considers reasonably necessary to achieve the purposes of parole set out in Proposal 23–5. Because one of the proposed purposes of parole is the protection of the community, this would allow the Board to impose any conditions reasonably necessary to achieve that purpose, including conditions related to offences committed in other countries by offenders transferred to Australia.

23.93 In relation to joint offenders, the ALRC understands that in some cases both a federal parole order and a state or territory parole order are necessary to authorise the release of the offender. In these circumstances, parole authorities at both federal and state or territory level will need to be involved in approving release on parole and in setting conditions of parole. The OMFO should be responsible for liaising with state

and territory authorities to ensure that the processes, parole orders and conditions imposed on the offender are properly co-ordinated.

23.94 The conditions imposed by the Federal Parole Board should be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

Proposal 23-10 Federal sentencing legislation should set out the standard conditions imposed on federal offenders released on parole or licence. The proposed Federal Parole Board should have the discretion to impose any other conditions considered reasonably necessary to achieve the purposes of parole.

Period of supervision

Would it be desirable for the federal parole authority to have greater flexibility in setting the length of the supervision period? [IP 29, Q13–8]

Background

23.95 One of the conditions regularly imposed on federal offenders is that the offender be subject to supervision during some part of the period on parole or release on licence. Except in relation to federal offenders sentenced to life imprisonment, the maximum length of the supervision period is three years.¹⁹¹² In relation to offenders sentenced to life imprisonment and released on parole under supervision, there is no limit imposed on the length of the supervision period and the Attorney-General or departmental delegate decides the length of the period.¹⁹¹³

23.96 In New South Wales the period of supervision is limited to three years and in Western Australia, in relation to sentences greater than four years where a parole term has been set, it is limited to two years.¹⁹¹⁴ In the other states and territories the period of supervision is limited only by the length of the parole period and in a number of jurisdictions supervision extends for the entire length of the parole period.¹⁹¹⁵

Issues and problems

23.97 Where a federal offender's parole or licence period is less than three years, or where the offender is serving a life sentence, it is possible to supervise the offender for the entire parole or licence period. However, in other cases the supervision period will end after three years and this may be before the end of the parole or licence period.

23.98 The Law Society of South Australia expressed the view that it would be desirable for the federal parole authority to have greater flexibility in setting the length

of the supervision period. This was on the basis that ‘recent research has shown that a slower approach to rehabilitation is more effective as it enables an ex-offender to better internalise change for more sustainable outcomes’.¹⁹¹⁶ The New South Wales Parole Board, which may impose supervision for a maximum of three years, also supported giving the federal parole authority greater flexibility.¹⁹¹⁷

ALRC’s views

23.99 The ALRC is of the view that the Federal Parole Board should have the discretion to impose an appropriate period of supervision on a federal offender. In many cases the Board may decide not to impose supervision on an offender for the entire length of the parole or licence period. However, it appears unnecessary to limit the possible period of supervision by legislation, except to provide that the period should not extend past the end of the parole or licence period. As discussed above, other than in relation to an offender sentenced to life imprisonment, a parole or licence period should commence on the day of release on parole or licence and end on the day the offender’s sentence expires.¹⁹¹⁸ This should be the maximum period that supervision may be imposed on a federal offender, but the Federal Parole Board should have the discretion to set a shorter period.

Proposal 23-11 Federal sentencing legislation should enable the proposed Federal Parole Board to impose a supervision period limited only by the length of the parole or licence period.

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- 1828 Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005).
 - 1829 *Crimes Act 1914* (Cth) ss 19AL(2), 19AP(1).
 - 1830 Delegation of 19 July 2004 made under the *Law Officers Act 1964* (Cth) s 17(2).
 - 1831 In some jurisdictions there is a separate body to deal with juvenile offenders, such as the Youth Parole Board established under the *Children and Young Persons Act 1989* (Vic).
 - 1832 See, eg, *Sentence Administration Act 2003* (WA) s 18; *Correctional Services Act 1982* (SA) s 67(6).
 - 1833 Law Society of South Australia, *Submission SFO 37*, 22 April 2005; JC, *Submission SFO 25*, 13 April 2005; A Freiberg, *Submission SFO 12*, 4 April 2005; K Warner, *Consultation*, Hobart, 13 April 2005; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; Youth Parole Board Victoria, *Consultation*, Melbourne, 30 March 2005; New South Wales Parole Board, *Consultation*, Sydney, 4 November 2004; Corrections Victoria and Adult Parole Board Victoria, *Consultation*, Melbourne, 31 March 2005; Queensland Community Corrections Board, *Consultation*, Brisbane, 3 March 2005; Parole Board of South Australia, *Consultation*, Adelaide, 20 April 2005; Parole Board of Tasmania, *Consultation*, Hobart, 14 April 2005; Sentence Administration Board ACT, *Consultation*, Canberra, 17 March 2005.
 - 1834 Queensland Community Corrections Board, *Consultation*, Brisbane, 3 March 2005; Parole Board of Tasmania, *Consultation*, Hobart, 14 April 2005; Youth Parole Board Victoria, *Consultation*, Melbourne, 30 March 2005.
 - 1835 Sentence Administration Board ACT, *Consultation*, Canberra, 17 March 2005.
 - 1836 *Jackson v The Queen* (1988) 33 A Crim R 413.
 - 1837 New South Wales Parole Board, *Consultation*, Sydney, 4 November 2004; Queensland Community Corrections Board, *Consultation*, Brisbane, 3 March 2005.
 - 1838 Correctional Services Northern Territory, *Submission SFO 14*, 5 April 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; Inspector of Custodial Services Western Australia, *Consultation*, Perth, 19 April 2005; Offenders Aid and Rehabilitation Services South Australia, *Consultation*, Adelaide, 20 April 2005.

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- 1840 Department of Justice Western Australia, *Consultation*, Perth, 18 April 2005; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005.
- 1841 Parole Board of Tasmania, *Consultation*, Hobart, 14 April 2005; JC, *Submission SFO 25*, 13 April 2005; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005.
- 1842 Attorney-General's Department, *Submission SFO 52*, 7 July 2005.
- 1843 *Corrections Act 1986* (Vic) s 69(2); *Sentence Administration Act 2003* (WA) s 115; *Parole of Prisoners Act 1971* (NT) s 3HA.
- 1844 *Crimes Act 1914* (Cth) s 19AP.
- 1845 Explanatory Memorandum (House of Representatives), Crimes Legislation Amendment Bill (No 2) 1989 (Cth).
- 1846 See Appendix 1, [33]–[39].
- 1847 Attorney-General's Department, *Consultation*, Sydney, 31 August 2004.
- 1848 *Crimes (Administration of Sentences) Act 1999* (NSW) s 140; *Rehabilitation of Offenders (Interim) Act 2001* (ACT) s 49.
- 1849 *Crimes (Administration of Sentences) Act 1999* (NSW) s 190; *Correctional Services Act 1982* (SA) s 77; *Rehabilitation of Offenders (Interim) Act 2001* (ACT) s 90.
- 1850 *Corrective Services Act 2000* (Qld) s 137.
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- 1852 New South Wales Parole Board, *Consultation*, Sydney, 4 November 2004; Corrections Victoria and Adult Parole Board Victoria, *Consultation*, Melbourne, 31 March 2005; Queensland Community Corrections Board, *Consultation*, Brisbane, 3 March 2005; Parole Board of South Australia, *Consultation*, Adelaide, 20 April 2005; Sentence Administration Board ACT, *Consultation*, Canberra, 17 March 2005.
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- 1857 Corrections Victoria and Adult Parole Board Victoria, *Consultation*, Melbourne, 31 March 2005.
- 1858 Law Society of South Australia, *Submission SFO 37*, 22 April 2005.
- 1859 *Crimes (Administration of Sentences) Act 1999* (NSW) s 186; *Corrections Act 1986* (Vic) s 71; *Corrective Services Act 2000* (Qld) s 182; *Sentence Administration Act 2003* (WA) s 107; *Correctional Services Act 1982* (SA) s 63; *Corrections Act 1997* (Tas) s 63; *Rehabilitation of Offenders (Interim) Act 2001* (ACT) s 85.
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- 1862 Sentence Administration Board ACT, *Consultation*, Canberra, 17 March 2005.
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- 1864 *Corrections Act 1986* (Vic) s 69(2); *Sentence Administration Act 2003* (WA) s 115; *Parole of Prisoners Act 1971* (NT) s 3HA.
- 1865 *Crimes (Administration of Sentences) Act 1999* (NSW) ss 155, 156. The *Crimes (Administration of Sentences) Amendment (Parole) Act 2004* (NSW), which is not yet in force, will assign such appeals to the Common Law Division of the Supreme Court rather than the Court of Criminal Appeal.
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- 1867 *Crimes Act 1914* (Cth) s 19AL(1).
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- 1872 Attorney-General's Department, *Consultation*, Canberra, 16 March 2005.
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- 1875 PS, *Submission SFO 21*, 8 April 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005.
- 1876 A Freiberg, *Submission SFO 12*, 4 April 2005; Correctional Services Northern Territory, *Submission SFO 14*, 5 April 2005; ACT Corrective Services, *Submission SFO 34*, 20 April 2005; Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005; Queensland Community Corrections Board, *Consultation*, Brisbane, 3 March 2005; Sentence Administration Board ACT, *Consultation*, Canberra, 17 March 2005; Parole Board of Tasmania, *Consultation*, Hobart, 14 April 2005; Parole Board of South Australia, *Consultation*, Adelaide, 20 April 2005.
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- 1897 *Ibid*, [15].
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- 1904 *Crimes Act 1914* (Cth) ss 19AN(1)(a), 19AP(7)(a).
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- 1908 See *Corrections Regulations 1998* (Vic) sch 4 Form 1; *Sentence Administration Act 2003* (WA) s 30.
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- 1912 *Crimes Act 1914* (Cth) s 16.
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- 1914 *Crimes (Administration of Sentences) Regulation 2001* (NSW) reg 216; *Sentence Administration Act 2003* (WA) s 28.
- 1915 *Corrections Regulations 1998* (Vic) Schedule 4 Form 1; *Corrective Services Act 2000* (Qld) s 144(2)(a); *Correctional Services Act 1982* (SA) s 68(1); *Corrections Act 1997* (Tas) s 77(2); *Rehabilitation of Offenders (Interim) Act 2001* (ACT) s 38; *Parole of Prisoners Act 1971* (NT) s 5(5).
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24. Breach of Parole or Licence

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Introduction

24.1 In the previous chapter, the ALRC proposed the establishment of a Federal Parole Board to make parole decisions in relation to federal offenders. This chapter examines, amongst other things, the role of the Board in relation to breach of the conditions attached to a parole order or licence. The reforms proposed in this chapter include that the powers of the Federal Parole Board to take action in response to a breach should be expressly set out in legislation, and that all federal offenders should receive credit for time spent on parole or licence before the parole or licence conditions were breached.

Powers of Federal Parole Board following breach of conditions

Should federal legislation include a list of options available in relation to federal offenders who have failed to comply with the conditions of a parole order or licence? What options should be included? Should the list be exhaustive? [IP 29, Q 13–10]

Background

24.2 Currently, a federal parole order or licence can be revoked in two ways. It is revoked automatically when a federal offender who is released on parole or licence commits a further state, territory or federal offence and is sentenced to a term of imprisonment of more than three months.¹⁹¹⁹ The question of automatic revocation is discussed further below. In addition, the Attorney-General has authority to revoke a parole order or licence if a federal offender fails to comply with conditions attached to the parole order or licence, or if there are reasonable grounds for suspecting that the offender has failed to comply.¹⁹²⁰

24.3 Once a parole order or licence is revoked, the offender may be arrested and must be brought before a ‘prescribed authority’, usually a state or territory magistrate, as soon as practicable. The magistrate is required to remand the offender in custody for the unserved portion of the original sentence.¹⁹²¹

Issues and problems

24.4 While the Attorney-General has a discretion to revoke a parole order or licence for breach of conditions, the legislation does not specify what other action the Attorney-General may take, for example, where the breach is of a minor nature and would not justify returning the offender to prison.

24.5 The ALRC understands that, in practice, the Attorney-General or departmental delegate may issue a formal warning in relation to breaches that are considered minor, but there is no express provision in federal legislation for this or any other alternative response to a breach of conditions.

24.6 By contrast, most state and territory legislation provides a range of possible responses to a breach of the conditions attached to a parole order. For example, the New South Wales Parole Board may revoke the order, impose further conditions on the order, or vary any of the existing conditions.¹⁹²² The Sentence Administration Board of the ACT may take no further action, issue a warning, impose additional or varied conditions, or revoke the parole order.¹⁹²³

24.7 There was significant support in consultations and submissions for including a list of options available to the federal parole authority in relation to a breach of a parole order or licence.¹⁹²⁴

ALRC's views

24.8 The power to revoke parole orders and licences currently resides with the Attorney-General or the departmental delegate. In the states and territories, these matters are dealt with by the parole authorities and the ALRC is of the view that, at the federal level, these matters should be dealt with by the proposed Federal Parole Board.

24.9 The ALRC is also of the view that it would be valuable to set out clearly in federal sentencing legislation the full range of the Board's powers to deal with a breach of a parole or licence condition.

Proposal 24-1 Federal sentencing legislation should provide that, where the proposed Federal Parole Board is satisfied that an offender has breached his or her obligations under a parole order or licence, the Board may:

- (a) take no further action;
- (b) issue a warning to the offender;
- (c) amend the order or licence by adding, revoking or varying the conditions attached to the order or licence; or
- (d) revoke the order or licence.

Opportunity to be heard before revocation of parole or licence

Background

24.10 Currently, where a federal offender fails to comply with a parole or licence condition, or there are reasonable grounds for suspecting that the offender has failed to comply, the Attorney-General or departmental delegate must, where possible and practicable, notify the offender of the alleged breach and the fact that the parole order or licence is to be revoked in 14 days. The offender then has the opportunity to provide written reasons why the parole order or licence should not be revoked.¹⁹²⁵

24.11 In the states and territories, revocation is dealt with by the state and territory parole authorities. In New South Wales, Victoria, Queensland, Western Australia and the Northern Territory the parole authority may revoke the order whether or not the offender has had an opportunity to give reasons why the order should not be revoked.¹⁹²⁶ In South Australia, except in relation to designated conditions, the parole

authority may revoke a parole order only after it has considered a report from the officer supervising the offender.¹⁹²⁷ In Tasmania, the parole authority may revoke a parole order only after it has called on the prisoner to show cause why the power should not be exercised, unless the authority considers it impracticable to do so.¹⁹²⁸ In the ACT the parole authority may revoke a parole order only after the authority has held an inquiry into the matter and the offender has appeared before the authority.¹⁹²⁹

Issues and problems

24.12 In consultations and submissions a number of corrective services agencies stated that the procedures in relation to the breach of a federal parole order or licence were much more cumbersome and time consuming than the procedures for dealing with state and territory offenders. This might jeopardise community safety if offenders who breach their parole orders or licences are not dealt with promptly.¹⁹³⁰ In those states and territories where parole orders can be revoked without giving the offender an opportunity to be heard, the process may be more streamlined but it does not conform to standards of procedural fairness. In those states and territories where the offender is given an opportunity to be heard this may be done promptly by bringing the offender before the parole authority in person. At the federal level, however, the need to issue a written notice and then wait for 14 days for a written response from the offender before taking action is likely to be one cause of delay.

ALRC's views

24.13 Given the serious consequences of revocation of a parole order or licence—that is, the offender will be returned to custody—the ALRC is of the view that such orders should generally not be revoked without giving the offender an opportunity to be heard. The offender should be given this opportunity unless it is impracticable (for example, where the offender has left the jurisdiction and cannot be found) or undesirable (for example, where the offender is placing himself or herself, or the community, at imminent risk of harm.)

24.14 The ALRC considers that the existing procedures for dealing with breach of parole or licence conditions by federal offenders are unnecessarily cumbersome. This situation has the potential to undermine the authority of federal parole orders and licences as well as the state and territory corrective services agencies responsible for administering them. The ALRC is of the view that the Federal Parole Board should be given responsibility for dealing with breaches of parole orders as a corollary of the power to grant those orders and impose conditions. Although release on licence is approved by the relevant minister after seeking the advice of the Board, responding to a breach should remain a matter for the Federal Parole Board. An offender's submissions to the Board need not be in writing, for example, the offender could be given the opportunity to address the Board by telephone, video link or in person. This will facilitate a quicker resolution of the matter.

24.15 Where the offender has not had the opportunity to provide reasons before the order or licence is revoked, the offender should be given that opportunity as soon as possible after the order or licence is revoked.

Proposal 24-2 Federal sentencing legislation should provide that the proposed Federal Parole Board must not revoke a parole order or licence without giving the federal offender an opportunity to provide reasons why the order should not be revoked unless the Board considers it to be impracticable or undesirable to do so. Where the federal offender has not had the opportunity to provide reasons before the order or licence is revoked, the offender should be given that opportunity as soon as possible after the order or licence is revoked.

Automatic revocation of parole or licence

Is the law and practice in relation to automatic revocation of federal parole or licence satisfactory? [IP 29, Q 13–9]

Background

24.16 Currently, a federal parole order or licence is revoked automatically when a federal offender who is released on parole or licence commits a further state, territory or federal offence and is sentenced to a term of imprisonment of more than three months.¹⁹³¹

24.17 In New South Wales, Victoria and Western Australia parole is never revoked automatically. In these jurisdictions the matter must go to the parole authority for consideration.¹⁹³² In all the other jurisdictions parole is automatically revoked where the offender is sentenced to a term of imprisonment of any duration for an offence committed during the period the offender was released on parole.¹⁹³³

ALRC's views

24.18 The ALRC has formed the view that, if an offender is sentenced to a term of imprisonment for an offence committed during the parole or licence period, the parole or licence should be automatically revoked. Revocation should not depend on the length of the term of imprisonment. If the offender is sentenced to any term of imprisonment and taken into custody, the parole order or licence is no longer of any effect and should be automatically revoked. A later custodial order is necessarily inconsistent with a parole order or licence that requires an offender to serve part of his or her sentence in the community.

24.19 For similar reasons, the ALRC is also of the view that where an offender is removed or deported from Australia during the parole or licence period, the parole order or licence is no longer of any effect and should be automatically revoked.

24.20 Where a term of imprisonment is imposed for an offence committed during the parole or licence period but the term of imprisonment is wholly suspended, the matter should be one for consideration by the Federal Parole Board.

Proposal 24-3 Federal sentencing legislation should provide that a parole order or licence is automatically revoked where an offender:

- (a) commits any offence during the parole or licence period and is sentenced to a term of imprisonment that is not completely suspended; or
- (b) is removed or deported from Australia during the parole or licence period.

Crediting clean street time

Should ‘street time’ be deducted from the balance of the sentence to be served and, if so, should this be provided for in federal legislation to ensure a consistent approach across all jurisdictions? [IP 29, Q 13–9]

Background

24.21 Where a parole order or licence is revoked, the offender becomes liable to serve that part of the sentence that had not been served at the time the offender was released on parole or licence. The balance of the sentence to be served is, however, subject to the operation of s 19AA(2) of the *Crimes Act 1914* (Cth), which picks up and applies state and territory laws that allow an offender credit for the time between release on parole or licence and the time the parole order or licence is revoked. In those jurisdictions that have such laws, the period of ‘clean street time’ is deducted from the sentence remaining to be served.

24.22 New South Wales, Queensland, Western Australia and South Australia give credit for ‘clean street time’.¹⁹³⁴ Victoria and Tasmania give the parole authority a discretion to give credit for ‘clean street time’¹⁹³⁵ although the parole authorities in both jurisdictions noted that credit was rarely, if ever, given.¹⁹³⁶ The ACT and the Northern Territory do not give credit for ‘clean street time’.¹⁹³⁷

Issues and problems

24.23 There was significant support for giving credit for ‘clean street time’ in consultations and submissions. This was on the basis that it provides encouragement and motivation to those on parole and recognises the efforts of the offender to comply with the conditions of parole. In addition, it was seen as particularly unfair, where the parole period was a long one and the breach occurred towards the end of the period, if no credit was given for the period of compliance.¹⁹³⁸ The Parole Board of South Australia stated that parole was not intended to be punitive, but to encourage behavioural change and that failing to recognise good behaviour did not encourage such behaviour.¹⁹³⁹

24.24 Even in those submissions and consultations that did not support giving credit for ‘clean street time’ there was a certain amount of ambivalence on the issue. It was noted that no credit provided an incentive to comply with conditions of parole for the entire parole period and that an offender could reapply for release on parole following revocation of parole. It was also noted, however, that offenders viewed the lack of credit for ‘clean street time’ as unfair.¹⁹⁴⁰

24.25 One further issue in relation to ‘clean street time’ is the way it is calculated in cases of automatic revocation. ‘Clean street time’ for federal offenders is calculated from the date of release on parole or licence to the date of revocation. Currently, a federal parole order or licence is revoked when the offender is actually sentenced for the offence committed while on parole or licence. By contrast, for New South Wales state offenders ‘clean street time’ is calculated from the date of release on parole to the date on which it appears to the New South Wales Parole Board that the offender failed to comply with the conditions of the parole order, for example, the date of the first offence committed on parole.

24.26 For a state offender in New South Wales, the balance of the sentence to be served is calculated from the date the offender committed the offence while on parole to the end of the original sentence. For a federal offender in New South Wales, the balance of the sentence to be served is calculated from the date a sentence is imposed for the new offence to the end of the original sentence. It is likely, therefore, that the balance a federal offender will be required to serve in New South Wales will be shorter than the balance that a state offender in New South Wales will be required to serve. It is also possible—where sentencing of the federal offender in relation to the new offence is delayed through adjournments and so on—that there will be little or no balance of the original sentence to be served.

24.27 Finally, only those federal offenders serving their sentences in states and territories that recognise ‘clean street time’ are given credit. This creates undesirable inequality between federal offenders in different jurisdictions and can give rise to problems when a federal offender wishes to transfer to another jurisdiction to serve his or her parole or licence period.

ALRC's views

24.28 On balance, for the reasons articulated in consultations and submissions, the ALRC is of the view that credit should be given for 'clean street time' following revocation of parole or release on licence. This should be provided for in federal sentencing legislation to ensure that such credit is given to all federal offenders released on parole or licence.

24.29 The ALRC is also of the view that the calculation of 'clean street time' should not be based on the date of sentencing but rather on the date of the first offence committed on parole or licence or, in the case of discretionary revocation, the date that the offender first failed to comply with the conditions of parole or licence.

Proposal 24-4 Federal sentencing legislation should provide that 'clean street time' is to be deducted from the balance of the period to be served following revocation of parole or licence. 'Clean street time' should be calculated from the date of release on parole or licence to:

- (a) in the case of automatic revocation upon conviction—the date the offence was committed; or
- (b) in any other case—the date on which it is shown to the Federal Parole Board's satisfaction that the offender first failed to comply with his or her obligations under the parole order or licence.

Cancellation of travel documents

Are the arrangements in relation to overseas travel by federal offenders released on parole or licence satisfactory? What further arrangements or provisions should be put in place to ensure that federal offenders comply with parole or licence conditions in relation to overseas travel? [IP 29, Q 13–11]

Background

24.30 It is usual for the Attorney-General or departmental delegate to impose conditions related to travel in federal parole orders or licences. These conditions include:

- that the offender will not leave the state or territory in which the offender is on parole or release on licence without the permission of a designated state or territory officer; and
- that the offender will not leave Australia without the written permission of the Attorney-General or the departmental delegate.¹⁹⁴¹

24.31 Before a federal offender released on parole or licence can travel out of Australia, he or she must hold a valid passport. One way of regulating international travel by federal offenders is to confiscate the offender's passport and to regulate the issue of any new passport to the offender. One of the problems identified in IP 29 was that the *Passports Act 1938* (Cth) did not expressly prohibit the issue of a passport to an offender who was still serving a prison sentence.

24.32 That Act was recently repealed and replaced by the *Australian Passports Act 2005* (Cth). The new Act establishes a regime under which a 'competent authority' may make a request to have an Australian passport or travel document cancelled and to ensure that a new passport is not issued to a person who is prevented from leaving Australia by force of, for example, a parole or licence condition. The Act makes clear that this may also apply to a person who is in prison.¹⁹⁴² A 'competent authority' is one that has responsibility for, or powers, functions or duties in relation to people who are subject to such conditions. This might include, for example, the proposed OMFO as well as the proposed Federal Parole Board.

24.33 In addition, the *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth) provides that a 'competent authority' may request that the responsible minister order the surrender of a person's foreign passport or travel document in similar circumstances.¹⁹⁴³

24.34 Finally, s 22 of the *Crimes Act* provides that in passing sentence for a serious narcotics offence or other prescribed offence, the court may order that a federal offender remain in Australia, surrender his or her Australian passport and refrain from obtaining or applying for an Australian passport.

Issues and problems

24.35 Offenders who are released on parole or licence and leave Australia without permission breach their parole or licence conditions, but they do not thereby commit a criminal offence. Although the offender may be warned at the immigration barrier that departure will be a breach of parole or licence conditions, the offender cannot be detained unless the offender has committed a further criminal offence that would justify their arrest. In the past, it appears that there were problems where a passport was issued to an offender in prison, allowing the offender to leave the country on release in breach of his or her parole or licence conditions.

ALRC's views

24.36 The ALRC is of the view that the new *Australian Passports Act* and the *Foreign Passports (Law Enforcement and Security) Act* will go some way towards better regulating international travel by federal offenders released on parole or licence. The OMFO should be responsible for ensuring that cancellation/refusal and surrender requests are processed in relation to federal offenders. The Federal Parole Board should ensure that appropriate arrangements are in place in relation to custody of an offender's travel documents, where necessary, in considering the grant of a parole order or licence.

24.37 The ALRC notes that under the new Acts an officer, including a Customs officer or member of the Australian Federal Police, can demand the surrender of a passport or travel document in certain circumstances. These include where the minister has ordered the surrender of a foreign passport or travel document and, in relation to a person holding an Australian passport or travel document, where the officer suspects on reasonable grounds that the person owes money to the Commonwealth, for example, where the Commonwealth has incurred expenses on behalf of the person in a foreign country.¹⁹⁴⁴ If the new passport control procedures are not sufficient to prevent federal offenders on parole or licence leaving the country without permission in the future, the Australian Government should consider introducing a provision to allow an officer to demand the surrender of an Australian passport or travel document where the officer believes on reasonable grounds that the person is prohibited from leaving Australia by force of a parole or licence condition. This would enable federal offenders to be stopped at the immigration barrier even if they have managed to obtain a valid passport or other travel document.

24.38 Finally, the ALRC is of the view that the Federal Parole Board should be responsible for considering requests from federal offenders who have been released on parole or licence for leave to travel overseas.

Proposal 24-5 The proposed OMFO should ensure that, where necessary, a request is made under the *Australian Passports Act 2005* (Cth) or the *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth) to:

- (a) cancel the Australian passport or travel document of a federal offender;
- (b) prevent an Australian passport or travel document being issued to a federal offender; or
- (c) surrender a foreign passport or travel document of a federal offender.

Proposal 24-6 The proposed Federal Parole Board should ensure that, when considering the grant of a parole order or licence, where necessary, a refusal/cancellation request is in place under the *Australian Passports Act 2005* (Cth) or that a surrender request has been made under the *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth).

Proposal 24-7 The Federal Parole Board should have responsibility for considering requests from federal offenders who have been released on parole or licence for leave to travel overseas.

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- 1919 *Crimes Act 1914* (Cth) s 19AQ.
 - 1920 *Ibid* s 19AU.
 - 1921 *Ibid* ss 19AV, 19AW.
 - 1922 *Crimes (Administration of Sentences) Act 1999* (NSW) s 170(4).
 - 1923 *Rehabilitation of Offenders (Interim) Act 2001* (ACT) s 58.
 - 1924 Correctional Services Northern Territory, *Submission SFO 14*, 5 April 2005; New South Wales Parole Board, *Submission SFO 22*, 8 April 2005; JC, *Submission SFO 25*, 13 April 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005.
 - 1925 *Crimes Act 1914* (Cth) s 19AU.
 - 1926 *Crimes (Administration of Sentences) Act 1999* (NSW) s 170; *Corrections Act 1986* (Vic) s 74; *Corrective Services Act 2000* (Qld) s 150; *Sentence Administration Act 2003* (WA) s 44; *Parole of Prisoners Act 1971* (NT) s 5.
 - 1927 *Correctional Services Act 1982* (SA) s 74.
 - 1928 *Corrections Act 1997* (Tas) s 79(2).
 - 1929 *Rehabilitation of Offenders (Interim) Act 2001* (ACT) s 58.
 - 1930 Department of Justice Western Australia, *Consultation*, Perth, 18 April 2005; Department of Corrective Services Queensland, *Submission SFO 27*, 14 April 2005.
 - 1931 *Crimes Act 1914* (Cth) s 19AQ.
 - 1932 *Crimes (Administration of Sentences) Act 1999* (NSW) s 179; *Corrections Act 1986* (Vic) s 77; *Sentence Administration Act 2003* (WA) s 44.
 - 1933 *Corrective Services Act 2000* (Qld) s 151(1); *Correctional Services Act 1982* (SA) s 75; *Corrections Act 1997* (Tas) s 79(3); *Rehabilitation of Offenders (Interim) Act 2001* (ACT) s 61; *Parole of Prisoners Act 1971* (NT) s 5(8).
 - 1934 *Crimes (Administration of Sentences) Act 1999* (NSW) s 171; *Corrective Services Act 2000* (Qld) s 152(2); *Sentence Administration Act 2003* (WA) s 71; *Correctional Services Act 1982* (SA) s 73.
 - 1935 *Corrections Act 1986* (Vic) s 77(7); *Corrections Act 1997* (Tas) s 79(5).
 - 1936 Corrections Victoria and Adult Parole Board Victoria, *Consultation*, Melbourne, 31 March 2005; Parole Board of Tasmania, *Consultation*, Hobart, 14 April 2005.
 - 1937 *Rehabilitation of Offenders (Interim) Act 2001* (ACT) s 43(1); *Parole of Prisoners Act 1971* (NT) s 7.
 - 1938 New South Wales Parole Board, *Submission SFO 22*, 8 April 2005; Law Society of South Australia, *Submission SFO 37*, 22 April 2005; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; Parole Board of South Australia, *Consultation*, Adelaide, 20 April 2005; Correctional Services Northern Territory and Parole Board of the Northern Territory, *Consultation*, Darwin, 27 April 2005.
 - 1939 Parole Board of South Australia, *Consultation*, Adelaide, 20 April 2005.
 - 1940 Sentence Administration Board ACT, *Consultation*, Canberra, 17 March 2005; Parole Board of Tasmania, *Consultation*, Hobart, 14 April 2005.
 - 1941 Attorney-General's Department, *Commonwealth of Australia Crimes Act 1914—Standard Parole Order* (2004).
 - 1942 *Australian Passports Act 2005* (Cth) s 12.
 - 1943 *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth) s 13.
 - 1944 *Australian Passports Act 2005* (Cth) s 25.

25. Other Methods of Release from Custody

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Introduction

25.1 There are a number of ways in which federal offenders serving custodial sentences may be released into the community before their sentence is complete—apart from release on parole or licence discussed in Chapters 23 and 24. This chapter examines a number of issues in relation to pre-release schemes, temporary leave of absence, and release by the Governor-General exercising the executive prerogative.

Pre-release schemes

Is the law and practice in relation to pre-release schemes available to federal offenders satisfactory? Would greater uniformity be desirable? How might this be achieved? [IP 29, Q 13–13]

Background

25.2 Pre-release schemes involve release from custody for a specific purpose prior to the expiry of the offender's non-parole period, for example, to engage in employment or education, or to complete a custodial sentence by way of home detention. Federal legislation does not expressly provide for specific pre-release schemes but instead relies on those available under state and territory law. Section 19AZD(3) of the *Crimes Act 1914* (Cth) provides that a law of a state or territory providing for a pre-release

scheme may also apply to a federal offender serving a sentence in the relevant state or territory where the scheme is prescribed in the *Crimes Regulations 1990* (Cth).¹⁹⁴⁵

Issues and problems

25.3 Regulation 5 of the *Crimes Regulations* includes a list of those state and territory pre-release schemes for which federal offenders are eligible. The list includes schemes in Victoria, Queensland, Western Australia and South Australia. There are no pre-release schemes listed for New South Wales, Tasmania, the ACT or the Northern Territory. A number of the schemes listed in reg 5 have been repealed or replaced in the relevant jurisdiction.

ALRC's views

25.4 The ALRC is of the view that the Australian Government should facilitate access to pre-release schemes for federal offenders in appropriate cases. Pre-release schemes are generally aimed at reintegrating offenders into the community and are an important element in rehabilitation. The fact that the *Crimes Regulations* are out of date highlights the failure of the Australian Government to address the needs of federal offenders in this regard. The proposed Office for the Management of Federal Offenders (OMFO) should be given the task of monitoring the effectiveness and suitability of state and territory pre-release schemes and providing advice to the Attorney-General of Australia regarding the state and territory pre-release schemes that should be included in the regulations and made available to federal offenders.

Proposal 25-1 The proposed Office for the Management of Federal Offenders (OMFO) should monitor the effectiveness and suitability of state and territory pre-release schemes for federal offenders and should provide advice to the Attorney-General of Australia regarding the state and territory pre-release schemes that should be made available for federal offenders.

Leave of absence

Is the law and practice in relation to the grant of leave of absence under state and territory laws, as they apply to federal offenders, satisfactory? [IP 29, Q 13-14]

25.5 Section 19AZD(1) of the *Crimes Act* provides that where a state or territory law allows state or territory offenders to be granted temporary leave of absence from prison, such leave may also be granted to federal offenders serving a sentence in the state or territory. Although there was some concern expressed in one submission in relation to federal offenders being granted leave of absence in one jurisdiction,¹⁹⁴⁶ no

systemic issues were identified and the ALRC does not currently intend to make any proposal in this area.

Executive prerogative to pardon or remit the sentence

Is the law and practice in relation to the exercise of the prerogative of mercy to pardon or remit sentences imposed on federal offenders satisfactory? [IP 29, Q 13–15]

Background

25.6 The Governor-General may exercise the executive prerogative, on the advice of the Federal Executive Council, to pardon or remit any sentence imposed on a federal offender. The prerogative is one element of executive power, vested in the Queen and exercisable by the Governor-General under s 61 of the *Australian Constitution*. Section 21D of the *Crimes Act* states that nothing in Part IB is to affect the exercise of the prerogative of mercy.

25.7 The executive prerogative is also available at the state and territory level in respect of state and territory offences and is vested in the Governor or Administrator. In all the states and territories the relevant minister, Governor or Administrator has some power to refer elements of applications for the exercise of the executive prerogative to the courts or to bodies of inquiry for advice or resolution.¹⁹⁴⁷ For example, in New South Wales the Governor may direct that an inquiry be conducted into the conviction or sentence; the minister may refer the whole case to the Court of Criminal Appeal to be dealt with as an appeal; or the minister may request that the Court give an opinion on any point arising in the case.¹⁹⁴⁸ In the ACT, the executive may order an inquiry into a conviction for a territory offence under the *Inquiries Act 1991* (ACT), although this power is not tied to the exercise of the executive prerogative. The board of inquiry must be constituted by a judge of the Supreme Court or a magistrate. The board of inquiry's report is referred to the Supreme Court of the ACT for consideration and the Court may take certain action in response to the report, for example, quash the conviction or confirm the conviction but recommend that the executive exercise the prerogative to pardon or remit the sentence.¹⁹⁴⁹

25.8 Currently, where the federal minister wishes to refer a matter raised in an application for the exercise of the executive prerogative to the courts for hearing and determination, the minister relies on state and territory provisions as picked up and applied by ss 68 and 79 of the *Judiciary Act 1903* (Cth).

Issues and problems

25.9 Reliance on the state and territory provisions in this way can give rise to problems where there is a need for detailed advice on the issues raised in an application for the exercise of the prerogative. First, not every jurisdiction has legislation permitting such a matter to be referred to an appellate court to be heard and determined as an appeal: for example, there is no such provision in the ACT. This creates disparity in the procedures available in respect of federal offenders in different parts of Australia.

25.10 Secondly, where such legislation does exist, there are lingering doubts about the ability of ss 68 or 79 of the *Judiciary Act* to pick up and apply such laws to federal criminal matters.¹⁹⁵⁰ This is because the relevant state or territory laws often give a named state officer (for example, the state Attorney-General) the power to refer the matter to a named state court (for example, the Court of Criminal Appeal). It is unclear whether the *Judiciary Act* enables a different officer (the Attorney-General of Australia) to refer the matter to the state court, at least where there is no on-going proceeding to which the reference relates.

25.11 Thirdly, even where the *Judiciary Act* does operate to pick up and apply the state provisions to federal criminal matters, there are constitutional limits to the functions that a state court can perform. For example, a state court cannot give, consistently with the *Australian Constitution*, an advisory opinion to the federal executive when exercising federal jurisdiction, even though it might give the state executive an advisory opinion in a state criminal matter.¹⁹⁵¹

Options for reform

25.12 The Attorney-General's Department expressed the view that it is desirable for the relevant federal minister to be able to refer some matters raised in applications for the exercise of the executive prerogative to a court for determination. The Department noted in its submission that

referral may be considered in cases where it is specifically requested by the petitioner; where the issues involved are of sufficient complexity; where the evidence is so voluminous that it is more appropriate for the matter to be dealt with by a Court; or where there is a reasonable possibility that a miscarriage of justice has occurred or there are sufficient grounds to consider that the conviction might have been unjust.

There are clearly cases where the administration of justice is best served by a matter being referred back to a Court for a hearing and a decision, rather than the executive making a decision on untested or incomplete information. It should not be a matter of chance whether State legislation provides for referral back to a Court, it should be available to all federal offenders.¹⁹⁵²

25.13 Alternatively, it would be possible to establish a procedure at the federal level to allow an inquiry to be established to consider such matters and to report to the executive. This would meet the concerns expressed by the Department, particularly if an inquiry was chaired by a judge or a retired judge, with adequate powers to carry out

its functions, for example, to require persons to appear and to require the production of documents and information. Any inquiry report would be provided to the executive but would not constrain the exercise of the prerogative.

ALRC's views

25.14 The executive prerogative to pardon or remit a sentence is an important process that, in exceptional and rare cases, may be exercised to do justice where legal rights have been exhausted. The ALRC accepts that in some cases it may be desirable for the executive to seek advice, for example, where the issues raised are complex or contested and the evidence is voluminous. However, the ALRC has formed the preliminary view that following an application for the exercise of the executive prerogative, such matters should not be referred to the courts for consideration as an appeal but referred to an executive inquiry for consideration and report.

25.15 At the federal level, a clear constitutional line is drawn between the exercise of the executive power and the exercise of judicial power by the courts. This distinction is drawn in part to prevent the exercise of judicial power being unduly affected or influenced by the executive. The principle underpins the independence of the judiciary. The executive prerogative is generally exercised once legal rights have been exhausted and is not constrained by legal concerns. It may, for example, be exercised purely on compassionate grounds. For these reasons, the ALRC is of the view that the distinction between the two processes—one judicial, the other executive—should be maintained. Where the executive requires advice in relation to the exercise of the prerogative, this should be provided in the first instance by the OMFO, and in more complex cases by a board of inquiry established for that purpose.

25.16 Federal sentencing legislation should make clear that such advice does not affect the power of the Governor-General in relation to the exercise of the executive prerogative.

Proposal 25-2 The proposed OMFO should provide advice to the relevant minister in relation to applications for the exercise of the executive prerogative to pardon or remit a sentence imposed on a federal offender.

Proposal 25-3 Federal sentencing legislation should provide that the relevant minister may refer a matter raised in an application for the exercise of the executive prerogative to a board of inquiry for investigation and report. The report should be provided to the minister and should inform, but not constrain, the exercise of the executive prerogative by the Governor-General.

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- 1945 The regulations provide that a federal offender is not eligible to participate in a pre-release scheme if the offender is liable to deportation under the *Migration Act 1958* (Cth) upon release.
 - 1946 JC, *Submission SFO 25*, 13 April 2005.
 - 1947 *Crimes Act 1958* (Vic) s 584; *Criminal Code Act 1899* (Qld) s 672A; *Sentencing Act 1995* (WA) s 140; *Criminal Law Consolidation Act 1935* (SA) s 369; *Criminal Code Act 1924* (Tas) s 419; *Criminal Code Act* (NT) s 431.
 - 1948 *Crimes Act 1900* (NSW) s 474C.
 - 1949 *Crimes Act 1900* (ACT) ss 422–432.
 - 1950 See, eg, in a slightly different context, *Williams v The King [No 2]* (1934) 50 CLR 551; *Peel v The Queen* (1971) 125 CLR 447.
 - 1951 Courts exercising federal jurisdiction must do so in a way that is consistent with the constitutional doctrine of the separation of powers. Federal judicial power does not include the ability to provide merely advisory opinions because judicial power must involve the binding and authoritative ascertainment or determination of existing rights: *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357.
 - 1952 Attorney-General's Department, *Submission SFO 52*, 7 July 2005.

26. Transfer of Federal Offenders

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Introduction

26.1 The Terms of Reference require the ALRC to examine whether current arrangements provide an efficient, effective and appropriate regime for the administration of federal offenders, and whether this could or should vary according to the place of trial or detention. Chapter 4 of Issues Paper 29, *Sentencing of Federal Offenders*¹⁹⁵³ (IP 29), examined the issues that determine the location of criminal proceedings and punishment, as well as the transfer of federal offenders between jurisdictions. The major concerns raised in response to IP 29 were the delays involved in interstate transfer of federal prisoners on welfare grounds and the absence of international transfer arrangements with some countries. In this chapter the ALRC makes a number of proposals to address these concerns.

Location of trial

Are the current rules with respect to the location of trial of persons charged with a federal offence satisfactory? If not, what factors should be relevant to determining the location of such a trial? [IP 29, Q 4–1]

Background

26.2 Section 80 of the *Australian Constitution* requires that where a federal offence is tried on indictment the trial must be held in the state where the offence was committed. This limitation does not apply to the vast majority of federal matters where, for example, the offender enters a guilty plea or the matter is dealt with summarily. Where an offence is not committed in a state, s 80 provides that the Australian Parliament may prescribe where the trial should be held. The *Judiciary Act 1903* (Cth) provides that in these circumstances the trial may be held in any state or territory.¹⁹⁵⁴ The Act also provides that, where a federal offence is begun in one state or territory and completed in another, the offender may be tried in either state or territory.¹⁹⁵⁵ Other legislation deals with offences committed at sea or on interstate or international aircraft flights.¹⁹⁵⁶

26.3 The *Judiciary Act* also provides that, subject to the limitation on location of trials on indictment in s 80 of the *Constitution*, federal criminal jurisdiction is conferred on state and territory courts notwithstanding any limits as to locality of the jurisdiction of those courts. This makes clear that state and territory courts may deal with federal offences committed in another state or territory in some circumstances.¹⁹⁵⁷

26.4 The Commonwealth Director of Public Prosecutions (CDPP)—the principal prosecuting authority in relation to federal offences—has offices in all state and territory capital cities, as well as regional offices in Townsville and Cairns. In cases that give rise to a choice of location (for example, where elements of the offence have been committed in more than one jurisdiction) the CDPP makes a decision about the location of trial based on the balance of convenience, considering such issues as the whereabouts of investigators and witnesses, and the jurisdiction in which the offender was apprehended.¹⁹⁵⁸

26.5 However, where the trial of a federal offence committed within the one state is to be on indictment there is no choice as to venue, even where the balance of convenience or the interests of justice would be better served by holding the trial in another jurisdiction.

Options for reform

26.6 In 1988, the Constitutional Commission recommended a number of changes to s 80 of the *Constitution* and expressed the view that:

Trial by jury for any offence against a law of the Commonwealth should be held in the State or Territory where the offence was committed. However, the court should

have power to transfer the trial to another competent jurisdiction on the application of either the accused or the prosecution. Where such an offence was not committed in a State or Territory, or was committed either in two or more of the States and Territories or in a place or places unknown, the trial should be held where Parliament prescribes.¹⁹⁵⁹

26.7 The Constitution Alteration (Rights and Freedoms) Bill 1988 (Cth), which included amendments to the *Constitution* based on these recommendations, was passed by the Australian Parliament but rejected at a referendum held on 3 September 1988.

26.8 In submissions, the CDPP and the Australian Taxation Office (ATO) expressed the view that the current arrangements generally operate satisfactorily. The CDPP did not see any need for constitutional change.¹⁹⁶⁰

ALRC's views

26.9 It is possible to think of situations in which it would be desirable to transfer the trial on indictment of a federal offender to another jurisdiction, for example, where the trial has attracted such publicity in the jurisdiction in which the offence was committed that the defendant is unlikely to receive a fair trial. However, it appears from consultations and submissions that the constitutional limitations on location of trial have not caused significant problems in practice. For this reason, while supporting the 1988 recommendations of the Constitutional Commission in principle, the ALRC does not propose constitutional change at this time.

Location of imprisonment and other sentences

Are the current arrangements by which federal offenders generally serve their sentence in the jurisdiction in which they were prosecuted satisfactory? If not, what arrangements would be preferable? [IP 29, Q 4–2]

Background

26.10 Generally, federal offenders serve their sentences in the state or territory in which they are sentenced. Under a range of cooperative arrangements discussed below, it is possible to transfer offenders, including federal offenders, between jurisdictions in some circumstances. These arrangements include offenders serving full-time custodial orders, offenders serving alternative sentencing orders picked up from state and territory law, and offenders released on parole or licence.

Issues and problems

26.11 In IP 29 the ALRC sought the views of stakeholders on whether a more flexible system should be established in relation to federal offenders, for example, a cooperative scheme to allow federal offenders to serve their sentence in the most appropriate or convenient location. A number of submissions and consultations expressed support for the existing arrangements.¹⁹⁶¹ However, prisoner support organisations and others emphasised the fundamental importance of offenders' proximity to family and other support structures and the need for more flexibility in relation to the location in which offenders serve their sentences. In particular, a number of consultations and submissions identified problems with the interstate and international transfer schemes designed to allow offenders to serve their sentences closer to home.¹⁹⁶² These issues are discussed below and a number of proposals are put forward to address the concerns raised.

Interstate transfer

Transfer on welfare grounds

Are there any concerns with the existing legislation or arrangements for transferring federal prisoners between Australian jurisdictions for the purpose of standing trial, or for welfare, national security or other reasons? Should existing procedures be consolidated or simplified? [IP 29, Q 4–3]

Background

26.12 Complementary federal, state and territory legislation provides for the transfer of offenders serving a term of imprisonment between jurisdictions.¹⁹⁶³ The *Transfer of Prisoners Act 1983* (Cth) allows for the transfer of a federal prisoner for the following purposes:

- the prisoner's welfare (s 6);
- to stand trial on outstanding charges in another state or territory (ss 8–9);
- to return to the state or territory in which he or she was initially sentenced (s 14);
or
- in the interests of national security (s 16B).

26.13 Submissions and consultations did not identify significant concerns with the provisions dealing with transfer to stand trial, to return to the state of sentencing, or on national security grounds.

26.14 However, significant concern was expressed in relation to transfer on welfare grounds. The *Transfer of Prisoners Act* provides that a prisoner may request a transfer to another state or territory in the interests of his or her welfare. The *Transfer of Prisoners Regulations 1984* (Cth) provide that a prisoner's welfare may relate to: family or near family support in the state or territory to which the prisoner seeks to be transferred; family or other social circumstances that may benefit the welfare of the prisoner; medical reasons; prospects of employment following release from prison; and any other matters that the prisoner wishes to put forward in support of the application.¹⁹⁶⁴

26.15 In exercising the discretion to grant or refuse an application for transfer on welfare grounds, the Attorney-General of Australia must have regard to all relevant matters, including the interests of the administration of justice and the prisoner's welfare.¹⁹⁶⁵ The Attorney-General must not make a welfare transfer order unless the appropriate minister of the state or territory to which the prisoner would be transferred has consented to the transfer.¹⁹⁶⁶ While the consent of the relevant minister in the sending state or territory is not legally required, it may be sought in practice. The Attorney-General may revoke a welfare transfer order on his or her own motion, or at the prisoner's request.¹⁹⁶⁷

Issues and problems

26.16 The major issue identified in submissions and consultations was delay in transferring offenders interstate on welfare grounds. The Offenders Aid and Rehabilitation Services of South Australia (OARSSA) works with interstate offenders with family in South Australia to assist them to apply for transfer back to South Australia on welfare grounds. However, where the offender has been sentenced to less than twelve months, OARSSA indicated that it was not worthwhile applying for a transfer because the process takes too long.¹⁹⁶⁸ In other consultations it was noted that the process took so long it appeared structured to discourage applications and that, on some occasions, transfer is not possible at all because the relevant state or territory will not accept the offender.¹⁹⁶⁹

26.17 Victoria Legal Aid expressed the view that the Attorney-General and the relevant state and territory ministers should be required to accommodate requests for transfer on welfare grounds unless the application is made in bad faith or the transfer would prejudice the administration of justice.¹⁹⁷⁰

26.18 The Department of Corrective Services in Queensland cautioned, however, that it was essential to ensure that jurisdictions to which offenders are transferred have appropriate facilities to house the offenders. The Department noted that the smaller jurisdictions do not have the same range of secure facilities available to house high risk offenders.¹⁹⁷¹

ALRC's views

26.19 The stated purpose of the transfer on welfare grounds is to 'assist the rehabilitation of prisoners and reduce the hardships caused to the families of prisoners'.¹⁹⁷² On that basis, the ALRC is of the view that federal offenders should generally be able to serve their sentences close to home and that the Australian Government should facilitate this in the public interest. However, it appears from consultations and submissions that there are currently significant delays encountered in arranging welfare transfers. The Australian Government should review the interstate transfer arrangements to ensure that federal offenders are routinely transferred interstate where welfare grounds are established. In particular, offenders should be transferred without delay to the receiving jurisdiction unless the transfer would prejudice the proper administration of justice, for example, because the receiving jurisdiction does not have appropriate facilities to house the offender.

26.20 In addition, the ALRC considers that the interstate transfer of federal offenders is a matter for the Australian Government. While consultation with the states and territories is appropriate and necessary to establish that legitimate welfare grounds exist and that the transfer will not prejudice the proper administration of justice, the interstate transfer of federal offenders should not depend on the consent of the states and territories. However, the consent of the states and territories is an appropriate requirement in relation to the interstate transfer of state and territory offenders and joint offenders.

Proposal 26-1 The Australian Parliament should amend the legislation and arrangements dealing with interstate transfer of prisoners on welfare grounds to ensure that:

- (a) federal offenders may be transferred interstate without delay where welfare grounds are found to exist, except where the transfer would prejudice the proper administration of justice;
- (b) the decision to transfer a federal offender interstate should be one for the Attorney-General of Australia, or a delegate; and
- (c) interstate transfer of a federal offender should not require the consent of either the sending or receiving state or territory (except in the case of joint federal-state/territory offenders), but the Attorney-General of Australia or a delegate should be required to consult with relevant authorities in the sending and receiving state or territory before making a transfer decision.

Transfer on other grounds

Are there circumstances justifying the transfer of federal prisoners between Australian jurisdictions that are not already accommodated by the *Transfer of Prisoners Act 1983* (Cth) or other legislation? [IP 29, Q 4–4]

26.21 The New South Wales Department of Corrective Services, in its submission, reiterated its support for a further ground of transfer—operational security.¹⁹⁷³ In their joint submission to the Senate Committee review of the Anti-terrorism Bill (No 2) 2004 (Cth), the state and territory Corrective Services Ministers recommended that transfer should be available on operational security grounds, in addition to national security grounds. Operational security grounds would include circumstances in which an extremely high-risk offender must be moved interstate to more secure facilities.¹⁹⁷⁴ The Attorney-General's Department advised the Senate Committee that the matter was already on the agenda of the relevant ministerial councils, and scheduled to be dealt with at a later date.¹⁹⁷⁵

ALRC views

26.22 The ALRC understands that the proposal to allow interstate transfers on operational security grounds is still under consideration by the Corrective Services Ministers Conference. The ALRC does not have sufficient information about the impact that such a development might have on federal offenders to make a proposal on this issue at this time.

Transfer while on parole

Are the existing legislation and arrangements for the transfer between Australian states and territories of federal offenders released on parole satisfactory? [IP 29, Q 4–5]

26.23 Complementary state and territory legislation provides for the transfer of state and territory parole orders through a system of interstate transfer, registration and enforcement.¹⁹⁷⁶ This legislative scheme does not, however, apply to federal offenders. Federal parole orders are made by the Attorney-General of Australia, or departmental delegate, under s 19AL of the *Crimes Act 1914* (Cth) and are valid throughout Australia. Where a federal offender wishes to transfer to another jurisdiction, it is usual for the state or territory parole authority to arrange to have the relevant conditions attached to the parole order amended under s 19AN of the *Crimes Act*—for example, reporting requirements specifying a particular parole office or officer.

26.24 No significant problems were identified with the arrangements for the transfer between Australian states and territories of federal offenders released on parole. In Chapter 23 of this Discussion Paper the ALRC proposes the establishment of a Federal Parole Board to make decisions in relation to the parole of federal offenders. If that proposal is implemented, the ALRC anticipates that any necessary changes to parole orders to allow offenders to move interstate would be made by the Board rather than the Attorney-General or delegate. The ALRC does not propose any further change to the transfer arrangements at this time.

Transfer while serving alternative sentences

What arrangements should be made for the transfer between Australian states and territories of federal offenders serving alternative sentences? Does the pilot scheme between NSW and the ACT provide an appropriate model? [IP 29, Q 4–6]

Background

26.25 As discussed in Chapter 7, a number of alternative sentences—such as periodic detention, home detention and community service orders—are picked up from state and territory law by s 20AB of the *Crimes Act* and reg 6 of the *Crimes Regulations 1990* (Cth) and made available in sentencing federal offenders. The options available vary from jurisdiction to jurisdiction; for example, periodic detention is available only in New South Wales and the ACT.

26.26 New South Wales and the ACT have introduced a pilot scheme for the interstate transfer, registration and enforcement of alternative sentences such as community service orders, recognisances, home detention orders, and periodic detention orders.¹⁹⁷⁷ The scheme commenced on 1 February 2005 and allows for the formal transfer of the supervision and administration of such sentences from one jurisdiction to another, with the consent of the offender. The purpose of the scheme is to allow offenders sentenced in one jurisdiction to serve their sentences in the other jurisdiction in order to take advantage of better family or community support or increased choice of employment or study opportunities.

26.27 Under the pilot scheme, before accepting a transfer, the receiving jurisdiction must be able to administer and supervise the offender's sentence safely, efficiently and effectively. In determining whether this is the case, the receiving jurisdiction must consider the safety of the community and of relevant individuals, including any victims.

26.28 The scheme formalises a process that already occurs informally between all Australian jurisdictions, allowing offenders with certain alternative sentences to have their orders supervised and administered in another jurisdiction. The informal arrangements led to difficulties where the offender breached the order while in the

receiving jurisdiction: it was necessary to return the offender to the original jurisdiction in order to enforce the sentence. The new scheme will allow the receiving jurisdiction to enforce the sentence in the event of breach.¹⁹⁷⁸

26.29 In consultations and submissions, the New South Wales Department of Corrective Services and ACT Corrective Services indicated that the pilot scheme did provide an appropriate model for a national scheme and that, following an evaluation, the pilot scheme was likely to be implemented nationally. The national scheme would be similar in some respects to the transfer of parole orders scheme, discussed above.¹⁹⁷⁹

ALRC's views

26.30 The ALRC is of the view that, given the links between an offender's proximity to family and other support structures and successful rehabilitation, it is important to ensure that federal offenders are generally able to serve their sentences close to home. The pilot scheme established in New South Wales and the ACT appears to provide an appropriate model for the transfer of offenders serving alternative sentences between jurisdictions and the ALRC supports further development of the scheme on a national level. The Australian Government and the governments of the states and territories should ensure that the benefits of the scheme are extended to include federal offenders as well as state and territory offenders.

Proposal 26–2 The Australian Government and the governments of the states and territories should work towards expanding the opportunities for the interstate transfer of federal offenders serving alternative sentences.

International transfer

Does the current scheme for the international transfer of prisoners raise any concerns in relation to the imprisonment, administration or release of offenders transferred to Australia? [IP 29, Q 4–7]

Background

26.31 Australia participates in international transfer of prisoners arrangements under the Council of Europe's *Convention on the Transfer of Sentenced Persons*.¹⁹⁸⁰ Under the scheme, Australian citizens and permanent residents who have community ties with an Australian state or territory and who are imprisoned in other countries participating in the scheme may apply to return to Australia to serve the balance of their sentences in an Australian prison. The scheme also permits foreign nationals who are held in

Australian prisons to apply to serve the balance of their sentence in a foreign country, provided that country is a participant in the scheme. The Australian Parliament has enacted legislation to give effect to the transfer scheme—the *International Transfer of Prisoners Act 1997* (Cth)—and the states and territories have enacted complementary legislation.

26.32 Upon transfer to Australia, the prisoner's sentence is treated as a federal sentence of imprisonment and the prisoner is treated as a federal prisoner. Any relevant Australian law, practice or procedure concerning the detention of prisoners applies in relation to the prisoner upon his or her transfer to Australia.¹⁹⁸¹ Arrangements under the Council of Europe Convention are limited to those countries that are a party to the Convention. Very few countries in the Asia-Pacific region are party to the Convention.¹⁹⁸²

26.33 Australia is also a party to the bilateral *Agreement Between the Government of Australia and the Government of the Kingdom of Thailand on the Transfer of Offenders and Co-operation in the Enforcement of Penal Sentences*.¹⁹⁸³

26.34 The first repatriation of an Australian held in a foreign prison occurred in April 2003 and involved a transfer from Thailand to Western Australia. A press release issued by the Australian Government at the time stated that applications were being considered for the transfer of 34 foreign nationals imprisoned in Australia who wished to serve the remainder of their sentences in their homelands. Applications for the transfer of 11 Australians from countries including the United Kingdom, the United States and Thailand were also being considered.¹⁹⁸⁴

26.35 In May 2005, the Minister for Foreign Affairs, the Hon Alexander Downer MP, announced that a draft bilateral agreement on the transfer of offenders had been sent to the Indonesian Government for consideration. He noted that there were 14 Australians in custody in Indonesia at that time, and about 155 Australians in custody around the world.¹⁹⁸⁵

26.36 The international transfer scheme is particularly important in the context of federal offenders. In its statistical overview of federal offenders, the Australian Institute of Criminology (AIC) notes that a high proportion of federal prisoners are born overseas or are foreign nationals.¹⁹⁸⁶ For example, while approximately 9 per cent of the Australian prisoner population comes from the Asia-Pacific region, 26 per cent of federal offenders come from that region. Conversely, while 74 per cent of the Australian prisoner population was identified as born in Australia or of Australian nationality, this was true of only 43 per cent of federal prisoners. The AIC has noted that this reflects one of the differences between federal and state/territory criminal law, namely, that federal law is more concerned with matters at the national level such as the international smuggling of drugs or persons.

26.37 A number of submissions noted that many foreign nationals in Australian prisons are not eligible for international transfer and that, even where they are eligible,

there are often long delays in arranging transfers.¹⁹⁸⁷ In particular, Northern Territory Correctional Services noted that a significant number of federal offenders being held in Australia are Indonesian nationals and that it would be desirable for them to be able to serve their sentences in their home country.¹⁹⁸⁸

ALRC's views

26.38 The ALRC is of the view that it is desirable for offenders to be able to serve their sentences in their home country wherever possible. Given the limited membership of the Council of Europe *Convention on the Transfer of Sentenced Persons*, particularly in the Asia-Pacific region, there is scope for the Australian Government to negotiate bilateral transfer arrangements with other countries in which significant numbers of Australian nationals are serving custodial sentences and with countries that have a significant number of their nationals serving custodial sentences in Australia.

Proposal 26-3 The Australian Government should aim to ensure that prisoners are generally able to serve their sentences in their home country. To this end, the Australian Government should negotiate bilateral agreements for the transfer of prisoners with:

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

1953 Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005).

1954 *Judiciary Act 1903* (Cth) s 70A.

1955 *Ibid* s 70.

1956 See, eg, *Crimes at Sea Act 2000* (Cth) and related state and territory legislation; *Crimes (Aviation) Act 1991* (Cth).

1957 *Judiciary Act 1903* (Cth) s 68(5), (6).

1958 Commonwealth Director of Public Prosecutions, *Consultation*, Sydney, 16 September 2004.

1959 Constitutional Commission, *Final Report of the Constitutional Commission* (1988), [9.705].

1960 Australian Taxation Office, *Submission SFO 18*, 8 April 2005; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.

1961 Australian Taxation Office, *Submission SFO 18*, 8 April 2005; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Law Society of South Australia, *Consultation*, Adelaide, 21 April 2005.

1962 A Freiberg, *Submission SFO 12*, 4 April 2005; JC, *Submission SFO 25*, 13 April 2005; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005; Offenders Aid and Rehabilitation Services South Australia, *Consultation*, Adelaide, 20 April 2005.

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- 1963 See *Transfer of Prisoners Act 1983* (Cth); *Prisoners (Interstate Transfer) Act 1982* (NSW); *Prisoners (Interstate Transfer) Act 1983* (Vic); *Prisoners (Interstate Transfer) Act 1982* (Qld); *Prisoners (Interstate Transfer) Act 1983* (WA); *Prisoners (Interstate Transfer) Act 1982* (SA); *Prisoners (Interstate Transfer) Act 1982* (Tas); *Prisoners (Interstate Transfer) Act 1993* (ACT); *Prisoners (Interstate Transfer) Act 1983* (NT).
- 1964 *Transfer of Prisoners Regulations 1984* (Cth) reg 4.
- 1965 *Transfer of Prisoners Act 1983* (Cth) s 6(3).
- 1966 *Ibid* s 6(4).
- 1967 *Ibid* s 7.
- 1968 Offenders Aid and Rehabilitation Services South Australia, *Consultation*, Adelaide, 20 April 2005.
- 1969 Prisoners' Legal Service and others, *Consultation*, Brisbane, 4 March 2005.
- 1970 Victoria Legal Aid, *Submission SFO 31*, 18 April 2005.
- 1971 Department of Corrective Services Queensland, *Consultation*, Brisbane, 3 March 2005.
- 1972 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 October 1983, 1898 (L Bowen—Deputy Prime Minister).
- 1973 Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005.
- 1974 Senate Legal and Constitutional Legislation Committee—Parliament of Australia, *Provisions of the Anti-terrorism Bill (No 2) 2004* (2004), 39.
- 1975 *Ibid*, 38.
- 1976 *Parole Orders (Transfer) Act 1983* (NSW); *Parole Orders (Transfer) Act 1983* (Vic); *Parole Orders (Transfer) Act 1984* (Qld); *Parole Orders (Transfer) Act 1984* (WA); *Parole Orders (Transfer) Act 1983* (SA); *Parole Orders (Transfer) Act 1983* (Tas); *Parole Orders (Transfer) Act 1983* (ACT); *Parole Orders (Transfer) Act 1981* (NT).
- 1977 *Crimes (Interstate Transfer of Community Based Sentences) Act 2004* (NSW); *Community Based Sentences (Transfer) Act 2003* (ACT).
- 1978 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 12 December 2002, 4374 (T Quinlan).
- 1979 ACT Corrective Services, *Submission SFO 34*, 20 April 2005; Department of Corrective Services New South Wales, *Submission SFO 42*, 28 April 2005.
- 1980 *Convention on the Transfer of Sentenced Persons*, 21 March 1983, Council of Europe, CETS 112, (entered into force generally on 1 July 1985).
- 1981 *International Transfer of Prisoners Act 1997* (Cth) s 46.
- 1982 The following parties to the Convention are not member States of the Council of Europe: Australia, Bahamas, Bolivia, Canada, Chile, Costa Rica, Ecuador, Israel, Japan, Mauritius, Panama, Republic of Korea, Tonga, Trinidad and Tobago, United States, Venezuela. Only four lie in the Asia-Pacific region.
- 1983 *Agreement Between the Government of Australia and the Government of the Kingdom of Thailand on the Transfer of Offenders and Co-operation in the Enforcement of Penal Sentences*, 26 July 2001, [2002] ATS 22, (entered into force generally on 26 September 2002).
- 1984 Department of Parliamentary Services, *International Transfer of Prisoners Amendment Bill 2004*, Bills Digest No 102 2003–04 (2004).
- 1985 A Downer (Minister for Foreign Affairs), 'Doorstop Interview—Schapelle Corby' (Press Release, 27 May 2005).
- 1986 See Appendix 1, Figure A1.13 and accompanying text.
- 1987 Confidential, *Submission SFO 11*, 15 March 2005; WR, *Submission SFO 41*, 28 April 2005.
- 1988 Correctional Services Northern Territory and Parole Board of the Northern Territory, *Consultation*, Darwin, 27 April 2005.

27. Young Federal Offenders

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Introduction

Should federal legislation play a greater role in relation to the sentencing, detention, administration and release of children or young persons convicted of a federal offence? If so, what should that role be? [IP 29, Q 15–1]

27.1 Young offenders belong to a category of offenders that merit special consideration. It is an internationally recognised principle that children, by reason of their physical or mental immaturity, are entitled to special care, safeguards and assistance, including appropriate legal protection.¹⁹⁸⁹

27.2 Three central concerns underpin the ALRC's development of the proposals in this chapter relating to the sentencing, administration and release of young people convicted of a federal offence:

- promoting consistency in the treatment of young federal offenders across states and territories;

- adhering to internationally accepted principles that are applicable to the sentencing of young people; and
- ensuring the efficacy of the federal criminal justice system.

27.3 The issue of consistency of treatment arises in relation to young federal offenders because s 20C(1) of the *Crimes Act 1914* (Cth) provides that:

A child or young person who, in a State or Territory, is charged with or convicted of an offence against a law of the Commonwealth may be tried, punished or otherwise dealt with as if the offence were an offence against a law of the State or Territory.

27.4 Section 20C(1) thus enables young federal offenders to be dealt with by the specialist juvenile justice systems established in the states and territories. Although there are similarities in the approaches to juvenile justice across states and territories, there are also areas of significant disparity. Furthermore, there are differences in the extent to which each state or territory adheres to internationally recognised principles in the sentencing of young people.

27.5 In 1991, the Gibbs Committee recommended that s 20C be the subject of a separate inquiry that would examine all relevant state and territory legislation in relation to the trial and punishment of young federal offenders.¹⁹⁹⁰ Given that no separate inquiry has been established in relation to s 20C, in this Discussion Paper the ALRC makes a number of proposals relating to the sentencing, administration and release of young federal offenders. However, it is acknowledged that further work needs to be done in relation to pre-trial and trial aspects of the treatment of young federal offenders.

Data on young people charged with or convicted of a federal offence

27.6 There is very little information available on young people in the federal criminal justice system. Issues Paper 29, *Sentencing of Federal Offenders* (IP 29) set out statistics available from earlier inquiries on the number of young federal offenders.¹⁹⁹¹ The Commonwealth Director of Public Prosecutions (CDPP) has since provided the ALRC with a preliminary analysis of more recent data on young federal offenders.¹⁹⁹²

27.7 From January 2000 to June 2005, the CDPP prosecuted 107 ‘cases’¹⁹⁹³ involving young people aged under 18 years at the time of sentencing. Of these, 73 (68 per cent) involved summary offences, with 34 (32 per cent) being prosecutions on indictment. In 94 per cent of cases, the young people were sentenced for the offence. The majority of cases were prosecuted in the Northern Territory (36 per cent) and Western Australia (27 per cent).

27.8 The number of custodial sentences imposed on young federal offenders has changed significantly in recent years. In 2000, 10 sentences (46 per cent) were

custodial, and in 2001 27 sentences (61 per cent) were custodial. However, only one custodial sentence was imposed per year in 2002 and 2003, and no custodial sentences were imposed from then until June 2005.

27.9 During the 2000–05 period, a further 657 cases involving young adults aged 18 years or over and under 21 years at the time of sentencing were prosecuted, of which 86 per cent were summary proceedings and 14 per cent were prosecutions on indictment. Sentences were imposed in 95 per cent of these cases. Most of these cases were prosecuted in the Northern Territory (27 per cent), Western Australia (20 per cent) and Queensland (16 per cent).

27.10 As with young federal offenders aged under 18 years, there has also been a decline in the imposition of custodial sentences on young adults who committed federal offences. In 2000, 40 sentences (35 per cent) were custodial; in 2002 only 18 sentences (15 per cent) were custodial, and this pattern has been repeated in subsequent years.

27.11 In the CDDP analysis, federal offences were grouped under five broad categories—drugs, fraud, corporations, money laundering, and other offences. The vast majority of cases—84 per cent of young people and 59 per cent of young adults—fell into the last category. A large number of cases in this category involve either illegal fishing or people smuggling offences. In relation to young adults, a significant number of cases (32 per cent) involved fraud.

27.12 No information is available to indicate whether these offenders were dealt with in a children's court or an adult court. Information on whether these matters were dealt with under the relevant juvenile justice legislation or Part IB of the *Crimes Act* is expected to be available for the final report of this Inquiry.

27.13 The Australasian Juvenile Justice Administrators and the Australian Institute of Health and Welfare have established the Juvenile Justice National Minimum Data Set (NMDS) based on information collected from state and territory juvenile justice departments. The NMDS will provide information on the broad characteristics of juvenile justice clients and the way in which they move through the juvenile justice systems, including information on sentencing outcomes.¹⁹⁹⁴ The report on data for the first three years of the ongoing collection (2001–03) is expected to be released in late 2005. However, the report is not expected to distinguish young federal offenders and young state or territory offenders. In the future, data will include broad categories of offence but will not distinguish between state or territory offences and federal offences. In addition, as not all young federal offenders are clients of juvenile justice departments, data on these offenders will not be captured by the NMDS.

27.14 The Australian Bureau of Statistics (ABS) is planning to expand reporting on court data to include juvenile courts. The ALRC has proposed in Chapter 22 that the ABS data distinguish between federal and state or territory offenders in order to support the development of evidence-based policy in relation to federal offenders, including young federal offenders.

Section 20C of the *Crimes Act*

27.15 As stated above, s 20C(1) of the *Crimes Act* provides that a child or young person may be tried and punished in accordance with state or territory laws, thus enabling young federal offenders to be dealt with by the specialist juvenile justice systems established in the states and territories.

27.16 In addition to noting past criticism of the operation of s 20C, IP 29 identified a number of particular problems relating to s 20C and the sentencing of young federal offenders. These included:

- the absence of a definition of ‘child or young person’ in Part IB of the *Crimes Act*;
- the absence of a clear statement about whether s 20C precludes the use of Part IB in the sentencing of young federal offenders;
- the absence of a statement that the penalty imposed on a young offender should be no greater than that imposed on an adult who commits an offence of the same kind;
- difficulties accessing diversionary options provided by the states and territories;
- doubts about the power to apply state or territory enforcement provisions if a young federal offender breaches a sentence; and
- disparity between the states and territories in legislative principles, procedures, sentencing options and sentencing patterns applicable to young federal offenders.¹⁹⁹⁵

27.17 These issues fall into two broad categories—namely, problems caused by reliance on the divergent state and territory juvenile justice systems; and problems caused by the interaction of the state/territory and federal systems, with the result that young federal offenders do not have access to the same sentencing options as young state or territory offenders.

Options for reform

27.18 There are four ways in which the federal criminal justice system might be reformed to address the concerns identified above:

- establish a separate federal juvenile justice system for young federal offenders;
- adopt a system that is comparable with that in place for adult federal offenders by developing legislation to deal more comprehensively with the sentencing, administration and release of young federal offenders (included as part of the ALRC's proposed federal sentencing Act);
- continue to rely on state and territory systems, but underpin this with federal provisions to ensure that minimum standards are met in dealing with young federal offenders; or
- continue to rely on state and territory juvenile justice systems, but work to harmonise those systems through the development of national standards and principles.

ALRC's views

27.19 Establishing a separate federal juvenile justice system would require not only the development of federal juvenile justice legislation and a federal children's court, but also the establishment of a federal juvenile justice administration to develop and supervise programs for young federal offenders, and the establishment of juvenile detention facilities. For reasons explained elsewhere in this Discussion Paper, the ALRC does not propose the adoption of a fully federal system for the sentencing, administration and release of federal offenders. With young federal offenders making up only a small proportion of the total number of federal offenders (who are themselves relatively few in number), the establishment of a separate federal juvenile justice system would be impractical.

27.20 Some submissions supported the second option—namely, developing federal legislation to deal more comprehensively with the sentencing, administration and release of young federal offenders.¹⁹⁹⁶ In practice, this option would involve state and territory courts—in many cases children's courts—continuing to apply state and territory juvenile justice procedures in federal matters, but applying federal legislation in relation to sentencing. However, data provided by the CDPF relating to young people and young adults suggests the annual caseload is low—on average, there were 20 cases involving young people and 120 cases involving young adults each year between 2000 and 2005.¹⁹⁹⁷ In these circumstances, the effort required to enact and utilise specialised federal sentencing legislation in relation to young federal offenders is likely to outweigh any benefits of establishing separate legislation.

27.21 However, the ALRC is of the view that some change is required to the existing system to promote greater consistency of approach in sentencing young federal offenders. This can be achieved by introducing new provisions in federal sentencing

legislation dealing with key aspects of the sentencing, administration and release of young federal offenders, while retaining primary dependence on the existing state and territory juvenile justice systems.

27.22 The ALRC suggests a four-pronged approach, discussed in subsequent sections of this chapter, based on:

- introducing federal minimum standards that will apply to all young federal offenders;
- requiring certain provisions that are applicable to adult federal offenders to apply also to young federal offenders;
- developing best practice guidelines for juvenile justice, to promote consistency across states and territories in relation to the sentencing, administration and release of young offenders; and
- increasing federal oversight of young federal offenders.

Federal minimum standards for young federal offenders

27.23 Federal minimum standards are a means of ensuring the adequacy of laws and practices with respect to young federal offenders, while maintaining the traditional role of state and territory systems of juvenile justice. This section considers a range of issues that the ALRC believes should be addressed in the standards.

Definition of child or young person

27.24 The term ‘child or young person’ is used in s 20C of the *Crimes Act*, but there is no definition in that Act or in the *Acts Interpretation Act 1901* (Cth). There have been various approaches in practice. While the CDPP has preferred to adopt the definitions in the juvenile justice legislation of the relevant state or territory, in some circumstances magistrates have assumed that ‘child or young person’ refers to any person under the age of 18 years.¹⁹⁹⁸

27.25 Although there has been greater divergence in the past, since 1 July 2005 all states and territories, with the exception of Queensland, have adopted a common definition of child or young person for the purpose of their juvenile justice legislation—namely, a person who is at least 10 years of age but under the age of 18.¹⁹⁹⁹ In Queensland the relevant definition applies to a person who is at least 10 years of age but under the age of 17.²⁰⁰⁰

27.26 The absence of a definition of ‘child or young person’ in federal sentencing legislation has resulted in different approaches being taken in practice. This means that a young person may be dealt with as a young person in one jurisdiction but as an adult in another. Adopting the definitions of ‘child or young person’ in the relevant state or

territory juvenile justice legislation could result in different treatment of young federal offenders, depending upon the state or territory in which the case is determined.

27.27 The ALRC considers that the lack of definition of ‘child or young person’ in the *Crimes Act* is unsatisfactory. The age at which a person charged with a federal offence should be treated and sentenced as a child or young person should be set out in federal legislation rather than left to the various state and territory definitions.

27.28 The *Crimes Act* currently states that a child under 10 years of age cannot be liable for an offence against a law of the Commonwealth.²⁰⁰¹ The *Crimes Act* also defines ‘child’ for the purposes of Part IAD and Part ID of the Act, both of which set 18 years as the upper limit.²⁰⁰² This upper age limit is consistent with the position in most states and territories and with the United Nations *Convention on the Rights of the Child 1989* (CROC).²⁰⁰³

27.29 The ALRC considers that federal sentencing legislation should use the term ‘young person’, defined as a person aged 10 years or over but not yet 18 years at the time the offence was committed.

Sentencing purposes, principles and factors

27.30 In accordance with s 20C of the *Crimes Act*, most young federal offenders are sentenced under the juvenile justice legislation of the relevant state or territory.²⁰⁰⁴ The sentencing principles applicable to young offenders differ from those applicable to adult offenders, although in some states they apply in addition to the sentencing principles for adult offenders.²⁰⁰⁵

27.31 Juvenile justice legislation in most states and territories (except the Northern Territory) provides that a number of principles or factors are to be taken into account in sentencing a young person.²⁰⁰⁶ For example, most jurisdictions provide that: a child should be encouraged to accept responsibility for the offending behaviour; a child should be provided with the opportunity to develop in socially responsible ways; and a child’s education, training or employment should not be interrupted where possible.

27.32 International instruments also set out a number of principles that are applicable when sentencing a young person. These include the following:

- the best interests of the child are a primary consideration;
- detention should be the last resort and should be imposed only for the shortest appropriate time;

- a range of sentencing options should be available in order to prevent institutionalisation;
- diversionary measures should be used wherever appropriate and desirable, so that juveniles are not removed from parental supervision unnecessarily;
- proceedings should be conducted in a way that facilitates the child's participation;
- a child should be treated in a manner that takes into account his or her age and the desirability of reintegration into society;
- the child's dignity and physical and mental integrity should be respected;
- delay should be avoided in the proceedings and the sentence;
- the sentence must be proportionate to the circumstances of the child and of the offence;
- the sentence must not be discriminatory or arbitrary in effect; and
- the child must have a right of appeal against the sentence.²⁰⁰⁷

27.33 One way to improve consistency in the sentencing of young federal offenders is for federal sentencing legislation to provide a comprehensive list of principles and factors in relation to the sentencing of young people. Alternatively, federal sentencing legislation could supplement the juvenile justice principles that are applied in the states and territories with an express statement of the fundamental principles that should be applied in the sentencing of young offenders.

ALRC's views

27.34 If federal sentencing legislation were to provide a comprehensive list of principles and factors in relation to the sentencing of young federal offenders, state and territory judicial officers would be required to apply a different set of sentencing principles to those applicable to young state or territory offenders. Given the relatively small number of matters involving young federal offenders, and the fact that well-developed juvenile sentencing principles and factors already exist in the states and territories, the ALRC considers that the preferable option is to rely on the existing state and territory laws.

27.35 However, there is a strong case for ensuring that those laws meet certain minimum standards, which should be set out in federal sentencing legislation. In the ALRC's view, two fundamental principles underpin international standards for dealing with young offenders. Article 3(1) of CROC states that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.²⁰⁰⁸

27.36 Article 37(b) of CROC provides that:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.²⁰⁰⁹

27.37 These principles are not adequately covered in all state and territory legislation.²⁰¹⁰ The ALRC is of the view that, given their importance as foundation principles of international juvenile justice, these two principles need to be expressly stated in federal sentencing legislation.

Circumstances in which a young person can be dealt with in an adult court

27.38 The function of the juvenile justice system is to deal with young people in accordance with principles and procedures that are specifically applicable to young people. This policy is reflected in international instruments, which require children to be dealt with taking into account their age,²⁰¹¹ and encourage the establishment of laws and procedures specifically applicable to children.²⁰¹²

27.39 However, not all young people accused or convicted of a federal offence are currently dealt with or sentenced by a children's court in accordance with state or territory juvenile justice legislation. There are three circumstances in which a young person may be dealt with or sentenced as an adult.

27.40 First, all states and territories have provisions allowing a young person to elect to have certain indictable offences²⁰¹³ that are triable summarily heard by a jury.²⁰¹⁴ Since generally there are no provisions for jury trials in children's courts,²⁰¹⁵ where a young person elects to proceed in this manner, the trial must generally be heard in an adult court.

27.41 However, a young person's right of election is subject to the requirement in s 80 of the *Australian Constitution* that the trial on indictment of any federal offence must be by jury. Although the section does not compel prosecution on indictment (even in the case of a serious offence),²⁰¹⁶ where the trial of a young person proceeds on indictment, the person must be tried by jury and cannot elect to be tried by a judge alone.²⁰¹⁷

27.42 Secondly, the children's court in some jurisdictions may order that a young person who is charged jointly with an adult be tried in an adult court.²⁰¹⁸ In most cases

there is an option to try the young person separately, and the CDDP prosecution policy requires prosecutors to take this course wherever possible.²⁰¹⁹

27.43 Thirdly, most states and territories have special provisions for dealing with young people who have committed a serious offence. In some cases, these offences must be heard by an adult court, and the adult court has the power to sentence the young person as an adult, applying sentencing principles and sentencing options applicable to adults.²⁰²⁰ In other cases, such offences are dealt with by the children's court but have a different range of sentencing options.²⁰²¹

27.44 Each state and territory has a different list of serious offences that attract adult jurisdiction or special treatment. In some states, the children's court has jurisdiction over all proceedings involving an offence alleged to have been committed by a young person, although the proceedings may be sent to an adult court at the court's discretion or on election by the young person, to be dealt with as an adult.²⁰²² In other jurisdictions, certain serious offences are excluded from the children's court jurisdiction and must be heard by an adult court.²⁰²³ The offences that are excluded may be nominated by type (for example, homicide, arson causing death, or culpable driving causing death),²⁰²⁴ or by the punishment available.²⁰²⁵ In some jurisdictions, a young person may be committed to trial in an adult court for certain indictable offences where the children's court exercises its discretion not to proceed summarily.²⁰²⁶ In South Australia and the ACT, even where the children's court has heard and determined the proceedings, there is provision to send the case to an adult court for determination of sentence.²⁰²⁷

27.45 Given the potential for differential treatment of young people charged with serious federal offences, an issue arises as to whether federal legislation should provide a definition of 'serious federal offence' to ensure uniformity of treatment. If so, any definition should have regard to the jurisdictional limits of each state and territory children's court. When investing state courts with federal jurisdiction, the Australian Parliament may by express declaration 'extend or limit the jurisdiction of a State court in respect of persons, locality, amount or otherwise, as it may think proper'.²⁰²⁸ However, in the absence of an express declaration, there is a long-standing policy that the jurisdictional limits prescribed by state and territory laws are to be respected.²⁰²⁹

ALRC's views

27.46 As a general rule, a young person should be dealt with and sentenced as a young person. However, it may be appropriate for a young person to be dealt with in an adult court in limited circumstances. This is reflected in the three exceptions adopted in state and territory law, namely, a young person's election, joint trials with an adult, and serious offences.

27.47 The ALRC is of the view that federal sentencing legislation should contain a definition of 'serious federal offence' to improve consistency of treatment of young federal offenders across states and territories. The definition should be formulated

bearing in mind the jurisdiction of the children's court in each state and territory. In practice, this means that the definition of 'serious federal offence' should be set at the lowest level of severity of the equivalently defined terms in state and territory legislation. The preferred definition of 'serious federal offence' should thus be any offence punishable by 14 years or more imprisonment. This is compatible with the children's court jurisdiction in every state and territory, and would ensure that all cases involving non-serious federal offences are heard in a children's court unless they fall within the other two exceptions.

27.48 The ALRC is also of the view that regardless of whether a matter is heard in an adult court or a children's court, the court should sentence the offender as a young person in accordance with the relevant juvenile justice legislation. International principles, including CROC, encourage states to establish laws and institutions that are specifically applicable to children.²⁰³⁰ There is no reason in principle why a young person who is tried in an adult court should be denied the benefit of sentencing principles and sentencing options that are applicable to young people. Those principles and options have sufficient breadth and flexibility to recognise the seriousness of any offence.

Legal representation

27.49 Currently, there is disparity in state and territory provisions relating to the legal representation of young people in criminal proceedings. In some states, juvenile justice legislation provides that young people must be informed of their right to obtain legal advice.²⁰³¹ In others, legislation requires a child to be represented in certain criminal proceedings unless he or she has had a reasonable opportunity to obtain legal representation and did not do so.²⁰³² In the Northern Territory, the court may make provision for the legal representation of a juvenile if it is of the opinion that representation is necessary.²⁰³³ In the ACT, where a young person charged with an offence is unrepresented, the court may only proceed if the child had a reasonable opportunity to obtain legal representation and the child's best interests will be adequately represented in the proceeding.²⁰³⁴

27.50 International human rights principles require that children be guaranteed the right to legal representation at all stages of criminal proceedings, including while under arrest or awaiting trial, in the preparation and presentation of their defence, at the determination of the charge, and when they are deprived of their liberty.²⁰³⁵

27.51 In the joint inquiry into children in the legal process, the ALRC and the Human Rights and Equal Opportunity Commission (HREOC) stated that one way of improving children's comprehension of, and participation in, criminal proceedings is to ensure that there is appropriate and early legal representation. It was also stated that legal representation is important in ensuring that young offenders receive proper advice about sentencing.²⁰³⁶

27.52 A lack of legal representation may limit a young person's understanding of, and ability to engage effectively in, the legal process. Research shows that young people who become involved in the juvenile justice system are more likely than non-offending young people to have poor oral language abilities, including the ability to express themselves verbally, and the ability to process and understand what others say.²⁰³⁷ The use of legal language in court is likely to further limit a young person's understanding of legal proceedings.²⁰³⁸

Options for reform

27.53 In Chapter 13 the ALRC deals with legal representation of adult federal offenders. Where an adult federal offender is not legally represented in a sentencing proceeding, the ALRC proposes that the court should generally adjourn the proceeding to allow the offender a reasonable opportunity to obtain representation. There are two exceptions to that requirement, namely, where: (a) the offender has refused or failed to exercise the right to legal representation in circumstances where the offender fully understands the right and the consequences of not exercising it; or (b) the court does not intend to impose, and does not impose, a sentence that would deprive an offender of his or her liberty or place the offender in jeopardy of being deprived of his or her liberty.²⁰³⁹ One option for reform is to extend this proposal to young federal offenders.

27.54 On the other hand, there is a case for providing a young person accused of a federal offence with stronger procedural safeguards than those applicable to adults because young people are more vulnerable and are less likely to be able to protect their own interests without legal representation. Accordingly, an alternative option is for federal sentencing legislation to provide that young federal offenders should have the opportunity to be legally represented in all sentencing proceedings, failing which the court should adjourn the proceedings. On this view, the two exceptions that apply to adult federal offenders would not apply to young federal offenders.

27.55 A third option is for federal sentencing legislation to provide that young federal offenders should have the opportunity to be legally represented in all sentencing proceedings, unless the offenders have refused or failed to exercise that right in circumstances where they fully understand the right and the consequences of not exercising it.

ALRC's views

27.56 Ensuring that young federal offenders have the opportunity to be legally represented in sentencing proceedings is necessary to protect the rights and interests of young people. It would also aid their understanding of the sentencing process, including the implications of the sentence order, the consequences of non-compliance with the order, and their right of appeal. In addition, it would ensure that young federal offenders have the same entitlement to legal representation regardless of the state or territory in which they are sentenced, and would promote compliance with Australia's international obligations.

27.57 The ALRC is of the view that a young federal offender should have the opportunity to be legally represented whether or not the court intends to impose a sentence that would deprive the offender of his or her liberty. Given that most sentencing options will have a significant impact on the life of a young federal offender, the availability of legal representation should not depend on whether the court intends to impose a sentence that would deprive the offender of his or her liberty.

27.58 However, there is no reason in principle why a court must adjourn the sentencing proceedings where the young person has refused or failed to exercise the right to legal representation in circumstances where he or she fully understands the right and the consequences of not exercising it. The ALRC's view is that the court should be able to proceed without adjournment in these circumstances.

Restrictions on publication

27.59 Each state and territory, with the exception of the Northern Territory,²⁰⁴⁰ has a general prohibition on reporting proceedings that identify a young person. The extent of the prohibition differs—for example, it may apply only in relation to proceedings in a children's court—and courts may allow publication in certain circumstances.²⁰⁴¹

27.60 Under CROC, the privacy of every child alleged to have committed a criminal offence must be respected at all stages of the proceedings²⁰⁴² in order to avoid causing harm to the young person 'by undue publicity or by the process of labelling'.²⁰⁴³ In principle, no information that may lead to the identification of a young offender should be published.²⁰⁴⁴

27.61 The public identification of young people as federal offenders is not consistent with the rehabilitative aims of juvenile justice and may not meet Australia's international obligations. In addition, the different state and territory provisions mean that the identity of young federal offenders may be protected in one state or territory but not in another.

27.62 In these circumstances, the ALRC considers that federal sentencing legislation should prohibit the publication of a report of proceedings involving a young person who is charged with, found guilty of, or has pleaded guilty to, a federal offence where the details would lead to identification of the young person.

Severity of punishment

27.63 Some state and territory juvenile justice legislation provides that the penalty imposed on a young offender should be no greater than that imposed on an adult who commits an offence of the same kind.²⁰⁴⁵

27.64 Although international instruments do not expressly state that a penalty imposed on a child should be no greater than that which would have been imposed if the offence were committed by an adult, such a principle is consistent with a number of accepted principles of juvenile justice. These include: (a) a child or young person should be treated in a manner that takes into account his or her age; (b) the disposition of a young offender should always be proportionate to the circumstances of the young person and the offence; (c) restrictions on a young person's liberty shall be imposed only after careful consideration and shall be limited to the shortest appropriate period; and (d) the best interests of the child should be a primary consideration.²⁰⁴⁶

27.65 In particular, the commentary to r 17.1 of the *Beijing Rules* states that whereas considerations of just desert and retribution might have merit in adult cases and possibly in cases of severe offences committed by young people, a strictly punitive approach in relation to the disposition of young offenders is not appropriate. In the case of young offenders, 'such considerations should always be outweighed by the interest of safeguarding the well-being and the future of the young person'.²⁰⁴⁷

27.66 The ALRC is of the view that treating young federal offenders more harshly than adult offenders for like offences is not consistent with the rehabilitative aims of juvenile justice. Federal sentencing legislation should thus state that the sentence imposed on a young federal offender should be no more severe than the sentence that would have been imposed if he or she were an adult.

Diversiory options

27.67 International principles provide that young offenders should be dealt with without resorting to formal judicial proceedings whenever appropriate and desirable,²⁰⁴⁸ and that the police, the prosecution and other agencies should be empowered to exercise discretion in diverting young people from criminal justice processing.²⁰⁴⁹

27.68 There are a number of diversionary schemes for young offenders in the states and territories. These schemes usually involve a two-tiered system of diversion—cautioning and conferencing. There are two levels of cautions in Australia—informal cautions (which are called 'warnings' in some states and territories)²⁰⁵⁰ and formal cautions.²⁰⁵¹ Formal cautions are available in all states and territories, while informal cautions are available everywhere except the ACT.

27.69 The process of conferencing involves a meeting between a young person (who has admitted to the offence), that person's family or supporters, the victim, the police, and the conference convenor. The purpose of the meeting is to discuss the offence, its impact, and the outcome (in the form of an undertaking that the offender is expected to make).²⁰⁵² There are differences between jurisdictions in the legislative framework, the kinds of offences that may be referred to conferences, the extent of the conferencing process, the range of conference outcomes, and the organisational placement or administration of the conferencing process.²⁰⁵³

27.70 It has been said that diversion of young offenders from the criminal justice system is ‘the optimal response to the problem of juvenile crime’.²⁰⁵⁴ The merits of diversion of young offenders include: avoiding the risk of trapping young people with a previously good record in a pattern of offending behaviour; accommodating the vulnerabilities of young offenders and lessening the punitive nature of the criminal justice system; allowing the identification of family, behavioural and health problems that may have contributed to the offending behaviour; helping to address the causes of the offending behaviour as well as its consequences; and potential saving of law enforcement resources.²⁰⁵⁵

27.71 It is unclear whether some of the state and territory diversionary options are available to young federal offenders. This issue was raised in the ALRC and HREOC inquiry into children in the legal process (ALRC 84), and again in consultations in this inquiry.²⁰⁵⁶ Section 20C of the *Crimes Act* refers to a child or young person being ‘tried, punished or otherwise dealt with’, which might be broad enough to include pre-court diversionary options. On the other hand, s 20C applies only to a child or young person who has been ‘charged with or convicted of a federal offence’, which may be interpreted as excluding a young person who has been accused of, but not yet charged with, a federal offence.

27.72 In addition, in some jurisdictions the court has the power to refer a young person to a diversionary process instead of dealing with the charge in court.²⁰⁵⁷ This creates difficulties in federal criminal matters because of the constitutional requirement that federal judicial power cannot be exercised by a non-judicial body.²⁰⁵⁸ This constitutional problem does not arise if the court refers the young person to a diversionary process, but final determination of the matter is left in the hands of the court.

ALRC’s views

27.73 The ALRC is of the view that state and territory diversionary options should be available to young federal offenders. This would be consistent with the internationally accepted principle that diversion of young offenders should be considered wherever appropriate and desirable.²⁰⁵⁹

27.74 In order to avoid the constitutional difficulty concerning pre-court diversion, federal sentencing legislation should provide that, where a court refers a young person who is accused of, has pleaded guilty to, or has been convicted of a federal offence to a state or territory diversionary process, the outcome of the process must be reported back to the court and should be taken into consideration in determining the appropriate sentence for the young person.

Transfer to adult prison

27.75 State and territory legislation differs on the age at which a person sentenced to detention in a juvenile facility can or must be transferred to an adult prison. Some states allow transfer of a young person to an adult prison from age 16 for behavioural reasons.²⁰⁶⁰ Queensland also allows the transfer of 17 year olds to adult prisons in particular circumstances, provided the detainee has previously been held in custody in prison or has been sentenced to imprisonment.²⁰⁶¹ The Northern Territory requires the transfer of detainees to an adult prison at age 18.²⁰⁶² There is no specified age for transfer in Tasmania or the ACT. However, in many cases a young person sentenced in the ACT to custodial detention will serve the period of detention in another state and is subject to the rules governing detention in that state.

27.76 Under art 37(c) of CROC, ‘every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so’.²⁰⁶³ Australia has entered a reservation to art 37(c). ALRC 84 observed that Australia’s reservation was based on real difficulties—having regard to Australia’s physical size and population distribution—in ensuring separation of young offenders and adult offenders, while enabling young offenders to maintain contact with their families.²⁰⁶⁴

27.77 It has been said that the transfer of a young person serving a sentence of detention to an adult prison at the age of 18 is in accordance with CROC because it ensures the separation of detainees who are now adults from younger detainees who are not.²⁰⁶⁵ On the other hand, there is an argument that where a person’s conduct in a juvenile detention facility poses a significant risk to the safety and welfare of other detainees or staff of the facility, there should be a mechanism for the transfer to an adult prison even if the person is not yet 18 years old.

27.78 ALRC 84 expressed serious concerns about the placement of 16 and 17 year olds in adult prisons. It was said that placing young offenders in an adult prison does little to meet the rehabilitative aims of juvenile justice, especially as contact with adult offenders might further criminalise young offenders. ALRC 84 also pointed out that the risk of criminalisation might be further increased where there were inadequate facilities and programs to deal with young people.²⁰⁶⁶

27.79 As noted in ALRC 84, there are no agreed national standards for the observance of natural justice in relation to the decision to transfer young offenders to adult prisons.²⁰⁶⁷ The joint inquiry recommended that no child under the age of 18 be placed in an adult prison unless a court decides that it is in the best interests of the child to do so, and that state and territory parliaments should amend their laws accordingly.²⁰⁶⁸ This recommendation has not been implemented.

27.80 The ALRC remains of the view that placing 16 or 17 year olds in adult prisons raises serious concerns. Consistently with art 37(c) of CROC, federal legislation should provide that a young federal offender sentenced to detention in a state or territory

juvenile facility should not be transferred to an adult prison until the age of 18, except where a court determines that it is in the best interests of the offender to do so.

Effect of attaining 18 years of age

27.81 There are significant differences among the states and territories in defining the age and circumstances in which a person, despite having been a ‘child’ at the time of the offence, will be treated as an adult for the purposes of trial or sentencing. In some jurisdictions this age is 18 years;²⁰⁶⁹ in New South Wales it is 21 years for an offence that is not a serious children’s indictable offence;²⁰⁷⁰ in Victoria it is 19 years.²⁰⁷¹ Depending on the jurisdiction, reaching the relevant age has the consequence that the person either is dealt with in the children’s court but sentenced as an adult,²⁰⁷² or is dealt with and sentenced in an adult court as an adult.²⁰⁷³ The event that triggers this change also varies, but it is usually the age of the person at the time of being charged with an offence,²⁰⁷⁴ at the time of the first court appearance,²⁰⁷⁵ or at the time of commencement of proceedings.²⁰⁷⁶

27.82 There is no specified age of this kind in South Australia or Tasmania, so that a person who was a child at the time of the offence will be dealt with and sentenced as a child, regardless of his or her age when charged, brought before the court, or sentenced. However, in Tasmania, where a person was a youth at the time of the offence but is aged 19 years or more at the time of commencement of proceedings, any term of detention imposed by the court is to be served as a term of imprisonment in an adult prison.²⁰⁷⁷

27.83 To ensure that a young person who has reached the age of 18 years at the time of sentencing is not sentenced to a juvenile detention facility, one option is for federal sentencing legislation to provide that a young person who has reached a certain age at the time of sentencing is to be dealt with as an adult. The age that currently applies in most states and territories is 18 years.

27.84 A second option is for federal sentencing legislation to provide that a young person who has reached the age of 18 at the time of sentencing should be dealt with and sentenced as a young person, but that any sentence of detention is to be served in an adult prison.

ALRC’s views

27.85 A person who has committed a crime as a young person should generally be dealt with in accordance with juvenile justice principles and sentenced as a young person. However, in line with the international standards requiring the separation of young detainees from adults, the ALRC considers that where a young person has reached the age of 18 years at the time of sentencing, any sentence of detention should be served as a sentence of imprisonment in an adult prison.

27.86 The ALRC does not consider that a person who has committed a federal offence as a young person should be dealt with as an adult merely because they have reached the age of 18 years at the time of being charged or sentenced. As noted above, the age at which young offenders are treated as adults for the purposes of trial or sentencing varies across jurisdictions. Adopting 18 years as the age by which a young federal offender is to be sentenced as an adult would provide consistency, but it would also mean that young federal offenders would be dealt with as adults at an earlier age than is currently the case in some jurisdictions.

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

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

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

However, where the matter is heard in an adult court, the young person must be sentenced as a young person if found guilty of the offence, in accordance with the relevant state or territory juvenile justice legislation;

- (e) a young federal offender should have the opportunity for legal representation in all sentencing proceedings. In the absence of legal representation, the court should adjourn the proceedings unless the offender has refused or failed to exercise the right to legal representation in circumstances where the offender fully understands the right and the consequences of not exercising it;
- (f) the publication of a report of proceedings involving a young person who is charged with, found guilty of, or has pleaded guilty to, a federal offence should be prohibited where the details would lead to identification of the young person;
- (g) the sentence imposed on a young federal offender should be no more severe than the sentence that would have been imposed if he or she were an adult;
- (h) where a court, exercising powers conferred by state or territory legislation, refers to a diversionary process any young person who is charged with, found guilty of, or has pleaded guilty to, a federal offence, the outcome of the process must be reported back to the court and the court is to finalise the matter after taking into consideration the outcome of the diversionary process;
- (i) a young federal offender sentenced to detention in a juvenile facility must not be transferred to an adult prison until he or she is at least 18 years of age, unless a court determines that it is in the best interests of the young person to do so; and

- (j) where a federal offence is committed by a person who was not yet 18 years old at the time of the commission of the offence but is 18 years or more at the time of sentencing, the court must proceed to sentence the person as a young person in accordance with the relevant state or territory juvenile justice legislation, except that any sentence imposing a term of detention shall be served as a term of imprisonment.

Specified adult provisions to apply to young federal offenders

27.87 In addition to the introduction of federal minimum standards for young federal offenders, a number of proposals made elsewhere in this Discussion Paper in relation to adult offenders should also be applied to young federal offenders. The areas of particular concern include:

- the prohibition of certain sentencing options (Chapter 7);
- giving credit for time spent in pre-sentence custody or detention (Chapter 10);
- the right to be present in sentencing proceedings (Chapter 13);
- an offender's understanding of sentencing proceedings and sentencing orders (Chapter 13);
- the use of victim impact statements and pre-sentence reports (Chapter 14);
- provisions dealing with an accused with a mental illness or intellectual disability (Chapter 28); and
- facilitating access by federal offenders to state or territory drug courts (Chapter 29).

27.88 One reason for extending these proposals to young federal offenders is that young people should have no lesser protection than adults who are alleged to have committed a federal offence. In practice, some of these protections are not available to the same extent across jurisdictions.

27.89 One example is the right of a child to be present, to be heard, and to participate in proceedings.²⁰⁷⁸ Many state and territory provisions are limited to requiring the court to ensure the young person has an understanding of the nature and purpose of the proceedings,²⁰⁷⁹ with a focus on the allegations being made and the facts that must be proved in a case.²⁰⁸⁰ Some jurisdictions require the court to explain the orders made by the court.²⁰⁸¹ While CROC focuses on participation of young people in proceedings affecting them, only a few jurisdictions specify the need to enable the young person to

participate in criminal proceedings generally,²⁰⁸² and none refers specifically to participation in the sentencing process.

27.90 An example of a protection that is available to a different extent in each state and territory is the ordering of pre-sentence reports.²⁰⁸³ Although there are provisions for the preparation and use of pre-sentence reports in all states and territories, the circumstances in which they must be made, their form and content, and the procedure for their consideration, vary across jurisdictions.²⁰⁸⁴

27.91 Another reason for extending specific proposals to young federal offenders is that the principles that underlie these proposals are widely accepted and reflected in international instruments relating both to adults and to young people. In particular, the following propositions reflect internationally accepted principles in sentencing:

- the prohibition against capital punishment and other forms of cruel, inhuman or degrading punishment;²⁰⁸⁵
- the right to the assistance of an interpreter;²⁰⁸⁶
- the right to be present, to be heard, and to participate in proceedings;²⁰⁸⁷
- the right to be provided with the reasons for a sentence of detention;²⁰⁸⁸
- the requirement that, except for minor offences, authorities are to consider pre-sentence reports prior to sentencing;²⁰⁸⁹
- the requirement that various alternatives to institutionalisation should be made available to the greatest extent possible;²⁰⁹⁰ and
- the right of an offender who is suffering from a mental illness to be treated in a specialised institution and receive all necessary treatment and assistance.²⁰⁹¹

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

- (a) prohibiting certain sentencing options, including capital punishment, corporal punishment, imprisonment with hard labour, and any other form of cruel, inhuman or degrading punishment (see Proposal 7–14);

(b)	requiring the court to take into account time spent in pre-sentence custody or detention (see Proposals 10–2 and 10–3);
(c)	requiring attendance of the offender during sentencing proceedings (see Proposal 13–1);
(d)	requiring the court to give an explanation of the sentence and a copy of the sentencing order to the offender (see Proposals 13–3, 13–4 and 13–5);
(e)	governing the use of victim impact statements and pre-sentence reports (see Proposals 14–1 and 14–2);
(f)	requiring the court to state its reasons for the sentence (see Proposal 19–1);
(g)	dealing with an accused with a mental illness or intellectual disability (see Proposals 28–1, 28–2, and 28–4 to 28–15);
(h)	requiring a suitably qualified interpreter, where necessary, in all proceedings related to sentencing (see Proposal 29–3); and
(i)	facilitating access to drug courts, where they are available for young offenders (see Proposal 29–4).

National best practice guidelines for sentencing young offenders

27.92 ALRC 84 recommended that national standards for juvenile justice be developed by the proposed federal Office for Children, in consultation with the relevant state and territory authorities, the legal profession, community groups, peak bodies such as juvenile justice advisory councils, and young people.²⁰⁹² The national standards were to include: principles for sentencing young offenders; provision for a wide range of sentencing options with clearer and more appropriate hierarchies based on minimum appropriate intervention by the formal justice system; minimum standards on the use of pre-sentence reports; and formal documentation of completion of non-custodial sentencing orders.²⁰⁹³

27.93 The development of national standards would eliminate much inconsistency across jurisdictions, while allowing for developments based on local needs. However, the proposed Office for Children has not been established and the recommended national standards have not been developed.

27.94 The Australasian Juvenile Justice Administrators (AJJA) is the national body responsible for overseeing the administration of juvenile justice. Its *Standards for Juvenile Custodial Facilities* deal with service standards for juvenile custodial facilities and are based on international obligations.²⁰⁹⁴ The Standards cover 11 major areas: basic entitlements of juveniles, including an abuse-free environment and regard to age and gender; rights of expression; screening, assessment, orientation and induction; personal and social development, including offenders programs and counselling services; communication with family and interaction with the community; access to health care, including mental health services and alcohol and drugs services; behaviour management; security and safety; building design and maintenance; human resources; and commitment to quality, supportive leadership and ethical conduct. The Standards are intended to be implemented by way of locally developed internal processes, in preparation for formal accreditation.²⁰⁹⁵

27.95 The ALRC considers that there is a need for greater consistency in the treatment of young offenders and for better compliance with international norms. One way to facilitate this is by the development of national best practice guidelines for juvenile justice, including guidelines in relation to the sentencing of young people. In the ALRC's view, the AJJA, in consultation with the proposed Office for the Management of Federal Offenders (OMFO), would be best suited to undertake the development of these guidelines.

Proposal 27–3 Until such time as a federal Office for Children is established, the Australasian Juvenile Justice Administrators, in consultation with the proposed Office for the Management of Federal Offenders, should develop national best practice guidelines for juvenile justice, including guidelines relating to the sentencing of young people.

Monitoring of young federal offenders

27.96 Young federal offenders tend to be an invisible class of federal offenders because they are relatively few in number and the current arrangements rely heavily on the juvenile justice systems of the states and territories. For example, the Attorney-General's Department traditionally has not collected data on young federal offenders.

27.97 Submissions and consultations suggested that there is insufficient knowledge about the current practices and issues surrounding sentencing, administration and release of young federal offenders. It is clear that there is a strong need for better data collection in this area; for better data sharing among government agencies; and for better analysis of data collected, with a view to informing practice and policy development.

27.98 In Chapter 22 the ALRC proposes that a new Office for the Management of Federal Offenders be established, with a wide range of monitoring functions in respect of federal offenders. In order to emphasise the importance of this area, the OMFO should be specifically charged with monitoring and reporting on young federal offenders, including by: maintaining information about these offenders; monitoring compliance with the *Standards for Juvenile Custodial Facilities*; liaising with states and territories about these Standards; providing policy advice to the Australian Government on these offenders; participating as a full member of the AJJA; and liaising with states and territories in relation to these offenders. Liaison should include contact with the relevant juvenile justice departments in the various jurisdictions.

Proposal 27–4 The proposed Office for the Management of Federal Offenders should monitor and report on young federal offenders. The functions of the Office should include:

- (a) maintaining information on young federal offenders as part of an up-to-date case management database in relation to all federal offenders;
- (b) monitoring compliance with the *Standards for Juvenile Custodial Facilities* in relation to young federal offenders, and liaising with the states and territories in relation to those Standards;
- (c) providing policy advice to the Australian Government in relation to young federal offenders and relevant aspects of the federal criminal justice system;
- (d) participating as a full member of the Australasian Juvenile Justice Administrators; and
- (e) liaising with the states and territories, including the relevant juvenile justice departments, in relation to young federal offenders.

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- 1989 *United Nations Universal Declaration of Human Rights*, GA Res 217A(III), UN Doc A/Res/810 (1948) art 25(2); *United Nations Declaration of the Rights of the Child*, GA Res 44/25, UN GAOR, UN Doc A/Res/44/49 (1989), preamble.
 - 1990 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991) Attorney-General's Department, [12.50], [12.59].
 - 1991 Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [15.3].
 - 1992 Commonwealth Director of Public Prosecutions, *Correspondence*, 4 May–2 September 2005, young people and young adults data.
 - 1993 For the purposes of this analysis, a 'case' is one that was dealt with by the CDPP arising from the same series of events that gave rise to an offence (or offences). Limitations of the data mean that it is not possible to identify whether two or more separate 'cases' involved the same young person if the cases did not arise from the same series of events. The number of 'cases' is currently the best approximation of the number of young persons dealt with by the CDPP during the stated period.

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- 1994 Australian Institute of Health and Welfare, *Juvenile Justice: A New National Collection—Bulletin No 19* (2004). See also A Broadbent, *Report on the Development of a Juvenile Justice National Minimum Data Set* (2001) Australian Institute of Health and Welfare.
- 1995 Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [15.5], [15.8]–[15.18]. The CDPP noted that all these issues arise in practice: Commonwealth Director of Public Prosecutions, *Consultation*, Darwin, 28 April 2005.
- 1996 JC, *Submission SFO 25*, 13 April 2005; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005.
- 1997 Commonwealth Director of Public Prosecutions, *Correspondence*, 4 May–2 September 2005, young people and young adults data.
- 1998 Commonwealth Director of Public Prosecutions, *Submission to Children and the Legal Process Inquiry 110*, 2 November 1995.
- 1999 The term used varies between jurisdictions, and includes ‘child’, ‘juvenile’, ‘youth’ and ‘young person’: *Children (Criminal Proceedings) Act 1987* (NSW) ss 3(1), 5; *Children and Young Persons Act 1989* (Vic) s 3(1); *Young Offenders Act 1994* (WA) s 3; *Criminal Code* (WA) s 29; *Young Offenders Act 1993* (SA) s 4; *Youth Justice Act 1997* (Tas) s 3(1); *Children and Young People Act 1999* (ACT) Dictionary (s 2), ss 8, 66; *Criminal Code 2002* (ACT) s 25; *Juvenile Justice Act 1983* (NT) s 3(1); *Criminal Code Act* (NT) sch 1 (s 38(1)). See also Youth Justice Bill (No 2) 2005 (NT) cl 6.
- 2000 *Juvenile Justice Act 1992* (Qld) sch 4, s 4; *Criminal Code Act 1899* (Qld) s 29(1). The Act provides for an increase in the upper age limit by regulation, but no such regulation has been made.
- 2001 *Crimes Act 1914* (Cth) s 4M.
- 2002 For the purposes of Part IAD of the *Crimes Act 1914* (Cth) (the protection of children in proceedings for sexual offences), ‘child’ means a person under the age of 18: s 15YA. For the purposes of Part ID (forensic procedures), ‘child’ means a person who is at least 10 years of age but under the age of 18: s 23WA.
- 2003 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 1.
- 2004 Compare H Bonney, ‘Young Offenders: Some Sentencing Considerations’ (1995) 69 *Law Institute Journal* 896, who suggests that Part IB can be applied to young federal offenders.
- 2005 *Juvenile Justice Act 1992* (Qld) s 150(1)(a); *Young Offenders Act 1994* (WA) s 46(1)(a); *Criminal Law (Sentencing) Act 1988* (SA) s 3A(1).
- 2006 *Children (Criminal Proceedings) Act 1987* (NSW) s 6; *Children and Young Persons Act 1989* (Vic) s 139; *Juvenile Justice Act 1992* (Qld) s 150, sch 1; *Young Offenders Act 1994* (WA) ss 7, 46; *Young Offenders Act 1993* (SA) s 3; *Youth Justice Act 1997* (Tas) s 5; *Children and Young People Act 1999* (ACT) ss 12–14, 68; Youth Justice Bill (No 2) 2005 (NT) cl 4.
- 2007 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) arts 2, 3(1), 12, 37, 40; *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) rr 5, 11, 14.2, 17.1, 18.1, 18.2, 19, 20; *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, UN Doc A/RES/45/113 (1990) rr 1, 2; *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) art 14.
- 2008 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 3(1).
- 2009 *Ibid* art 37(b). See also *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) rr 17.1(b), 19; *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, UN Doc A/RES/45/113 (1990) rr 1, 2.
- 2010 Only the ACT legislation sets out the ‘best interests’ principle: *Children and Young People Act 1999* (ACT) s 12(1)(a). The principle that detention should be used only as a measure of last resort and for the shortest appropriate period of time is not provided for in New South Wales, Victoria, South Australia or the Northern Territory. However, the principle is reflected in the Youth Justice Bill (No 2) 2005 (NT) cl 4(c).
- 2011 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 40(1); *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) art 14(4).

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- 2012 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 40(3).
- 2013 An 'indictable offence' is one punishable by imprisonment for a period exceeding 12 months, unless the contrary intention appears: *Crimes Act 1914* (Cth) s 4G.
- 2014 *Children (Criminal Proceedings) Act 1987* (NSW) s 31(2); *Children and Young Persons Act 1989* (Vic) s 134; *Juvenile Justice Act 1992* (Qld) ss 83, 86, 88, 93; *Children's Court of Western Australia Act 1988* (WA) s 19B(1); *Young Offenders Act 1993* (SA) s 17(3)(b); *Youth Justice Act 1997* (Tas) s 161(2), (3); *Children and Young People Act 1999* (ACT) ss 90, 91; *Juvenile Justice Act 1983* (NT) s 37; *Youth Justice Bill (No 2) 2005* (NT) cl 54(2).
- 2015 However, in Queensland a child may be tried for an indictable offence before the Children's Court judge sitting with a jury: *Juvenile Justice Act 1992* (Qld) s 98.
- 2016 *R v Archdall* (1928) 41 CLR 128, 139–140.
- 2017 *Brown v The Queen* (1986) 160 CLR 171.
- 2018 See, eg, *Children's Court of Western Australia Act 1988* (WA) s 19C; *Youth Justice Act 1997* (Tas) s 28(1).
- 2019 See Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (1998) <<http://www.cdpp.gov.au/Prosecutions/Policy/Default.aspx>> at 6 October 2004, [2.24] which highlights the need for restraint in laying conspiracy charges.
- 2020 See, eg, *Children (Criminal Proceedings) Act 1987* (NSW) s 28(1)(a) (serious children's indictable offence); *Children and Young Persons Act 1989* (Vic) s 16(1) (murder, attempted murder, manslaughter, arson causing death and culpable driving causing death).
- 2021 See, eg, *Children and Young People Act 1999* (ACT) s 92.
- 2022 See, eg, *Children's Court of Western Australia Act 1988* (WA) ss 19, 19B; *Young Offenders Act 1993* (SA) ss 16, 17.
- 2023 See, eg, *Children (Criminal Proceedings) Act 1987* (NSW) s 28(1)(a); *Children and Young Persons Act 1989* (Vic) s 16(1).
- 2024 See, eg, *Children (Criminal Proceedings) Act 1987* (NSW) s 3(1) (definition of 'serious children's indictable offence' includes homicide); *Children and Young Persons Act 1989* (Vic) s 16(1) (murder, attempted murder, manslaughter, arson causing death and culpable driving causing death); *Young Offenders Act 1993* (SA) s 17(3)(a) (homicide, or an offence consisting of an attempt to commit, or assault with intent to commit homicide).
- 2025 See, eg, *Children (Criminal Proceedings) Act 1987* (NSW) s 3(1) (definition of 'serious children's indictable offence' includes an offence with a maximum sentence of life or 25 years or more imprisonment); *Juvenile Justice Act 1992* (Qld) s 8 ('serious offence' means an offence with a maximum sentence of life or 14 years or more imprisonment).
- 2026 See, eg, *Children and Young Persons Act 1989* (Vic) ss 16(1)(c), 134(3); *Young Offenders Act 1993* (SA) s 17(3).
- 2027 *Young Offenders Act 1993* (SA) s 17(3); *Children and Young People Act 1999* (ACT) s 92.
- 2028 *Peacock v Newtown Marrickville & General Co-operative Building Society (No 4) Ltd* (1943) 67 CLR 25, 39.
- 2029 L Zines, *Cowen and Zines's Federal Jurisdiction in Australia* (3rd ed, 2002), 213.
- 2030 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 40(3); *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) r 2.3.
- 2031 *Young Offenders Act 1997* (NSW) s 7(b); *Young Offenders Act 1994* (WA) s 44(2)(b); *Young Offenders Act 1993* (SA) s 30(2)(b); *Youth Justice Act 1997* (Tas) s 29(1)(a)(ii).
- 2032 *Children and Young Persons Act 1989* (Vic) ss 20, 21; *Juvenile Justice Act 1992* (Qld) s 79.
- 2033 *Juvenile Justice Act 1983* (NT) s 40. Compare *Youth Justice Bill (No 2) 2005* (NT) cl 62.
- 2034 *Children and Young People Act 1999* (ACT) s 24.
- 2035 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) rr 7.1, 15.1; *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, UN Doc A/RES/45/113 (1990) r 18(a); *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) arts 37(d), 40(2)(b)(ii), (iii).
- 2036 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [18.182], [19.87].

- 2037 P Snow and M Powell, 'Interviewing Juvenile Offenders: The Importance of Oral Language Competence' (2004) 16(2) *Current Issues in Criminal Justice* 220.
- 2038 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [18.180], [19.85].
- 2039 Proposal 13–2.
- 2040 Northern Territory legislation gives the court a discretion to order that the proceedings are not to be publicised except by authorised personnel, but does not protect the identity of a young person if the publication is by the authorised personnel: *Juvenile Justice Act 1983* (NT) s 23. Compare *Youth Justice Bill* (No 2) 2005 (NT) cl 50.
- 2041 *Children (Criminal Proceedings) Act 1987* (NSW) s 11; *Children and Young Persons Act 1989* (Vic) s 26; *Juvenile Justice Act 1992* (Qld) ss 234, 301; *Children's Court of Western Australia Act 1988* (WA) ss 35, 36A; *Young Offenders Act 1993* (SA) ss 13, 63C; *Youth Justice Act 1997* (Tas) s 31; *Children and Young People Act 1999* (ACT) s 61A.
- 2042 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 40(2)(b)(vii). See also *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) r 8.1.
- 2043 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) r 8.1.
- 2044 *Ibid* r 8.2.
- 2045 *Children (Criminal Proceedings) Act 1987* (NSW) s 6(e); *Young Offenders Act 1994* (WA) s 7(c); *Youth Justice Act 1997* (Tas) s 5(1)(b); *Children and Young People Act 1999* (ACT) ss 99(1)(c), 123(1)(b).
- 2046 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) arts 3(1), 37(b), 40; *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) rr 5.1, 17.1, 19; *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, UN Doc A/RES/45/113 (1990) rr 1, 2; *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) art 14(4).
- 2047 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985), commentary to r 17.1.
- 2048 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 40(3)(b); *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985), r 11.1.
- 2049 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) r 11.2.
- 2050 *Young Offenders Act 1997* (NSW) pt 3; *Children and Young People Act 1999* (ACT) s 81(3)(k), *Police Administration Act* (NT) s 120H. A similar provision is contained in the *Youth Justice Bill* (No 2) 2005 (NT) cl 39.
- 2051 K Polk and others, *Early Intervention: Diversion and Youth Conferencing* (2003) Australian Government, vii.
- 2052 K Daly and H Hayes, 'Restorative Justice and Conferencing in Australia' (2001) 186 *Trends and Issues in Crime and Criminal Justice* 1, 2.
- 2053 C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia* (2002), 374.
- 2054 M Findlay, S Odgers and S Yeo, *Australian Criminal Justice* (3rd ed, 2005), 321.
- 2055 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [18.36]–[18.37].
- 2056 *Ibid*, [18.56]–[18.58]; Law Society of South Australia, *Consultation*, Adelaide, 21 April 2005.
- 2057 *Young Offenders Act 1994* (WA) s 28; *Juvenile Justice Act 1992* (Qld) ss 33(b), 161; *Youth Justice Act 1997* (Tas) s 37(1).
- 2058 *Australian Constitution* s 71.
- 2059 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 40(3)(b); *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) r 11.1.
- 2060 *Children (Detention Centres) Act 1987* (NSW) s 28B; *Children and Young Persons Act 1989* (Vic) s 240; *Young Offenders Act 1994* (WA) s 178; *Young Offenders Act 1993* (SA) s 63(4).

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- 2061 *Juvenile Justice Act 1992* (Qld) s 270.
- 2062 *Juvenile Justice Act 1983* (NT) s 53(6). The Youth Justice Bill (No 2) 2005 (NT) cl 164(1) preserves this provision.
- 2063 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 37(c). Article 10 of the *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) has a similar requirement in relation to both accused and convicted young offenders. See also *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) rr 13.4, 26.3; *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, UN Doc A/RES/45/113 (1990) r 29; *United Nations Standard Minimum Rules for the Treatment of Prisoners*, UN Doc A/CONF/6/1 (1955) r 8(d).
- 2064 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [20.102].
- 2065 J Sanders, 'Human Rights in Juvenile Justice' (Paper presented at NSW Young Lawyers Continuing Legal Education Seminar, Sydney, 25 October 2004), 5.
- 2066 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [20.111]–[20.112].
- 2067 *Ibid*, [20.113].
- 2068 *Ibid*, Rec 273.
- 2069 *Children (Criminal Proceedings) Act 1987* (NSW) s 19(3) (serious children's indictable offence); *Juvenile Justice Act 1992* (Qld) s 140; *Young Offenders Act 1994* (WA) s 50B; *Children and Young People Act 1999* (ACT) s 69; *Juvenile Justice Act 1983* (NT) ss 3(1) (definition of 'juvenile'), 19.
- 2070 *Children (Criminal Proceedings) Act 1987* (NSW) ss 19, 28.
- 2071 *Children and Young Persons Act 1989* (Vic) s 3(1) (definition of 'child').
- 2072 *Juvenile Justice Act 1992* (Qld) s 140; *Young Offenders Act 1994* (WA) s 50B; *Children and Young People Act 1999* (ACT) s 69.
- 2073 *Children (Criminal Proceedings) Act 1987* (NSW) ss 16–19; *Children and Young Persons Act 1989* (Vic) ss 3 (definition of 'child'), 16; *Juvenile Justice Act 1983* (NT) ss 3(1) (definition of 'juvenile'), 19. Compare Youth Justice Bill (No 2) 2005 (NT) cl 6(2).
- 2074 *Children (Criminal Proceedings) Act 1987* (NSW) ss 16(c), 28(1)(d).
- 2075 *Children and Young Persons Act 1999* (ACT) s 69.
- 2076 *Children and Young Persons Act 1989* (Vic) s 3(1) (definition of 'child'); *Juvenile Justice Act 1992* (Qld) s 140. In Western Australia, a young person who is 18 years or older at the time of sentencing is to be sentenced as an adult: *Young Offenders Act 1994* (WA) s 50B. In the Northern Territory, the event that triggers this change may be the age of the person at the time of being charged or at the time of court appearance: *Juvenile Justice Act 1983* (NT) ss 3(1) (definition of 'juvenile'), 19; Northern Territory Magistrates Courts, *About the NT Courts & Tribunals* <www.nt.gov.au/justice/ntmc/about.shtml> at 30 October 2005.
- 2077 *Youth Justice Act 1997* (Tas) s 103.
- 2078 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 12; *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) r 14.2.
- 2079 *Juvenile Justice Act 1992* (Qld) ss 72, 158; *Children's Court of Western Australia Act 1988* (WA) s 34; *Youth Court Act 1993* (SA) s 8; *Youth Justice Act 1997* (Tas) s 29(1)(a); *Juvenile Justice Act 1983* (NT) s 41; Youth Justice Bill (No 2) 2005 (NT) cl 61.
- 2080 See, eg, *Children (Criminal Proceedings) Act 1987* (NSW) s 12(1); *Juvenile Justice Act 1983* (NT) s 41(2) (only in the absence of legal representation).
- 2081 See, eg, *Children (Criminal Proceedings) Act 1987* (NSW) s 12(3) (only upon request by the child or by some other person on behalf of the child); *Children and Young Persons Act 1989* (Vic) s 23; *Juvenile Justice Act 1992* (Qld) ss 72(2)(c), 158; *Youth Justice Act 1997* (Tas) s 50; Youth Justice Bill (No 2) 2005 (NT) cl 123.
- 2082 *Children (Criminal Proceedings) Act 1987* (NSW) s 12(4); *Juvenile Justice Act 1992* (Qld) s 72; *Children and Young People Act 1999* (ACT) s 22.
- 2083 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) r 16.
- 2084 For example, in most states and territories the ordering of a pre-sentence report in relation to a child or young person is mandatory only when the court is considering making certain types of sentencing orders.

- See *Children (Criminal Proceedings) Act 1987* (NSW) s 25 (imprisonment or control order); *Children and Young Persons Act 1989* (Vic) s 52 (youth residential centre order, youth training order, or where a child appears to be intellectually disabled); *Juvenile Justice Act 1983* (NT) ss 44(1) (sentence of detention or imprisonment), 53AA(1) (community work order). In other jurisdictions, a pre-sentence report is discretionary: *Young Offenders Act 1993* (SA) s 32; *Criminal Law (Sentencing) Act 1988* (SA) ss 3A, 8; *Children and Young People Act 1999* (ACT) s 73.
- 2085 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, [1989] ATS 21, (entered into force generally on 26 June 1987); *United Nations Universal Declaration of Human Rights*, GA Res 217A(III), UN Doc A/Res/810 (1948) art 5; *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) art 7; *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) r 17.2 (capital punishment), 17.3 (corporal punishment); *United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA Res 43/173, Annex, 43 UN GAOR Supp, UN Doc A/43/49 (1988), principle 6.
- 2086 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) art 14(3)(f); *United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA Res 43/173, Annex, 43 UN GAOR Supp, UN Doc A/43/49 (1988) principle 14; *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 40(2)(b)(vi).
- 2087 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) art 14; *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 12; *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) r 14.2.
- 2088 *United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA Res 43/173, Annex, 43 UN GAOR Supp, UN Doc A/43/49 (1988) principle 11(2).
- 2089 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) r 16.
- 2090 *United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)*, UN Doc A/RES/45/110 (1990); *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 40(4); *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) r 18.1.
- 2091 *United Nations Standard Minimum Rules for the Treatment of Prisoners*, UN Doc A/CONF/6/1 (1955) r 82; *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, UN Doc A/RES/40/33 (1985) r 26; *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, UN Doc A/RES/45/113 (1990) r 53.
- 2092 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), Rec 192.
- 2093 *Ibid*, Recs 239, 240, 244, 246.
- 2094 Australasian Juvenile Justice Administrators, *Standards for Juvenile Custodial Facilities (Revised Edition)* (1999).
- 2095 *Ibid*, 5.

28. Federal Offenders with a Mental Illness or Intellectual Disability

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Introduction

What concerns arise in relation to the operation of the provisions of Part IB of the *Crimes Act 1914* (Cth) dealing with mental health or intellectual disability? In particular, do any concerns arise in relation to: (a) fitness to be tried; (b) the options available for sentencing or the making of alternative orders (including the detention of persons acquitted because of mental illness); or (c) the interaction of federal, state and territory laws in this area? How might these concerns be addressed? [IP 29, Q 14–1]

28.1 Divisions 6 to 9 of Part IB of the *Crimes Act 1914* (Cth) deal with the prosecution and disposition of persons with a mental illness or intellectual disability. Division 6 outlines the consequences that flow from a person being found unfit to be tried. Division 7 contains the procedure for acquittal because of mental illness. Division 8 sets out a summary disposition procedure for persons with a mental illness or intellectual disability. Division 9 sets out the various sentencing alternatives for persons with a mental illness or intellectual disability.

28.2 Consultations and submissions raised a number of issues in relation to Divisions 6 to 8 of Part IB. The ALRC has concluded that these issues should be dealt with as part of a comprehensive inquiry into mental illness and intellectual disability within the federal criminal justice system. This chapter considers Division 9 of Part IB and issues related to the sentencing, administration and release of federal offenders with a mental illness or intellectual disability.

28.3 Mental and intellectual impairments other than mental illness and intellectual disability (including severe personality disorder and acquired brain injury) also raise significant issues in the context of the criminal justice system. The ALRC has not considered these issues in this chapter. However, the ALRC believes that issues related to these impairments should be investigated as part of the comprehensive inquiry that is proposed below.

28.4 Mentally ill and intellectually disabled persons are disproportionately represented within Australian state and territory criminal justice systems.²⁰⁹⁶ However, it is not known how many federal offenders have a mental illness or intellectual disability. Data provided by the Commonwealth Director of Public Prosecutions (CDPP) suggests that during the five years from 1999–2000 to 2003–04, 56 defendants have successfully applied to have their matter dealt with under Divisions 6 to 9 of Part IB of the *Crimes Act*.²⁰⁹⁷ However, these figures do not include federal offenders with a mental illness or intellectual disability who have been sentenced or dealt with under provisions other than Divisions 6 to 9 of Part IB.

The need for a comprehensive inquiry

Background

28.5 In 1988, ALRC 44 recommended a number of reforms in relation to the sentencing of federal offenders with a mental illness or intellectual disability. However, the ALRC noted that these recommendations were only a ‘stop-gap measure’ until comprehensive reforms were implemented.²⁰⁹⁸ ALRC 44 concluded that the interaction of mentally ill and intellectually disabled offenders with the criminal justice system as a whole, not with just one component of it, needed to be considered and a comprehensive response developed. The ALRC recommended that it should be given a separate reference covering all issues concerning the mentally ill and intellectually disabled in the criminal justice system.

28.6 In the intervening years, a number of law reform commissions, parliamentary committees and ad hoc review bodies have considered issues related to persons with a mental illness or intellectual disability within the criminal justice system.²⁰⁹⁹ These inquiries have described the disadvantage experienced by persons with a mental illness or intellectual disability in the criminal justice system. A significant finding of such inquiries is that mentally ill people detained by the criminal justice system are frequently denied the health care and human rights protections to which they are entitled.²¹⁰⁰

Issues and problems

28.7 There has never been a full review of issues concerning the mentally ill and intellectually disabled within the federal criminal justice system. Inquiries into persons with a mental illness or intellectual disability and the criminal justice system have been limited to discrete issues, or have focused on state and territory criminal justice systems. In particular, the ALRC’s recommendation for a comprehensive review has not been implemented.

28.8 Consultations and submissions to the current inquiry identified a number of important issues that extend beyond Part IB of the *Crimes Act*. These include the criminalisation of persons with a mental illness or intellectual disability; service provision; criminal responsibility and defences; the provision of involuntary treatment; legal professional conduct rules; prison conditions; and access to social security benefits.²¹⁰¹

28.9 Consultations and submissions were particularly critical of Divisions 6 to 8 of Part IB.²¹⁰² Stakeholders commented on the general lack of interaction between these provisions and state and territory legislation. Some suggested that the provisions offend international standards. A number questioned the need for the *Crimes Act* provisions and argued that the relevant state or territory provisions should apply to federal offenders, while others stated that a comprehensive federal scheme should be established.²¹⁰³

28.10 Division 6 outlines the consequences that flow from a person being found unfit to be tried. Issues raised in relation to these provisions included whether fitness to be tried should be determined by a specialist tribunal or a court; whether a person found unfit to be tried has the capacity to object to detention in a hospital for treatment; whether a person found unfit should be detained in prison; the absence of a procedure for determining guilt, leave from custody, and movement between custodial and non-custodial orders; and whether the Attorney-General's Department (AGD) is the appropriate body to review a person's detention.²¹⁰⁴

28.11 Division 7 contains the procedure for acquittal because of mental illness. Stakeholders questioned whether Part IB should provide for the consequences that flow from an acquittal because of 'mental impairment' (as opposed to 'mental illness'), and for the detention in prison of persons acquitted on the grounds of mental illness. They also noted the lack of provision for the circumstances of the offence to be considered by a court when setting a period of detention; and the lack of a procedure for determining guilt, leave from custody, and movement between custodial and non-custodial orders.²¹⁰⁵

28.12 Division 8 sets out a summary disposition procedure for persons with a mental illness or intellectual disability. Consultations and submissions noted that it is unclear how the provisions operate when state and territory legislation provides a procedure for determining fitness to be tried in summary matters. Stakeholders noted that orders made under the Division cannot be enforced and that the requirement to comply with conditions for three years is unduly onerous. It was also said that the requirement that a person suffer 'from a mental illness within the meaning of the civil law of the State or Territory' could preclude many people with a mental illness from being dealt with under these provisions.²¹⁰⁶

ALRC's views

28.13 The Terms of Reference require the ALRC to inquire into, and report on, whether Part IB of the *Crimes Act* is an appropriate, effective and efficient mechanism for the sentencing, imprisonment, administration and release of federal offenders. Divisions 6 to 8 of Part IB deal with stages of the criminal justice process that precede sentencing, imprisonment, administration and release. The ALRC has therefore concluded that consideration of these issues falls outside the Terms of Reference.

28.14 However, as noted in ALRC 44, the distinction between pre-sentence and post-sentence stages is artificial when considering the appropriate way to deal with persons with a mental illness or intellectual disability. Developing reform in relation to these offenders at the sentencing stage can only lead to piecemeal reform.²¹⁰⁷

28.15 In light of the scope of the current inquiry, the limited consideration that has been given to persons with a mental illness or intellectual disability in the federal

criminal justice system, the findings of other inquiries in relation to these offenders in state and territory criminal justice systems, and the important issues raised in consultations and submissions about stages of the federal criminal justice system that precede sentencing, the ALRC has concluded that a full-scale inquiry is required. The ALRC affirms the recommendation in ALRC 44 that the interaction of mentally ill and intellectually disabled offenders with the criminal justice system as a whole needs to be considered.

Proposal 28–1 The Australian Government should initiate an inquiry into issues concerning the mentally ill and the intellectually disabled in the federal criminal justice system.

Preliminary issues

Definitions

Background

28.16 Various provisions in Division 9 of Part IB of the *Crimes Act* relate to offenders with a ‘mental illness within the meaning of the civil law of that State or Territory’ or an ‘intellectual disability’.

28.17 A court must be satisfied that a person is suffering from a ‘mental illness within the meaning of the civil law of that State or Territory’ before it can make a hospital order or a psychiatric probation order.²¹⁰⁸ Section 20BW provides that a court must be satisfied that a person is suffering from an ‘intellectual disability’ before it can make a program probation order. ‘Intellectual disability’ is not defined in the *Crimes Act*. State and territory legislation defines these terms in different ways.²¹⁰⁹

Issues and problems

28.18 Consultations and submissions noted that many of the provisions in Divisions 6 to 9 of Part IB are confusing and left ‘at large’ because ‘mental illness’ and ‘intellectual disability’ are not defined.²¹¹⁰

28.19 Stakeholders emphasised that federal sentencing legislation should distinguish between ‘mental illness’ and ‘intellectual disability’.²¹¹¹ In the majority of cases, intellectual disability is a permanent condition. Although mental illness can be permanent, many people can recover fully from some forms of mental illness. In other cases mental illness may be episodic. This difference is significant in the criminal law context because, for example, a person with a mental illness may, at some stages of his or her life, be fit to be tried for an offence. However, a person with a severe intellectual disability may never have the capacity to be tried.

28.20 Some submissions also noted that the application of the state and territory civil law test for ‘mental illness’ could operate unfairly and result in federal offenders being

treated differently across jurisdictions.²¹¹² For example, mental health legislation in South Australia defines ‘mental illness’ as ‘any illness or disorder of the mind’,²¹¹³ whereas New South Wales legislation provides a more restrictive definition.²¹¹⁴

28.21 One significant issue is that ‘mental illness within the meaning of the civil law of that State or Territory’ and ‘intellectual disability’ are used in different contexts in Part IB. For example, ‘intellectual disability’ may be relevant when a court is making an order under Division 9, or when making an order in relation to fitness to be tried under Division 6.²¹¹⁵

28.22 Another issue is the interaction between federal law and state and territory laws dealing with such persons. A person accused of a federal offence will need to satisfy criteria under state and territory legislation before it can be determined whether the person can or must be admitted for treatment of a mental illness, or whether the person is eligible to receive other services provided by state and territory authorities.²¹¹⁶

28.23 A further issue is whether definitions of these terms should provide for the possibility that mental illness, intellectual disability and substance abuse may co-exist. A number of submissions noted the prevalence of ‘dual diagnosis’ in offender populations. Dual diagnosis refers to a coexisting diagnosis of mental illness and intellectual disability, or mental illness and substance abuse, or intellectual disability and substance abuse.²¹¹⁷

28.24 Submissions suggested that diagnostic criteria and broad definitions of symptoms should not be used to define these terms.²¹¹⁸ The Victorian Law Reform Commission has stated that tools such as the *Diagnostic and Statistical Manual of Mental Disorders* (DSM IV) are not designed to be used in the legal context and that such diagnostic tools evolve and change over time.²¹¹⁹

ALRC’s views

28.25 It is the ALRC’s view that federal sentencing legislation should define the terms ‘mental illness’ and ‘intellectual disability’. In particular, the definition of ‘mental illness’ should not rely on the application of state and territory civil law tests. The operation of various provisions of federal sentencing legislation would be clarified and uniformity of treatment of offenders with these impairments would be more readily achieved if these terms were clearly defined in federal legislation.²¹²⁰

28.26 In defining ‘mental illness’ and ‘intellectual disability’, account should be taken of the different contexts in which the terms are used. For example, the definitions need to take account of the fact that in some circumstances persons with these impairments should be diverted from the criminal justice system, but also that these conditions may be relevant when a court is sentencing or making an order in relation to an offender with a mental illness or intellectual disability.

28.27 The ALRC has also concluded that the terms should be defined taking into account the possibility that mental illness, intellectual disability and substance abuse may co-exist. A number of reviews have noted the prevalence of dual diagnosis in offender populations.²¹²¹ Dual diagnosis will be relevant when a court is determining the type of sentence or order to impose on an offender. Such offenders may require more than one type of treatment, rehabilitation program or other services.

28.28 The ALRC endorses the view expressed in submissions that diagnostic criteria should not be used to define these terms. The *Diagnostic and Statistical Manual of Mental Disorders* (DSM IV) states that it is not designed to be used in legal contexts.²¹²² Further, definitions that rely on diagnostic criteria are likely to become out of date as a result of developments in the fields of psychiatry and psychology.

28.29 Consideration will also need to be given to the difference between the appropriate definitions in civil and criminal contexts. The application of the state and territory civil law test for ‘mental illness’ may unfairly preclude many people with mental illness from the benefit of the special procedures in Part IB. In New South Wales, for example, the criminal law test is less restrictive than the civil law test, allowing a greater number of defendants in criminal matters to be dealt with under the special procedures in the *Mental Health (Criminal Procedure) Act 1990* (NSW).²¹²³

Proposal 28–2 Federal sentencing legislation should define the terms ‘mental illness’ and ‘intellectual disability’. In defining these terms, account should be taken of:

- (a) the different contexts in which the terms are used;
- (b) the interaction between federal law and state and territory laws dealing with such persons;
- (c) the possibility that mental illness, intellectual disability and substance abuse may co-exist;
- (d) the potential difference between criteria used for clinical diagnosis and those appropriate for forensic purposes; and
- (e) the difference between the appropriate definitions in civil and criminal contexts.

Location of provisions

28.30 One threshold issue is the location of Divisions 6 to 9 of Part IB of the *Crimes Act*. Part IB deals primarily with the sentencing and imprisonment of federal offenders.

However, Divisions 6 to 8 of Part IB deal with stages of the criminal justice process that precede sentencing.

28.31 In Chapter 2 the ALRC proposes that federal sentencing legislation should be redrafted to make its structure clearer and more logical. In particular, the order of provisions should reflect the chronology of stages in the criminal justice process. Consistent with that view, the ALRC has concluded that those provisions relating to stages of the criminal justice process that precede sentencing should remain in the *Crimes Act*. However, provisions relating to the sentencing alternatives for persons suffering from a mental illness or intellectual disability should be located in federal sentencing legislation.

Proposal 28–3 Provisions relating to fitness to be tried, acquittal due to mental illness, and summary disposition of persons suffering from a mental illness or intellectual disability should remain in the *Crimes Act 1914* (Cth). Provisions relating to sentencing alternatives for persons suffering from a mental illness or intellectual disability should be relocated to federal sentencing legislation.

Diversion from the criminal justice system

28.32 A number of submissions stated that people with a mental illness or intellectual disability should be supported, protected and diverted from the criminal justice system into appropriate services that meet their needs.²¹²⁴

28.33 The main methods of pre-sentence diversion under Part IB are the fitness to be tried procedures under Division 6, acquittal because of mental illness under Division 7 and the summary disposition procedures under Division 8.

28.34 Another method of diversion is a court diversionary scheme, such as the Magistrates Court Diversion Program (MCDP) in South Australia. Under the MCDP a court can adjourn proceedings to allow an offender with a mental illness, intellectual disability, personality disorder, acquired brain injury or neurological disorder to voluntarily address his or her mental health or disability needs and offending behaviour in the community. The MCDP is open to offenders who have committed a summary offence and certain minor indictable offences. Eligible participants are assigned a Liaison Officer who supports and advises participants and service providers, and liaises with them in regard to service provision and the participant's progress. At the final hearing, the magistrate makes a determination taking into account the participant's involvement in the MCDP.²¹²⁵

28.35 The MCDP and other state and territory court diversionary schemes have been successful in diverting persons with a mental illness or intellectual disability away from the criminal justice system and into appropriate treatment and care. For example, after one year of operation the New South Wales Court Liaison Service screened 800 people, of which 64 per cent had a serious mental illness and 50 per cent of these were diverted into community or inpatient mental health services.²¹²⁶

28.36 In Chapter 7 the ALRC proposes that federal sentencing legislation should enable a judicial officer to defer the sentencing of a federal offender for up to 12 months. This order would authorise a court to adjourn proceedings to allow an offender to voluntarily address his or her condition and offending behaviour using a similar process to the MCDP.

28.37 However, court diversionary schemes can be resource intensive. Later in this chapter the ALRC proposes that the Australian Government work with state and territory governments to improve service provision to federal offenders. These services should include court diversionary schemes, programs and accommodation in the community that are appropriate to offenders with a mental illness or intellectual disability. A number of successful diversionary schemes have been developed in the United States. These schemes may provide an appropriate model for diversionary schemes in Australia.²¹²⁷

28.38 Another method of diversion is drug court programs, which are discussed in Chapter 29. However, offenders with a mental illness or intellectual disability are excluded from some of these programs. For example, to be eligible for the New South Wales Drug Court program the ‘person must not be suffering from any mental condition that could prevent or restrict the person’s active participation in a program under the Act’.²¹²⁸ The ALRC is interested in hearing views about how such programs may be adapted for federal offenders with a dual diagnosis that includes substance abuse.

Sentencing factors

Background

28.39 In Chapter 6 the ALRC makes a number of proposals in relation to the factors a court must consider when sentencing a federal offender. This section discusses whether federal sentencing legislation should list additional factors that a court must consider when determining the sentence to be passed, or the order to be made,²¹²⁹ in relation to a federal offender with a mental illness or intellectual disability.

28.40 Section 16A(2)(m) of the *Crimes Act* provides that, in addition to any other matters, a court must take into account the ‘mental condition’ of a federal offender when sentencing, or when making an order, in respect of him or her. The *Crimes Act* does not define ‘mental condition’. The courts have considered a number of conditions under this factor.²¹³⁰

28.41 Sentencing legislation in the ACT, South Australia and Queensland also lists ‘mental condition’ as a sentencing factor but does not define the term.²¹³¹ Northern Territory sentencing legislation refers to ‘intellectual capacity’ and New South Wales legislation provides that the fact that ‘the offender was not fully aware of the consequences of his or her actions because of the offender’s age or disability’ is a mitigating factor in sentencing.²¹³²

Issues and problems

28.42 The Intellectual Disability Rights Service (IDRS) noted that under s 3 of the *Mental Health (Criminal Procedure) Act 1990* (NSW), ‘mental condition’ is defined specifically to exclude both mental illness and developmental disability (a term that encompasses intellectual disability). It submitted that the definition under the state legislation and the lack of clarity in the federal *Crimes Act* leads to confusion and potentially to injustice.²¹³³

28.43 Another issue is whether the sentencing factors a court must consider when sentencing a federal offender should include that the offender is seeking treatment or participating in a program to deal with offending behaviour. A number of submissions emphasised that mental illness can be treated.²¹³⁴ Stakeholders also noted that programs can be tailored to deal with the slow learning of people with an intellectual disability, and can result in a reduction in offending behaviour.²¹³⁵ The *Crimes Act 1900* (ACT) includes as a sentencing factor, ‘whether the offender is voluntarily seeking treatment for any physical or mental condition that may have contributed to the commission of the offence’.²¹³⁶

ALRC’s views

28.44 The ALRC considers that federal sentencing legislation should provide that the factors to be considered in sentencing a federal offender should be amended to include ‘mental illness’ and ‘intellectual disability’, in addition to ‘mental condition’.²¹³⁷ This is especially important given the established links between mental illness, intellectual disability and offending behaviour;²¹³⁸ the increased recognition in case law of the relevance of these conditions in sentencing;²¹³⁹ and the over-representation of persons with these conditions within Australian criminal justice systems.

28.45 Courts generally accept that the fact that an offender is mentally ill or intellectually disabled, although not legally insane, may be considered in sentencing because it reduces the degree of blameworthiness that would otherwise attach to the offence, and therefore justifies a lesser punishment.²¹⁴⁰ These impairments can also affect the weight to be accorded to general deterrence because an offender with a mental condition may not be considered to be ‘an appropriate medium for making an example to others’.²¹⁴¹ The ALRC has not heard that courts are failing to consider mental illness or intellectual disability under s 16A(2)(m). However, the ALRC

believes that federal sentencing legislation would be clearer if it stated that ‘mental illness’, ‘intellectual disability’ and ‘mental condition’ are factors to be considered when sentencing a federal offender, when they are relevant and known to the court.

28.46 Federal sentencing legislation should also provide that, in addition to the sentencing factors set out in Chapter 6, a court must consider whether the offender is voluntarily seeking treatment or is undertaking a behaviour intervention program to address any physical condition, mental illness, intellectual disability or mental condition that may have contributed to the commission of the offence, where that factor is relevant and known. Offenders should be encouraged to voluntarily address conditions and disabilities that may have contributed to the commission of the offence. If a person is already receiving and responding to a program or treatment it may be that the period of time required for rehabilitation is lessened, justifying a shorter sentence or less severe sentencing option. This will be particularly relevant when a court defers a sentence to allow a federal offender to voluntarily address his or her impairment and offending behaviour.

Proposal 28–4 Federal sentencing legislation should be amended to provide that the factors to be considered in sentencing a federal offender include:

- (a) ‘mental illness’ and ‘intellectual disability’ in addition to ‘mental condition’; and
- (b) that the offender is voluntarily seeking treatment or is undertaking a behaviour intervention program to address any physical condition, mental illness, intellectual disability or mental condition that may have contributed to the commission of the offence.

Existing sentencing options

28.47 Division 9 of Part IB sets out sentencing alternatives for federal offenders with a mental illness or intellectual disability. The Division provides for three options—hospital orders, psychiatric probation orders and program probation orders, each of which is made ‘without passing sentence on the person’.

28.48 The ALRC has considered adopting state and territory sentencing alternatives in relation to federal offenders with a mental illness or intellectual disability.²¹⁴² However, it is the ALRC’s view that existing sentencing alternatives under Division 9 should be expanded and improved.

Hospital orders

Background

28.49 Under s 20BS(1) of the *Crimes Act* a court may make a hospital order in lieu of passing sentence on a federal offender who has been convicted on indictment of a federal offence. The order directs that the person be detained in a hospital for a specified period for the purpose of receiving certain treatment,²¹⁴³ which is the principal purpose of the order.²¹⁴⁴ Data provided by the CDPP suggests that in the five years from 1999–2000 to 2003–04 state and territory courts have not imposed a hospital order.²¹⁴⁵

28.50 Before making a hospital order the court must be satisfied that: the person is suffering from a mental illness within the meaning of the civil law of that state or territory; the illness contributed to the commission of the offence; appropriate treatment is available in a hospital; and the proposed treatment cannot be provided to the person other than as an inmate of a hospital.

28.51 The order cannot be made unless the person would otherwise have been sentenced to a term of imprisonment and cannot exceed the period of imprisonment that would have been ordered. At any time while the hospital order is in force, the person detained or the CDPP may apply to the court to discharge it and replace it with another sentence that could have been imposed at the time the order was made.

28.52 As part of the order, the court may also set a lesser period of detention during which the person is not eligible to be released from the hospital—much like a non-parole period may be set in relation to period of imprisonment. If a lesser period has been set, the decision to release the person at the end of that period is made by the AGD on the advice of two duly qualified psychiatrists with experience in the diagnosis and treatment of mental illness. The order for release can be conditional and can be revoked.

Issues and problems

28.53 One issue for consideration is whether hospital orders should be available only for offenders who have been convicted of an indictable federal offence. Summary federal offences can attract a sentence of imprisonment for a period not exceeding 12 months.²¹⁴⁶

28.54 Although the sentencing factors listed in s 16A(2) of the *Crimes Act* must be considered when making a hospital order, Division 9 is silent on what factors a court is to consider when setting a lesser period or when declining to set a lesser period. Further, Division 9 does not provide for a standard lesser period, although ALRC 44 stated that the lesser period of the hospital order should end after completion of 70 per cent of the period ordered.²¹⁴⁷

28.55 Another issue is the role of the Attorney-General in deciding whether an offender should be released at the end of the lesser period of the hospital order. It may be more appropriate for an independent body such as the proposed Federal Parole Board to make these decisions.

ALRC's views

28.56 Federal sentencing legislation should continue to provide for hospital orders because they are an appropriate alternative to imprisonment for federal offenders with a mental illness.

28.57 The ALRC has also concluded that federal offenders with a mental illness who have committed summary offences that are punishable by imprisonment should have access to treatment in a hospital as an alternative to imprisonment. To draw a distinction between summary and indictable offences in this context is artificial, given that such an offender will generally fulfil all other requirements of a hospital order.

28.58 ALRC 44 commented that hospital orders should be equated with imprisonment.²¹⁴⁸ In Chapter 9 the ALRC makes a number of proposals in relation to setting non-parole periods. It is the ALRC's view that the proposals in relation to the matters to be considered when fixing or declining to fix a non-parole period, the preclusion of non-parole periods for sentences less than 12 months, and the benchmark relative non-parole period, should apply when a court fixes or declines to fix a lesser period under a hospital order.

28.59 It is the ALRC's view that the proposed Federal Parole Board, assisted by the reports of two duly qualified psychiatrists, is a more appropriate body than the AGD to make decisions in relation to the release of persons after the expiry of the lesser period. Decisions about the detention of a person with a mental illness or intellectual disability should be made by persons with expertise in the area. In Chapter 23 the ALRC proposes that the Federal Parole Board should include members with relevant expertise in the areas of psychology, psychiatry and social work.

Proposal 28–5 Federal sentencing legislation should provide that:

- (a) hospital orders are available as a sentencing option when a person with a mental illness is convicted of either a summary federal offence punishable by imprisonment or an indictable federal offence;
- (b) decisions in relation to the release from detention of persons subject to a hospital order are to be made by the proposed Federal Parole Board. The Board should consider the reports of two duly qualified psychiatrists in determining whether to release the person from detention, and on what conditions; and
- (c) the reforms identified in Proposals 9–1, 9–2 and 9–3 also apply in relation to hospital orders.

Probation orders

Background

28.60 Section 20BV of the *Crimes Act* provides that where a person is convicted of a federal offence and the court is satisfied that the person has a mental illness within the meaning of the civil law of that state or territory, the court may—without passing sentence—make an order that the person reside at, or attend, a specified hospital or other place for the purpose of receiving psychiatric treatment. This is known as a psychiatric probation order.²¹⁴⁹ The court must also order that the person will be subject to supervision by a probation officer for a period not exceeding two years, and will be of good behaviour for such period as the court specifies, not exceeding five years.²¹⁵⁰ Data provided by the CDPP indicates that courts have imposed seven psychiatric probation orders in the five years from 1999–2000 to 2003–04.²¹⁵¹

28.61 Section 20BY provides that the court may—without passing sentence—make an order that a federal offender with an intellectual disability be released on condition that he or she undertake an education program or treatment specified in the order.²¹⁵² This is known as a program probation order and is subject to the same additional conditions as psychiatric probation orders.²¹⁵³ Data provided by the CDPP indicates that in the five years from 1999–2000 to 2003–04 state and territory courts have not imposed a program probation order.²¹⁵⁴

28.62 Sections 20BW and 20BX set out the consequences of a breach of a psychiatric probation order or program probation order. If the person has, without reasonable excuse, failed to comply with the order, the court may: impose a pecuniary penalty not exceeding 10 penalty units; discharge the order and make an order for the conditional

release of the offender under s 20; revoke the order and deal with the person as if the order had not been made; or take no further action.

Issues and problems

28.63 Consultations and submissions did not address psychiatric probation orders. However, the IDRS noted that program probation orders have the potential to provide for the needs of offenders with an intellectual disability. The IDRS submitted that program probation orders could be used in conjunction with justice plans, which are discussed further below.²¹⁵⁵

28.64 The provisions dealing with the breach of these orders raise a number of issues. In Chapter 17, the ALRC proposes that courts should be able to deal with all breaches of federal sentencing orders regardless of whether an offender has a reasonable cause or excuse for the breach. Another issue is the lack of flexibility for dealing with a breach. In Chapter 17, the ALRC proposes that a court should have power to vary an order when an offender breaches it, so that the court has the flexibility to tailor any orders to an offender's individual circumstances.

ALRC's views

28.65 Federal sentencing legislation should continue to provide for psychiatric probation orders and program probation orders. These orders allow offenders to live in the community while addressing the behaviour that may have contributed to the commission of an offence. They also provide an alternative to sending an offender with a mental illness or intellectual disability to prison. Program probation orders are also a suitable option for offenders with a dual diagnosis because they provide for the treatment of an offender as well as participation in education programs.

28.66 Consistent with the proposal in Chapter 17, federal sentencing legislation should remove the requirement that a court can deal with a breach of the conditions of a psychiatric probation order or a program probation order only if the offender does not have a reasonable excuse for the breach.²¹⁵⁶ The ALRC has also concluded that, in addition to the power to discharge or revoke the order or take no further action, federal sentencing legislation should provide that a court has the power to vary a psychiatric probation order or program probation order when it has been breached.²¹⁵⁷

<p>Proposal 28–6 Federal sentencing legislation should:</p> <p>(a) empower a court to deal with all breaches of a psychiatric probation order or program probation order, regardless of whether the offender has a reasonable excuse for the breach; and</p>
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- (b) provide that, in addition to its existing powers, a court dealing with a breach of a psychiatric probation order or program probation order may vary the order if satisfied of the breach.

New sentencing options

28.67 Submissions suggested that there is a lack of adequate sentencing alternatives under Part IB for federal offenders with an intellectual disability. This section considers three options that may be appropriate for these offenders—justice plans, compulsory care and rehabilitation orders, and guardianship orders. The section also considers assessment and treatment orders, which may be appropriate for federal offenders with a mental illness.

Justice plans

28.68 There is currently no mechanism under federal sentencing legislation to ensure that federal offenders with an intellectual disability receive the care, rehabilitation and treatment they may require to address their offending behaviour. One option to address this problem is the introduction of justice plans for federal offenders with an intellectual disability.

28.69 A justice plan is a statement specifying services that are recommended for an offender and are designed to reduce the likelihood of the person committing further offences.²¹⁵⁸ Justice plans are currently available only in Victoria under Part 3 of the *Sentencing Act 1991* (Vic).²¹⁵⁹ Under the Act, a court can impose a special condition that an offender with an intellectual disability participate in the services specified in a justice plan on receiving: (a) a declaration of eligibility to receive disability services under the *Intellectually Disabled Persons' Services Act 1986* (Vic); (b) a justice plan prepared by the Victoria Department of Human Services; and (c) a pre-sentence report.

28.70 Justice plans appear to provide a flexible and effective mechanism for ensuring that persons with an intellectual disability receive the care and treatment they may require to deal with their offending behaviour. The ALRC has formed the preliminary view that federal sentencing legislation should provide that, in jurisdictions where justice plans are available, participation in the services specified in the plan may be attached as a condition of a community based order, discharge, conditional release, deferred sentence, program probation order and the proposed compulsory care and rehabilitation order.²¹⁶⁰

28.71 The ALRC is also of the view that the proposed Office for the Management of Federal Offenders (OMFO) should collaborate with state and territory authorities to promote the adoption of justice plans throughout Australia. Justice plans provide a link

between federal offenders and services provided by state and territory agencies responsible for intellectual disability services. The wider availability of justice plans should promote uniformity in the treatment of federal offenders with an intellectual disability across jurisdictions.

Proposal 28–7 Federal sentencing legislation should provide that, in jurisdictions where justice plans are available, participation in the services specified in the plan may be attached as a condition of a community based order, discharge, conditional release, deferred sentence, program probation order and the proposed compulsory care and rehabilitation order.

Proposal 28–8 The proposed Office for the Management of Federal Offenders should collaborate with state and territory authorities to promote the adoption of justice plans throughout Australia. These plans should specify the services that are recommended for a person with an intellectual disability for the purpose of reducing the likelihood of the person committing further offences.

Care and rehabilitation orders

28.72 There may be circumstances where a federal offender with an intellectual disability requires long-term rehabilitation and care. However, there are no appropriate options under federal sentencing legislation—other than imprisonment—for these offenders because hospital orders are generally considered to be inappropriate for persons with an intellectual disability.²¹⁶¹

28.73 The ALRC proposes that federal sentencing legislation should provide for a compulsory care and rehabilitation order.²¹⁶² This order is based on the hospital order but is designed for offenders with an intellectual disability, with the goal of promoting access to rehabilitation programs and other care. A court should not make a compulsory care and rehabilitation order unless it would have otherwise sentenced the person to a term of imprisonment. The order would state that the person be detained in secure accommodation for a period specified in the order, and may require compliance with any condition that the court considers appropriate in the circumstances. This may include conditions that the person participate in: (a) rehabilitation and behaviour intervention programs; and (b) the services specified in a justice plan, where available.

Proposal 28–9 Federal sentencing legislation should provide that a court may make an order for the long-term care and rehabilitation of a federal offender with an intellectual disability. The provision should be modelled on s 20BS of the *Crimes Act* and provide that the court may, in lieu of imposing a sentence of imprisonment, make an order that the person be detained in secure accommodation for a period specified in the order, and require compliance with any condition that the court considers appropriate in the circumstances.

Guardianship orders

28.74 The Council of Social Service of New South Wales (NCOSS) submitted that consideration should be given to the use of guardianship orders to sentence federal offenders with an intellectual disability.²¹⁶³ Guardianship orders are available as a sentencing alternative in the United Kingdom. Under s 37 of the *Mental Health Act 1983* (UK), where a person is convicted before the Crown Court or a Magistrates' Court the court may place the person under the guardianship of a local social services authority or other approved person.

28.75 The adoption of guardianship orders as a sentencing alternative for federal offenders raises a number of issues including: the circumstances in which a guardianship order is appropriate; the factors a court must consider when imposing such an order; and whether the order should be available without passing sentence on the offender. A significant issue is who would be responsible for the administration of these orders. NCOSS noted that regard would need to be given to whether federal offenders would be placed under the guardianship of state and territory guardianship boards or a guardian.²¹⁶⁴

28.76 ALRC 44 recommended the introduction of guardianship orders. The ALRC commented that where the power to commit a person to the guardianship of another is vested in a board or other tribunal, the form of guardianship order will have to be that the department of corrective services in that jurisdiction take the necessary steps to have the offender placed under guardianship.²¹⁶⁵

28.77 The ALRC has formed the preliminary view that it is unnecessary for federal sentencing legislation to provide for guardianship orders. Program probation orders and psychiatric probation orders allow a federal offender with a mental illness or intellectual disability to live in the community and address their offending behaviour under the supervision of a probation officer. Additionally, guardianship legislation in each Australian state and territory allows for a guardianship board or tribunal to make a guardianship order.²¹⁶⁶ However, the ALRC is interested in receiving further information and submissions on the use of guardianship orders for federal offenders

with an intellectual disability either as a sentencing option or as an order without passing sentence.

Assessment and treatment orders

28.78 There is no procedure under Division 9 for assessing an offender to determine whether a hospital order is appropriate. One option for reform is for federal sentencing legislation to provide for assessment orders. Such orders are available under s 90 of the *Sentencing Act 1991* (Vic), which allow for the detention of an offender as an involuntary patient for up to 72 hours to allow an assessment to be made of his or her suitability for a hospital order.²¹⁶⁷ On the expiry of the order the offender is returned to court for sentence or other order.

28.79 Additionally, Division 9 does not provide for the court to order that a person be detained for diagnosis, assessment and treatment for a short period of time when there are indications of a number of conditions that require investigation.²¹⁶⁸ Diagnosis, assessment and treatment orders are available under the Victorian sentencing legislation.²¹⁶⁹ They allow for the detention of an offender as an involuntary patient for up to three months for diagnosis, assessment and treatment. These orders are appropriate where the evidence indicates that there is a need for a period of in-patient monitoring or supervision of the person.²¹⁷⁰ On the expiry of the assessment order the offender is returned to court for sentence or other order.

28.80 The ALRC has not received any submissions in relation to whether federal sentencing legislation should provide for assessment or diagnosis, assessment and treatment orders.²¹⁷¹ The ALRC is interested in receiving further information and submissions on this issue.

Treatment by state and territory authorities

Issues and problems

28.81 Hospital orders and psychiatric probation orders require state and territory mental health authorities to provide treatment to federal offenders with a mental illness. One submission stated that the difficulty for state and territory mental health services is that the *Crimes Act* does not authorise a service provider to treat someone involuntarily under state legislation; nor (in the case of a person who receives a community based order under the *Crimes Act*) to require a person to attend appointments or receive treatment.²¹⁷²

Options for reform

28.82 The Australian Government has made a number of arrangements with the states and territories in relation to federal offenders under s 3B of the *Crimes Act*.²¹⁷³ These arrangements provide that state and territory officers may exercise powers and functions that are appropriate for the carrying out of an order made under Divisions 6 to 9 of Part IB.²¹⁷⁴ It is unclear whether these powers and functions would extend to the provision of involuntary treatment. One option for reform would be to amend these

arrangements so that state and territory mental health services officers could provide involuntary treatment to federal offenders in certain circumstances.

28.83 Another option is to encourage states and territories to amend their mental health legislation to ensure that their health authorities are able to provide involuntary treatment to federal offenders who are the subject of orders that require psychiatric treatment. Victorian legislation was recently amended to ensure that federal offenders in Victoria may be treated, as far as possible, in the same way as other forensic patients under the state mental health legislation.²¹⁷⁵ However, these amendments apply only to federal offenders who have been acquitted due to mental illness and detained under s 20BJ of the *Crimes Act*.

28.84 A further option for reform is for federal sentencing legislation to provide that federal offenders who are subject to orders requiring psychiatric treatment should be dealt with as a ‘forensic patient’ under relevant state or territory mental health legislation. State and territory mental health legislation makes provision for involuntary and other treatment to offenders who are detained in a hospital, prison or other place, or released from custody subject to conditions. These offenders are usually classified as ‘forensic patients’.²¹⁷⁶

ALRC’s views

28.85 It is important that state and territory authorities are authorised to treat federal offenders with a mental illness who are subject to orders requiring psychiatric treatment but who do not have the capacity to consent to treatment. Without this authority the rehabilitative function of these orders cannot be fulfilled. However, the provision of involuntary treatment is a controversial issue. The ALRC has received only one submission in relation to this issue and is interested in receiving further information and views on appropriate options for reform.

Procedural and evidential issues

Pre-sentence reports

Issues and problems

28.86 One method of informing the court about a person’s mental illness or intellectual disability is through the use of pre-sentence reports, which are discussed in Chapter 14.

28.87 A number of submissions supported the view that federal sentencing legislation should provide for mandatory pre-sentence reports in relation to offenders with a mental illness or intellectual disability.²¹⁷⁷ However, two key issues were raised.

28.88 The first relates to the need for authors of pre-sentence reports to have sufficient expertise in mental illness or intellectual disability when preparing reports.²¹⁷⁸ Without appropriate expertise, pre-sentence reports could disadvantage offenders because their illness or disability could be wrongly identified as indicating a lack of co-operation, with adverse implications for their sentence.²¹⁷⁹

28.89 The second issue relates to resources. The Victorian Institute of Forensic Mental Health (Forensicare) noted that the preparation of pre-sentence reports is time consuming and resource intensive. Forensicare stated that pre-sentence reports should not be produced without the criminal justice system reimbursing or paying for the services of those who have to prepare them.²¹⁸⁰

Options for reform

28.90 One option for reform is for federal sentencing legislation to provide that a pre-sentence report is mandatory when sentencing a federal offender with a mental illness or intellectual disability. ALRC 44 did not recommend mandatory pre-sentence reports. Noting the significant resource issues, the ALRC recommended that where there were reasonable grounds to expect that it would assist in sentencing, courts should avail themselves of pre-sentence reports.²¹⁸¹

28.91 Alternatively, federal sentencing legislation could provide that pre-sentence reports are mandatory only in certain circumstances. In its report on *People with Disabilities and the Criminal Justice System*, the New South Wales Law Reform Commission (NSWLRC) recommended that a mandatory pre-sentence report be limited to circumstances where a person with intellectual disability is unrepresented and a sentence of imprisonment is a reasonable possibility. This was intended to ensure that a report is prepared in serious cases where the person may not have anyone to raise the need for such a report on his or her behalf.²¹⁸²

ALRC's views

28.92 Pre-sentence reports are particularly important when a federal offender has a mental illness or intellectual disability because their impairment may justify diversion from the criminal justice system or imposition of a less severe sentence. Additionally, if a court is aware that a federal offender has a mental illness or intellectual disability, it will be able to tailor a sentence or other order to ensure that the offender receives the treatment, support or care required.

28.93 Mandatory pre-sentence reports in all matters involving a federal offender with a mental illness or intellectual disability is an attractive option. However, the significant resource implications of such a proposal has led the ALRC to conclude that such a proposal should be qualified. The ALRC supports the general approach taken by the NSWLRC because it addresses the need to protect vulnerable and unrepresented offenders whose liberty is at stake, while taking account of resource implications. However, it is not necessary to make special provision for unrepresented offenders with a mental illness or intellectual disability because more general reforms about the

adjournment of sentencing proceedings in the absence of legal representation are proposed in Chapter 13.

28.94 Chapter 14 includes a detailed proposal in relation to pre-sentence reports for federal offenders, including that federal sentencing legislation should require a pre-sentence report to be prepared by ‘a suitably qualified person’. It may be that more than one expert may be required to prepare a pre-sentence report in relation to a federal offender with a dual diagnosis.

Proposal 28–10 Federal sentencing legislation should provide that a court must request a pre-sentence report when:

- (a) an offender has a mental illness or intellectual disability, or such a condition is suspected; and
- (b) there is a reasonable prospect that the court will impose a sentence that deprives the offender of his or her liberty or places the offender in jeopardy of being deprived of his or her liberty.

Certificate of available services

Background

28.95 Under Division 9 of Part IB, a court can impose an order for the education, treatment or custody in a health facility of a federal offender.²¹⁸³ A court can also require an offender to receive psychiatric treatment or participate in a rehabilitation program as a condition of a community based order or other order under Part IB of the *Crimes Act*.²¹⁸⁴

28.96 Various provisions in Division 9 state that a court must be satisfied that these services are available before making a hospital order, psychiatric order or program probation order.²¹⁸⁵ However, a court does not have to be satisfied that these services are available if the court wants to attach the provision of treatment or other services to the offender as a condition of a community based order, conditional release or other sentencing option under Part IB.

Issues and problems

28.97 Part IB makes no provision about how a court is to be satisfied that appropriate education programs, treatment or custody in a health facility are available for a federal offender. Service providers may be put in an invidious position if a court imposes a condition that a federal offender be held at a health facility, receive treatment or attend a behaviour intervention program, and those services are not available.

28.98 Forensicare submitted that federal sentencing legislation should provide that a court must not order that a person be hospitalised or receive services without prior confirmation from the service provider that the bed or services are available.

Options for reform

28.99 One option for reform is for federal sentencing legislation to make provision for a certificate of available services such as that under s 47 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).²¹⁸⁶ Section 47 provides that a court must request the Victorian Department of Human Services to provide the court with a certificate of available services if the court is considering imposing orders for the custody of a person or for the provision of treatment or other services.

28.100 Under the provision, a certificate must state whether facilities or services are available and, if so, give an outline of those facilities or services. If no facilities or services are available, the certificate may state any other options the Secretary considers appropriate for the court to consider in making the proposed order.

28.101 The Victorian legislation provides for a certificate of available services only in relation to services provided to offenders with a mental illness. One variation on this model would be to require a certificate in relation to offenders with a mental illness or intellectual disability. Another variation would be for federal sentencing legislation to provide that a certificate is discretionary.

ALRC's views

28.102 Federal sentencing legislation should provide for a certificate of available services such as that provided for in Victorian legislation. In *R v Batori*, Gullaci J noted that the lack of a mechanism similar to s 47 was a gap in federal sentencing legislation.²¹⁸⁷

28.103 Certificates of available services have the potential to provide a link between the federal criminal justice system and the provision of services by state and territory agencies. As noted by Forensicare, such a gatekeeping mechanism is vitally important to allow service providers to respond appropriately, and for courts to see their sentencing orders carried out.²¹⁸⁸ For this reason, the ALRC proposes that it should be mandatory for a court to request a certificate of available services.

28.104 The ALRC has concluded that courts should also be assured that appropriate services are available before making an order in relation to an offender with an intellectual disability. The ALRC therefore proposes that certificates of available services should apply not only to the provision of psychiatric services, as provided for under s 47, but also to services such as behaviour intervention and other rehabilitation programs that are appropriate for federal offenders with an intellectual disability.

Proposal 28–11 Federal sentencing legislation should provide that a court must request that the state or territory department with responsibility for the provision of services to persons with a mental illness or intellectual disability provide the court with a ‘certificate of available services’ if the court is considering imposing an order that a federal offender receive treatment or participate in a rehabilitation program.

Administration and release

Programs and pre-release schemes

Background

28.105 State and territory departments of corrective services provide a range of offender rehabilitation programs, including cognitive skills programs, drug and alcohol programs, vocational skills programs and education programs.²¹⁸⁹ Federal offenders may undertake these programs in prison as a condition of a sentencing option, or while on parole.

28.106 The states and territories also offer a variety of pre-release schemes that involve release of an offender from custody for a specific purpose prior to the expiry of the offender’s non-parole period, for example, to engage in employment or education. Pre-release schemes are discussed in Chapter 25.

28.107 ALRC 44 noted that mentally ill and intellectually disabled offenders may require a number of programs, including occupational and physical therapy, welfare services, and programs addressing individual living skills. The ALRC noted that participation in these programs should be on the basis of the offender’s consent if his or her motivation and cooperation is to be encouraged.²¹⁹⁰

Issues and problems

28.108 IP 29 asked whether any issues arise in relation to the availability of rehabilitation programs and pre-release schemes for mentally ill or intellectually disabled federal offenders during their sentences.²¹⁹¹

28.109 A number of consultations and submissions reported that there was a lack of appropriate programs for offenders with a mental illness or intellectual disability, both in prisons and in the community.²¹⁹² A study of offender rehabilitation programs delivered by each state and territory in 2003 revealed that only one state offered a program that was specifically designed for offenders with an intellectual disability.²¹⁹³

28.110 The requirement that offenders consent to participate in programs or that they give an undertaking to participate in pre-release schemes raises issues for federal offenders with a mental illness or intellectual disability. It is important that offenders with these impairments are fully informed before giving consent or an undertaking because they may have less ability to understand the nature of the program or scheme, and may be more at risk of failing to comply with an undertaking.

28.111 Submissions also noted that offenders with a mental illness or intellectual disability have limited access to programs in prison and pre-release schemes because a large proportion of them are placed on protective orders or are considered by corrective services staff to be too difficult as they require assistance and support to participate in programs.²¹⁹⁴

28.112 Offenders with a mental illness or intellectual disability may experience difficulty participating in rehabilitation programs. For example, a federal offender with an intellectual disability may not be able to participate in a group-work program because of poor verbal skills or a short attention span, and may experience difficulty complying with onerous conditions.²¹⁹⁵

28.113 A lack of access to prison programs can result in federal offenders with a mental illness or intellectual disability serving longer sentences than offenders without these impairments. Offenders will often be required to undertake prison programs in order to be considered for parole. Parole boards are hesitant to release an offender unless they are convinced that the person is not a threat to the community.²¹⁹⁶ A further issue is the lack of appropriate programs in the community for federal offenders with a mental illness or intellectual disability who are on parole.

ALRC's views

28.114 Federal offenders with a mental illness or intellectual disability should have access rehabilitation programs and pre-release schemes so that they may be given the opportunity to address their offending behaviour. Unequal access to rehabilitation programs and pre-release schemes may result in offenders with these impairments being held in custody longer than other offenders. This is discriminatory and may conflict with international standards and national guidelines in relation to offenders with a mental illness or intellectual disability.²¹⁹⁷

28.115 The ALRC has addressed the lack of appropriate programs and pre-release schemes by proposing that the Australian Government and state and territory governments work together to improve service provision to federal offenders with a mental illness or intellectual disability.²¹⁹⁸ The ALRC also proposes that the OMFO should monitor and provide advice to the Attorney-General of Australia in relation to state and territory programs and pre-release schemes that are appropriate for federal offenders with a mental illness or intellectual disability.²¹⁹⁹

28.116 The ALRC has also noted concerns about the ability of these offenders to consent or give an undertaking. The ALRC proposes that state and territory departments of corrective services provide appropriate advice and support to federal offenders with a mental illness or intellectual disability to ensure that they are fully informed, and are able to consent to participate in prison programs or give an undertaking to be able to participate in pre-release schemes. This support and advice should include ensuring that federal offenders fully understand the nature of the programs or schemes, the effect the program or scheme will have on the likelihood of parole, and the consequences of a refusal or failure to participate.

28.117 State and territory corrective services officers (including prison officers, community corrections officer, and probation and parole officers) should also provide ongoing advice and support to federal offenders in order to facilitate compliance with any conditions of a program or scheme.

Proposal 28–12 State and territory departments of corrective services should ensure that appropriate advice and support is provided to federal offenders with a mental illness or intellectual disability who are required to give consent to participate in a rehabilitation program or give an undertaking to participate in a pre-release scheme.

Parole

28.118 Offenders with a mental illness or intellectual disability often experience difficulties accessing parole. In IP 29, the ALRC asked whether this issue arose in relation to federal offenders.²²⁰⁰

Issues and problems

28.119 Submissions raised the issue of the capacity of persons with a mental illness or intellectual disability to understand and meet the conditions imposed on them when granted parole. It was said that imposing conditions, without appropriate support and assistance, would be setting the person up for failure.²²⁰¹ It has been reported that in the period 1990–98, 10.1 per cent of prison inmates identified with intellectual disabilities in New South Wales were in prison for breach of parole conditions, compared with 5.7 per cent of all inmates.²²⁰²

28.120 The Department of Corrective Services Queensland noted that where a federal offender with a mental illness or intellectual disability contravenes a parole or release on licence order, the Department must correspond with federal authorities and wait for their response prior to taking action. The Department suggested that community corrections could be authorised to take immediate action to prevent federal offenders

posing a risk to themselves or others pending a decision by the relevant federal authority.²²⁰³

28.121 A number of submissions and consultations emphasised that a lack of appropriate accommodation in the community for offenders with a mental illness or intellectual disability impedes access to parole.²²⁰⁴

ALRC's views

28.122 In Chapter 23 the ALRC proposes that the Federal Parole Board should include members with relevant expertise in the areas of psychology, psychiatry and social work.²²⁰⁵ This will assist in making parole orders that are appropriate to federal offenders with a mental illness or intellectual disability.

28.123 The ALRC also proposes a range of amendments to current parole arrangements so that the Federal Parole Board can deal with breaches of parole more efficiently and effectively, while still ensuring that the offender is given an opportunity to address the Board about the alleged breach.²²⁰⁶

28.124 The ALRC has also addressed the lack of appropriate accommodation in the community for federal offenders with these impairments who are on parole by proposing that the Australian Government work together with state and territory governments to improve service provision to federal offenders with a mental illness or intellectual disability.

Other issues of concern

Adequacy of service provision

Background

28.125 Australia is subject to a number of international obligations that require it to recognise the right of all Australians to the enjoyment of the highest attainable standard of physical and mental health.²²⁰⁷ Although not legally binding, other international instruments set out standards for the provision of services to persons with a mental illness or intellectual disability,²²⁰⁸ including those in prison.²²⁰⁹

28.126 There are nationally agreed standards for the provision of services in correctional facilities, which apply to offenders with a mental illness or intellectual disability.²²¹⁰ The *National Mental Health Strategy*²²¹¹ and the *Commonwealth Disability Strategy* also set out a number of principles for the provision of services.²²¹²

28.127 State and territory government agencies are primarily responsible for the provision of services to federal offenders with a mental illness or intellectual disability.²²¹³ These services may include, for example, the provision of treatment to a federal offender with a mental illness who is subject to a hospital order, or the provision of secure accommodation and behaviour intervention programs to a federal offender with an intellectual disability as part of a program probation order.

Issues and problems

28.128 It has been suggested that services are not being provided to federal offenders with a mental illness or intellectual disability in accordance with Australia's international obligations, international standards and national standards.²²¹⁴

28.129 Problems identified in relation to service provision include: a lack of appropriate and accessible rehabilitation and treatment programs and other services in prison; the availability of appropriate accommodation in the community to facilitate access to rehabilitation and treatment programs, alternative sentencing options and parole; the funding and resourcing of community based services; the need to develop appropriate treatment and rehabilitation programs and other services for persons with dual diagnosis; the availability of long-term care for persons with a mental illness; the need for appropriately qualified staff to deliver treatment and rehabilitation services to offenders inside and outside the prison system; the availability of appropriate accommodation in prisons for prisoners with ongoing mental health conditions; the development of culturally appropriate assessment tools; and support for organisations that provide legal services to persons with a mental illness or intellectual disability.²²¹⁵

28.130 One submission stated that the Australian government needs to take responsibility for providing funding to the states and territories to enable them to bring their systems to a comparable level and it should also take responsibility for the provision of services to federal offenders in each state and territory.²²¹⁶

ALRC's views

28.131 The ALRC believes that the Australian Government should play a greater role in the coordination and oversight of service provision to persons with a mental illness or intellectual disability who have come into contact with the federal criminal justice system. This is particularly important to ensure that federal offenders with a mental illness or intellectual disability are treated uniformly across jurisdictions. Improved service provision should be directed to ensuring that federal offenders have equal access to diversionary schemes, sentencing options, prison programs, pre-release schemes and parole.

28.132 The Australian Government will need to work with state and territory governments to ensure that services are provided to federal offenders with a mental illness or intellectual disability in accordance with international obligations, international standards, and national standards. As noted in Chapter 22, the OMFO's role will include monitoring compliance with these standards.²²¹⁷

Proposal 28–13 The Australian Government and state and territory governments should work together to improve service provision to federal offenders with a mental illness or intellectual disability.

Development of national standards

28.133 Nationally agreed standards, such as the *Standard Guidelines for Corrections in Australia* and the *Standards for Juvenile Custodial Facilities* set out broad guidelines in relation to the provision of services to offenders with a mental illness or intellectual disability. For example, the *Standard Guidelines for Corrections in Australia* provides that ‘prisoners who are suffering from mental illness or an intellectual disability should be provided with appropriate management and support services’. However, there are no nationally agreed standards in relation to how those services are to be delivered to ensure optimal diagnosis, treatment and rehabilitation.

28.134 The ALRC is aware that the National Mental Health Working Group (NMHWG) has developed a *Proposed National Statement of Principles for Forensic Mental Health* (Proposed Principles). The NMHWG requires the endorsement of the Corrective Services Administrators’ Conference (CSAC) to be able to progress the Proposed Principles.²²¹⁸ One submission noted with concern the delay in implementing the Proposed Principles.²²¹⁹

28.135 The Proposed Principles are underpinned by a number of international instruments, and set out a range of standards, including standards in relation to assessment, safe and secure treatment, comprehensive forensic mental health services, ethics, staff knowledge and skills, and accountability.²²²⁰

28.136 Greater efforts should be made to ensure that federal offenders with a mental illness or intellectual disability are treated as uniformly as possible throughout Australia. Although the states and territories are responsible for the delivery of mental health and intellectual disability services, these services should be delivered within a framework provided by nationally agreed principles. This is particularly important to ensure consistent treatment across jurisdictions of persons with a mental illness or intellectual disability who have been accused of committing a federal offence.

28.137 The Proposed Principles provide a suitable model for such national standards. However, other standards will need to be developed in relation to the provision of services to persons with an intellectual disability in the criminal justice system. These standards should be underpinned by international standards (such as the *United Nations Declaration of the Rights of the Disabled*) and should address issues relevant to the provision of services in custodial and non-custodial environments.

28.138 The CSAC is the appropriate body to develop and promote compliance with national standards. However, in developing these standards CSAC will need to work

with the relevant state and territory authorities with responsibility for the provision of mental health, disability and other relevant services. The proposed OMFO should monitor individuals with a mental illness or intellectual disability in the federal criminal justice system to ensure compliance with these standards.²²²¹

Proposal 28–14 The Corrective Services Administrators’ Conference should develop and promote compliance with national standards for the assessment, detention, treatment and care of persons with a mental illness or intellectual disability who come into contact with the criminal justice system. These standards should comply with relevant international instruments.

Monitoring

Background

28.139 Chapter 22 proposes the establishment of the OMFO to monitor and report on all federal offenders, including offenders with a mental illness or intellectual disability.²²²²

28.140 One issue for consideration is whether the OMFO should monitor persons with a mental illness or intellectual disability who have been found unfit to be tried, acquitted due to mental illness, or summarily discharged under Divisions 6 to 8 of Part IB. The AGD periodically reviews the detention of persons who have been found unfit to be tried or acquitted due to mental illness.²²²³ However, there is no *ongoing* monitoring of these persons or the conditions of their detention. As persons subject to these orders have not been convicted or sentenced, they would not otherwise be covered by the ALRC’s proposal in Chapter 22.

28.141 The ALRC has concluded that the OMFO should monitor persons with a mental illness or intellectual disability who have been accused of a federal offence and subsequently acquitted due to mental impairment, found unfit to be tried, or summarily discharged when they are subject to ongoing court orders. These persons will often be detained in a prison or a health facility as a result of coming into contact with the federal criminal justice system. The Australian Government thus has an interest in assessing whether the states and territories are administering these orders in conformity with national and international standards. Further, the OMFO will be able to provide advice to the AGD to assist it in developing policy in relation to these persons.

Proposal 28–15 The Office for the Management of Federal Offenders should monitor persons with a mental illness or intellectual disability who have been accused of a federal offence and are subject to continuing obligations under a court order in connection with the offence.

Education about mental illness and intellectual disability

28.142 One consultation noted the stigma associated with mental illness and intellectual disability in the criminal justice system.²²²⁴ One submission stated that it is essential that there be funding of education services to improve skills of people within the criminal justice system who work with people with a mental illness or intellectual disability.²²²⁵ Another submission noted that because training is inadequate in this area, the skills utilised to deal with people with these complex problems are inconsistent, and frequently cause additional problems.²²²⁶

28.143 Chapter 19 includes proposals directed to the education of judicial officers, the CDPP and other Commonwealth prosecuting authorities, legal practitioners, corrective services officers and court services officers in relation to the federal criminal justice system and federal offenders. The ALRC considers that this training should include a component on issues relevant to persons with a mental illness or intellectual disability. For example, judicial officers should receive training on appropriate sentencing options for these offenders; Commonwealth prosecutors and legal practitioners should be trained on how to detect whether a person accused of a federal offence has a mental illness or intellectual disability; and state and territory corrective services officers should receive training on how to provide appropriate support to federal offenders with these conditions.

28.144 Chapter 19 also includes proposals in relation to the development of federal sentencing benchbooks and Aboriginal cultural awareness benchbooks. These benchbooks should provide commentary on issues relevant to mental illness and intellectual disability in the context of the federal criminal justice system.

Young federal offenders

28.145 Section 20C(1) of the *Crimes Act* provides that a child or young person who is charged with or convicted of an offence against a law of the Commonwealth may be tried, punished or otherwise dealt with in accordance with state and territory laws. Young federal offenders with a mental illness or intellectual disability are thus often dealt with by state and territory juvenile justice systems and mental health systems, rather than under Part IB.²²²⁷

28.146 Although juvenile justice legislation in each jurisdiction sets out a number of sentencing options that are appropriate for young offenders,²²²⁸ it does not provide for sentencing options, or alternatives to sentencing, that are specifically designed for young offenders with a mental illness or intellectual disability.²²²⁹

28.147 In Chapter 27 the ALRC proposes a four-pronged approach to the sentencing, administration and release of young federal offenders: introducing federal minimum standards; applying specific proposals in this Discussion Paper that are applicable to adult federal offenders to young federal offenders; developing best practice guidelines for juvenile justice; and increasing federal involvement in overseeing young federal offenders.

28.148 The minimum standards proposed in Chapter 27 apply to young federal offenders with a mental illness or intellectual disability but they do not specifically address issues related to young offenders with these impairments.

28.149 In ALRC 84, the ALRC and the Human Rights and Equal Opportunity Commission (HREOC) recommended the establishment of national standards for juvenile justice, including standards relevant to young offenders with a mental illness.²²³⁰ The ALRC and HREOC recommended that: (a) these standards should provide that courts consider specialist psychiatric reports prior to making sentencing decisions; (b) sentences, where appropriate, should provide for systematic and continuing assessment and treatment for young offenders affected by mental illness or severe emotional or behavioural disturbance; and (c) court, detention centre and other agency staff should receive appropriate training in the assessment, treatment and support of young people affected by mental illness or severe emotional or behavioural disturbance.²²³¹

28.150 The ALRC is interested in hearing views on whether these standards should be adapted for young federal offenders with a mental illness or intellectual disability, or whether additional minimum standards are required.

28.151 A number of proposals in this chapter are applicable to young federal offenders with a mental illness or intellectual disability. These proposals include improving service provision to federal offenders; developing nationally agreed standards for the detention, treatment and care of persons with a mental illness or intellectual disability; and monitoring by the OMFO.²²³²

28.152 In Chapter 27, the ALRC proposes the development of national best practice guidelines for juvenile justice. These guidelines should be consistent with the proposed national standards for the detention, treatment and care of persons with a mental illness or intellectual disability to be developed by the Corrective Services Administrators' Conference.²²³³

28.153 In Chapter 22 the ALRC proposes that the OMFO monitor and report on all federal offenders. The ALRC also proposes that the OMFO should monitor persons with a mental illness or intellectual disability who have been accused of a federal offence and subsequently acquitted due to mental impairment, are found unfit to be

tried, or summarily discharged when they are subject to ongoing court orders.²²³⁴ This proposal should also apply to young persons with a mental illness or intellectual disability who have been accused of a federal offence.

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- 2096 See, eg, T Butler and S Allnutt, *Mental Illness Among New South Wales Prisoners* (2003) NSW Corrections Health Service, 2; New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996), ch 2.
- 2097 Many of these defendants were accused of committing social security offences. A further eight defendants had applications dismissed: Commonwealth Director of Public Prosecutions, *Correspondence*, 4 May–2 September 2005, mental illness and intellectual disability data.
- 2098 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [200].
- 2099 See, eg, Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993); Mental Health Council of Australia and Brain and Mind Research Institute in association with the Human Rights and Equal Opportunity Commission, *Not for Service: Experiences of Injustice and Despair in Mental Health Care in Australia* (2005); New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996); Victorian Law Reform Commission, *Defences to Homicide—Final Report* (2004); Victorian Law Reform Commission, *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care—Final Report* (2003); Legislative Council Select Committee on Mental Health—Parliament of New South Wales, *Mental Health Services in New South Wales* (2002).
- 2100 See, eg, Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993), ch 25.
- 2101 Correctional Services Northern Territory and Parole Board of the Northern Territory, *Consultation*, Darwin, 27 April 2005; Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005; Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005; Legal Services Commission of South Australia, *Submission SFO 19*, 8 April 2005; Mental Health Council of Australia, *Submission SFO 32*, 18 April 2005; Mental Health Coordinating Council, *Submission SFO 44*, 29 April 2005; Prisoners' Legal Service, *Submission SFO 28*, 15 April 2005; Office of the Public Advocate Victoria, *Submission SFO 47*, 2 May 2005; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; Victorian Institute of Forensic Mental Health, *Submission SFO 43*, 29 April 2005; Welfare Rights Centre Inc (Queensland), *Submission SFO 29*, 15 April 2005.
- 2102 The courts have also criticised these provisions. See, eg, Transcript of Proceedings, *R v Batori*, (County Court of Victoria, Gullaci J, 17 May 2004); *R v Burns (No 2)* (1999) 169 ALR 149; *R v Goodfellow* (1994) 120 ALR 657; *R v Robinson* [2004] VSC 505.
- 2103 Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005; Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005; Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005; Mental Health Coordinating Council, *Submission SFO 44*, 29 April 2005; Mental Health Council of Australia, *Submission SFO 32*, 18 April 2005; Victoria Legal Aid, *Submission SFO 31*, 18 April 2005; Victorian Institute of Forensic Mental Health, *Submission SFO 43*, 29 April 2005.
- 2104 Corrections Victoria and Adult Parole Board Victoria, *Consultation*, Melbourne, 31 March 2005; Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005; Victoria Legal Aid, *Submission SFO 31*, 18 April 2005; Victorian Institute of Forensic Mental Health, *Submission SFO 43*, 29 April 2005. See also Criminal Law Committee Law Institute of Victoria, *Submission on Part 1B Division 6 of the Crimes Act 1914 (Cth)—Unfitness to Plead and the Detention of Mentally Ill Offenders* (2004) Law Institute of Victoria.
- 2105 Corrections Victoria and Adult Parole Board Victoria, *Consultation*, Melbourne, 31 March 2005; Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005; Mental Health Council of Australia, *Submission SFO 32*, 18 April 2005; Victorian Institute of Forensic Mental Health, *Submission SFO 43*, 29 April 2005.
- 2106 Commonwealth Director of Public Prosecutions, *Consultation*, Brisbane, 3 March 2005; Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005; Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005; Legal Services Commission of South Australia, *Submission SFO 19*, 8 April 2005; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005; Prisoners' Legal Service and others, *Consultation*, Brisbane, 4 March 2005.
- 2107 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [200].
- 2108 *Crimes Act 1914* (Cth) ss 20BS(1), 20BV(1)(a).

- 2109 See, eg, *Mental Health Act 1990* (NSW) sch 1; *Mental Health (Criminal Procedure) Act 1990* (NSW) pt 1; *Crimes Act 1958* (Vic) s 50; *Criminal Code 2002* (ACT) s 27; *Criminal Law Consolidation Act 1935* (SA) s 8A; *Mental Health and Related Services Act 1998* (NT) ss 4, 6.
- 2110 Commonwealth Director of Public Prosecutions, *Consultation*, Sydney, 16 September 2004; Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005.
- 2111 Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005; Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005; Mental Health Coordinating Council, *Submission SFO 44*, 29 April 2005; Mental Health Council of Australia, *Submission SFO 32*, 18 April 2005.
- 2112 Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005; New South Wales Legal Aid Commission, *Submission SFO 36*, 22 April 2005.
- 2113 *Mental Health Act 1993* (SA) s 3.
- 2114 *Mental Health Act 1990* (NSW) sch 1.
- 2115 *Crimes Act 1914* (Cth) ss 16A(2)(m), 20BB(1)(a).
- 2116 See, eg, *Mental Health Act 1990* (NSW) sch 1; *Intellectually Disabled Persons' Services Act 1986* (Vic) ss 3, 8.
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- 2119 Victorian Law Reform Commission, *Defences to Homicide—Final Report* (2004), [5.19].
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- 2121 See G Jacobsen, *Prisons Cannot Handle Drug and Mental Health Burden, Report Says* (2004) Sydney Morning Herald <www.smh.com.au> at 16 July 2004. See also M Teesson and L Byrnes, *National Drug Strategy and National Mental Health Strategy: National Comorbidity Project* (2001) National Drug and Alcohol Research Centre.
- 2122 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-TR* (2000), xxxii.
- 2123 *Mental Health (Criminal Procedure) Act 1990* (NSW) s 32.
- 2124 Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005; Mental Health Council of Australia, *Submission SFO 32*, 18 April 2005; Mental Health Coordinating Council, *Submission SFO 44*, 29 April 2005.
- 2125 Magistrates Court of South Australia, *Magistrates Court Court Diversion Program* <http://www.courts.sa.gov.au/courts/magistrates/court_diversion.html> at 3 October 2005. Similar diversionary schemes are available in other states and territories: see A Freiberg, 'Problem-oriented Courts: Innovative Solutions to Intractable Problems?' (Paper presented at AIJA Magistrates' Conference, Melbourne, 20–21 July 2001).
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- 2127 New York State Division of Probation Correctional Alternatives, *Shared Services: Alternatives to Incarceration for Defendants and Offenders with Mental Illness* New York States Division of Probation and Correctional Alternatives <http://www.dpca.state.ny.us/shared_mentally_ill.htm> at 3 October 2005.
- 2128 *Drug Court Regulation 2005* (NSW) reg 4.
- 2129 Division 9 of Part IB sets out various alternative sentencing orders that can be made 'without passing sentence' on a federal offender with a mental illness or intellectual disability.
- 2130 See, eg, *Monahan v McLeod* [2004] QDC 10 (severe depressive episode); *R v Thinh Tang* (Unreported, Supreme Court of Victoria (Court of Appeal), Tadgel J, Batt J and Vincent AJA, 2 October 1997) (low level intellectual functioning); *R v Scott* [2003] NSWCCA 28 (organic brain damage).
- 2131 *Crimes Act 1900* (ACT) s 342(1); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1); *Penalties and Sentences Act 1992* (Qld) s 18.
- 2132 *Sentencing Act 1995* (NT) s 5(2); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3).
- 2133 Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005.

- 2134 See, eg, Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005; Mental Health Coordinating Council, *Submission SFO 44*, 29 April 2005.
- 2135 Youth Parole Board Victoria, *Consultation*, Melbourne, 30 March 2005; Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005.
- 2136 *Crimes Act 1900* (ACT) s 342(1)(o).
- 2137 The *United Nations Declaration on the Rights of Disabled Persons* states that disabled people have the right to have their condition taken fully into account in any legal proceedings: *United Nations Declaration on the Rights of Disabled Persons*, UN Doc A/RES3447 (XXX) (1975), Principle 11.
- 2138 S Henderson, *Mental Illness and the Criminal Justice System* (2003) Mental Health Co-ordinating Council.
- 2139 New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996), [8.51].
- 2140 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [202]; R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [3.724].
- 2141 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [3.724]. See, eg, *Roadley v The Queen* (1990) 51 A Crim R 336, 343.
- 2142 As suggested by Victorian Institute of Forensic Mental Health, *Submission SFO 43*, 29 April 2005.
- 2143 *Crimes Act 1914* (Cth) ss 20BS–20BU.
- 2144 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [206].
- 2145 Commonwealth Director of Public Prosecutions, *Correspondence*, 4 May–2 September 2005, Mental illness and intellectual disability data.
- 2146 *Crimes Act 1914* (Cth) s 4H.
- 2147 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [206].
- 2148 *Ibid*, [206].
- 2149 *Crimes Act 1914* (Cth) ss 20BV–20BX.
- 2150 *Ibid* s 20BV(3).
- 2151 Commonwealth Director of Public Prosecutions, *Correspondence*, 4 May–2 September 2005, Mental illness and intellectual disability data.
- 2152 *Crimes Act 1914* (Cth) s 20BY. Similar orders are available under state and territory legislation. See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95A; *Sentencing Act 1991* (Vic) s 38(1); *Penalties and Sentences Act 1992* (Qld) pt 5.
- 2153 *Crimes Act 1914* (Cth) s 20BY(2).
- 2154 Commonwealth Director of Public Prosecutions, *Correspondence*, 4 May–2 September 2005, Mental illness and intellectual disability data.
- 2155 Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005.
- 2156 See Proposal 17–1.
- 2157 See Proposal 17–2.
- 2158 *Sentencing Act 1991* (Vic) s 3.
- 2159 Justice plans have been considered in Victorian Law Reform Commission, *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care—Final Report* (2003).
- 2160 When the Office for the Management of Federal Offenders provides advice to the Australian Government on whether state and territory alternative sentencing options should be picked up and applied to federal offenders, it should also provide advice on whether justice plans may be attached as a condition of these options.
- 2161 S Hayes, ‘Sentencing of People with Mental Disorders’ (2005) 96 *Reform* 24, 26.
- 2162 See also Victorian Law Reform Commission, *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care—Final Report* (2003), [7.40]–[7.41], Recs 107–110.
- 2163 Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005. See also J Simpson and L Rogers, *Intellectual Disability and Criminal Law—Hot Topics Issue 39* (2002) Legal Information Access Centre.
- 2164 Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005.
- 2165 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Recs 133–138, [213].
- 2166 See, eg, *Guardianship Act 1987* (NSW) s 14; *Guardianship and Administration Act 2000* (Qld) s 12; *Guardianship and Administration Act 1993* (SA) s 25; *Guardianship and Administration Act 1995* (Tas) s 20; *Guardianship and Management of Property Act 1991* (ACT) s 7.
- 2167 See also *Sentencing Act 1997* (Tas) s 72; *Sentencing Act 1995* (NT) s 79.
- 2168 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [10.205].
- 2169 *Sentencing Act 1991* (Vic) s 91.

- 2170 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [10.204].
- 2171 Forensicare submitted that state sentencing alternatives should apply to federal offenders: Victorian Institute of Forensic Mental Health, *Submission SFO 43*, 29 April 2005.
- 2172 Ibid.
- 2173 See Ch 22.
- 2174 See, eg, *Commonwealth of Australia Gazette—Special (Arrangement under Section 3B of the Crimes Act 1914 of the Commonwealth of Australia between the Commonwealth of Australia and NSW)*, 12 November 1990, No S293.
- 2175 *Mental Health Legislation (Commonwealth Detainees) Act 2004* (Vic).
- 2176 See, eg, *Mental Health Act 1990* (NSW) sch 1; *Mental Health Act 1986* (Vic) s 3, pt 3; *Mental Health Act 2000* (Qld) pt 7.
- 2177 Mental Health Council of Australia, *Submission SFO 32*, 18 April 2005; Mental Health Coordinating Council, *Submission SFO 44*, 29 April 2005; Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005; Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005.
- 2178 Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005.
- 2179 New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996), [8.56].
- 2180 Victorian Institute of Forensic Mental Health, *Submission SFO 43*, 29 April 2005.
- 2181 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [203].
- 2182 New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996), [8.57].
- 2183 *Crimes Act 1914* (Cth) ss 20BS (hospital orders), 20BV (psychiatric probation orders), 20BY (program probation orders).
- 2184 For example, as a condition of a conditional release under Ibid s 20. See Ch 7.
- 2185 Ibid ss 20BS(1)(c), 20BV(1)(c), 20BY(1)(c).
- 2186 Victorian Institute of Forensic Mental Health, *Submission SFO 43*, 29 April 2005.
- 2187 Transcript of Proceedings, *R v Batori*, (County Court of Victoria, Gullaci J, 17 May 2004), 3.
- 2188 Victorian Institute of Forensic Mental Health, *Submission SFO 43*, 29 April 2005.
- 2189 K Howells and others, *Correctional Offender Rehabilitation Programs: The National Picture in Australia* (2004) Criminology Research Council <<http://www.aic.gov.au/crc/reports/200203-04.html>> at 5 September 2005, 8.
- 2190 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [217].
- 2191 Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [14.46].
- 2192 Correctional Services Northern Territory and Parole Board of the Northern Territory, *Consultation*, Darwin, 27 April 2005; Corrections Victoria and Adult Parole Board Victoria, *Consultation*, Melbourne, 31 March 2005; Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005; Mental Health Council of Australia, *Submission SFO 32*, 18 April 2005; Parole Board of Tasmania, *Consultation*, Hobart, 14 April 2005; Queensland Community Corrections Board, *Consultation*, Brisbane, 3 March 2005; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; Youth Parole Board Victoria, *Consultation*, Melbourne, 30 March 2005. See also Gaol as Community Housing: A Forum on Intellectual Disability and Criminal Justice, Sydney, 10 November 2004.
- 2193 K Howells and others, *Correctional Offender Rehabilitation Programs: The National Picture in Australia* (2004) Criminology Research Council <<http://www.aic.gov.au/crc/reports/200203-04.html>> at 5 September 2005, 58, 105. The study did not consider treatment or educational and vocational programs.
- 2194 Sisters Inside Inc, *Submission SFO 40*, 28 April 2005; Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005. See also T Walsh, *Incorrections: Investigating Prison Release Practice and Policy in Queensland and its Impact on Community Safety* (2004), 110.
- 2195 S Hayes, 'A Review of Non-custodial Interventions with Offenders with Intellectual Disabilities' (2005) 17 *Current Issues in Criminal Justice* 69, 74–75.
- 2196 Corrections Victoria and Adult Parole Board Victoria, *Consultation*, Melbourne, 31 March 2005; Sentence Administration Board ACT, *Consultation*, Canberra, 17 March 2005; Queensland Community Corrections Board, *Consultation*, Brisbane, 3 March 2005; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005.

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- 2197 See, eg, *United Nations Standard Minimum Rules for the Treatment of Prisoners*, UN Doc A/CONF/6/1 (1955), rr 62, 65, 66; Corrective Services Ministers' Conference and Conference of Correctional Administrators, *Standard Guidelines for Corrections in Australia* (2004).
- 2198 Proposal 28–13.
- 2199 Proposal 22–4.
- 2200 Australian Law Reform Commission, *Sentencing of Federal Offenders*, IP 29 (2005), [14.46].
- 2201 Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005; Mental Health Coordinating Council, *Submission SFO 44*, 29 April 2005.
- 2202 Department of Corrective Services, *Recidivism and Other Statistics on Population of Inmates with Intellectual Disability in NSW Correctional Centres 1.1.1990–31.12.98* (2000) in J Simpson and L Rogers, *Intellectual Disability and Criminal Law—Hot Topics Issue 39* (2002) Legal Information Access Centre.
- 2203 Department of Corrective Services Queensland, *Submission SFO 27*, 14 April 2005.
- 2204 Corrections Victoria and Adult Parole Board Victoria, *Consultation*, Melbourne, 31 March 2005; Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005; Parole Board of Tasmania, *Consultation*, Hobart, 14 April 2005; Youth Parole Board Victoria, *Consultation*, Melbourne, 30 March 2005.
- 2205 See Proposal 23–1.
- 2206 See Ch 24 and Proposals 24–1 to 24–3.
- 2207 See, eg, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, ATS 5, (entered into force generally on 3 January 1976) art 12; *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 24.
- 2208 See, eg, *United Nations Declaration on the Rights of Mentally Retarded Persons*, UN Doc A/RES2856 (XXVI) (1971); *United Nations Declaration on the Rights of Disabled Persons*, UN Doc A/RES3447 (XXX) (1975); *United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, UN Doc A/RES48/96 (1993).
- 2209 See, eg, *United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, UN Doc A/RES/46/119 (1991) Principle 20.
- 2210 Corrective Services Ministers' Conference and Conference of Correctional Administrators, *Standard Guidelines for Corrections in Australia* (2004); Australasian Juvenile Justice Administrators, *Standards for Juvenile Custodial Facilities (Revised Edition)* (1999).
- 2211 See Australian Health Ministers' Conference, *National Mental Health Plan 2003–2008* (2003); Australian Health Ministers' Conference, *National Mental Health Plan 2003–2008* (2003); Mental Health Consumer Outcomes Task Force, *Mental Health Statement of Rights and Responsibilities* (2000).
- 2212 Family and Community Services, *Commonwealth Disability Strategy* <www.facs.gov.au/disability/cds/cds/cds_index.htm> at 4 October 2005.
- 2213 See, eg, *Commonwealth of Australia Gazette—Special (Arrangement under Section 3B of the Crimes Act 1914 of the Commonwealth of Australia between the Commonwealth of Australia and NSW)*, 12 November 1990, No S293. The Australian Government has some responsibility for the provision of services to persons with a mental illness or an intellectual disability under the *Disability Services Act 1986* (Cth) and Australian Health Agreements.
- 2214 See Mental Health Council of Australia and Brain and Mind Research Institute in association with the Human Rights and Equal Opportunity Commission, *Not for Service: Experiences of Injustice and Despair in Mental Health Care in Australia* (2005).
- 2215 Correctional Services Northern Territory and Parole Board of the Northern Territory, *Consultation*, Darwin, 27 April 2005; Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005; Intellectual Disability Rights Service, *Submission SFO 38*, 21 April 2005; Law Society of South Australia, *Consultation*, Adelaide, 21 April 2005; Mental Health Coordinating Council, *Submission SFO 44*, 29 April 2005; Mental Health Council of Australia, *Submission SFO 32*, 18 April 2005; Parole Board of South Australia, *Consultation*, Adelaide, 20 April 2005; Prisoners' Legal Service, *Submission SFO 28*, 15 April 2005; Sisters Inside Inc, *Submission SFO 40*, 28 April 2005.
- 2216 Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005.
- 2217 Proposal 22–4.
- 2218 Following CSAC endorsement the NMHWG intended to seek endorsement from the Australian Health Ministers Conference, the Corrective Services Ministers Conference and the Standing Committee of Attorneys General. While awaiting a response from CSAC, NMHWG has established a subcommittee to consider the implementation of the Proposed Principles by state and territory mental health services.

- 2219 Mental Health Council of Australia, *Submission SFO 32*, 18 April 2005.
- 2220 National Mental Health Working Group, *Proposed National Statement of Principles for Forensic Mental Health* (2002), 3–4.
- 2221 See Ch 22.
- 2222 See Proposals 22–3, 22–4.
- 2223 See, eg, *Crimes Act 1914* (Cth) ss 20BD, 20BK.
- 2224 Mental Health Council of Australia, *Consultation*, Canberra, 17 March 2005.
- 2225 Council of Social Service of NSW, *Submission SFO 24*, 13 April 2005.
- 2226 Mental Health Coordinating Council, *Submission SFO 44*, 29 April 2005.
- 2227 *Children (Criminal Proceedings) Act 1987* (NSW); *Children and Young Persons Act 1989* (Vic); *Young Offenders Act 1994* (WA); *Young Offenders Act 1993* (SA); *Youth Justice Act 1997* (Tas); *Children and Young People Act 1999* (ACT); *Juvenile Justice Act 1983* (NT). See also Youth Justice Bill (No 2) 2005 (NT).
- 2228 See Ch 27.
- 2229 However, there is some intersection between juvenile justice and mental health legislation. See, eg, *Children (Criminal Proceedings) Act 1987* (NSW) s 31; *Juvenile Justice Act 1992* (Qld) s 61.
- 2230 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), Rec 192.
- 2231 Ibid, Rec 249.
- 2232 Proposals 28–13 to 28–15.
- 2233 Proposal 28–14.
- 2234 Proposal 28–15.

29. Other Special Categories of Offenders

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Introduction

What issues arise in relation to the sentencing, imprisonment, administration, or release of the following categories of federal offenders: women; offenders with dependants or other significant family responsibilities; Aborigines or Torres Strait Islanders; offenders with a first language other than English; offenders with drug addiction [and] offenders with problem gambling? [IP 29, Q15–2, part]

29.1 This chapter provides a broad overview of some of the issues that arise when sentencing particular categories of federal offenders, namely, women, offenders with family and dependants, Aboriginal or Torres Strait Islander (ATSI) offenders, offenders from linguistically and culturally diverse backgrounds, offenders with a drug addiction and offenders with problem gambling. Although each special category is discussed separately below, many federal offenders belong to more than one category. Young federal offenders are discussed separately in Chapter 27 and federal offenders with a mental illness or intellectual disability are discussed in Chapter 28.

A systemic approach to reform

29.2 This Discussion Paper proposes a range of reforms to the law relating to the sentencing, administration and release of federal offenders. Throughout the Inquiry the ALRC has been cognisant of issues relating to the special categories of offenders discussed in this chapter and the need to ensure that the federal sentencing regime addresses issues relevant to these offenders. Accordingly, proposals made elsewhere in this Discussion Paper seek to promote the equitable treatment of these special categories of offenders.

29.3 *Sentencing factors:* In Chapter 6 the ALRC proposes that a court sentencing a federal offender should consider any factor that is relevant to sentencing and known to the court. The ALRC proposes that federal sentencing legislation list examples of factors that may be relevant to sentencing. These factors include a federal offender's history, personal circumstances and prospects of rehabilitation. Courts sentencing federal offenders thus have a discretion to consider: the social and economic disadvantage and particular rehabilitative needs of federal female and ATSI offenders; the probable effect of a sentence on a federal offender's family or dependants; and the fact that a federal offender has a drug addiction or a history of problem gambling.²²³⁵

29.4 *Sentencing options:* A number of sentencing options that are available in the states and territories are not available to courts sentencing federal offenders. Some of these options have been specifically designed for special categories of offenders such as those with a drug addiction. In Chapter 7, the ALRC proposes that the Office for the

Management of Federal Offenders (OMFO) should monitor and evaluate the use and effectiveness of state and territory sentencing options and should advise the Australian Government regarding the sentencing options that should be made available to federal offenders.²²³⁶ This system will enable sentencing options that are particularly appropriate for special categories of federal offenders to be made available to these offenders as they are introduced and evaluated.

29.5 Pre-sentence reports: Pre-sentence reports are a valuable mechanism for providing courts with information about the personal circumstances of special categories of federal offenders and the probable effect of a sentence on an offender or the offender's family or dependants. In Chapter 14 the ALRC proposes that federal sentencing legislation should authorise a court to request a pre-sentence report prior to sentencing a federal offender and to specify issues to be addressed in that report.²²³⁷

29.6 Education: In Chapter 19 the ALRC proposes that the National Judicial College of Australia (NJCA) provide regular training to judicial officers about the sentencing of federal offenders and particular issues relevant to sentencing federal offenders. This will ensure that judicial officers are informed of the sentencing options available for special categories of offenders and the most appropriate ways to promote their rehabilitation.²²³⁸ The ALRC also proposes that the NJCA develop a bench book on federal sentencing that discusses the equal treatment of all federal offenders and, in particular, the sentencing of ATSI offenders.²²³⁹ Regular training should also be provided to court services officers regarding issues arising in relation to special categories of federal offenders.²²⁴⁰

29.7 Data collection: In Chapter 22 the ALRC proposes that the OMFO develop, in consultation with other stakeholders and experts in data collection, a comprehensive national database on all federal offenders. This data should include the information required to enable the Australian Government to develop appropriate policies in relation to special categories of offenders and to oversee the administration of their sentences.²²⁴¹

29.8 Funding for special projects: In Chapter 22, the ALRC proposes that the OMFO should have the capacity to fund special programs with respect to federal offenders, for example, to meet the needs of special categories of offenders.²²⁴²

29.9 Compliance with international obligations and national guidelines: In Chapter 22 the ALRC also proposes that the OMFO monitor progress towards achieving compliance with the *Standard Guidelines for Corrections in Australia*.²²⁴³ The guidelines set standards in relation to the treatment of and services offered to offenders in correctional facilities and in the community. These standards address many of the issues identified below in relation to special categories of offenders.

29.10 Pre-release schemes: In Chapter 25, the ALRC expresses the view that the OMFO should monitor the suitability of state and territory pre-release schemes and provide advice to the Attorney-General of Australia regarding the schemes that should

be made available for federal offenders.²²⁴⁴ This mechanism enables pre-release schemes—which may be established to accommodate the needs of special categories of offenders—to be made available to federal offenders.

29.11 The remainder of this chapter examines some of the issues that arise in relation to the *sentencing* of special categories of offenders and makes a number of proposals relating to some of these issues.

Women offenders

29.12 The Australian Institute of Criminology (AIC) has conducted a statistical overview of federal prisoners for the purposes of this Inquiry.²²⁴⁵ This study reveals that female federal prisoners represent 0.4 per cent of the total prison population in Australia and 12 per cent of the total federal prison population. While male federal prisoners constitute 2.7 per cent of all male prisoners in Australia, female federal prisoners constitute 5.5 per cent of all female prisoners. On 13 December 2004 there were 84 female federal prisoners.²²⁴⁶

29.13 The rate of imprisonment of female federal offenders is lower than the rate of imprisonment for female state and territory offenders²²⁴⁷ and has remained relatively constant since 2001. In contrast, the rate of imprisonment for female state and territory offenders has increased consistently since 1998.²²⁴⁸

29.14 A significant proportion of female federal prisoners have committed fraud and deception offences against the *Crimes Act 1914* (Cth) and the *Social Security Act 1991* (Cth).²²⁴⁹ The data analysed by the AIC reveal that as at 13 December 2004 no women were imprisoned for committing corporations, fisheries or migration offences.²²⁵⁰

Sentencing factors

29.15 While the sex of an offender should not of itself be a relevant sentencing factor, the history and circumstances of a female federal offender will often be different to those of a male federal offender. Studies have consistently concluded that female offenders are more likely than male offenders to be primary caregivers, to have been unemployed prior to sentencing, to have mental health problems, to have experienced high levels of addiction, and to have suffered domestic violence and sexual abuse in the past.²²⁵¹ There may also be occasions on which the circumstances of a female federal offender are inextricably linked to her sex. For example, the fact that a female offender is pregnant will often be a relevant consideration in sentencing.

29.16 In addition, in some circumstances a sentence may have a more severe impact on a female offender than on a male federal offender. For example, because women represent a small proportion of the overall prisoner population, states and territories generally have a limited number of correctional facilities for women.²²⁵² The fact that a

female offender may be required to serve a sentence of imprisonment in a correctional facility located far from her family and social networks may be relevant to sentencing.

Sentencing options

29.17 As noted above, a significant proportion of female federal offenders commit fraud-related offences. These offenders often do not present a threat to the safety of the community. Accordingly, when determining what sentencing option to impose on a female federal offender for a fraud-related offence the sentencing purpose of protecting the community will often have little relevance. Where a female federal offender is motivated to commit a fraud-related offence by need, the sentencing purposes of retribution and general deterrence may also be of limited relevance and rehabilitation may be the most relevant sentencing purpose to consider. This may have implications for the sentencing option chosen.

29.18 Correctional administrators from all jurisdictions have developed and published *Standard Guidelines for Corrections in Australia*.²²⁵³ These guidelines set out goals to be achieved by corrective service authorities in all states and territories. The guidelines state that programs and services provided to offenders by community based correctional agencies should be tailored to suit each offender's needs and that programs related to gender should be developed in consultation with relevant community groups and experts.²²⁵⁴ In Chapter 22, the ALRC expresses the view that the OMFO should monitor progress towards achieving these standards.²²⁵⁵

29.19 A number of submissions and consultations raised issues relating to the management of female offenders in correctional facilities.²²⁵⁶ The Australian prison population is predominantly male. Accordingly, corrective services agencies have traditionally been concerned with the administration of male offenders. A number of Australian and overseas studies have highlighted the need for reform of the design and management of correctional facilities for women.²²⁵⁷ Some of these issues relate to: the security classification of female offenders; the sex of staff in correctional facilities; the availability of ante-natal and post-natal care for pregnant female offenders; search procedures; and the hygiene and health services available to female offenders.

29.20 These issues are clearly important and submissions and consultations made during the course of this Inquiry have highlighted the need for them to be addressed. However, as discussed in Chapter 1, these issues lie outside the ALRC's Terms of Reference and will not be considered further here.

Rehabilitation programs

29.21 The number of women in Australia's prison population is relative small. Accordingly, rehabilitation programs for women in correctional facilities can be limited²²⁵⁸ and at times they are simply modified versions of the rehabilitation programs developed for male prisoners.²²⁵⁹ In its previous report on sentencing, the ALRC noted that there were fewer rehabilitation programs available for women. Currently, Western Australia is the only jurisdiction to have rehabilitation programs

specifically designed for women.²²⁶⁰ Victoria and Queensland have adapted existing programs to meet the needs of female offenders.²²⁶¹

29.22 Sisters Inside addressed the issue of rehabilitation programs for female federal offenders, submitting that:

Women prisoners do not have adequate recreation or adequate programs, including educational and skill-based programs. The small numbers of women prisoners has been a justification for the failure to focus on the particular requirements of women prisoners. Correctional policies and practices applied to women are an adaptation of those considered appropriate for men—women are a correctional afterthought. It is clear that the programs provided to women prisoners are not comparable in quantity, quality or variety to those provided to male prisoners.²²⁶²

29.23 Rehabilitation programs for female federal offenders should be relevant to women's experiences and needs and should not reinforce gender stereotypes. For example, rehabilitation programs could focus on issues associated with physical and sexual abuse, substance abuse, education, parenting and employment. Anecdotal evidence suggests that rehabilitation programs that have been most successful for women are those that are provided in an intimate and confidential environment; encourage women to establish and develop support networks;²²⁶³ and are staffed by women who serve as role models.²²⁶⁴

Offenders with family and dependants

29.24 Several international instruments recognise the importance of the family as a fundamental unit of society.²²⁶⁵ Sentences imposed on federal offenders with family and dependants have the potential to disrupt and damage family relationships.

Sentencing factors

29.25 Section 16A(2)(p) of the *Crimes Act* requires a court sentencing a federal offender to take into account the probable effect of the sentence under consideration on the offender's family or dependants. As noted in Chapter 6, some courts have held that this factor can be considered only in 'exceptional circumstances'.²²⁶⁶ The ALRC proposes that federal sentencing legislation should clarify that this factor should be considered, where relevant and known, when sentencing any federal offender.²²⁶⁷

29.26 Separation of an infant child from a parent can have profoundly damaging physical and psychological effects on the infant. Separation can prevent a mother from breastfeeding an infant. Numerous studies have shown that breastfeeding promotes an infant's sensory and cognitive development and lowers infant morbidity and mortality. In addition, separation can prevent or hinder an infant's attachment to his or her parents. Attachment assists an infant's physical, psychological and social development.²²⁶⁸ The ALRC's 1988 report on sentencing expressed the view that a

mother of a young child should be imprisoned only in exceptional circumstances.²²⁶⁹ The *United Nations Declaration of the Rights of the Child 1989* provides that, ‘a child of tender years shall not, save in exceptional circumstances, be separated from his mother’.²²⁷⁰

29.27 Separation of a parent from a child who is older than an infant can also have severe negative physical and psychological effects on the child. Several reports have examined the effects of parental incarceration on children.²²⁷¹ The effects can vary depending on: whether the child was living with the parent at the time the parent was incarcerated; whether the incarcerated parent was the child’s primary caregiver; the length of the sentence of imprisonment imposed on the parent; and the age of the child.²²⁷² The effects of a parent’s imprisonment on a child tend to be a more extreme version of the effects of any enforced and traumatic parent-child separation²²⁷³ and may include:

physical health problems, hostile and aggressive behaviour, use of drugs or alcohol, truancy, running away from home, disciplinary problems, withdrawal, fearfulness, bedwetting, poor school performance, excessive crying, nightmare[s], problems in relationships with others, anxiety and depression and attention problems.²²⁷⁴

29.28 The separation can also be a traumatic experience for the parent. A study in Western Australia of the impact of imprisonment on women’s familial and social circumstances noted that all mothers who participated in the study discussed the emotional trauma associated with separation from their children, and expressed concern about the wellbeing of their children and frustration at their inability to help their children when they experienced difficulties.²²⁷⁵

29.29 In addition to the hardship caused to children, sentences imposed on federal offenders may also adversely affect other adults, such as spouses and other dependants. These adverse effects can include emotional distress and reduced financial circumstances.²²⁷⁶

Sentencing options

29.30 The ALRC has previously expressed the view that an offender’s childcare responsibilities should not limit the range of sentencing options available to a court, and that facilities for community-based sentences should have childcare facilities.²²⁷⁷ Childcare facilities are available for some state and territory offenders serving sentences in the community. For example, the Women’s Community Custody Program in Brisbane enables women to perform community service at a centre that enables children under to five to live with their mothers and older children to stay with their mothers on weekends and holidays. However, the ALRC was informed in consultations that many women still experience difficulties accessing sentencing options such as community service because of a lack of childcare facilities.²²⁷⁸

Rehabilitation programs

29.31 There are long-term social and economic benefits associated with encouraging offenders to maintain strong emotional bonds with family and dependants. For example, it has been argued that the strength or weakness of the mother-child bond is a significant indicator of recidivism for women with children.²²⁷⁹

29.32 Family support can assist an offender to reintegrate into the community after serving a sentence of imprisonment. Accordingly, offenders with family or dependants may benefit from participating in rehabilitation programs that focus on developing the offender's parenting skills or re-establishing severed connections between the offender and his or her dependants. A rehabilitation program that assists prisoners to develop their parenting skills and improve relationships with their children has been implemented in all jurisdictions.²²⁸⁰

Contact with family and dependants

29.33 Enabling federal offenders to maintain regular contact with their children assists these offenders to preserve and develop their parenting skills and to continue to develop relationships with their children. It has been argued that allowing an offender to maintain contact with his or her child while incarcerated is not a privilege for the parent but rather a right of the child.²²⁸¹ Article 9(3) of the *United Nations Convention on the Rights of the Child* 1989 provides that:

State parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.²²⁸²

Accommodating children in correctional facilities

29.34 There are conflicting views about the appropriateness of allowing children to reside with their parents in custodial settings.²²⁸³ A number of state and territory correctional facilities enable children to reside with their mothers until they are of a certain age.²²⁸⁴ For example, Brisbane's Women's Correctional Centre has a facility enabling eight women to live with their children.²²⁸⁵ In May 2004 the Boronia Pre-Release Centre for Women opened in Western Australia. This facility provides accommodation for 71 women and their children in 'self-care domestic-style accommodation units'.²²⁸⁶ ACT Corrective Services submitted that the design of the prison being developed in the ACT would enable children to stay with their primary caregiver in prison, either overnight or for weekend visits, or on an ongoing basis up to a certain age.²²⁸⁷

29.35 In New South Wales, the mother of a young child can apply to the Commissioner of Corrective Services for a local leave permit enabling her to serve her sentence with her child in an appropriate environment, such as her home.²²⁸⁸ However,

as discussed in Chapter 25, pre-release schemes available to state and territory offenders are only available to federal offenders when they are prescribed in the *Crimes Regulations 1990* (Cth), and no New South Wales pre-release schemes are so prescribed.

29.36 In addition to residing with their mothers on a full-time basis, a number of correctional facilities enable children to stay with their mothers part-time.²²⁸⁹ Some facilities also facilitate all-day visits so that parents can spend longer periods of time with their children.

ALRC's views

29.37 Federal offenders sentenced to a period of imprisonment should be allowed to maintain contact with their children except where contact would not be in the best interests of child. The ALRC supports the existence of programs that enable children to live with their mothers in safe and supportive environments within correctional facilities. These programs should be extended to all primary caregivers of children.

Aboriginal and Torres Strait Islander offenders

29.38 Indigenous peoples are among the most disadvantaged and socially marginalised groups in the world.²²⁹⁰ In Australia, ATSI offenders are over-represented in all jurisdictions at all stages of the criminal justice process.²²⁹¹

29.39 In 1991, the Royal Commission into Aboriginal Deaths in Custody (Royal Commission) released a report that contained a comprehensive analysis of the involvement of Aboriginal people in the criminal justice system. The report concluded that Aboriginal deaths in custody were largely due to the gross over-representation of Aboriginal offenders in the criminal justice system. This over-representation was attributable to the systemic socio-economic marginalisation of Aboriginal people caused by post-colonial dispossession, cultural fragmentation and disempowerment.

29.40 The Royal Commission noted that no national statistics were available on the sentencing of ATSI offenders that would enable a comparison of sentences imposed across jurisdictions.²²⁹² The Attorney-General's Department (AGD) does not systematically collect information about federal ATSI offenders.²²⁹³ Accordingly, it is unknown how many federal offenders are Aboriginal or Torres Strait Islanders. However, the Northern Australian Aboriginal Legal Aid Service informed the ALRC that only a very small percentage of its work involved federal ATSI offenders and that the federal offences committed by ATSI offenders tended to be offences against the *Social Security Act 1991* (Cth).²²⁹⁴

Sentencing factors

29.41 Discrimination on the basis of race is prohibited in the sentencing process.²²⁹⁵ ATSI offenders should not be sentenced more leniently or harshly than non-ATSI offenders simply because of their race. Australian courts have consistently held that

Aboriginality is not a mitigating factor in sentencing.²²⁹⁶ To adopt a position that an offender's ATSI background is a mitigating factor assumes that ATSI people are a homogenous group rather than a group with diverse social, cultural and economic backgrounds. In *R v Fernando*, Wood J held that:

In sentencing persons of Aboriginal descent the court must avoid any hint of racism, paternalism or collective guilt yet must nevertheless assess realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.²²⁹⁷

29.42 However, when sentencing a federal ATSI offender the court is required to take into account the offender's cultural background and any social, economic or other disadvantage encountered by an offender to the extent that these factors are relevant and known to the court.²²⁹⁸ This is consistent with art 10(1) of the International Labour Organisation *Convention No 169 Concerning Indigenous and Tribal Persons in Independent Countries 1989* (ILO Convention 169), which states that when 'imposing penalties laid down by the general law on members of these peoples account shall be taken of their economic, social and cultural characteristics'.²²⁹⁹ The circumstances and cultural background of an ATSI offender may identify a motive for an offence, explain the commission of the offence, point towards an appropriate penalty, or reveal appropriate action to be taken to promote the rehabilitation of the offender.

Sentencing options

29.43 The Royal Commission recognised that the great expansion of the number of sentencing options in Australia provided an opportunity to apply the principle that imprisonment is a sanction of last resort and to divert ATSI offenders from correctional facilities.²³⁰⁰ In order to break the cycle of recidivism, the Royal Commission recommended that ATSI offenders should be able to undertake personal development courses as part of community service work.²³⁰¹

29.44 As discussed in Chapter 7, s 17A of the *Crimes Act* contains a legislative endorsement of a widely recognised common law principle that imprisonment is a sanction of last resort. This principle is of particular importance when sentencing ATSI offenders. The Royal Commission concluded that the high number of deaths in custody of Aboriginal people was primarily explained by their disproportionate detention rates²³⁰² and recommended that governments legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort.²³⁰³ Article 10(2) of ILO Convention 169 provides that, when sentencing indigenous and tribal peoples, preference should be given to methods of punishment other than confinement to prison. While Australia is not a signatory to this Convention, the courts have held that its provisions reinforce the legislative principle that imprisonment should be a sanction of last resort.²³⁰⁴

29.45 In addition, in *R v Fernando* the court held that a lengthy term of imprisonment imposed on an ATSI offender might be unduly harsh if served in an environment dominated by non-ATSI offenders and staff with a limited understanding of the offender's culture and society.²³⁰⁵

29.46 At the beginning of the ALRC's Inquiry, the Minister for Family and Community Services, Senator the Hon Kay Patterson, wrote to the Attorney-General regarding the issue of third party management of the income of an offender who had been convicted of an alcohol, drug or gambling related offence. It was suggested that such an option might be of particular benefit to Indigenous communities. Stakeholders expressed the view that such a sentencing option would not be practicable for ATSI offenders in remote communities,²³⁰⁶ and that it would be discriminatory to create such a sentencing option if it were imposed only on ATSI offenders.²³⁰⁷

Rehabilitation programs

29.47 Some states and territories have designed rehabilitation programs for ATSI offenders.²³⁰⁸ However, in 2004 a report on offender treatment programs in Australia noted that:

Given the over-representation of Indigenous people in the criminal justice system, especially in custodial environments, and the general recognition by informants that mainstream offender rehabilitation programs do not adequately meet the needs of Indigenous offenders, it is surprising that only a handful of programs have been specifically developed for Indigenous offenders.²³⁰⁹

29.48 During consultations the ALRC was informed that existing rehabilitation programs are not appropriately tailored to meet the needs of ATSI offenders.²³¹⁰ It was said that effective rehabilitation programs for ATSI offenders should be adequately resourced, incorporate principles of Aboriginal healing, and provide ongoing assistance to participants to enable them to avoid engaging in behaviour that may contribute to further offending.²³¹¹

Traditional laws and customs

29.49 In 1986, the ALRC released its report into Aboriginal customary laws (ALRC 31).²³¹² The report made wide ranging recommendations on the recognition of Aboriginal customary laws in relation to, among other things: marriage, children and family property; criminal law and sentencing; local justice mechanisms for Aboriginal communities; and traditional hunting, fishing and gathering rights.

29.50 ALRC 31 contained a detailed analysis of the recognition of Aboriginal customary laws in sentencing.²³¹³ The report did not define the term 'customary law' but noted that narrow legislative definitions 'misrepresent the reality':

Exactly how Aboriginal customary laws are to be defined will depend on the form of recognition adopted ... But it is clear that definitional questions should not be allowed to obscure the basic issues of remedies and recognition. It will usually be sufficient to

identify Aboriginal customary laws in general terms, where these are recognised for particular purposes.²³¹⁴

29.51 In this Discussion Paper, the ALRC uses the term ‘traditional laws and customs’. This term is consistent with s 233 of the *Native Title Act 1993* (Cth), which refers to ‘traditional laws acknowledged, and the traditional customs observed’. The traditional laws and customs of ATSI offenders may vary between ATSI communities.

29.52 Information about ATSI traditional laws and customs may be relevant to sentencing to explain the circumstances surrounding the commission of the offence. For example, in *R v Shannon* the Supreme Court of South Australia took into account the fact that the offender believed himself to be at risk of harm from ‘kadaitcha’ men at the time that he committed the offences for which he was being sentenced.²³¹⁵ Information about the traditional punishment inflicted on an offender following an offence, or to be inflicted on the offender in the future, may be a mitigating factor in sentencing.²³¹⁶ While traditional punishments may take a wide variety of forms, they can include spearing, beating or banishment.²³¹⁷ Sentences imposed on ATSI offenders could be structured to accommodate traditional laws and customs. For example, a sentence could be structured to enable an ATSI offender to attend a traditional ceremony.²³¹⁸

29.53 ALRC 31 considered the ways in which information about traditional laws and customs and Aboriginal community opinions could be determined and presented to the court sentencing an Aboriginal offender.²³¹⁹ The ALRC concluded that:

It should be specifically provided that, where a member of an Aboriginal community has been convicted of an offence, the court may, on application made by some other member of the community or a member of the victim’s family or community, give leave to the person to make a submission orally or in writing concerning the sentence to be imposed for the offence. The court should be able to give leave on terms ... It should also be provided ... that the Court may adjourn to enable a pre-sentence report to be obtained from a person with special expertise or experience, in any case where Aboriginal customary laws or traditions are relevant in sentencing.²³²⁰

Community participation in sentencing

29.54 Some state and territory sentencing legislation enables courts sentencing ATSI offenders to have regard to ATSI community opinions.²³²¹ For example, sentencing legislation in Queensland provides that the court must have regard to any relevant submissions made by a representative of a community justice group in the offender’s community when sentencing an ATSI offender.²³²²

29.55 Circle sentencing is another way of enabling members of ATSI communities to participate in the sentencing process. Circle sentencing developed in Canada in response to a general perception that the Canadian criminal justice system did not work

well for Indigenous offenders. Circle sentencing has several aims, including reducing existing barriers between courts and ATSI people, empowering ATSI communities, providing relevant and meaningful sentencing options for ATSI offenders, promoting reconciliation between victims and offenders, and reducing recidivism.²³²³

29.56 Circle sentencing hearings are generally conducted in an informal setting and are usually attended by a judicial officer who acts as a facilitator in the hearing, the offender, members of the offender's community, the victim, and friends or family of the victim. During a circle sentencing hearing the offender tells his or her story; the victim has an opportunity to describe the impact the offender's behaviour has had on him or her; and members of the offender's community (usually elders) talk to the offender about his or her behaviour. While participants in the circle sentencing hearing are actively involved in determining the appropriate sentence to be imposed on an offender, the judicial officer must ultimately approve any sentence under consideration.²³²⁴ Participants tend to report high levels of satisfaction with circle sentencing proceedings.²³²⁵

29.57 Circle sentencing is currently available in some form in the majority of states and territories.²³²⁶ Some circle sentencing initiatives have a legislative basis, while others operate informally.²³²⁷ The process by which offenders are selected to participate in circle sentencing hearings differs among the jurisdictions.²³²⁸ ATSI community members often have a role in determining whether a particular offender is eligible to participate in a circle sentencing hearing.²³²⁹

ALRC's views

29.58 As noted above, the Royal Commission conducted a comprehensive inquiry into the involvement of Aboriginal people in the criminal justice system in Australia. A number of recommendations made by the Royal Commission are aimed at reducing the number of Aboriginal people in custody. The ALRC expresses its support for these recommendations in so far as they relate to the sentencing of federal ATSI offenders.

29.59 Further, the ALRC affirms its commitment to the recommendations made in ALRC 31 in so far as they relate to the sentencing of federal ATSI offenders. The ALRC remains of the view that federal sentencing legislation should contain a general legislative endorsement of the practice of considering traditional laws and customs when sentencing if they are relevant and known to the court. The ALRC also remains of the view that federal sentencing legislation should enable a court sentencing a federal ATSI offender to consider oral or written submissions from an ATSI community member when ascertaining traditional laws and customs or relevant community opinions.

29.60 While it may be desirable to create a sentencing option designed to assist in the rehabilitation of offenders with a drug addiction or problem gambling—such as third party management of the offender's income—the ALRC considers that it would be racially discriminatory to impose such a sentencing option only on ATSI offenders. However, the ALRC proposes that the OMFO should monitor the development of new

state and territory sentencing options and provide advice to the Australian Government regarding their suitability for federal offenders.²³³⁰

29.61 A number of other proposals in this Discussion Paper are relevant to the sentencing of federal ATSI offenders. In Chapter 14, the ALRC proposes that federal sentencing legislation should enable courts sentencing federal offenders to request that pre-sentence reports be prepared by suitably qualified persons.²³³¹ This would enable an expert with knowledge of ATSI communities, such as an anthropologist, to prepare a pre-sentence report for a court sentencing a federal ATSI offender. In Chapter 7, the ALRC proposes that federal sentencing legislation should facilitate access by federal offenders to state or territory restorative justice initiatives, which include circle sentencing initiatives.

Proposal 29–1 The ALRC affirms its commitment to the recommendations made in ALRC 31, *The Recognition of Aboriginal Customary Laws* (1986) in so far as they relate to the sentencing of federal Aboriginal or Torres Strait Islander (ATSI) offenders. In particular, the ALRC affirms its commitment to the recommendations that:

- (a) legislation should endorse the practice of considering traditional laws and customs, where relevant, in sentencing an ATSI offender; and
- (b) in ascertaining traditional laws and customs or relevant community opinions, oral or written submissions may be made by a member of the community of an ATSI offender or victim.

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

- (a) sentencing and correctional authorities should accept that community service can be performed in many ways, and approval should be given, where appropriate, for ATSI offenders to perform community service work by pursuing personal development courses (Rec 94);
- (b) judicial officers and other participants in the criminal justice system whose duties bring them into contact with ATSI people should be encouraged to participate in appropriate cross-cultural training programs developed after consultation with appropriate ATSI organisations (Recs 96, 97);

- (c) governments should take more positive steps to recruit and train ATSI people as court staff and interpreters in locations where a significant number of ATSI people appear before the courts (Rec 100);
- (d) an appropriate range of properly funded sentencing options should be available, and ATSI communities should participate in the development, planning and implementation of these programs (Recs 109, 111, 112, 113);
- (e) departments and agencies responsible for non-custodial sentencing programs for ATSI offenders should employ and train ATSI people to take particular responsibility for implementing such programs and educating the community about them (Rec 114); and
- (f) corrective services authorities should ensure that ATSI offenders are not denied opportunities for probation and parole because of the lack of infrastructure or staff to monitor such orders (Rec 119).

Offenders from linguistically and culturally diverse backgrounds

29.62 There is a paucity of data on the cultural background of federal offenders or the number of federal offenders with a first language other than English. However, the AIC's statistical overview of federal prisoners shows that 53 per cent of federal prisoners with a known country of birth or nationality were foreign and seven per cent of federal prisoners were of Indonesian nationality.²³³²

29.63 In the negotiations leading up to the Commonwealth Grants Commission's 2004 review of the distribution of revenue from the Goods and Services Tax, a number of states and territories argued that federal prisoners were more expensive to accommodate than state and territory prisoners. New South Wales noted that in 1999–2000, 36.2 per cent of federal prisoners in that state were from a culturally or linguistically diverse background and submitted that it incurred extra costs when providing these prisoners with interpreters, meeting their dietary needs and ensuring they had access to welfare, psychological and educational services.²³³³ The Northern Territory also noted the additional costs incurred in meeting the health and cultural needs of Indonesian federal offenders.²³³⁴

29.64 Despite the lack of firm data regarding federal offenders in these categories it can reasonably be inferred that a significant proportion of federal offenders are from culturally and linguistically diverse backgrounds.

Sentencing factors

29.65 In Chapter 6 the ALRC proposes that federal sentencing legislation should require a court to consider a federal offender's circumstances and cultural background when sentencing the offender, so far as these factors are relevant and known to the court.²³³⁵ The term 'offender's circumstances' is broad enough to enable a court to consider the fact that a federal offender has a first language other than English. This may be relevant when assessing whether an offender will experience isolation in prison due to the fact that he or she cannot speak English.²³³⁶

Sentencing options

29.66 Sentencing options for federal offenders with a first language other than English may be more limited than those available to other federal offenders. For example, it has been noted that sentencing options that require offenders to be supervised by community corrections officers may not be available to offenders who are unable to speak English.²³³⁷ In addition, sentencing options that incorporate rehabilitation programs conducted in English, such as anger management or drug addiction counselling, may not be available to offenders who are unable to speak English.²³³⁸

Rehabilitation programs

29.67 Federal offenders with a first language other than English may also be unable to access rehabilitation programs conducted in English. The Department of Justice Western Australia submitted that language barriers might prevent federal offenders with a first language other than English from accessing programs in prison.²³³⁹ The Queensland Department of Corrective Services noted that culturally and linguistically diverse prisoners had been identified as a special needs group in Queensland and that the *Corrective Services Act 2000* (Qld) required the special needs of offenders to be considered when establishing services and programs for offenders.²³⁴⁰

Education for judicial officers, lawyers and corrective services staff

29.68 The provision of education to judicial officers, lawyers and corrective services staff about the linguistic and cultural needs of federal offenders could help to minimise the problems faced by federal offenders from linguistically and culturally diverse backgrounds.

29.69 Education programs could focus on developing the skills of lawyers who work with federal offenders with a first language other than English. These education programs could be modelled on the New South Wales Law Society's *Guide to Best Practice for Lawyers Working with Interpreters and Translators in a Legal Environment*²³⁴¹ or the *Indigenous Protocols for Lawyers in the Northern Territory*.²³⁴² Alternatively, they could focus on the difficulties associated with interpreting during court proceedings, such as the problems encountered by interpreters attempting to

explain complex legal concepts or to explain issues in culturally relevant terms. In addition, they could seek to highlight the actual difficulties experienced by federal offenders with a language other than English. One such program offered to magistrates in Victoria in 1988 involved magistrates playing the role of either witnesses or litigants in mock proceedings conducted entirely in a language other than English.²³⁴³

29.70 Education programs could also provide judicial officers, lawyers and corrective services staff with information on the different cultural value systems, traditions and beliefs of federal offenders. This could help to ensure that all federal offenders are treated equitably regardless of their cultural background and that all involved in the federal criminal justice are responsive and sensitive to cultural diversity among federal offenders.

29.71 In its 1992 report on multiculturalism and the law, the ALRC recommended that the Australian Institute of Judicial Administration (AIJA) provide education and information programs to the judiciary and court personnel designed to increase cross-cultural awareness and training in the use of interpreters.²³⁴⁴ The AIJA has since published a number of reports on these issues, including a report on Indigenous issues for courts and a report on cross-cultural awareness for the judiciary.²³⁴⁵ As discussed in Chapter 19, the ALRC believes that the National Judicial College of Australia is now best placed to provide training on the sentencing of federal offenders to those working in the federal criminal justice system.

Provision of interpreters at sentencing hearings

29.72 One issue that arises is whether federal offenders with a first language other than English should be provided with interpreters at sentencing hearings. The *Crimes Act* requires the court to explain a sentence to a federal offender 'in language likely to be readily understood by the person'.²³⁴⁶ However, it does not contain provisions specifically requiring courts to provide federal offenders who are unable to speak or understand English with interpreters during sentencing proceedings. Section 30 of the *Evidence Act 1995* (Cth) deals with the provision of interpreters to witnesses who are unable to understand and speak English competently. However, the provisions of the *Evidence Act* do not apply in federal sentencing proceedings unless the court directs otherwise.²³⁴⁷

29.73 The common law establishes that a criminal trial must take place in the presence of the accused.²³⁴⁸ This has been held to extend beyond the mere corporeal presence of the accused to require that the accused understands the evidence and is able to conduct his or her case adequately.²³⁴⁹ In *R v East*, Kirby J commented that the entitlement to an interpreter was not a language right but an 'aspect of the commitment of the judicature to fairness of the trial process'.²³⁵⁰

29.74 A number of international instruments provide that anyone charged with a criminal offence has the right to the free assistance of an interpreter if he or she does not understand or speak the language used in the court.²³⁵¹ In *Cuscani v The United*

Kingdom, the European Court of Human Rights held that the right to a fair trial guaranteed by art 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950* had been violated when an offender was not provided with an interpreter at a sentencing hearing.²³⁵²

29.75 The ALRC has been informed that many federal drug offenders whose first language is not English have stated that they do not understand the judicial process.²³⁵³ In consultations, the ALRC was informed that Indonesian offenders in the Northern Territory are always provided with interpreters.²³⁵⁴ However, one federal offender submitted that in his experience interpreters were not always provided to offenders when they were required, and that those provided did not always accurately interpret court proceedings.²³⁵⁵

ALRC's views

29.76 The provision of an interpreter to an offender with a first language other than English is vital to ensure that the offender is able to understand the sentencing process, provide adequate instructions to his or her legal representative, and give evidence at the sentencing hearing if he or she chooses to do so. The ALRC believes that the ultimate responsibility for ensuring a federal offender understands and can participate in federal sentencing proceedings rests with the court. Accordingly, the onus should be on the court to decide whether a federal offender's proficiency in English is sufficient to enable him or her understand and participate in the sentencing proceedings. If not, a suitably qualified interpreter should be provided free of charge.²³⁵⁶

Proposal 29–3 Federal sentencing legislation should require a suitably qualified interpreter to be provided to a federal offender in all proceedings related to sentencing unless the court is satisfied that the offender can understand and speak the English language sufficiently to enable the offender to follow and participate in those proceedings. The costs of the interpreter should be borne by the Commonwealth.

Offenders with a drug addiction

29.77 A number of studies have highlighted the relationship between drug use and crime.²³⁵⁷ Offenders with a drug addiction can commit offences while under the influence of drugs or to obtain money to procure drugs. It is not known what proportion of federal offenders are addicted to drugs.

Sentencing factors

29.78 Drug addiction is often relevant to sentencing. For example, an offender's addiction to drugs may explain why he or she committed an offence, or may be relevant to the prospects of rehabilitation.²³⁵⁸ In Chapter 28, the ALRC proposes that the court should consider the fact that an offender is voluntarily seeking treatment to address any physical or mental condition that may have contributed to the commission of the offence when sentencing a federal offender.²³⁵⁹

29.79 Drug addiction of itself is generally not considered to be a mitigating factor in sentencing in Australia. In *R v Henry* the New South Wales Court of Criminal Appeal held that:

The sentencing practices of the court are part of an anti-drug message, which the community as a whole has indicated that it wishes to give to actual and potential users of illegal drugs. Accepting drug addiction as a mitigating factor for the commission of crimes of violence would significantly attenuate the message. The concept that committing crimes in order to obtain monies to buy an illegal substance is in some way less deserving of punishment than the commission of the same crime for the obtaining of monies for some other, but legal, purpose is perverse.²³⁶⁰

29.80 However, it has been held that drug addiction may be a mitigating circumstance where the addiction did not develop as a result of the voluntary ingestion of drugs, but rather as a result of some other circumstance such as medical treatment.²³⁶¹

29.81 In Chapter 6, the ALRC proposes that federal sentencing legislation should state that a court sentencing a federal offender must consider any factor that is relevant to sentencing and known to the court, including: the nature, seriousness and circumstances of the offence; and the character, antecedent criminal history, cultural background, history and circumstances of the offender, including age, financial circumstances, physical and mental condition.²³⁶²

Sentencing options

29.82 Victorian sentencing legislation contains a sentencing option specifically designed for offenders with a drug addiction. If a Victorian court is satisfied that an offender's drug addiction contributed to the commission of an offence and the court is considering sentencing the offender to a period of imprisonment of not more than 12 months, the court may, after receiving a pre-sentence report, make a Combined Custody and Treatment Order (CCTO). A CCTO involves the imposition of a period of imprisonment of not more than 12 months. An offender must serve at least six months of the sentence and then serve the remainder of the sentence in the community. During the latter period the offender is required to comply with conditions attached to the order.²³⁶³ This sentencing option is not available to federal offenders.

29.83 Some state sentencing legislation provides for sentencing options that seek primarily to promote the rehabilitation of an offender. For example, in Western Australia a court may sentence an offender to an Intensive Supervision Order and in

Queensland a court may sentence an offender to an Intensive Correction Order.²³⁶⁴ These options may be appropriate when sentencing offenders with a drug addiction. As discussed in Chapter 7, sentencing options available in states and territories are not automatically picked up and applied to federal offenders. However, the ALRC proposes that the OMFO monitor state and territory options and advise the Australian Government regarding the options that should be made available to federal offenders.

Rehabilitation programs

29.84 The *Standard Guidelines for Corrections in Australia* note the need to provide offenders serving sentences in the community or in prison with appropriate programs that address the underlying causes of their criminal behaviour and assist them to develop the skills necessary to lead law-abiding lives.²³⁶⁵

29.85 Drug rehabilitation programs are available in all states and territories.²³⁶⁶ They vary in intensity from educational programs that aim to motivate offenders to address their drug addiction, to residential programs offering ‘intensive, long term, highly structured, self-help, residential treatment for chronic drug misusers’.²³⁶⁷ The majority of drug rehabilitation programs in Australia are low intensity programs, a fact that has been described as surprising given the high percentage of substance users in the criminal justice system.²³⁶⁸

Drug Courts

Background

29.86 Drug courts are specialist, problem-oriented courts that aim to break the nexus between drug addiction and crime.²³⁶⁹ Drug courts are based on the philosophy of ‘therapeutic jurisprudence’—that is, the philosophy that the law can affect the psychological and physical well-being of those with whom it has contact.²³⁷⁰ Drug courts have a number of common features. They generally operate informally; focus on identifying the treatment needs of an individual offender; and provide offenders with access to appropriate treatment and rehabilitation services. Judges in drug courts are required to take an active role in supervising the treatment and progress of offenders. The high level of judicial supervision of proceedings in drug courts means that drug court judges are required to abandon their traditional role and adopt the role of ‘confessor, taskmaster, cheerleader and mentor’.²³⁷¹

29.87 Drug courts have been established in a number of states and territories.²³⁷² Some are established by legislation while others operate without a legislative basis.²³⁷³ Drug courts can be accessed only by offenders who plead guilty to the offences for which they have been charged.²³⁷⁴ However, the composition, powers, jurisdiction and eligibility criteria of the drug courts differ between jurisdictions. In addition, some drug courts are able to make specific sentencing orders. For example, drug courts in

Queensland can make Intensive Drug Rehabilitation Orders (IDRO) and drug courts in Victoria can make Drug Treatment Orders.²³⁷⁵

Issues and problems

29.88 One issue that arises is whether federal offenders can access state and territory drug courts. As discussed in Chapter 7, s 68(1) of the *Judiciary Act 1903* (Cth) picks up and applies state and territory procedural laws to federal prosecutions in state and territory courts. Section s 79 of the *Judiciary Act* picks up and applies to a court exercising federal jurisdiction certain state and territory procedural laws, except in so far as they are inconsistent with the Australian Constitution or with other federal laws. Whether a law relating to a drug court in a state or territory is capable of being picked up and applied in the federal context needs to be determined on a case-by-case basis.

29.89 The sentencing orders made by a drug court may not be picked up and applied to federal offenders by s 20AB of the *Crimes Act*.²³⁷⁶ Section 20AB identifies specific state and territory sentencing options that can be made available to federal offenders and provides that other such options can be prescribed by regulation.²³⁷⁷ In *Commonwealth Director of Public Prosecutions v Costanzo* it was held that an IDRO made under the *Drug Rehabilitation (Court Diversion) Act 2000* (Qld) was not picked up and applied by s 20AB.²³⁷⁸ The court held that an IDRO was not sufficiently similar to the existing sentencing options available to federal offenders to be a 'similar sentence or order' within the meaning of s 20AB(1) of the *Crimes Act*.²³⁷⁹

ALRC's views

29.90 As discussed in Chapter 6, the ALRC does not believe that federal sentencing legislation should list aggravating and mitigating sentencing factors. However, a court sentencing a federal offender should be required to consider any relevant and known sentencing factor, including factors relating to an offender's history and personal circumstances. Accordingly, courts sentencing federal offenders have a discretion to consider an offender's drug addiction if the court is aware of the addiction.

29.91 Federal sentencing legislation should also enable federal offenders to access state and territory drug courts. This can be achieved by ensuring that federal sentencing legislation picks up and applies sentencing orders made by state and territory drug courts to federal offenders. However, it may not be appropriate to enable *all* federal offenders with a drug addiction to access state and territory drug courts. For example, these courts generally do not accommodate offenders convicted of offences of a violent or sexual nature. Accordingly, the ALRC believes that federal sentencing legislation should specify any particular federal offences or categories of federal offences for which federal offenders should not be able to access state and territory drug courts.

Proposal 29–4 Federal sentencing legislation should facilitate access by federal offenders to state or territory drug courts in appropriate circumstances. In particular, federal sentencing legislation should:

- (a) provide that the orders that can be made by a drug court are prescribed ‘additional sentencing alternatives’ for federal offenders; and
- (b) specify any federal offences or categories of federal offences for which such orders cannot be made.

Offenders with problem gambling

29.92 Problem gambling has been defined as ‘the situation when a person’s gambling activity gives rise to harm to the individual player, and/or to his or her family, and may extend to the community’.²³⁸⁰ Pathological gambling is a form of problem gambling that is recognised as an impulse control disorder by the American Psychiatric Association.²³⁸¹ Recent research points to a causal relationship between problem gambling and financial crime.²³⁸² Offenders with problem gambling may commit federal offences in order to obtain money with which to gamble, or to service gambling-related debts. While it has been estimated that 2.1 per cent of the Australian adult population are problem gamblers,²³⁸³ there is no available information about the proportion of federal offenders with problem gambling.

Sentencing factors

29.93 Problem gambling has often been treated as analogous to drug addiction in sentencing jurisprudence.²³⁸⁴ It is generally considered relevant to the sentencing exercise, but is rarely considered to be a mitigating factor.²³⁸⁵ However, it has been argued that problem gambling should be a mitigating factor because gambling is ‘a legal product, promoted in some cases by the state and certainly licensed by it in a way that illegal drugs are not’.²³⁸⁶ It has been held that if problem gambling is to be considered a mitigating factor, it is not mitigating to the extent that the proceeds of the offending are used for non-gambling purposes.²³⁸⁷

Rehabilitation programs

29.94 Problem gambling has not traditionally been viewed as a significant factor contributing to offending behaviour.²³⁸⁸ Accordingly, there are few rehabilitation programs for problem gamblers in Australia.²³⁸⁹ Yet there is a growing awareness of the relationship between problem gambling and crime, and of the need to develop and implement rehabilitation programs to address problem gambling. In 2003 Relationships

Australia (SA) Inc received funding from the South Australian Department of Human Services to develop and conduct a pilot rehabilitation program for prisoners in Mobilong Gaol.²³⁹⁰ The ALRC supports these initiatives. Rehabilitation programs for problem gambling could focus on ensuring offenders understand the nature and dynamics of gambling, appreciate the harm that can result from excessive gambling, and learn skills to deal with problem gambling.²³⁹¹

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- 2235 See Proposal 6–1.
 2236 See Proposal 7–12.
 2237 See Proposal 14–2.
 2238 See Proposal 19–3.
 2239 See Proposal 19–4.
 2240 See Proposal 19–7.
 2241 See Proposal 22–8.
 2242 See Proposal 22–6.
 2243 See Proposal 22–4.
 2244 See Proposal 25–1.
 2245 See Appendix 1.
 2246 See Appendix 1, [29].
 2247 See Appendix 1, Figure A1.7 and accompanying text.
 2248 See Appendix 1, Figures A1.7, A1.8 and accompanying text.
 2249 See Appendix 1, Figure A1.9 and accompanying text.
 2250 Ibid.
 2251 See, eg, Australian Bureau of Statistics, *Australian Social Trends 2004*, 4102.0 (2004), 185; New South Wales Legislative Council, *Select Committee on the Increase in Prisoner Population: Issues Relating to Women*, Interim Report (2000), [1.5]; J Salomone, *Towards Best Practice in Women's Corrections: The Western Australian Low Security Prison for Women* (2004) Department of Justice Western Australia <www.justice.wa.gov.au> at 18 October 2005, 4; Canadian Human Rights Commission, *Protecting their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women* (2003), 5.
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 2254 Ibid, [5.2], [5.8].
 2255 See Proposal 22–4.
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 2259 J Salomone, *Towards Best Practice in Women's Corrections: The Western Australian Low Security Prison for Women* (2004) Department of Justice Western Australia <www.justice.wa.gov.au> at 18 October 2005, 3. See also Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [228].
 2260 K Howells and others, *Correctional Offender Rehabilitation Programs: The National Picture in Australia* (2004) Criminology Research Council <<http://www.aic.gov.au/crc/reports/200203-04.html>> at 5 September 2005, 66. This survey of rehabilitation programs in Australia excluded educational and vocational programs.
 2261 Ibid, 66.
 2262 Sisters Inside Inc, *Submission SFO 40*, 28 April 2005.

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- 2263 A McWhinney, 'Working It Out from the Inside: A Non-traditional Approach to Domestic Violence Support Groups in a Women's Prison' (Paper presented at Is Prison Obsolete?, Melbourne, 20–22 July 2005).
- 2264 M Morash, T Bynum and B Koons, *Women Offenders: Programming Needs and Promising Approaches* (1998) National Criminal Justice Reference Service <www.ncjrs.org/pdffiles/171668.pdf> at 20 October 2005.
- 2265 See *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) art 23(1); *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, ATS 5, (entered into force generally on 3 January 1976) art 10(1).
- 2266 See, eg, *R v Sinclair* (1990) 51 A Crim R 418, 430; *R v Ceissman* (2001) 119 A Crim R 535, [36].
- 2267 See Proposal 6–1.
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- 2271 See, eg, Legislative Council Standing Committee on Social Issues—Parliament of New South Wales, *A Report Into Children of Imprisoned Parents*, Report Number 12 (1997); Legislative Assembly Standing Committee on Community Services and Social Equity—Parliament of the Australian Capital Territory, *The Forgotten Victims of Crime: Families of Offenders and their Silent Sentence*, Report 6 (2004).
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- 2304 *Police v Abdulla* (1999) 106 A Crim R 466, 472.
- 2305 *R v Fernando* (1992) 76 A Crim R 58, 63.
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- 2314 *Ibid*, [101].
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- 2316 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Law*, ALRC 31 (1986), [507].
- 2317 *Ibid*, [500].
- 2318 *Ibid*, [515].
- 2319 *Ibid*, [523]–[531].
- 2320 *Ibid*, [531].
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- 2322 *Ibid* s 2(o).
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- 2325 See, eg, I Potas and others, *Circle Sentencing in New South Wales: A Review and Evaluation* (2003) Judicial Commission of New South Wales, iv; D Dick, 'Circle Sentencing of Aboriginal Offenders: Victims Have a Say' (2004) 7 *Judicial Review* 57, 69; K Auty and others, 'The Koori Court—A Positive Experience' (2005) 79(5) *Law Institute Journal* 40.

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- 2362 See Proposal 6–1.
- 2363 *Sentencing Act 1991* (Vic) s 18Q.
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30. Corporations

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Introduction

What issues arise in relation to the sentencing, imprisonment, administration, or release of ... corporations and their directors? [IP 29, Q15–2, part].

30.1 A corporation is an artificial entity that the law treats as having its own legal personality. A corporation includes a company, a body corporate or an unincorporated body that can sue or be sued or hold property.²³⁹² A corporation can commit a federal offence.²³⁹³ However, there is no available data on how many corporations are sentenced for federal offences.

30.2 The ALRC has considered penalties for corporations in detail on two occasions.²³⁹⁴ In addition, the New South Wales Law Reform Commission (NSWLRC) has completed an inquiry into the sentencing of corporations.²³⁹⁵ The ALRC does not propose to revisit the work of these inquiries in this chapter but will focus on sentencing options, sentencing factors and sentencing hearings for corporations that have committed federal offences.

Sentencing options

Background

30.3 Many of the sentences that can be imposed on natural persons cannot be imposed on corporations—for example, a corporation cannot be sentenced to imprisonment. Fines are the most commonly utilised sentencing option for corporations. Section 4B(3) of the *Crimes Act 1914* (Cth) empowers a court sentencing a corporation to impose a pecuniary penalty that is up to five times greater than the maximum pecuniary penalty that could be imposed on a natural person convicted of the same offence, provided that the contrary intention does not appear in the offence provision. The *Crimes Act* does not contain any specific sentencing options for corporations.

Issues and problems

30.4 One issue that arises is whether additional sentencing options should be available to courts sentencing corporations for federal offences. Fines can be an ineffective sentencing option for corporations because they have a limited ability to achieve the purposes of sentencing.²³⁹⁶ For example, a fine will not deter a corporation if it is viewed as another business expense; nor punish a corporation if the burden of the fine is shifted to consumers by an increase in the price of the corporation's goods or services; nor promote the rehabilitation of a corporation if it does not attempt to alter the corporation's management structure or internal culture.²³⁹⁷

30.5 In addition, a variety of sentencing options may be needed for corporations because they vary in size, purpose and financial viability. The Commonwealth Director of Public Prosecutions (CDPP) gave the following examples of types of corporations:

- a proprietary company that is merely the 'alter ego' of its sole director;
- a closely-held company that is wholly owned by its directors, each of which exercises close management control;
- a company controlled by directors who, as a group, only hold a minority of shares;
- a listed company with a large, diverse shareholding that includes major financial institutions, which is controlled by a core group of executive directors, some of whom have significant shareholdings; and
- a company in liquidation under the control of an administrator.²³⁹⁸

30.6 The Australian Securities and Investments Commission (ASIC) submitted that sentencing options for corporations could be similar to civil remedies contained in the *Australian Securities and Investments Commission Act 2001* (Cth).²³⁹⁹ These include probation orders, community service orders and publicity orders.²⁴⁰⁰ The CDPP

submitted that federal sentencing legislation should include a broad range of sentencing options for corporations to enable the court to impose an appropriate sentence after considering all of the circumstances of the case.²⁴⁰¹

30.7 Recent reviews have concluded that a variety of sentencing options should be available to courts when sentencing corporations.²⁴⁰² These options are discussed further below.

Survey of sentencing options

Equity fines

30.8 An equity fine involves the transfer of shares from the corporation to a state criminal compensation fund. The compensation fund is then entitled to dispose of the shares and distribute the assets to persons affected by the conduct of the corporation.²⁴⁰³ Equity fines are intended to diminish a corporation's market value.²⁴⁰⁴

30.9 It has been argued that equity fines are advantageous because they enable financial burdens to be imposed on corporations that lack the liquid assets to pay a fine.²⁴⁰⁵ However, it has also been argued that equity fines could adversely affect innocent shareholders and would be difficult to administer in practice.²⁴⁰⁶ The ALRC has previously recommended against the introduction of equity fines as penalties under the *Trade Practices Act 1974* (Cth) or as civil penalties.²⁴⁰⁷ The NSWLRC recommended against the introduction of equity fines as sentencing options for corporations.²⁴⁰⁸ The CDPP submitted that it might be practically difficult to administer equity fines given the volatility in the price of equities.²⁴⁰⁹

Turnover fines

30.10 A turnover fine is a fine calculated by reference to the annual turnover of the corporation.²⁴¹⁰ It is similar to the 'day fine' for a natural person discussed in Chapter 7. Turnover fines would ensure that fines imposed on corporations operated equitably regardless of the financial circumstances of the offending corporation.²⁴¹¹ However, it has been argued that the amount of a turnover fine may represent disproportionate punishment for an offence.²⁴¹² The ALRC has previously recommended against the introduction of turnover fines as civil penalties.²⁴¹³

30.11 ASIC submitted that a fine imposed on a corporation could be determined by way of a sliding scale based on the degree of market capitalisation achieved by the corporation²⁴¹⁴ or by other means, such as an assessment of a corporation's turnover. However, ASIC also noted that that fines calculated according to the financial circumstances of a corporation

might have unintended consequences by adversely impacting on other individuals or companies who were not implicated in the offence. The cost of a fine may be passed on to: shareholders due to reduced share price, creditors by reducing company capital

and increasing credit risk; employees if the fine is severe enough to result in cutting of staff; and consumers through increased prices.²⁴¹⁵

30.12 The CDPP submitted that turnover fines, by requiring the court to consider complex accounting issues, could significantly complicate the sentencing process.²⁴¹⁶

Disqualification orders

30.13 Disqualification orders are designed to restrain the activities of corporations. They may include orders to: cease certain commercial activities for a particular period; refrain from trading in a specific geographic region; revoke or suspend licences for particular activities; disqualify the corporation from particular contracts (for example, government contracts); or freeze the corporation's profits.²⁴¹⁷ Disqualification orders have the potential to adversely affect consumers, shareholders and employees.²⁴¹⁸

Orders requiring corrective action

30.14 Corporate probation orders are designed to ensure that a corporation does not engage in the same contravening conduct, similar conduct or related conduct during the period of the order. Internal discipline orders, organisational reform orders and punitive injunctions are types of corporate probation and are discussed below.²⁴¹⁹ Corporate probation orders are primarily intended to promote the rehabilitation of corporations, although they may satisfy other sentencing purposes such as deterrence and retribution.

30.15 *Internal discipline orders.* These orders require corporations to investigate their offending behaviour, take appropriate internal disciplinary action against those involved in the offence or offences, and provide the court with a satisfactory compliance report.²⁴²⁰ Accordingly, they have been described as a form of 'mandated self-policing'.²⁴²¹ The CDPP submitted that care should be taken when imposing such an order to ensure that an offending corporation is not able to shift the blame for an offence onto a junior employee.²⁴²²

30.16 It is said that internal discipline orders can be an effective sentencing option for corporations because they target the individuals involved in a corporation's criminal behaviour, can be tailored to suit the particular corporation, and are cheap to administer.²⁴²³ However, appropriate steps need to be taken to ensure that individuals are not deprived of the procedural safeguards provided to those suspected or accused of engaging in criminal activity.²⁴²⁴

30.17 *Organisational reform orders.* Organisational reform orders take the form of 'a court order that requires a corporation's organisation and methods to be reviewed, under court scrutiny, in order to avoid a repetition of the offence in issue'.²⁴²⁵ Suitably qualified experts, such as corporate lawyers or accountants, could supervise organisation reform orders on the court's behalf.²⁴²⁶

30.18 *Punitive injunctions.* A punitive injunction requires a corporation to take steps to reform its organisational structure or activities in a manner that incorporates a punitive element.²⁴²⁷ The punitive element might be that the reforms need to be undertaken within a short period of time or that particular members of senior management be actively involved. The ALRC has previously recommended against the establishment of punitive injunctions as civil penalties.²⁴²⁸ The NSWLRC recommended that punitive injunctions be introduced as sentencing options for corporations.²⁴²⁹

Orders requiring activities for the benefit of the community

30.19 Community service orders require corporations to expend both time and effort to undertake activities for the benefit of the community. A community service order can be used to require a corporation to repair the harm caused by an offence. For example, a corporation could be ordered to work on a project to remedy the environmental harm caused by its offence.²⁴³⁰ Alternatively, a community service order could be used to require a corporation to make its facilities available to community groups²⁴³¹ or to provide training programs to members of the community. It has been argued that a community service order requiring a corporation to make a financial contribution to a community project should bear a reasonable relationship to the offence in question to avoid 'the perception of arbitrariness or bias on the part of judges in their choice of community projects.'²⁴³²

Publicity orders

30.20 Publicity orders require corporations to publicise information about their offending conduct to specific groups of people or to the community at large.²⁴³³ It has been argued that publicity orders are effective sentencing options because they can damage a corporation's reputation, adversely affect the morale of a corporation's employees and diminish a corporation's profits.²⁴³⁴ Publicity orders may require corporations to disclose their offending conduct, acknowledge their wrongdoing or correct harm caused by their offending conduct.

Dissolution orders

30.21 Dissolution or deregistration is sometimes referred to as 'corporate capital punishment'.²⁴³⁵ Dissolution of a corporation is a way of ensuring that the corporation cannot repeat its offending conduct. However, it has been described as an extreme sentencing option because of its adverse impact on employees, shareholders and consumers. In addition, dissolution does not necessarily prevent the dissolved corporation from continuing its activities under a different name.²⁴³⁶ It has been said that dissolution should only be used in cases where the offending conduct is egregious or where the offending corporation was operated primarily for a criminal purpose.²⁴³⁷

30.22 The NSWLRC recommended that courts be given the power to prevent the reincorporation of a corporation in certain circumstances, such as where the

reincorporated corporation intended to carry on the same activities as the dissolved corporation.²⁴³⁸ The ALRC has previously recommended against dissolution as a civil penalty for corporations.²⁴³⁹

ALRC's views

30.23 The ALRC is of the view that it is desirable to establish a variety of additional sentencing options for corporations in order to enable the purposes of sentencing to be achieved when sentencing corporations for federal offences. These options should be set out in federal sentencing legislation.

30.24 The ALRC considers that equity fines and turnover fines should not be introduced as sentencing options for corporations because it is undesirable for the quantum of a financial penalty to be inextricably linked to the financial circumstances of the offender. As discussed in Chapter 5, sentences should be proportionate to the gravity of the offence and should be consistent, in the sense that like cases should be treated alike. Equity fines are inappropriate in the federal criminal context because there is no federal criminal compensation fund to which a corporation's shares might be transferred.

30.25 The ALRC considers that the other sentencing options discussed above, namely, disqualification orders, corporate probation orders, community service orders, publicity orders and dissolution orders should be available to courts sentencing corporations for federal offences. While the ALRC has previously recommended against the introduction of dissolution orders and punitive injunctions as civil penalties, it believes that these sentencing options are appropriate in the criminal justice system with its emphasis on punishment and condemnation.

Proposal 30–1 Federal sentencing legislation should include the following sentencing options for corporations that have committed a federal offence:

- (a) orders disqualifying the corporation from undertaking specified commercial activities;
- (b) orders requiring the corporation to take corrective action within the organisation, such as internal disciplinary action or organisational reform;
- (c) orders requiring the corporation to undertake activities for the benefit of the community;
- (d) orders requiring the corporation to publicise its offending conduct; and
- (e) orders dissolving the corporation.

Sentencing factors

Background

30.26 Section 16A(2) of the *Crimes Act* sets out a number of matters that a court must take into account in sentencing an offender, to the extent that they are relevant and known to the court. In Chapter 6, the ALRC has proposed that this list of sentencing factors be amended. Some of the sentencing factors that the ALRC has proposed should be included in federal sentencing legislation, such as the effect of an offence on the environment or the market, could be relevant when sentencing a corporation. However, other proposed factors, such as the probable effect of a sentence on an offender's family or dependants, will be irrelevant when sentencing a corporation. The factors relevant to the administration of the criminal justice system, such as whether an offender pleads guilty to an offence or provides assistance to the authorities, may also be relevant when sentencing corporations.

Issues and problems

30.27 The NSWLRC recommended that, in addition to the general sentencing factors, sentencing legislation in New South Wales should set out factors that are relevant when sentencing corporations. These factors included aggravating factors (foreseeability of the offence or its consequences; involvement in or tolerance of the criminal activity by management; and absence of an effective compliance program) and mitigating factors (financial circumstances of the offender; presence of an effective compliance program; stopping unlawful conduct promptly and voluntarily; and the effect of the penalty on services to the public).²⁴⁴⁰

30.28 As noted above, corporations can vary greatly in size, nature and financial viability. In addition, the factors that may reveal the degree of a corporation's culpability in the commission of an offence will differ from those that indicate the culpability of a natural person. Factors that may indicate the culpability of a corporation include the existence or absence of a compliance program designed to detect criminal activity; the actions of a corporation upon discovery of the offence; and the extent to which the offence or its consequences could have been foreseen. Further, a sentence imposed on a corporation will not generally affect relatives or dependants of the corporation (although it may affect related entities), but it may affect third parties such as shareholders and consumers.

30.29 The CDPP submitted that any regime providing for the sentencing of corporations should be flexible enough to enable the court to consider the many different types of corporations.²⁴⁴¹ ASIC submitted that courts should take into account the size and nature of a corporation when sentencing it for a federal offence and that sentencing factors for corporations should be contained in general sentencing legislation, rather than in legislation creating the offence.²⁴⁴²

ALRC's views

30.30 Federal sentencing legislation should state that a court must consider any factor that is relevant and known to the court when sentencing a corporation for a federal offence. The legislation should also set out an indicative list of factors to be considered, which may be applicable according to the circumstances of the case. The weight to be given to any sentencing factor should remain a matter for the court. This will provide guidance to judicial officers about the type of factors that may be relevant when sentencing corporations, and will promote consistency in sentencing without being unduly prescriptive. For the reasons outlined in Chapter 6, the ALRC does not believe that the legislation should specify whether the sentencing factors are aggravating or mitigating.

Proposal 30–2 Federal sentencing legislation should state that a court, when sentencing a corporation, must consider any factor that is relevant to sentencing and known to the court. These factors may include any of the following matters to the extent that they are applicable:

- (a) the type, size, financial circumstances and internal culture of the corporation;
- (b) the existence or absence of an effective compliance program designed to prevent and detect criminal conduct;
- (c) whether the corporation ceased the unlawful conduct voluntarily and promptly upon discovery of the offence;
- (d) the extent to which the offence or its consequences could be foreseen; and
- (e) the effect of the sentence on third parties.

Sentencing hearings**Attendance at sentencing hearing**

30.31 As discussed in Chapter 13, Part IB of the *Crimes Act* does not require a federal offender to be present at sentencing. The ALRC has proposed that federal sentencing legislation provide that, subject to defined exceptions, the offender must be present during certain sentencing proceedings.²⁴⁴³

30.32 A particular difficulty arises in relation to the presence of a corporation at a sentencing hearing because a corporation, as an artificial legal entity, cannot physically attend a hearing.

30.33 However, it may be desirable to have a representative of the corporation in attendance at a sentencing hearing for a number of reasons. For example, it may be important to explain the details of a sentencing order to a representative of the corporation. In addition, requiring the attendance of a representative of the corporation could help to achieve the sentencing purpose of denunciation, in appropriate cases, by allowing judicial officers to express disapproval of the offending conduct directly to the corporation's representative. It could also help to achieve the sentencing purpose of deterrence by emphasising the significance of the offence to an officer who may have the ability to influence the corporation's future conduct.²⁴⁴⁴

30.34 The NSWLRC recommended that courts in New South Wales be empowered to require the attendance of any officer of a corporation at a sentencing hearing and that courts should be given the discretion to decide which officer should attend.²⁴⁴⁵ This would enable courts to target officers involved in the offence, or officers with the ability to ensure that the corporation does not repeat the offence.²⁴⁴⁶

Pre-sentence reports and victim impact statements

30.35 Another issue is whether pre-sentence reports and victim impact statements should be available when sentencing corporations. The NSWLRC recommended the use of pre-sentence reports for corporations²⁴⁴⁷ but rejected the use of victim impact statements beyond that already provided for by New South Wales legislation on the basis that many offences committed by corporations did not have identifiable victims and that information about the harm caused by an offence committed by a corporation could often be provided another way.²⁴⁴⁸

30.36 ASIC submitted that offences committed by corporations were often wrongly perceived as 'victimless' offences and that there were a number of situations in which it would be desirable to present information to the court on behalf of victims of offences committed by corporations.²⁴⁴⁹ In addition, ASIC submitted that information provided to assist courts sentencing federal offenders should address issues such as 'market integrity, market confidence and consumer confidence in the financial sector'.²⁴⁵⁰

ALRC's views

30.37 The ALRC is of the view that federal sentencing legislation should empower courts sentencing corporations for federal offences to require any officer of the corporation to attend the sentencing hearing. This will enable the court to provide the appropriate officer of an offending corporation with an explanation of the sentence, and may also help to achieve the sentencing purposes of deterrence and denunciation.

30.38 Victim impact statements and pre-sentence reports are discussed in Chapter 14. The ALRC has proposed that federal sentencing legislation enable both victim impact

statements and pre-sentence reports to be prepared, where appropriate, in sentencing matters involving corporations.²⁴⁵¹

Proposal 30–3 Federal sentencing legislation should empower a court, in sentencing a corporation for a federal offence, to require the attendance of any officer of the corporation at any stage of the sentencing proceedings.

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- 2392 *Corporations Act 2001* (Cth) s 57A.
 - 2393 See, eg, *Trade Practices Act 1974* (Cth) pt VC; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ch 2.
 - 2394 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994) Chs 9–10; Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), Ch 28.
 - 2395 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003).
 - 2396 Purposes of sentencing are discussed in Ch 4.
 - 2397 See New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), [6.1]–[6.7].
 - 2398 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
 - 2399 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.
 - 2400 *Australian Securities and Investments Commission Act 2001* (Cth) ss 12GLA–12GLB.
 - 2401 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
 - 2402 See Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), Ch 28; New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), [6.20].
 - 2403 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [28.13].
 - 2404 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), [7.1].
 - 2405 *Ibid*, [7.3].
 - 2406 *Ibid*, [7.16]–[7.27].
 - 2407 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), [10.27]; Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), Rec 28–1.
 - 2408 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), Rec 5.
 - 2409 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
 - 2410 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [26.100].
 - 2411 *Ibid*, [26.106]–[26.114].
 - 2412 *Ibid*, [26.106]–[26.114].
 - 2413 *Ibid*, [26.118].
 - 2414 Such as the scheme outlined in s 1317DAE of the *Corporations Act 2001* (Cth) to determine the penalty to be specified in an infringement notice for a contravention of ss 674(2) of that Act.
 - 2415 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.
 - 2416 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
 - 2417 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), [8.2].
 - 2418 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
 - 2419 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), [9.7].
 - 2420 *Ibid*, [9.8].
 - 2421 B Fisse, ‘Sentencing Options against Corporations’ (1990) 1 *Criminal Law Forum* 211, 233.
 - 2422 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
 - 2423 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), [9.9]–[9.10].
 - 2424 B Fisse, ‘Sentencing Options against Corporations’ (1990) 1 *Criminal Law Forum* 211, 234–235.

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- 2425 Australian Law Reform Commission, *Sentencing: Penalties*, DP 30 (1987), [297].
2426 Ibid, [297].
2427 B Fisse, 'Sentencing Options against Corporations' (1990) 1 *Criminal Law Forum* 211, 237.
2428 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), [10.24]; Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [28.31].
2429 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), Rec 9.
2430 R Mulheron, 'Criminal Enforcement of Environmental Law: Limitations and "Flat Earth Thinking" Sanctions' (1996) *Queensland Law Society Journal* 427, 440.
2431 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
2432 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), [10.17].
2433 Ibid, [11.1].
2434 B Fisse, 'Sentencing Options against Corporations' (1990) 1 *Criminal Law Forum* 211, 240; New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), [11.2]–[11.13].
2435 J Coffee, "'No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79(3) *Michigan Law Review* 386.
2436 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), [8.20].
2437 Ibid, [8.21]. See also Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
2438 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), Rec 8.
2439 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [28.21].
2440 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), Rec 3.
2441 Commonwealth Director of Public Prosecutions, *Submission SFO 51*, 17 June 2005.
2442 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.
2443 See Proposal 13–1.
2444 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), [14.26].
2445 Ibid, Rec 23.
2446 Ibid, [14.35].
2447 Ibid, [14.7], Rec 22.
2448 Ibid, [14.23].
2449 Australian Securities and Investments Commission, *Submission SFO 39*, 28 April 2005.
2450 Ibid.
2451 See Ch 14.

Appendix 1.

Federal Prisoners: A Statistical Overview

Australian Institute of Criminology*

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Note: This Appendix contains a large number of charts, which for greater clarity can be viewed in colour on the ALRC's website: www.alrc.gov.au.

Federal law enforcement legislation

1. The Australian Law Reform Commission (ALRC) asked the AIC to examine existing data sources on Australia's prisoner population with a specific focus on the sub-group of federal offenders. The purpose was to assist the ALRC with its inquiry into the sentencing of federal offenders under Part IB of the *Crimes Act 1914* (Cth).

There were two possible data sources that allowed for an examination of the nature and extent of federal offending, and in particular those persons whose offences result in a term of imprisonment. These were data published by the Australian Bureau of Statistics (ABS) and an extract of data maintained by the Australian Government Attorney-General's Department (AGD).

2. Federal law enforcement is based in a diverse body of legislation. An extract from the Commonwealth Director of Public Prosecutions (CDPP) Annual Report shows that in 2003–04 the CDPP dealt with 9,368 charges under 68 separate Commonwealth Acts (Commonwealth Director of Public Prosecutions 2004). Figure A1.1 shows charges brought under the major pieces of legislation, defined as those under which 50 or more summary charges or 10 or more indictable charges were brought. A full listing of relevant legislation is reproduced in Part 8 of this paper.

3. Offences under the *Social Security Act 1991* (Cth) accounted for 40 per cent of prosecutions while a further 27 per cent were offences under the *Criminal Code 1995* (Cth). A further 534 related charges (6%) were brought under *the Crimes Act*.

4. In recent years many offences under the *Crimes Act* have been removed from that Act and re-established—not necessarily in the same way—under the *Criminal Code*. The *Crimes Act* now covers a much smaller range of offences against the Commonwealth. In 2003–04 the CDPP dealt with nearly five times as many charges under the *Criminal Code* (n=2,576) than it did under the *Crimes Act* (n=534). In contrast during 2002–03 the CDPP dealt with 595 charges under the *Crimes Act* and 950 charges under the *Criminal Code* (Commonwealth Director of Public Prosecutions 2003). A reduction in *Social Security Act* offences from 4,684 in 2002–03 to 3,778 in 2003–04 may also be largely due to new offences becoming available under the *Criminal Code*.

5. An important feature of federal offending is the very high proportion of offences that are dealt with summarily. Of 9,368 charges dealt with by the CDPP 8,477 (91%) were summary offences and 891 (9%) were indictable. Of the 3,778 charges under the *Social Security Act*, only two were indictable offences. Even offences under the *Criminal Code* were mostly summary offences (94%).

6. For some pieces of legislation, such as the corporations and customs laws, a far greater proportion were dealt with as indictable offences, indicating the higher relative seriousness of the offences—major fraud and drug smuggling in particular—that arise under these laws.

Figure A1.1: Charges dealt with by the CDPP in 2003–04: Major legislative sources

Legislation	Summary	Indictable	Total
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Social Security Act	3,776	2	3,778
Criminal Code	2,431	145	2,576
Crimes Act	350	184	534
Fisheries Management Act	395	6	401
Customs Act	78	241	319
Non-Commonwealth legislation: Other	157	43	200
Taxation legislation	196	1	197
Financial Transactions Reports Act	161	33	194
Bankruptcy Act	94	35	129
Corporations Law	64	65	129
Excise Act	56	48	104
Migration Act	81	23	104
Great Barrier Reef Marine Park Act and Regs	75	-	75
Civil Aviation Act and Regulations	69	3	72
Non-Commonwealth legislation: Drugs	24	15	39
Torres Strait Fisheries Act	7	10	17
Total (all legislation)	8,477	891	9,368

Note: Major legislative sources are those with 50 or more summary charges or 10 or more indictable charges.

Source: Commonwealth Director of Public Prosecutions Annual Report 2003–04.

Data sources

Attorney-General's Department

7. The AGD is responsible for administering the sentences of federal prisoners. The Department maintains a database of federal prisoner records primarily as a case management tool to assist it in fulfilling its role in relation to administering the sentence and release of federal prisoners. As the database provides the data upon which actions are taken to release federal prisoners from custody, any omission in the data could lead to release action not being taken at the correct time. This could result in an individual being illegally held in custody beyond their authorised date of release. There is a strong incentive for the AGD to maintain the data accurately to avoid such a situation. This also creates a mechanism that ensures the accuracy of the data, as any omission would quickly be highlighted by the individual prisoner or the jurisdiction in

which the prisoner is held. The data maintained by the AGD are therefore considered an accurate record of federal prisoners at any given point in time.

8. Because the database and procedures for its maintenance were established for case management purposes and not with an intention to use the data as a source for statistical analyses, federal prisoner records have not been archived in a form that would allow any time-series analysis. When a person ceases to be a federal prisoner—because he or she is released from custody or completes a federal sentence and begins a sentence for a state/territory offence—that person's details are deleted from the database. The AGD undertakes monthly back-ups of the data and retains these on separate disks. While data on former prisoners are potentially available through the disks, accessing this would be a very labour-intensive process. Part 3 of this paper contains some information about changes in the federal prisoner profile over time, based on data published quarterly by the ABS.

9. This paper uses a snapshot taken on 13 December 2004 and reflects the federal prisoners in custody at that time. Though the numbers in this dataset are small, they represent the total population count for federal prisoners.

Australian Bureau of Statistics

10. A snapshot of Australian prisoners is also available through the annual census *Prisoners in Australia*, published by the ABS (see, for example, Australian Bureau of Statistics 2004b). This provides data on those persons in prison as at midnight on 30 June each year. As a snapshot, it does not capture information on the flow of people through prisons over time. Time-series data are published in the quarterly reports, *Corrective Services Australia* (see Australian Bureau of Statistics 2004a), which provide average daily numbers of persons in custody on a monthly and quarterly basis. In addition to daily averages, this publication provides some data on persons in custody on the first day of each month.

11. There are differences in the variables captured in the two ABS publications. Data captured in the *Prisoners in Australia* census include:

- numbers of prisoners by sex, age, country of birth, prior imprisonment, level of sentencing court, most serious offence or charge;
- aggregate sentences and time expected to serve;
- sentenced versus unsentenced status;
- above variables by Indigenous status;

- location/institution where held;
- security classification;
- periodic detainees by age, sex and most serious offence; and
- persons in community corrections.

12. Data captured in the quarterly *Corrective Services Australia* include:

- full-time custody—numbers of persons by sex and type of custody (open versus secure);
- imprisonment rates, by sex;
- sentenced receptions;
- Indigenous persons in full-time custody by sex and legal status;
- periodic detention—numbers and rates, by sex;
- federal sentenced prisoners in full-time custody, by sex; and
- persons in community corrections by sex and type of order.

13. Federal prisoners are not reported separately in *Prisoners in Australia*. Until 2001 this publication had reported data separating federal prisoners from state and territory prisoner populations. From 2002 federal prisoners were included as part of the reported overall prison population, together with state and territory prisoners.

14. Due to the differences between state and territory definitions of ‘federal prisoner’, and because the ABS already reported more accurate monthly and quarterly data provided by the AGD, a decision was taken by the working group that advises the ABS on corrective services data to drop federal prisoners as a separate category in the annual census data.

15. The ABS publishes data on federal sentenced prisoners in the quarterly *Corrective Services Australia* series (Australian Bureau of Statistics 2004a). The data published is provided directly to the ABS by AGD. These data are broken down by jurisdiction, but not by other variables such as type of custody. Until September 2004 the data was also broken down by sex, but this breakdown was not provided in the December 2004 or March 2005 reports.

Use of available data

16. In attempting to draw comparisons between federal and state/territory prisoner populations it was not possible to rely on a single data source. It was necessary to draw on each of the available data sources to provide a profile of the characteristics of federal prisoners.

Imprisonment rates

17. The rates of state/territory and federal imprisonment from January 1998 to September 2004 in Part 3 of this paper were calculated by subtracting the federal prisoner numbers published in *Corrective Services Australia* from the average daily numbers of persons in custody in the same publication to yield a net state/territory prisoner count. The federal prisoner counts and net state/territory counts were both calculated as rates using general adult population figures published by the ABS.

Sex distributions

18. Sex distributions in Part 3 were calculated using data from *Corrective Services Australia* by subtracting federal prisoner counts by sex from numbers of persons in custody by sex to yield a net state/territory prisoner count. Rates of imprisonment for federal female prisoners and state/territory female prisoners were calculated using general adult female population figures published by ABS.

Offence distributions

19. Offence categories and distributions in Part 3 were extracted from the federal prisoners data as at 13 December 2004, provided by AGD.

Prisoners by jurisdiction

20. The Australian prisoners by jurisdiction data in Part 3 were drawn from *Corrective Services Australia*, which included calculating a net state/territory prisoner count as described in paragraph 17 above.

Nationality

21. Country of birth or nationality comparisons in Part 4 are between nationality as recorded in the federal prisoners data provided by AGD and country of birth as published by the ABS in *Prisoners in Australia*.

Sentences

22. Sentence comparisons in Part 5 are between sentences recorded in the federal prisoners data provided by AGD and sentence data published in *Prisoners in Australia*. As the ABS does not separately identify federal prisoners in the annual census, the census data includes both state/territory and federal prisoners and there is no reliable

way of extracting federal prisoner data from the overall prison population data. Calculated mean and median sentences therefore incorporate double counting of federal prisoners in the census data. However given the small number of federal prisoners in the Australian prison population (less than three per cent of the total prison population) and their distribution across the range of sentencing outcomes the effects of this double counting will be relatively minor, but should be taken into account in interpreting the data.

Population data and statistical significance

23. The two datasets used in this paper, data held by AGD and data collected by the ABS, are both population datasets. That is, they are data on all prisoners rather than just a sample of prisoners. As such the data are not subject to sampling error and tests of statistical significance should not be used:

significance is essentially a measure of risk in making an inference on the basis of a sample pattern to the population from which the sample was randomly drawn/assigned. If population data are used, however, then significance is not meaningful since there is no inferential risk. In such a case it might be misleading to report p levels. Specifically, some substantial findings might be inappropriately discarded by the reader as being 'non-significant', while trivial findings might be unduly emphasized by the reader on the basis of being 'significant'.²⁴⁵²

24. While any differences observed in population data are real, that does not mean they are necessarily important. The decision as to whether the differences are important is a policy decision.

25. However, care must be taken when interpreting observations in this paper due to the very small numbers of federal prisoners, particularly in some jurisdictions, and the effect that individual differences can have on the observations. In a large population it requires a relatively large amount of change to effect distributions. In a very small population, the replacement of a few individuals with others who have different characteristics of interest can alter observed distributions of those characteristics.

Non-parole period as a proportion of total sentence

26. Part 5 of this paper includes an examination of federal prisoner sentences focusing on the non-parole period as a proportion of the total sentence. This was done using the federal prisoner data from the AGD. In this data set, sentence data was recorded in a text or string format. This was then converted to a numeric format based on the number of months, which was also used to calculate mean and median aggregate sentences and time expected to serve. To examine non-parole periods, the numeric value for the non-parole period was divided by the numeric value for the head or total sentence. This was then converted into a percentage for presentation purposes.

27. The limitations to this mathematical approach are demonstrated in Figure A1.2. In this example, five sentences were randomly selected from among those sentences where the non-parole period was between 60 and 65 per cent of the head sentence. In

the first case, the sentence is a ‘neat’ five and half years, with three and a half years non-parole period, leaving a ‘neat’ two years on parole. The calculated proportion is a less visually ‘neat’ 0.64, which is the same proportion as the differently constituted sentence in case two and the much longer sentence in case five.

Figure A1.2: Examples of federal prisoner sentences and calculated proportion of non-parole period.

	Head sentence	Non-parole period	Proportion
1	05 yrs 06 mths 00 dys	03 yrs 06 mths 00 dys	.64
2	07 yrs 00 mths 00 dys	04 yrs 06 mths 00 dys	.64
3	07 yrs 06 mths 00 dys	04 yrs 08 mths 00 dys	.62
4	08 yrs 00 mths 00 dys	05 yrs 00 mths 00 dys	.63
5	22 yrs 00 mths 00 dys	14 yrs 00 mths 00 dys	.64

Source: Federal Prisoners 2004 (AIC file)

28. While each of the cases in this example involves a combination of years and months that is easy to understand and manage, the non-parole period does not reduce to a simple mathematical proportion like 60 per cent or two-thirds. While some cases will produce a mathematical outcome of this kind, many do not. The results in this part of the paper are presented in intervals of ten per cent and five per cent and should be interpreted on that basis.

The federal prisoner population: a profile

Numbers and rates

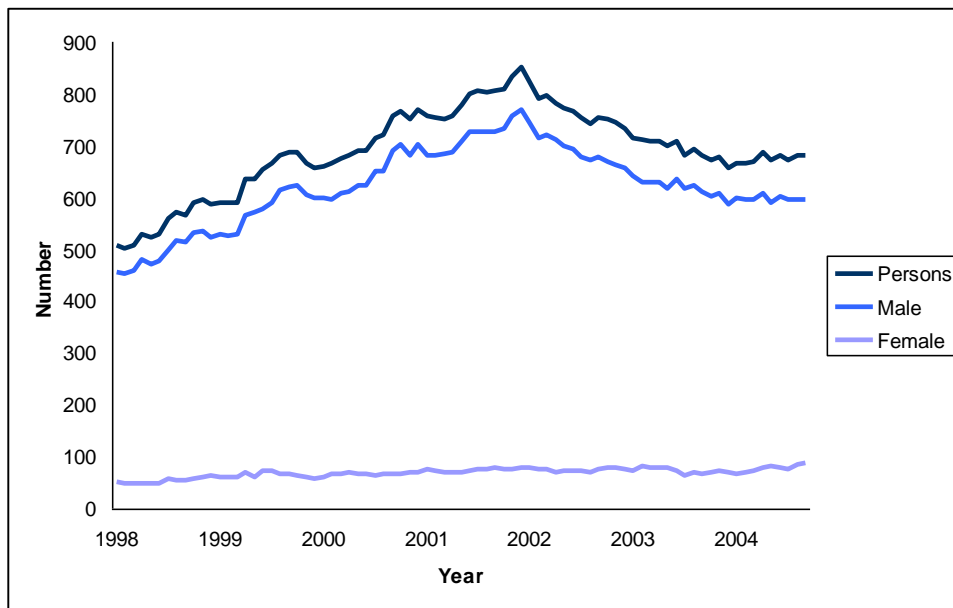
29. Based on data obtained from the AGD, on 13 December 2004 there were 695 federal prisoners in Australia. There were 611 males (88%) and 84 females (12%). In comparison, the ABS report *Corrective Services Australia, December 2004* (Australian Bureau of Statistics 2004a) showed 685 federal prisoners were held on 1 December 2004. This slight discrepancy is likely due to movements in the federal prisoner population during the intervening period, movements that may not have been reflected in the database at the point the snapshot was taken. It does however demonstrate that both datasets are essentially producing the same counts.

Changes in the federal prisoner population

30. Using ‘first day of the month’ counts published by the ABS in *Corrective Services Australia*, Figure A1.3 shows changes in the numbers of federal prisoners from January 1998 to September 2004, the last date for which separate male and

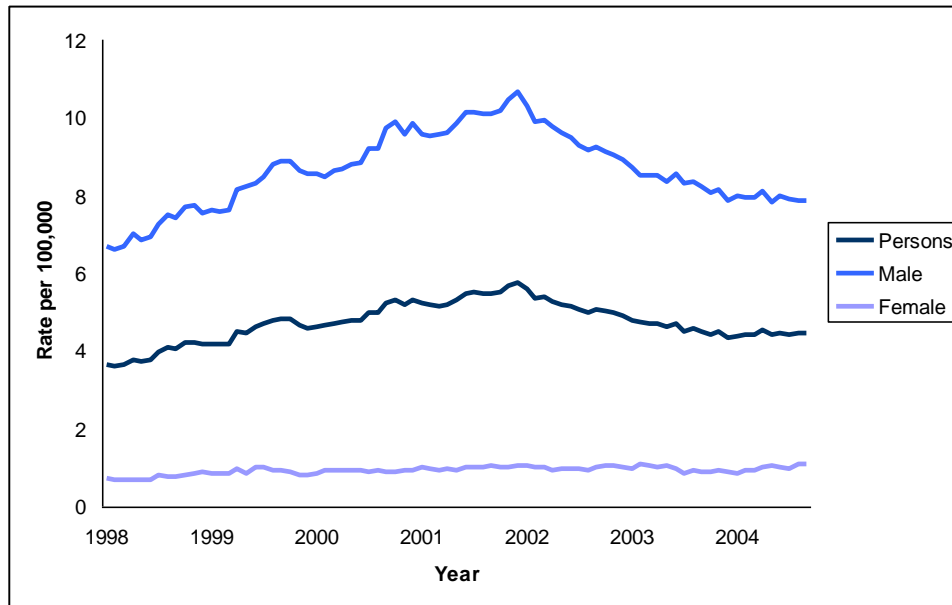
female numbers were available. There was consistent growth in the number of federal prisoners from January 1998 through to a peak in December 2001. Numbers then began to decline before again showing a slight increase from the earlier part of 2004. Some reasons for the sharp peak in federal prisoner numbers are discussed below in the context of state and territory breakdowns.

Figure A1.3: Number of federal prisoners, 1998–2004



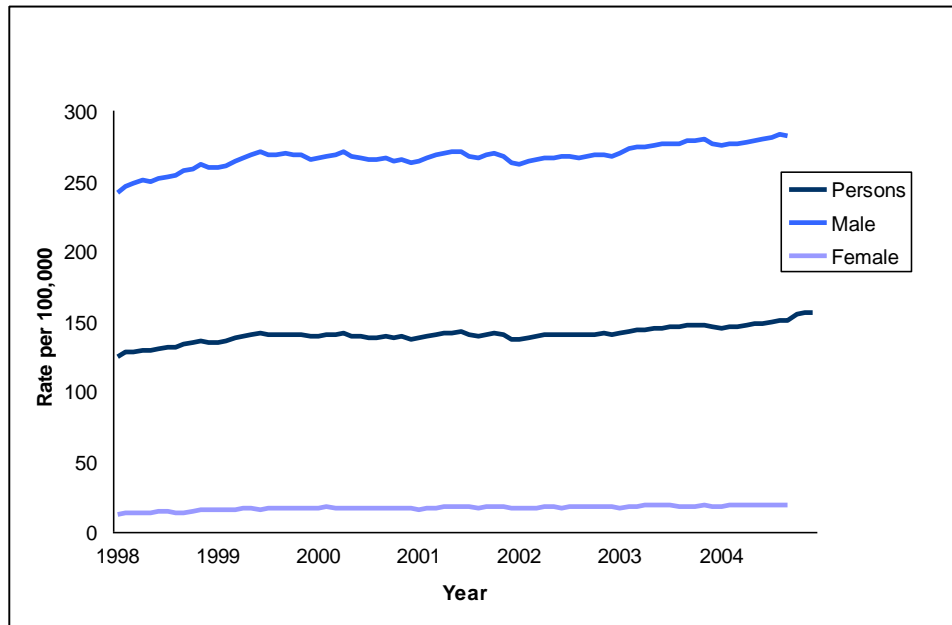
Source: ABS, Corrective Services Australia (2004).

31. Figure A1.4 shows changes in the rate of federal imprisonment per 100,000 of the general adult population. This indicates that the rise and subsequent decline in federal prisoner numbers is not due to changes in the overall population.

Figure A1.4: Federal imprisonment rate, 1998–2004

Source: ABS, Corrective Services Australia (2004).

32. In contrast, the rate of imprisonment of state/territory offenders increased at a steady rate during the January 1998 to September 2004 period (see Figure A1.5). This may be largely due to the much greater numbers of state and territory prisoners, such that changes in policing operations, policy decisions and levels of criminal activity within individual offence types do not have the same potential to affect the overall imprisonment rate.

Figure A1.5: State/territory imprisonment rate, 1998–2004

Source: ABS, Corrective Services Australia (2004).

Distribution by sex

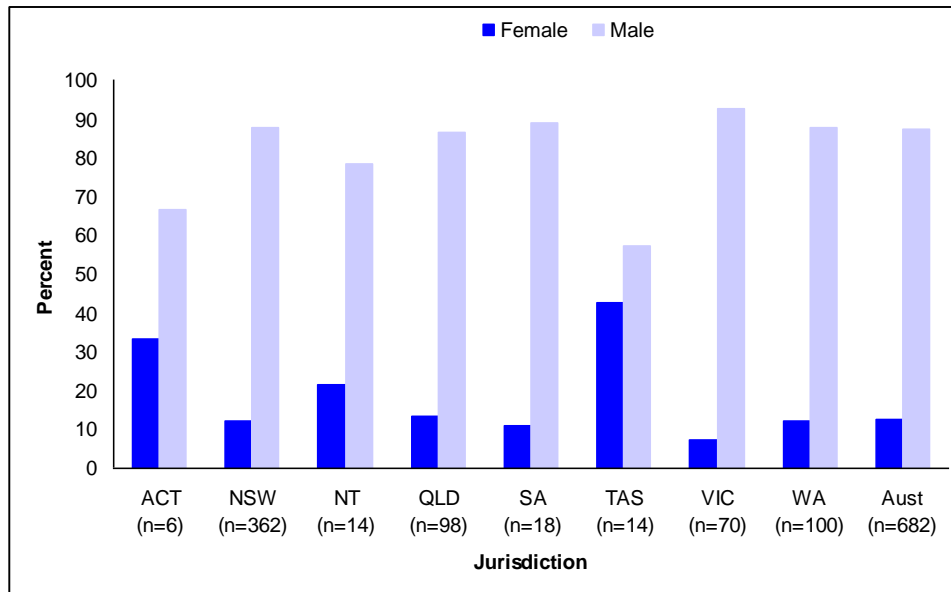
33. Using quarterly ABS data (ABS 2004a), in September 2004 there was an average of 23,553 persons in full-time custody in Australia. Of these, 21,959 persons were in custody for state or territory offences, while there were 682 federal prisoners. Federal prisoners are only a very small proportion of all prisoners in Australia. Viewed across the entire prisoner population, male federal prisoners are 2.5 per cent ($n=595$) of all people in custody and female federal prisoners are 0.4 per cent ($n=87$) of the total prisoner population. Within males, federal prisoners constitute 2.7 per cent of all males in custody. Within females, federal prisoners constitute 5.5 per cent of female prisoners.

34. Among the federal prisoners there were 87 per cent males and 13 per cent females. As shown in Figure A1.6, this distribution within the federal prisoner population is fairly consistent across most jurisdictions.

35. The relative over-representation of female prisoners in Tasmania and the ACT is an artefact of the small numbers of prisoners held in those jurisdictions: very small differences in raw numbers produce large differences in percentages. For instance, at the beginning of July 2004 there was one female federal prisoner in Tasmania and eight males, so that the sex distribution was 11 per cent female and 89 per cent male,

close to the national distribution. The imprisonment of three females during July 2004 and two during August 2004 changed the distribution to the 43 per cent female and 57 per cent male, shown in Figure A1.6.

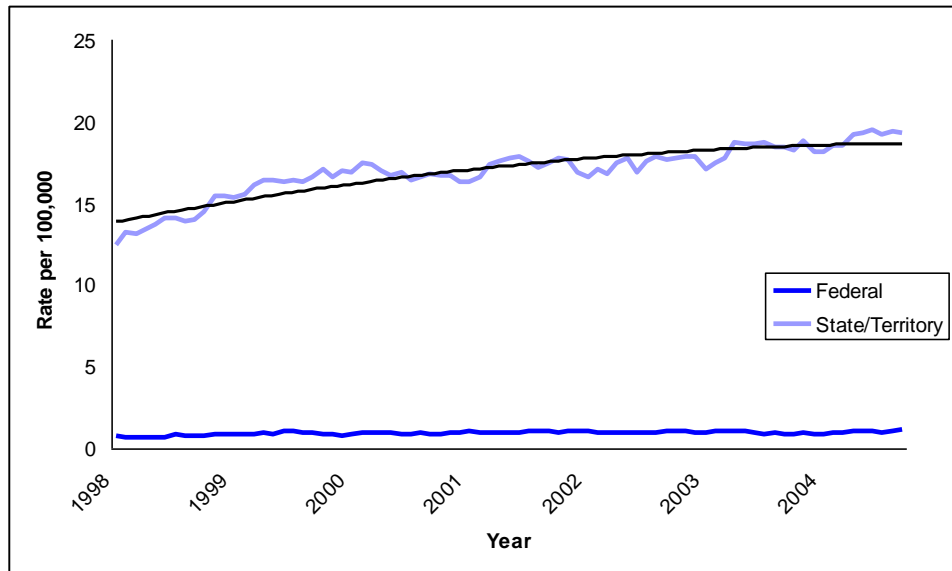
Figure A1.6: Federal prisoners by sex and jurisdiction



Source: ABS, Corrective Services Australia (2004).

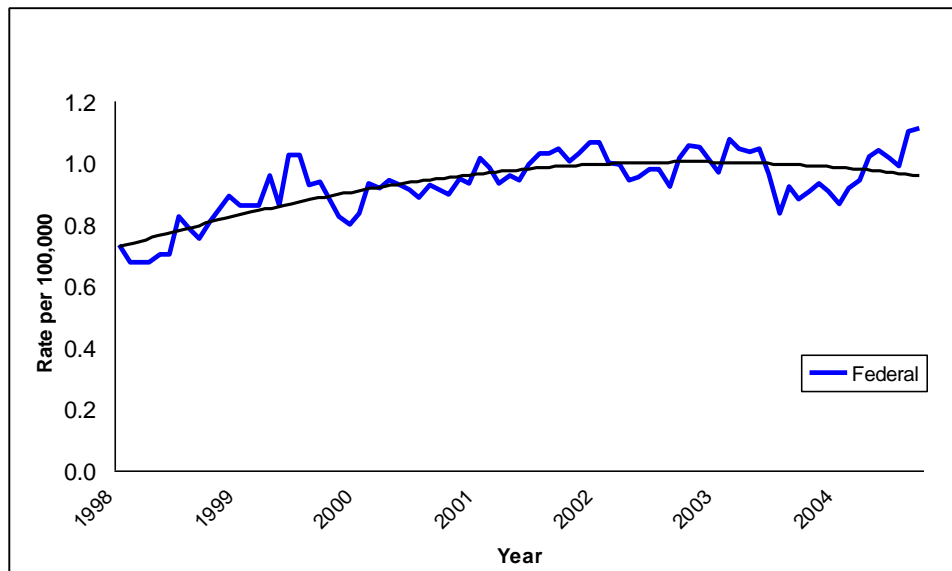
36. The rate of imprisonment of females within the federal prisoner population is lower than the state/territory female imprisonment rate (Figure A1.7). Furthermore, the rate of imprisonment of females within the federal prisoner population has largely plateaued since 2001, while the rate of imprisonment of state/territory female prisoners has consistently increased since 1998, as can be seen by comparing the trend lines in Figures A1.7 and A1.8

Figure A1.7: Female prisoners per 100,000 adult females in the population, 1998-2004



Source: ABS, Corrective Services Australia (2004).

Figure A1.8: Female federal prisoners per 100,000 adult females in the population, 1998-2004



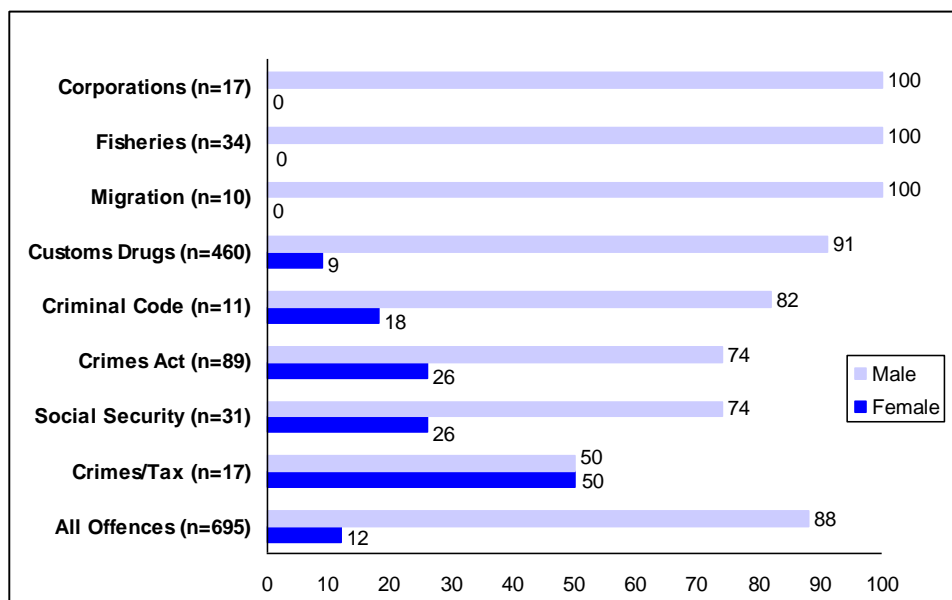
Source: ABS, Corrective Services Australia (2004). The scale of this chart is considerably different from that of the previous chart in order to indicate more clearly trends in the data.

37. The distribution of offence types varies across male and female offenders. Figure A1.9 shows the sex distribution across types of offence for ‘major’ categories, that is, those with 10 or more persons serving sentences for that category of offence.

38. The proportion of females imprisoned for offences against the *Crimes Act* is twice that of the overall female federal prisoner population. Similarly the proportion of females imprisoned for ‘Crimes/Tax’ offences is more than four times the proportion of females in the federal prisoner population. A majority of CDPP prosecutions under the *Crimes Act* in 2003-04 were for fraud and other deception offences, generally involving an attempt to gain some financial advantage. The proportion of female *Social Security Act* offenders is also greater than the proportion of females in the total federal prisoner population.

39. These results suggest a higher representation of females in offences involving welfare-type payments, a phenomenon which has also been observed in state/territory prisoner population (Goldstraw, Smith and Sakurai 2005). Against this interpretation it is worth noting that all of the prisoners offending against corporations, fisheries²⁴⁵³ or migration legislation were male.

Figure A1.9: Percentage of male and female federal prisoners by major offence classification as at 13/12/2004



Source: Federal Prisoners 2004 (AIC file).

Distribution by jurisdiction

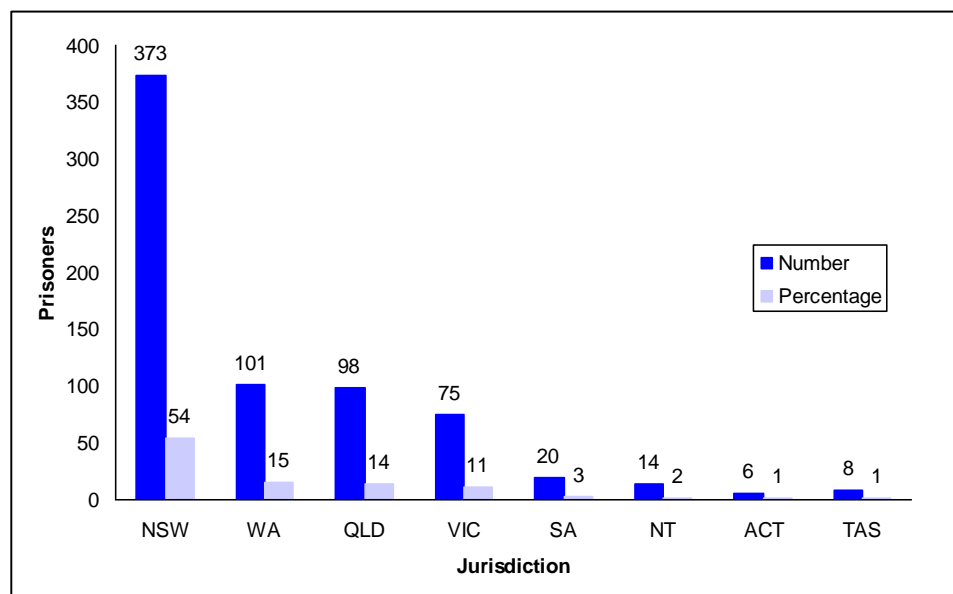
Federal prisoners

40. Federal prisoners are held in the correctional systems of the state or territory in which they committed their offence or offences, and where they were convicted and sentenced. Prisoners may seek transfer to other jurisdictions on welfare grounds or may be transferred for justice reasons, such as where they are wanted for prosecution of more serious offences in another jurisdiction. For this reason, the location in which an offender is held in custody does not necessarily reflect the jurisdiction in which the offence occurred, though in the overwhelming majority of cases it will.

41. The small number of federal prisoners recorded against the ACT represents persons held in NSW, but who were convicted and sentenced in ACT courts. Persons convicted of federal offences in the ACT may be sentenced to periodic detention, which is then served within the Territory, but there are no periodic detainees in this sample.

42. The distribution of federal prisoners across jurisdictions as at 13 December 2004 is shown in Figure A1.10. Not surprisingly, as NSW is the most populous state, the majority of federal prisoners were held there and only small proportions were held in Tasmania, the Northern Territory and the ACT.

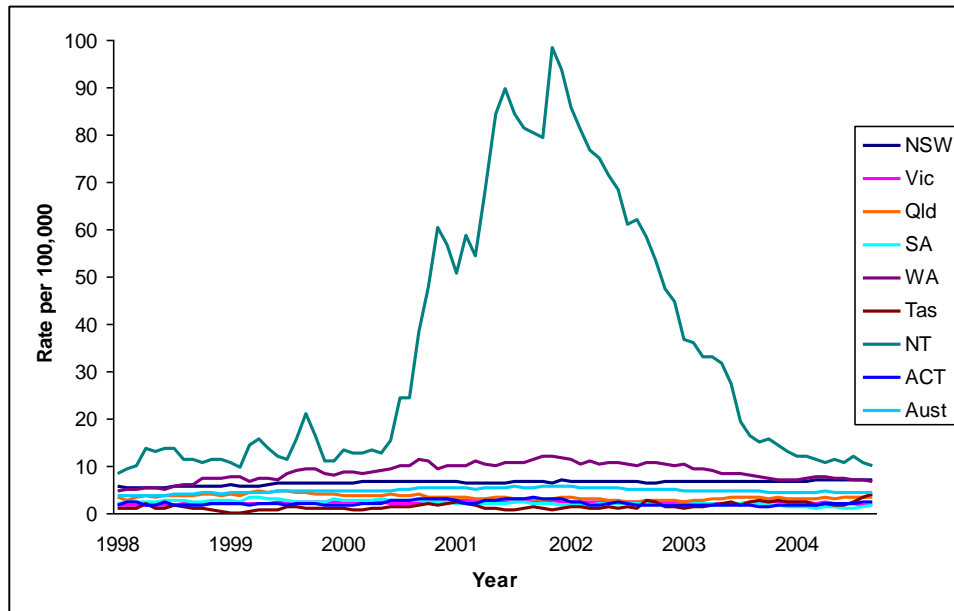
Figure A1.10: Federal prisoners by jurisdiction as at 13/12/2004: numbers and percentages



Source: Federal Prisoners 2004 (AIC file). Percentages do not total 100 due to rounding.

43. There have been changes in the number of federal prisoners in each jurisdiction over time. Figure A1.11 provides the rate of federal imprisonment per 100,000 adult population between 1998 and 2004. The rates have remained relatively stable except for the Northern Territory, and to a lesser extent Western Australia. From a rate of 15.45 persons per 100,000 of the general adult population in June 2000, the rate of imprisonment in the Northern Territory increased to a peak of 98.24 per 100,000 in November 2001. By September 2003 the rate had fallen to 15.04, the lowest rate since May 2000. The rate has remained low since, down to 9.93 per 100,000 in September 2004.

Figure A1.11: Federal prisoners per 100,000 adult population by jurisdiction, 1998–2004



Source: ABS, Corrective Services Australia (2004).

44. The increase in federal imprisonment in the Northern Territory was almost solely due to an increase in the commission and detection of ‘people smuggling’ offenders under the *Migration Act 1951* (Cth) (Northern Territory Department of Justice 2004: 8; Warton 2002: 14). This resulted in a relatively large number of people being detected for these offences in Australia’s northern waters. The majority of these offenders were the crew of Indonesian vessels, who typically received sentences of around 12 months imprisonment. Typically, a number of crew members would be convicted at the same time and most offences were detected and dealt with during a relatively short period. The short timeframe involved and the general consistency of the sentences resulted in a relatively large number of people entering the Northern Territory and Western Australia correctional systems within a short period, and leaving those systems again within a short period, 12 to 18 months later.

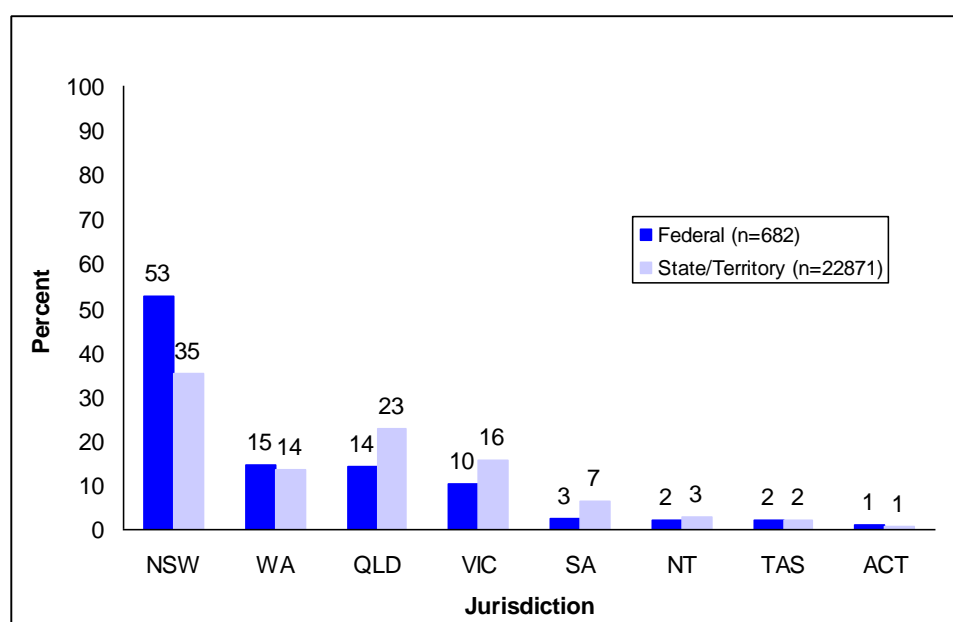
45. Given the small population of federal prisoners, particularly in the smaller jurisdictions, and the narrower range of offences under federal legislation it is easier to identify the impact of specific enforcement activities on the overall federal prisoner profile. Similar impacts would be also be occurring in the state prison population.

Comparisons with state/territory prisoners

46. Figure A1.12 shows the distribution of Australian prisoners across jurisdictions. In both federal and state/territory prisoner populations the greatest number of prisoners is held in NSW, the largest jurisdiction. Over half of all federal prisoners were in NSW, compared with 35 per cent of state/territory prisoners. Queensland held only 14 per cent of federal prisoners, compared with more than 22 per cent of all state/territory prisoners. Victoria and South Australia also had a relative under-representation of federal prisoners.

47. The high proportion of federal prisoners in NSW is related to the prominence of drug importation offences in the federal prisoner population. As discussed further below, nationally some 67 per cent of drug offenders are held in NSW and 83 per cent of all federal prisoners held in NSW are drug offenders.

Figure A1.12: Australian prisoners by jurisdiction



Source: ABS, Corrective Services Australia (2004).

Distribution by country of birth or nationality

48. The AGD's federal prisoners database and the ABS national prison census provide data on prisoners by their country of birth or nationality. In the federal prisoners data this is recorded as 'nationality' and reflects the prisoner's nationality or

country of citizenship as determined by the CDPP, typically from documents obtained from the prisoner or other sources. The country recorded does not necessarily reflect the categories in the Standard Australian Classification of Countries as used by the ABS (see Australian Bureau of Statistics 2004a). In the ABS national prison census, the 'country of birth' is recorded using the Standard Australian Classification and is determined by corrective services agencies based on prisoner interviews. There may be inconsistencies between the AGD and ABS data based on these differences.

49. The data in Figure A1.13 show that for both the federal prisoner population and the overall Australian prisoner population, persons of Australian nationality or birth are the most highly represented group. Australian persons make up only 43 per cent of the federal prisoner population, compared with 74 per cent of the overall prisoner population. This reflects one of the fundamental differences between Commonwealth and state/territory criminal law, with Commonwealth law more often addressing matters at a national level, such as the international smuggling of drugs or persons.

50. The other notable representation among federal prisoners is persons of Indonesian nationality, who make up seven per cent of the federal prisoner population. On 13 December 2004 68 per cent (n=34) of Indonesian federal prisoners were being held for fisheries-related offences, for an average term of just over seven months. Given the small numbers and relatively short sentences involved, these distributions may be subject to fluctuation over time.

Figure A1.13: Country of birth or nationality of Australian prisoners

Country of birth or nationality	Federal		Australia	
	No.	%	No.	%
Australia	302	43	17,954	74
Asia—other	59	8	312	1
Indonesia	50	7	82	0
Africa*	30	4	57	0
Europe—other	30	4	583	2
Hong Kong (SAR of China)	27	4	65	0
United Kingdom and Ireland	27	4	638	3
North America/Canada	24	3	56	0
Latin America	20	3	0	0
Middle East [#]	16	2	180	1
Netherlands	15	2	52	0
China (excludes Hong Kong SAR & Taiwan)	14	2	144	1
New Zealand	14	2	606	3
Vietnam	11	2	668	3
South Pacific	5	1	270	1
Other	1	0	842	3
Unknown	50	7	1,662	7
Total	695	100	24,171	100

Source: Federal Prisoners 2004 (AIC file); ABS, Prisoners in Australia 2004. *ABS data places African countries except South Africa in 'other'. # ABS data places Middle East countries except Lebanon in 'other'.

Offences

Types of offences

51. The available data on federal prisoners does not record discreet offences using the established Australian Standard Offence Classification (ASOC) or the older Australian National Classification of Offences (ANCO) systems. Rather the offences

are placed into categories based, in most cases, around the relevant legislation. This produces categories such as ‘Crimes Act’, which covers any offence against the *Crimes Act 1914*.

52. In some cases more specific detail is given about the relevant section of the Act, such as ‘Crimes/50BC’ (child sex tourism—sexual conduct involving child under 16) or ‘Crimes/50DB’ (encouraging an offence against the child sex tourism provisions of the Act).

53. In further cases the category may indicate a broader part of the Act. For example, ‘Crimes/Post’ indicates an offence against one of the several sections of Part VIIA of the Act—‘Offences relating to postal services’.

54. As noted above, federal offending overall is dominated by relatively minor offences involving deception or dishonesty and minor financial gain. When the subset of offenders who become imprisoned is examined, the picture is dominated by serious drug importation offences.

55. Figure A1.14 provides a breakdown of federal prisoners by offence categories as recorded by the AGD. The majority of prisoners (n=460; 66.2%) had committed offences under the *Customs Act 1901* (‘CD’ is an abbreviation of ‘Customs Drugs’), usually involving the importation of narcotics or ‘drug smuggling’.

56. There are only a small number of other offence categories with notable representation. Those include offences under provisions of the *Crimes Act 1914*, *Criminal Code 1995*, *Corporations Act 2001*, *Taxation Administration Act 1953* (in conjunction with *Crimes Act* offences), *Fisheries Management Act 1991*, *Migration Act 1951* and the *Social Security Act 1991*. Together with the *Customs Act 1901*, these eight areas of legislation account for 97 per cent of persons imprisoned for Commonwealth offences.

Figure A1.14: Federal prisoners by recorded offence category as at 13/12/2004

Type of Offence	No.	%
Bankruptcy	6	<1
‘CD’ (Customs Drugs)	460	66
CD/Crimes Act	2	<1
CD/Proceeds of Crime Act	3	<1
Civil Aviation	1	<1
Corporations	17	2
Criminal Code	11	2
Crimes Act	89	13
Crimes Act/Currency	1	<1
Crimes Act s 50BC	1	<1
Crimes Act s 50DB	1	<1
Crimes Act/Postal	1	<1
Crimes Act/Proceeds of Crime Act	2	<1
Crimes Act/Tax	12	2
Customs (not drugs)	1	<1
Environment Act	1	<1
Escape	1	<1
Excise	2	<1
Family Law	1	<1
Fisheries-related	34	5
Financial Transactions Reporting Act	3	<1
Health Insurance Act	2	<1
‘I/PROT’ Act	1	<1
Migration Act	10	1
Passports	1	<1
Social Security	31	4
Total	695	100

Source: Federal Prisoners 2004 (AIC file).

Offence distributions in federal prisoner population

57. Figure A1.15 shows the distribution across jurisdictions of major federal prisoner offence types. ‘Major offences’ for this purpose are those where 10 or more federal prisoners are serving sentences where this is the most serious indicated offence. Offence categories in the database that show multiple offences (such as ‘Crimes/Tax’

and 'CD/Crimes') have been aggregated into the first indicated offence. Offences under the *Criminal Code* have also been aggregated with *Crimes Act* offences for this purpose.

58. The majority of prisoners serving sentences for drugs offences (n=465, 67%) were in NSW and 83 per cent of all federal prisoners (n=310) held in that State were drugs offenders. Sydney is a major international transport hub and therefore the most likely location for illicit drugs to enter the country. The prominence of illegal drug imports into NSW is also likely to be a result of the significance of Sydney as an illicit drug market and distribution point.

Figure A1.15: Number of major federal prisoner offence types by jurisdiction as at 13/12/2004

Type of Offence	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Total
Customs Drugs	2	310	8	26	12	0	52	55	465
Corporations	0	6	0	3	1	2	2	3	17
Crimes Act	4	41	2	28	6	3	18	16	118
Fisheries-related	0	0	0	24	0	0	0	10	34
Migration	0	1	3	0	0	0	0	6	10
Social Security	0	6	1	13	0	3	2	6	31
Total (all offence types)	6	373	14	98	20	8	75	101	695

Source: Federal prisoners 2004 (AIC file).

59. In contrast, all fisheries-related offenders were located in either Queensland (n=24, 71%) or Western Australia (n=10, 29%). Migration offences were also strongly localised, with six in Western Australia (60%) and three in the Northern Territory (30%). As the large majority of fisheries and migration offenders come from Indonesia (n=39 of 44 offenders; 89%) the location of fisheries and migration offences reflects the physical location of fishing areas and sea transportation routes.

60. Fourteen per cent of the federal prisoner population was located in Queensland (n=98), yet 42 per cent of social security offenders were located in Queensland (n=13). Possible reasons for the over-representation of social security prisoners in Queensland cannot be answered using data available for this paper.

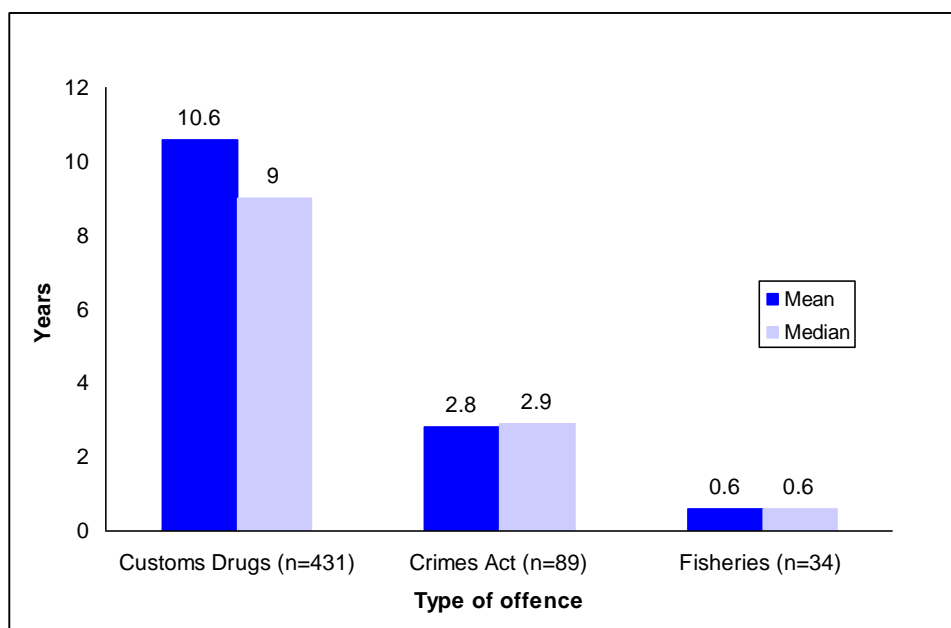
Drug offences

61. The high proportion of drugs offenders in the federal prisoner population is partly a function of the seriousness of the offences. As examined in more detail below, drug importation offences typically incur a lengthy sentence, so these offenders will remain and accumulate in the system. In contrast, even though there may be more

offenders receiving shorter sentences for other offences, during any given period the number entering imprisonment will tend to be offset by the number released.

62. To illustrate this point, as shown in Figure A1.16, the mean sentence for ‘Customs Drugs’ offences is nearly 10 years 8 months and the median sentence is 9 years. There are also 29 sentences of life imprisonment for ‘Customs Drugs’ not included in these calculations. For the next most frequent offence category, ‘Crimes Act’, the mean sentence is 2 years 10 months with a median of 2 years 11 months and a longest sentence of 8 years. For the third most frequent offence category, ‘Fisheries’, the mean and median terms of imprisonment, resulting from fine-default, are only 7 months with a longest term of 14 months. The federal prisoner population is therefore dominated by drug importation offences in terms of both numbers of prisoners and the seriousness of the offences.

Figure A1.16: Mean and median sentences for most common offence categories amongst federal prisoners as at 13/12/2004



Source: Federal Prisoners 2004 (AIC file). Note that 29 life sentences for ‘Customs Drugs’ offences have been excluded for calculation purposes.

Fraud offences

63. Not surprisingly, federal offending is dominated by fraud offences against the Commonwealth. As noted above, 40 per cent of all offences dealt with by the CDPP in 2003–04 were offences against the *Social Security Act*. Due to the nature of this legislation these offences generally involve an act or omission intended to gain a financial advantage for the offender.

64. Figures A1.17 and A1.18 show charges dealt with by the CDPP under the *Crimes Act* and the *Criminal Code*. These figures list all offences involving deception or dishonesty to gain a financial advantage, together with an aggregated total for other offences under those Acts. A full listing of charges dealt with by the CDPP under those Acts is included in Part 8 of this paper.

65. Together with the *Social Security Act*, offences under the *Crimes Act* and the *Criminal Code* comprised 70 per cent of all matters dealt with by the CDPP. A breakdown of the 3,110 total charges brought under these latter two Acts shows that 2,789 charges (90%) were for offences involving fraud or other acts of dishonesty. The offence of ‘obtaining a financial advantage’ under s 135.2 of the *Criminal Code* represented 84 per cent of charges under that legislation. The offences of ‘imposition’ (s 29B) and the more serious offence of ‘fraud’ (s 29D) accounted for 69 per cent of charges brought under the *Crimes Act*.

66. As noted above, a large proportion of fraud and dishonesty offences are dealt with on a summary basis, particularly those under the *Social Security Act*. Only 0.05 per cent of the 3,778 offences brought under that Act were indictable offences, with a similar percentage of ‘obtaining a financial advantage’ offences under the *Criminal Code* being dealt with on indictment.

Figure A1.17: Number of charges dealt with by the CDPP in 2003–04: Crimes Act 1914

Offence	Summary	Indictable
False pretences (s 29A)	5	–
Imposition (s 29B)	127	16
Fraud (s 29D)	91	137
Forgery (ss 65-69)	6	1
Falsification of books (s 72)	1	–
Other offences under the <i>Crimes Act</i>	120	30
Total	350	184

Source: Commonwealth Director of Public Prosecutions Annual Report 2003–04.

Figure A1.18: Number of charges dealt with by the CDPP in 2003–04: Criminal Code 1995

Offence	Summary	Indictable
Obtaining property by deception (s 134.2)	9	7
Obtaining a financial advantage by deception (s 134.2)	26	57
General dishonesty (s 135.2)	54	38
Obtaining financial advantage (s 135.2)	2,155	1
False or misleading statement in applications (s 136.1)	19	3
False or misleading information (s 137.1)	7	1
False or misleading documents (s 137.2)	3	1
Making forged documents (s 144.1)	5	3
Using forged document (s 145.1)	10	2
Falsification of documents (s 145.4)	4	—
Other offences under the <i>Criminal Code</i>	139	32
Total	2,431	145

Source: Commonwealth Director of Public Prosecutions Annual Report 2003–04.

Comparative offence distributions

67. Differences in the nature of federal and state/territory criminal laws mean there are few grounds for comparison between the types of offences committed by the federal and state/territory prisoner populations. State and territory criminal laws largely concern actions committed against individual persons or against personal property, and are intended to reduce harm at an individual level. Other state and territory laws are concerned with regulation of activities that fall within state and territory responsibilities, such as road traffic laws. In contrast, federal criminal laws are largely framed around protection of federal assets, or are matters for which the Australian Government has constitutional responsibility, such as importation of illicit drugs and migration as well as transnational offences such as those involving sexual servitude, child sex tourism and offences related to terrorist activities.

68. This means that many offences that dominate state and territory prisoner populations are entirely or largely missing from the federal prisoner population. For example, just five types of state offence—homicide, other acts intended to cause injury, sexual assault and related offences, robbery and extortion, and unlawful entry—account for 60 per cent of prisoners in the state and territory prison populations but are

not represented in the federal prisoner population. Where offences involving property or violence occur in federal law they are narrowly focused on acts against government property or government officials.

69. Nonetheless, some basis for comparison exists, albeit in a relatively crude form. The *Prisoners in Australia* census provides broad level data on sentenced prisoners by most serious offence. Offence category information is also available from the AGD's federal prisoners database. These snapshots are separated in time by nearly six months and some discrepancies must be expected because of this. At a very broad level of analysis these discrepancies are unlikely to effect the overall interpretation.

70. As noted earlier, federal offending is characterised by a very high proportion of fraud and other offences involving deception and dishonesty. A very high proportion of federal offences that result in imprisonment involve illicit drugs, and a smaller though clearly observed proportion involves fraud offences.

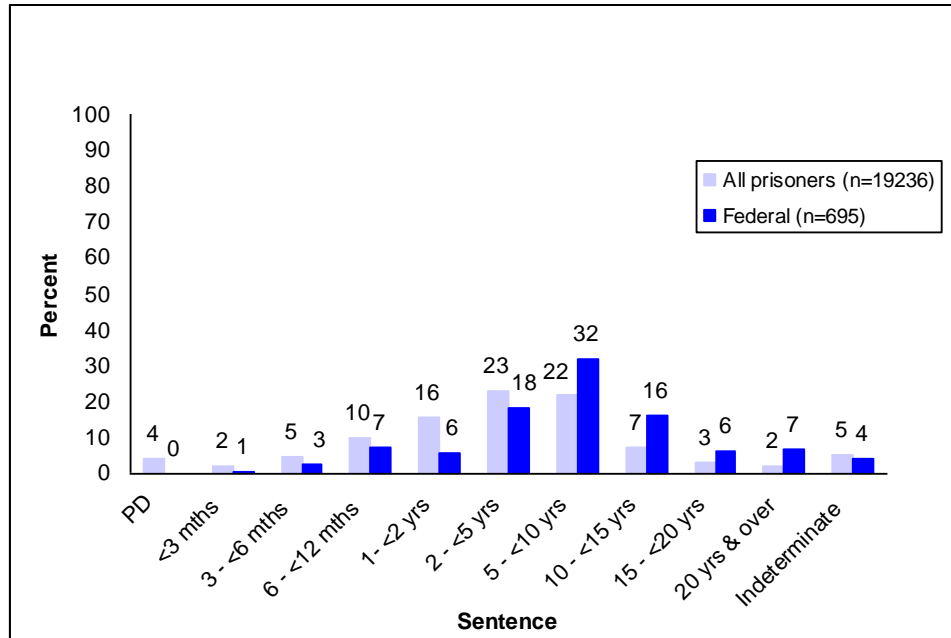
Sentences

71. The annual *Prisoners in Australia* census provides data on the aggregate sentences of prisoners in the overall prison population. The census also provides data on time expected to service, that is, how long prisoners are expected to remain in prison before being released unconditionally or conditionally. The AGD's federal prisoners database also provides snapshot data on sentences and non-parole periods, creating the ability to compare at a broad level sentencing for federal and state/territory offences.

Aggregate sentences

72. The aggregate sentence is the total or maximum sentence a prisoner is serving, often referred to as the head sentence. It includes the time a person may spend on conditional release from prison. This sentence may be composed of elements from different offences or multiple counts of an offence. Some of these elements might be served concurrently, others consecutively. The aggregate sentence is the total period of time a person will be under sentence.

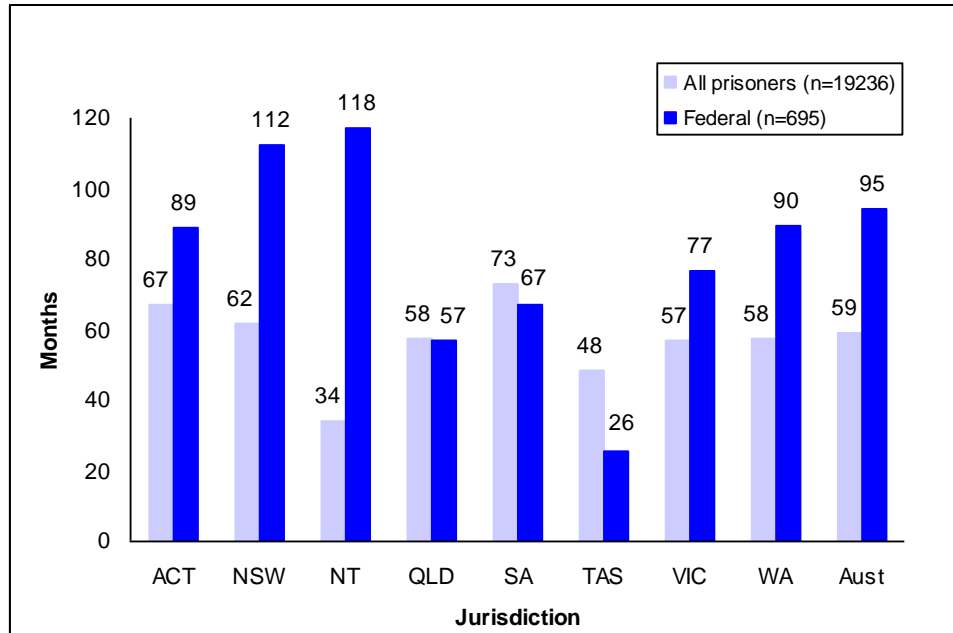
73. The ABS publishes data on aggregate sentences by prisoner numbers as well as by mean and median aggregate sentences. Compared with all Australian prisoners, the federal prisoner population attracts longer sentences. Figure A1.19 shows that 37 per cent of Australian prisoners received aggregate sentences of less than two years and 60 per cent received less than five years. In contrast, only 17 per cent of federal prisoners received less than two years imprisonment and 35 per cent received less than five years. While only 17 per cent of Australian prisoners received more than 10 years, 33 per cent of federal prisoners received these longer terms.

Figure A1.19: Australian prisoners by length of aggregate sentence

Source: Federal Prisoners 2004 (AIC file) and ABS, Prisoners in Australia.

74. Mean and median aggregate sentences were calculated for this paper from the federal prisoners' data set. Mean and median aggregate sentences for both federal prisoners and state/territory prisoners exclude life and other indeterminate sentences (ABS 2004b: 11). This allows further comparison of federal offences with state/territory offences, as provided in Figure A1.20. The mean sentence for prisoners across Australia is 59 months. There is some variation across jurisdictions with mean sentences ranging from 34 months in the Northern Territory to 73 months in South Australia.

75. The mean sentence for federal prisoners was more than 60 per cent longer at 95 months. There is also greater variation, with mean sentences ranging from 26 months in Tasmania to 118 months in NSW. While at one end the Tasmanian figure is subject to the influence of a very small number of cases (n=8), at the other end the NSW figure is elevated by a number of lengthy sentences for drug offences. The mean sentences for Australia and NSW have also been reduced by the exclusion of indeterminate sentences, the majority of which are life sentences for drug offences committed in NSW.

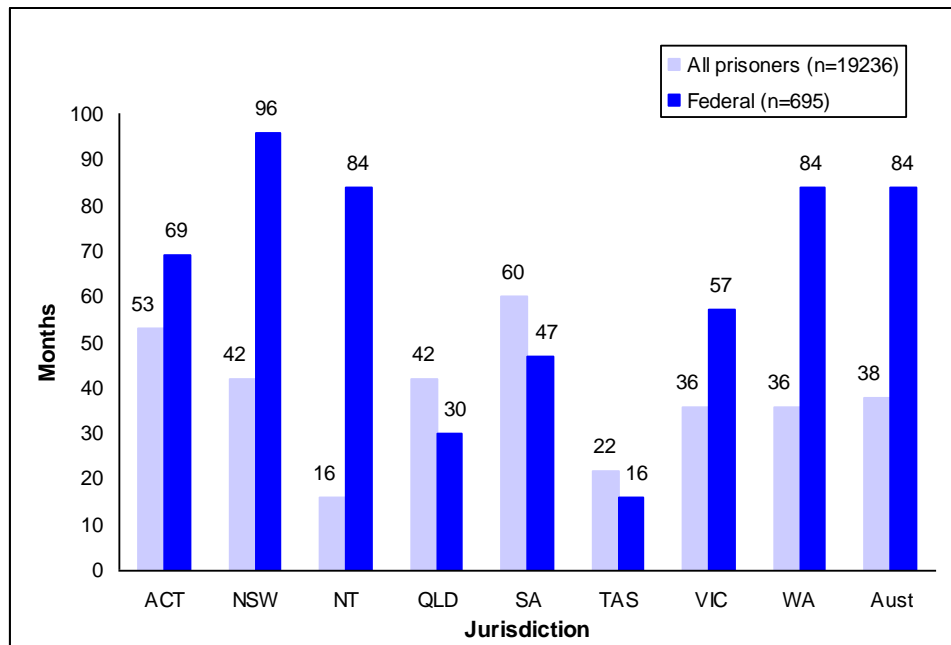
Figure A1.20: Australian prisoners mean aggregate sentence by jurisdiction

Source: Federal Prisoners 2004 (AIC file) and ABS, Prisoners in Australia.

76. Within a prisoner population, mean aggregate sentences may be skewed by a disproportionate number of short or long sentences.²⁴⁵⁴ As noted above, most Australian prisoners (but not federal prisoners) serve sentences of less than five years. Some prisoners will also receive very long sentences of more than 25 years, which can have a skewing effect on the arithmetic mean.

77. Another way of looking at aggregate sentences is through the median sentence, which may provide a more valid descriptor. Figure A1.21 shows that the median sentence for prisoners in Australia was 38 months. The median sentences ranged from 16 months in the Northern Territory to 60 months in South Australia.

78. The median sentence for federal prisoners is 84 months. As with state/territory prisoners, there is variation in federal median sentences, ranging from 16 months in Tasmania to 96 months in NSW.

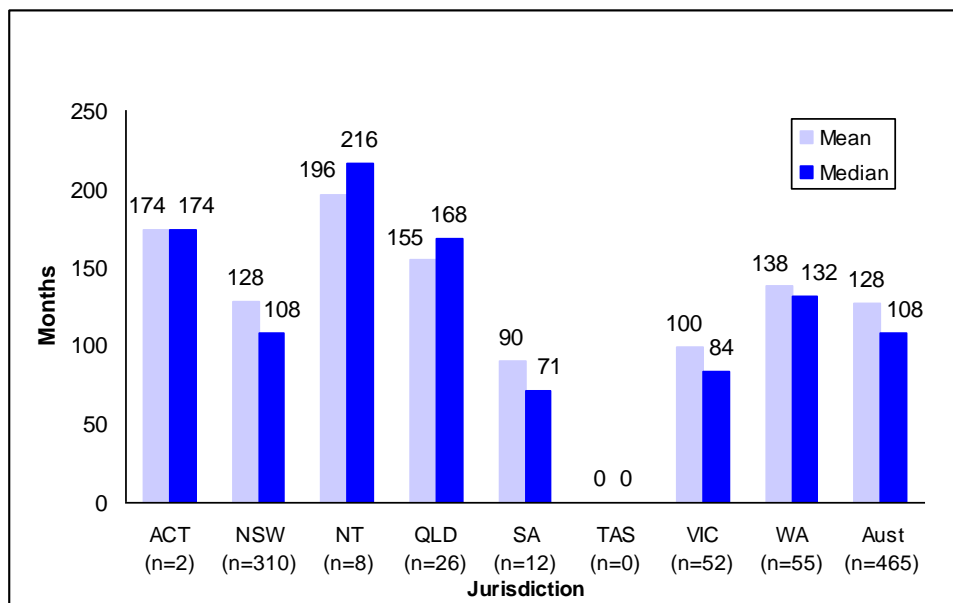
Figure A1.21: Australian prisoners: median aggregate sentence by jurisdiction

Source: Federal Prisoners 2004 (AIC file) and ABS, Prisoners in Australia.

79. Breakdowns of the mean and median aggregate sentences given to federal prisoners across major offence categories and by jurisdiction are given below. Some caution must be taken in interpreting these charts because each has different scales, reflecting the much heavier sentences attracting to drugs offences.

80. Figure A1.22 indicates that the highest aggregate sentences for drug offenders were given in the Northern Territory, although the number of cases there is small (n=8). Because a range of factors can affect the sentencing outcome in any particular case, the potential influence of individual cases should be taken into account in interpreting these data. In addition, these mean and median figures do not include indeterminate sentences. In NSW where the majority of federal drug offenders are held (n=310), these figures do not include 29 prisoners serving life sentences for drug offences.

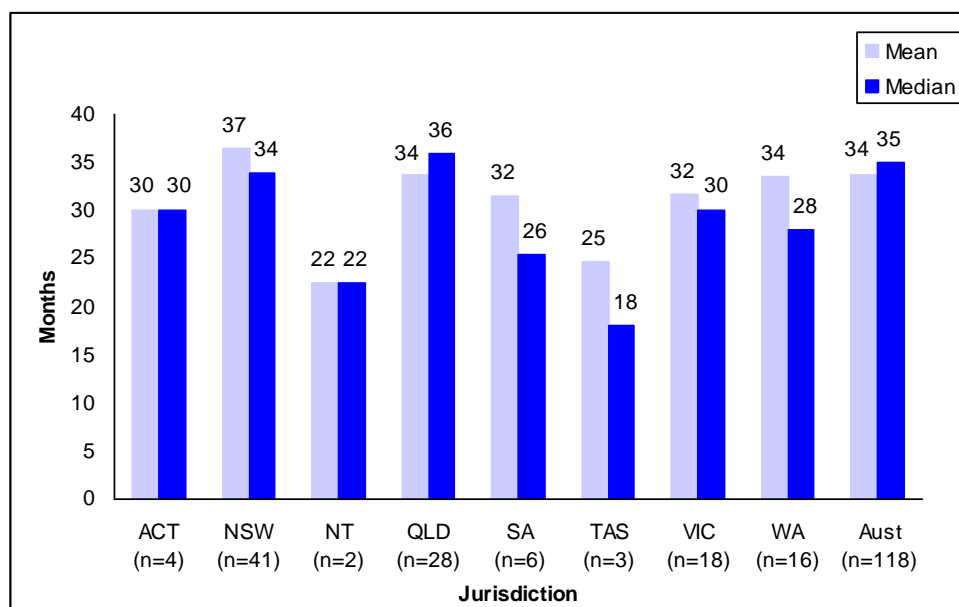
Figure A1.22: Federal prisoners: mean and median aggregate sentences for drugs offences by jurisdiction



Source: Federal Prisoners 2004 (AIC file).

81. Figure A1.23 shows mean and median aggregate sentences for *Crimes Act* offences. These show less variation than sentences given for drugs offences, though there is still variation across jurisdictions.

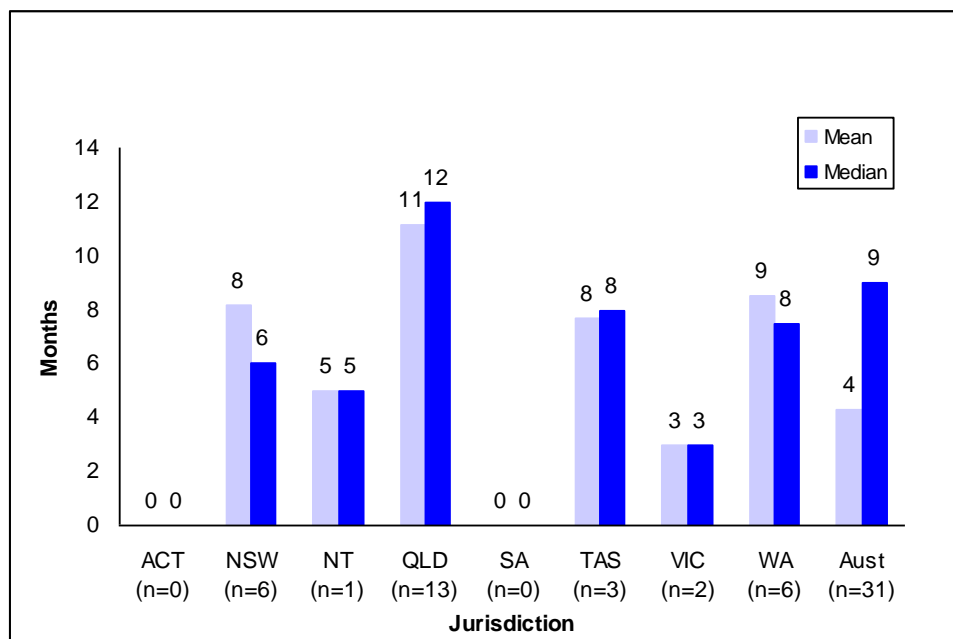
Figure A1.23: Federal prisoners: mean and median aggregate sentences for Crimes Act offences by jurisdiction



Source: Federal Prisoners 2004 (AIC file).

82. Distributions of mean and median aggregate sentences for *Social Security Act* offences are shown in Figure A1.24.

Figure A1.24: Federal prisoners: mean and median aggregate sentences for Social Security Act offences by jurisdiction



Source: Federal Prisoners 2004 (AIC file).

Non-parole periods

83. The non-parole period is an important indicator of variations in sentencing practice because it not only represents the minimum duration of the sentence but in many cases also constitutes the actual period of time spent in custody. This is true of federal prisoners even more so than state and territory prisoners given that federal prisoners with head sentences of less than 10 years are granted automatic release on parole at the end of their non-parole period.

84. When examining data on non-parole periods, two important measures are the percentage of the total sentence formed by the non-parole period (the 'relative non-parole period') and the time expected to serve. The relative non-parole period can be determined from the AGD's snapshot data on federal prisoners, but the available ABS data do not allow for a comparison of relative non-parole periods between federal and state/territory prisoners. The ABS data do, however, allow comparisons on the basis of time expected to serve.

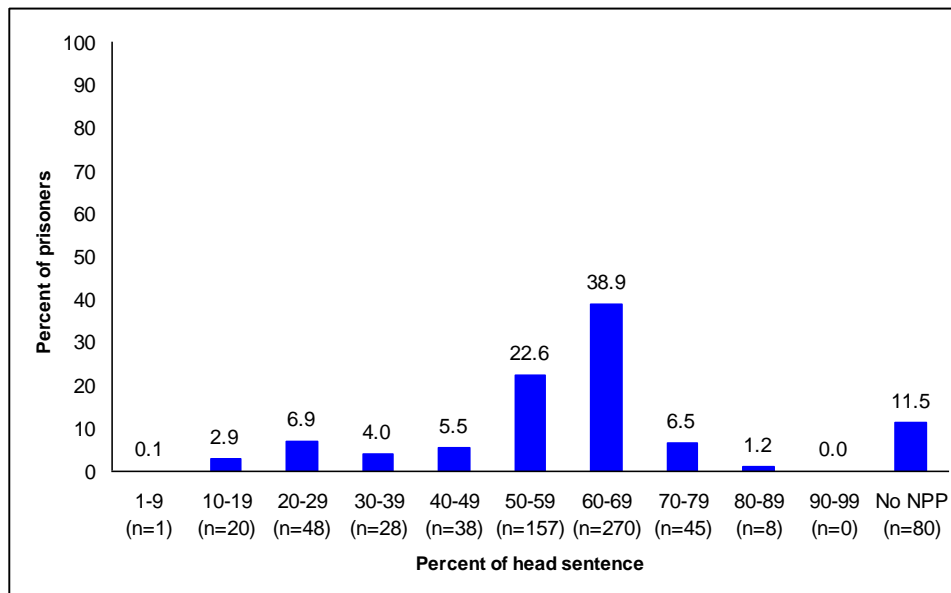
Relative non-parole periods by jurisdiction

85. One strong indicator of variation in sentencing practices across jurisdictions is the proportion of the total or head sentence that is formed by the non-parole period. To

allow this to be examined, the sentences and non-parole periods represented in text form in the AGD's federal prisoners database were converted into a numeric form and a calculation made of the percentage of the total sentence formed by the non-parole period. The resulting percentages were grouped into intervals of 10 per cent and the relative frequency of each group was calculated.

86. Figure A1.25 shows that across the entire federal prisoner population most offenders (69%) received non-parole periods that were at least half of their head sentence and a further 11.5 per cent received sentences that did not have a non-parole period. There was a noticeable clustering of non-parole periods at 50 per cent of the head sentence and a further, larger clustering between 60 and 69 per cent of the head sentence.

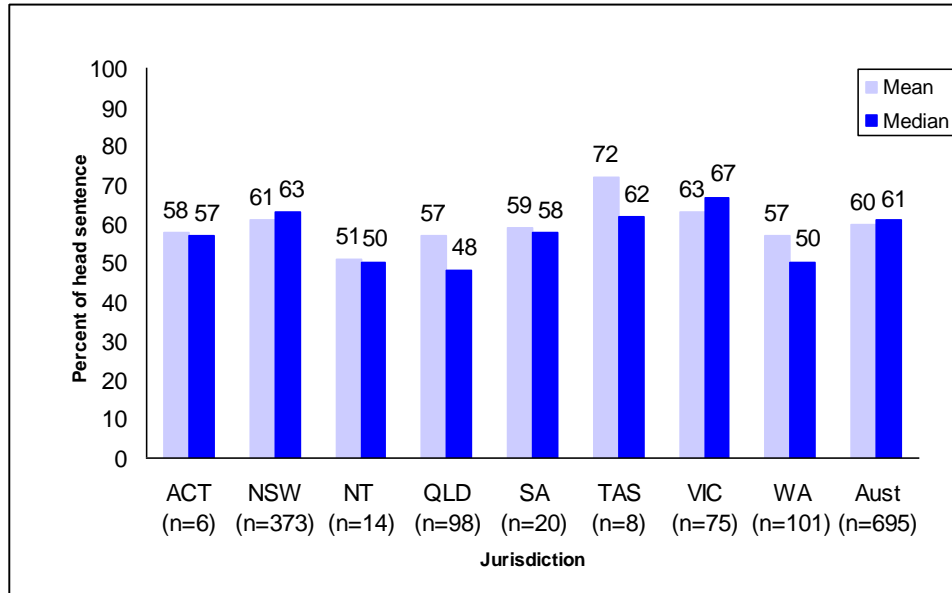
Figure A1.25: Federal prisoners: non-parole period as percentage of head sentence



Source: Federal Prisoners 2004 (AIC file).

87. Figure A1.26 shows the mean and median relative non-parole periods across the jurisdictions.

Figure A1.26: Federal prisoners: mean and median relative non-parole periods by jurisdiction

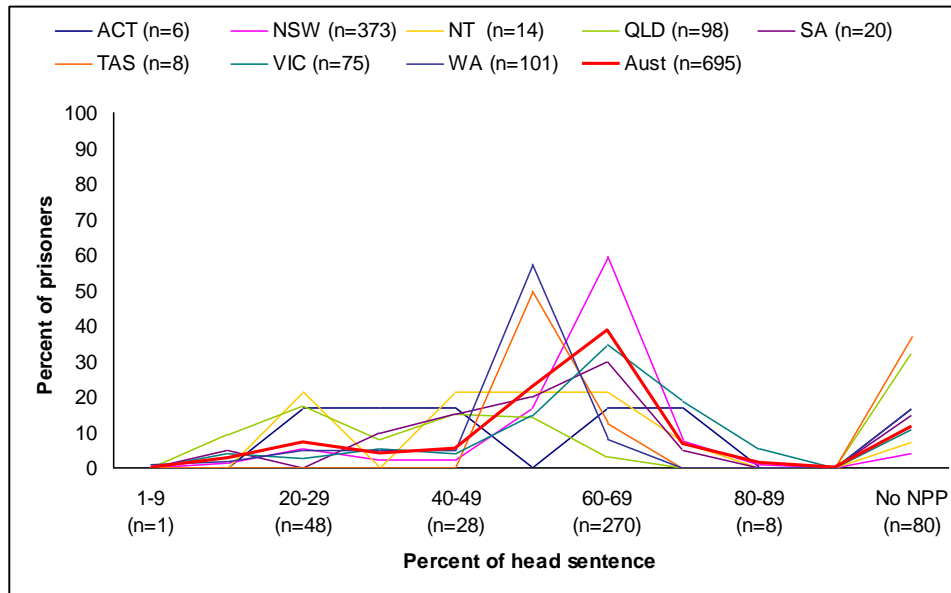


Source: Federal Prisoners 2004 (AIC file).

88. Figure A1.27 breaks down the relative non-parole periods in each jurisdiction into 10 per cent intervals. Non-parole periods were most often set at 50 per cent of the head sentence in the Northern Territory (21.4% of all sentences), Tasmania (37.5%) and Western Australia (45.4%). Interpreting these results must take into account remissions on the head sentence that were still available in Western Australia at the time most of these prisoners were sentenced. In Queensland, South Australia and Victoria approximately 15 per cent of prisoners received non-parole periods at 50 per cent of the head sentence, in line with the average across Australia.

89. Although most federal prisoners received non-parole periods that were at least half of their head sentence, some jurisdictions imposed a relatively high percentage of sentences with non-parole periods below that level. In Queensland, 50 per cent of prisoners received non-parole periods less than half of their total sentence. This type of sentence was also common in the ACT (50%) and the Northern Territory (42%). Explanations for these and other variations in relative non-parole periods between jurisdictions would require further examination at a level not possible with the available data.

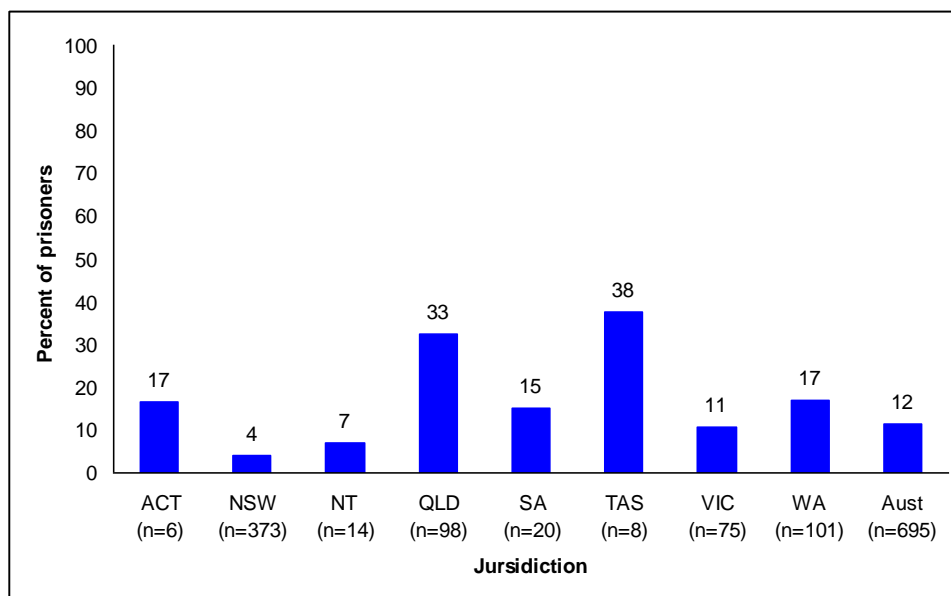
Figure A1.27: Federal prisoners: non-parole period as percentage of head sentence by jurisdiction



Source: Federal Prisoners 2004 (AIC file). Only selected percentage ranges depicted. Indicated values are percentages across all ranges.

90. Figure A1.28 shows wide variation between jurisdictions in the proportion of federal sentences within that state or territory with no non-parole period. Because s 19AB of the *Crimes Act* requires a non-parole period to be set when the total sentence exceeds three years, sentences with no non-parole period necessarily relate to shorter sentences. The high percentages of sentences without non-parole periods in Tasmania and Queensland reflect the lower mean and median aggregate sentences in those states. As with other Tasmanian data, it is necessary to take into account the influence of individual variations on the very small numbers of federal prisoners held in Tasmania. In the case of Queensland, the dominance of shorter sentences may be related to the high proportion of social security offenders imprisoned in that state.

Figure A1.28: Federal prisoners: percentage of sentences with no non-parole period by jurisdiction



Source: Federal Prisoners 2004 (AIC file).

Time expected to serve

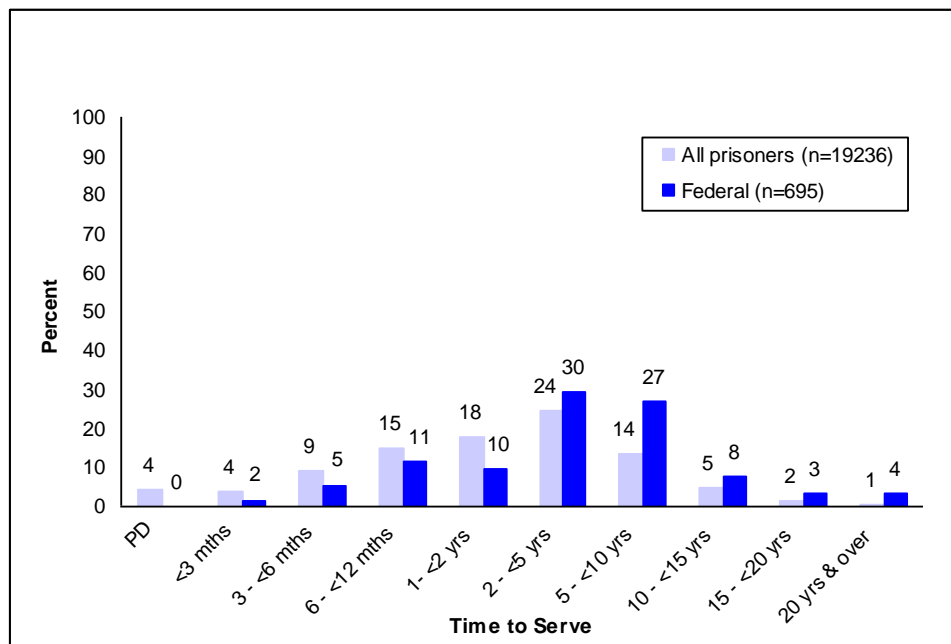
91. 'Time expected to serve' is a measure of how long a prisoner is expected to remain in prison before being released, assuming the prisoner is released on the date he or she first becomes eligible. Generally speaking, it is a measure of the total sentence for those cases where there is a fixed sentence without a non-parole period, and a measure of the non-parole period where one is included in the sentence.

92. Relative to the 'time expected to serve', the actual time served is influenced in one direction by those cases where a prisoner is not granted parole at the first eligible date and in the other direction by cases where a prisoner is granted early release, typically for compassionate reasons. These influences affect only a small proportion of cases and, by operating in both directions, are likely to negate each other, leaving 'time expected to serve' as a reasonably accurate measure of how long the prisoner population will actually remain in custody.

93. Figure A1.29 shows that, as was the case with aggregate sentences, federal prisoners are likely to remain in prison longer than Australian prisoners overall. Thus, the chart shows that 50 per cent of Australian prisoners expected to serve less than two years and 74 per cent expected to serve less than five years. In contrast, only 28 per cent of federal prisoners expected to serve less than two years and 58 per cent expected

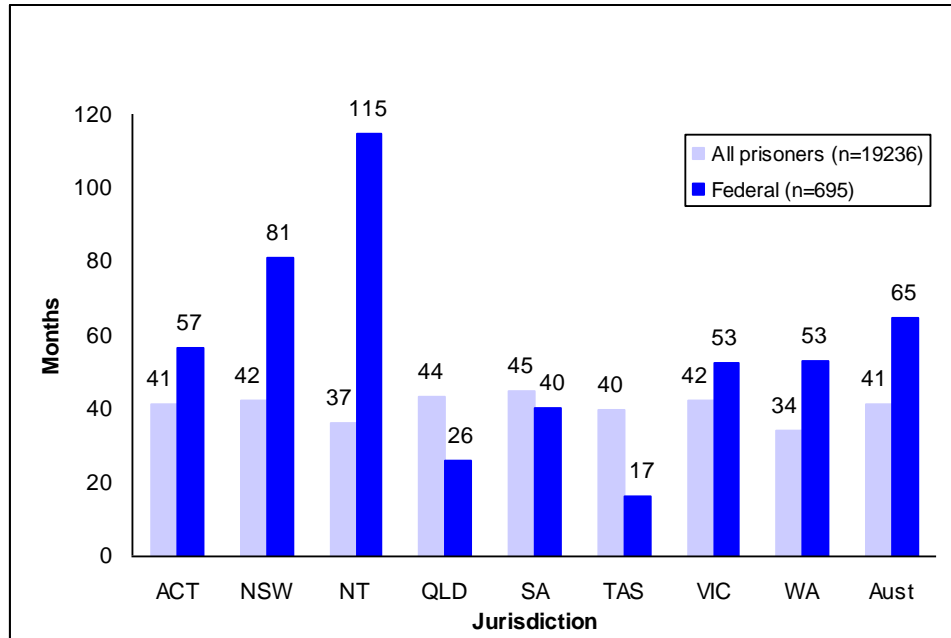
to serve less than five years. While only eight per cent of Australian prisoners expected to serve more than 10 years, 15 per cent of federal prisoners expected to serve these longer periods. As non-parole periods are often set as a percentage of the head sentence, this is an expected result.

Figure A1.29: Australian prisoners by length of time expected to serve



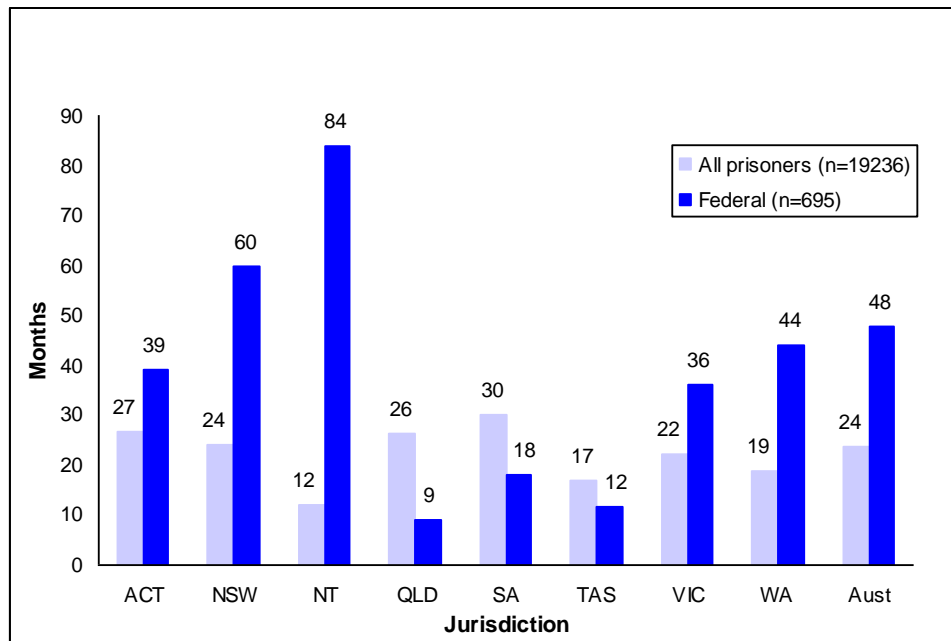
Source: Federal Prisoners 2004 (AIC file) and ABS, Prisoners in Australia.

94. In the overall Australian prison population there is relatively little variation across jurisdictions, with mean time expected to serve ranging from 34 months in Western Australia to 45 months in South Australia (Figure A1.30). In the federal prisoner population there is wider variation, from 17 months in Tasmania to 115 months in the Northern Territory.²⁴⁵⁵ These figures exclude two cases where the individuals are serving a life sentence with no non-parole period. In cases where there is an indeterminate head sentence with a set non-parole period, that non-parole period has been included in the calculations of mean and median sentences. The mean time expected to serve for all Australian prisoners (41 months) is also lower than that for all federal prisoners (65 months).

Figure A1.30: Australian prisoners, mean time expected to serve by jurisdiction

Source: Federal Prisoners 2004 (AIC file) and ABS, Prisoners in Australia.

95. Data for median time expected to serve (Figure A1.31) shows a similar pattern to that for means, with much greater cross-jurisdictional variation for federal sentences. The median time expected to be served by all federal prisoners (48 months) is double that of the general prison population (24 months).

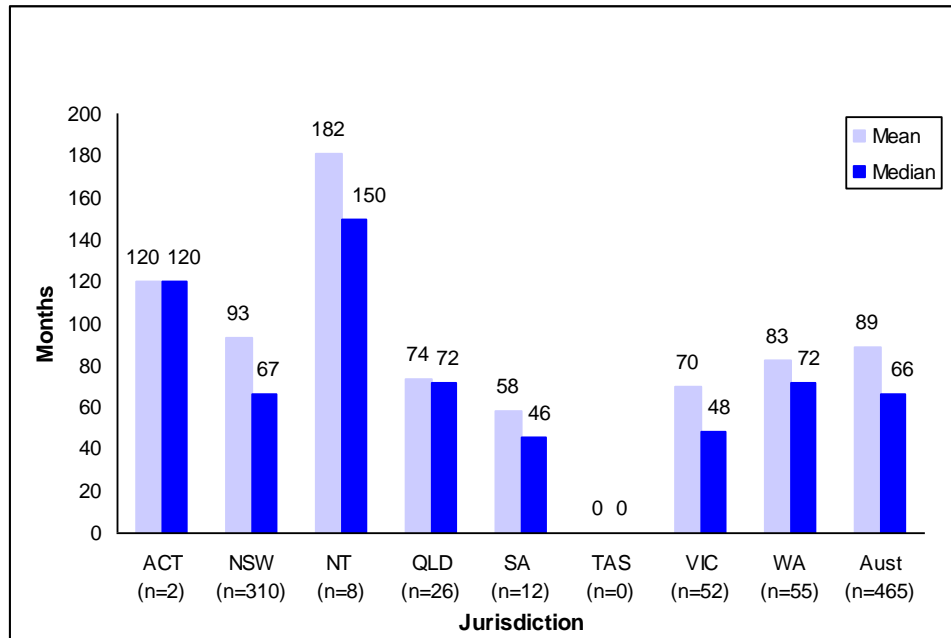
Figure A1.31: Australian prisoners, median time expected to serve by jurisdiction

Source: Federal Prisoners 2004 (AIC file) and ABS, Prisoners in Australia.

96. As was done with aggregate sentences, mean and median time expected to serve has also been calculated for major federal offences. As noted in relation to aggregate sentences, care must be taken when interpreting these charts due to the different scales used.

97. Figure A1.32 shows mean and median time expected to serve in different jurisdictions for drugs offences under the *Customs Act*. The pattern is the same seen for aggregate sentences, with very high mean and median sentences in the Northern Territory. Again, this effect is likely to be strongly influenced by the small number of prisoners held in the Northern Territory for these offences, and the exclusion of life sentence prisoners in NSW.

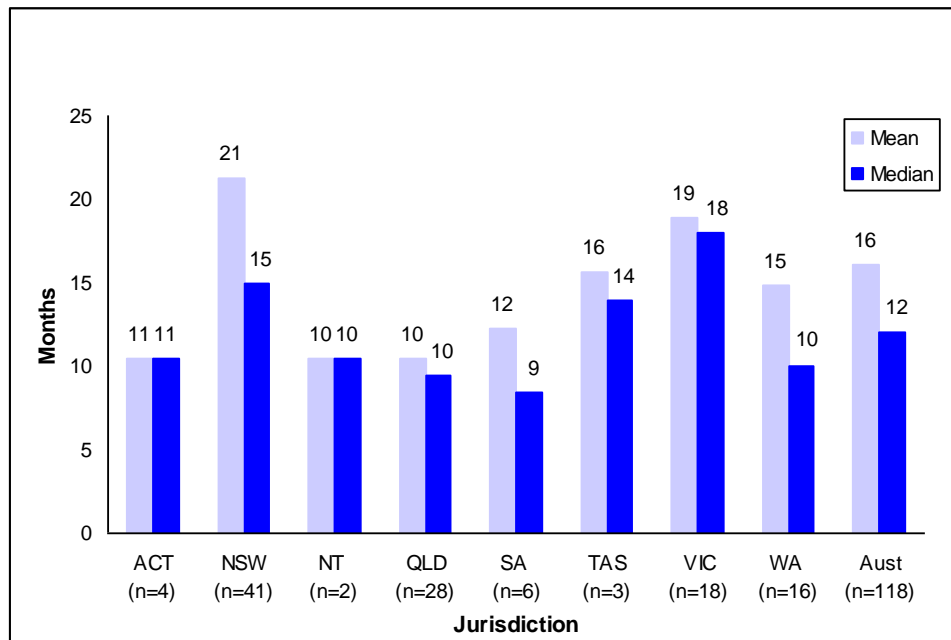
Figure A1.32: Federal prisoners: mean and median time expected to serve for drugs offences by jurisdiction



Source: Federal Prisoners 2004 (AIC file).

98. Time expected to serve for *Crimes Act* offences is longer in some jurisdictions, particularly NSW and Victoria, than others (Figure A1.33). As the 'Crimes Act' category covers a range of different offences under the *Crimes Act*, further examination—at a greater level of detail than can be found in the available data—would be needed to determine whether this is the result of differences in sentencing for similar offences, or differences in the particular offences being committed in each jurisdiction.

Figure A1.33: Federal prisoners: mean and median time expected to serve for Crimes Act offences by jurisdiction



Source: Federal Prisoners 2004 (AIC file).

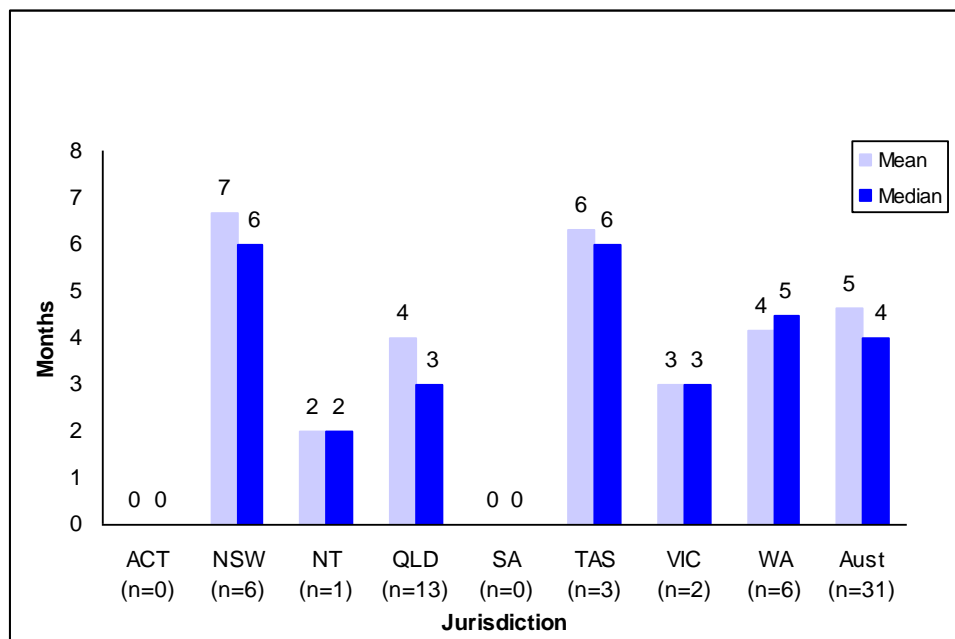
99. Figure A1.24 above showed that mean and median aggregate sentences for *Social Security Act* offences in Queensland are longer than in other jurisdictions. Mean and median time to serve for *Social Security Act* offences, as shown in Figure A1.34, are shorter in Queensland than in many other jurisdictions. This is the result of a relatively small number of cases involving short non-parole periods. Of nine cases in Queensland where the aggregate sentence was 12 months:

- two prisoners were expected to serve two months;
- five prisoners were expected to serve three months;
- one prisoner was expected to serve five months; and
- one prisoner was expected to serve the full 12 months.

100. Of two individuals sentenced to 15 months in Queensland, one was expected to serve three months and the other six months. The two remaining *Social Security Act* offenders had been sentenced to one month and six months, respectively, and were expected to serve their full sentences.

101. The reason for these short non-parole periods is not evident from the data at hand. As shown in Figure A1.15 above, *Social Security Act* offenders are relatively over-represented in Queensland compared with other jurisdictions.

Figure A1.34: Federal prisoners: mean and median time expected to serve for Social Security Act offences by jurisdiction



Source: Federal Prisoners 2004 (AIC file).

Concluding remarks

102. This paper has provided an overview of the nature and extent of federal offending, and changes in the federal prisoner profile over time utilising two sources of data. It has also explored some comparisons between federal prisoners and the general prisoner population.

103. Federal prisoners represent only a very small part of the Australian prisoner population. Information published by the ABS is a valuable source of knowledge about the Australian prison population but is limited in its coverage of federal prisoners.

Most of the published data includes federal prisoners as part of the overall population and does not allow for information about federal prisoners to be readily identified.

104. While federal prisoners are only a small part of the Australian prisoner population, they also represent the end result of only a very small part of offending against federal law. During 2003–04 the CDPP dealt with over 9,000 criminal charges from the activities of 5,500 defendants.

105. Most federal prosecutions originate with a small number of agencies: most matters dealt with by the CDPP are referred to it by Centrelink for offences under the *Social Security Act*. Centrelink's role in administering financial payments on a very large scale makes it a clear target for people attempting to gain financial advantage through dishonest means. The very large number of matters referred by Centrelink, almost all of which are dealt with summarily, helps to create an overall picture of federal offending as dominated by small scale acts of dishonest and fraudulent representation.

106. The vast majority of federal offending does not result in imprisonment. An examination of the small federal prisoner population shows that it is dominated by persons serving lengthy sentences, mostly for serious drug offences. The profile is one of a culturally diverse population, which reflects the type of offences for which the Commonwealth has responsibility. Based on an examination of sentences, the federal prisoner population exhibits a higher level of criminality than the general prisoner population across Australia, which again reflects the crimes for which the Commonwealth has responsibility. As a result of a small total population and a fairly narrow range of offences that result in imprisonment, the federal prisoner population is marked by strong localisation of some offences within particular states and territories.

107. There remain firm limits to what can be said about federal offending given the available data. In particular when comparing to aggregated state and territory offending, the crimes for which the Commonwealth has responsibility are the primary reason for differences in both the profile of offenders and their sentencing outcomes at the national level. The available data is restricted to a relatively small number of comparable variables. In relation to federal offending that does not result in imprisonment there has been little information published. Information in the CDPP's annual reports provides some clues to the potential for a far greater understanding of federal offending to be gained in the future.

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Additional data

The main body of this paper contains a number of tables in which information has been extracted or condensed in the interests of clearer presentation. This part contains the complete information.

Figure A1.35: Charges dealt with by the CDPP in 2003–04: Relevant legislation

Legislation	Summary	Indictable	Total
Social Security Act	3776	2	3778
Criminal Code	2431	145	2576
Crimes Act	350	184	534

Fisheries Management Act	395	6	401
Customs Act	78	241	319
Non-Commonwealth legislation: Other	157	43	200
Taxation legislation	196	1	197
Financial Transaction Reports Act	161	33	194
Bankruptcy Act	94	35	129
Corporations Law	64	65	129
Migration Act	81	23	104
Excise Act	56	48	104
Great Barrier Reef Marine Park Act and Regulations	75	—	75
Civil Aviation Act and Regulations	69	3	72
Crimes (Currency) Act	44	9	53
Passports Act	37	8	45
Non-Commonwealth legislation: Drugs	24	15	39
Health Insurance Act	38	—	38
Crimes (Aviation) Act	31	2	33
Torres Strait Fisheries Act	29	2	31
Environment Protection & Biodiversity Conservation Act	25	6	31
Australian Crime Commission Act	27	1	28
Trade Marks Act	27	—	27
Copyright Act	23	—	23
Superannuation Industry (Supervision) Act	18	1	19
Public Order (Protection of Persons and Property) Act	17	—	17
ANTS (Family Assistance) (Administration) Act	16	—	16
Student Assistance Act	16	—	16
Quarantine Act	15	—	15
Air Navigation Act and Regulations	11	—	11
Census and Statistics Act	9	—	9
Primary Industries Levy Collection	9	—	9
Veterans Entitlements Act	9	—	9
Proceeds of Crime Act	6	3	9
National Health Act	8	—	8
Radio Communications Act	4	3	7
Defence Act and Regulations	6	—	6
Insurance (Agents and Brokers) Act	4	2	6
Financial Management and Accountability Act	3	1	4
Marriage Act and Regulations	3	1	4
Agriculture & Veterinary Chemicals Code Act	3	—	3
Commonwealth Electoral Act	3	—	3
Distillation Act	3	—	3
Foreign Acquisitions & Takeovers Act	3	—	3
ANTS (Australian Business Number) Act	2	1	3

Export Control Act	—	2	2
Crimes (Confiscation) Act	2	—	2
Service & Execution of Process Act	2	—	2
Therapeutic Goods Act	2	—	2
Protection of Sea (Prevention of Pollution from Ships) Act		2	2
Aged Care Act	1	—	1
Australian Citizenship Act	1		1
Australian Military Regulations	1	—	1
Australian Postal Corporation Act	1	—	1
Banking Act	1	—	1
Crimes (Aircraft) Act	1	—	1
Financial Sector (Collections of Data) Act	1	—	1
Fuel (Penalty and Surcharges) Administration Act	1	—	1
Historic Shipwrecks Act	1	—	1
National Crime Authority Act	1	—	1
Protection Movable Cultural Heritage Act	1	—	1
Protection Orders Act	1	—	1
Tobacco Advertising Prohibition Act	1	—	1
Vagrants Gaming & Other Offences Act	1	—	1
Workplace Relations Act	1	—	1
Australian Securities Commission Act	—	1	1
Navigation Act	—	1	1
Royal Commission Act	—	1	1
Total	8,477	891	9,368

Source: Commonwealth Director of Public Prosecutions Annual Report 2003–04.

Figure A1.36: Charges dealt with by the CDPP in 2003–04: Crimes Act 1914

Offence	Summary	Indictable	Total
Fraud (s 29D)	91	137	228
Imposition (s 29B)	127	16	143
Telecommunications offences (ss 85ZB–85ZKB)	38	–	38
Administration of Justice (ss 32–50)	12	6	18
Damage property (s 29)	15	2	17
Stealing or receiving (s 71)	7	7	14
Postal offences (ss 85E–85ZKB)	12	–	12
Trespass on Commonwealth land (s 89)	12	–	12
Accessory after the fact (s 6)	6	5	11
Computer offences (ss 76A–76F)	7	3	10
Bribery (ss 73 & 73A)	5	3	8
Forgery (ss 65–69)	6	1	7
False pretences (s 29A)	5	–	5
Offence against Commonwealth (s 7)	1	3	4
Breach of recognizance (ss 20A, 20AC)	2	–	2
Fail to furnish name (s 3)	2	–	2
Conspiracy (s 86)	–	1	1
Falsification of books (s 72)	1	–	1
Resisting public officers (s 76)	1	–	1
Total	350	184	534

Source: Commonwealth Director of Public Prosecutions Annual Report 2003–04

Figure A1.37: Charges dealt with by the CDPP in 2003–04: Criminal Code 1995

Offence	Summary	Indictable	Total
Obtaining financial advantage (s 135.2)	2155	1	2156
General dishonesty (s 135.2)	54	38	92
Obtaining a financial advantage by deception (s 134.2)	26	57	83
Theft (s 131.1)	20	10	30
Obstruction of Commonwealth officials (s 149.1)	21	1	22
False or misleading statement in applications (s 136.1)	19	3	22
Theft of mail receptacles/articles/messages (s 471.1)	14	4	18

Obtaining property by deception (s 134.2)	9	7	16
Using forged document (s 145.1)	10	2	12
Burglary (s 132.4)	10	–	10
False or misleading information (s 137.1)	7	1	8
Making forged documents (s 144.1)	5	3	8
Attempt to commit an offence (s 11.1)	4	4	8
Taking or concealing mail receptacles etc (s 471.3)	7	–	7
Receiving Stolen Mail Receptacles (s 471.2)	6	1	7
Bribery of Commonwealth Official (s 141.1)	2	5	7
Corrupting benefits to C'wealth official (s 142.1)	6	–	6
Threatening to cause harm to C'wealth official (s 147.2)	6	–	6
Causing harm to C'wealth official (s 147.1)	5	1	6
Aggravated Burglary (s 132.5)	5	–	5
Unauthorised access to, or modification of, restricted data (s 478.1)	5		5
Complicity in Committing an Offence (s 11.2)	3	2	5
Abuse of Public Office (s 142.2)	4	–	4
Falsification of documents (s 145.4)	4	–	4
False or misleading documents (s 137.2)	3	1	4
Possession of Property Suspected as POC (s 400.9)	2	2	4
Impersonate C'wealth official (s 148.1)	3	–	3
Damaging or destroying mail receptacles etc (471.6)	3	–	3
Use Postal Service to menace etc (s 471.12)	3	–	3
Conspiracy in Committing an Offence (s 11.5)	2	–	2
Impersonation of Official by Official (s 148.2)	2	–	2
Dealing in Proceeds of Crime >\$1000 (s 400.7)	2	–	2
Dishonest taking or retention of property (s 132.8)	1	1	2
Robbery (s 132.2)	1	–	1
Equipped for Theft (s 132.7)	1	–	1
Unauthorised Modification of Computer Data (s477.2)	1	–	1
Using Postal Service to Make Threat (s 471.11)	–	1	1
Total	2,431	145	2,576

Source: Commonwealth Director of Public Prosecutions Annual Report 2003–04.

Figure A1.38: Federal prisoners as at 13 December 2004: Offence categories by jurisdiction

Type of Offence	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Total
CD (Customs Drugs)	2	306	8	26	12	0	52	54	460
Crimes	2	32	2	24	6	3	10	10	89
Fisheries	0	0	0	24	0	0	0	10	34
Soc Sec	0	6	1	13	0	3	2	6	31
Corporations	0	6	0	3	1	2	2	3	17
Crimes/Tax	0	4	0	2	0	0	5	1	12
Criminal Code	1	3	0	2	0	0	2	3	11
Migration Act	0	1	3	0	0	0	0	6	10
Bankruptcy	0	3	0	1	0	0	0	2	6
CD/Proceeds Crime	0	2	0	0	0	0	0	1	3
FTRA	0	2	0	1	0	0	0	0	3
CD/Crimes	0	2	0	0	0	0	0	0	2
Crimes/Proceeds	1	0	0	0	0	0	0	1	2
Excise	0	0	0	1	0	0	1	0	2
Health Ins	0	1	0	1	0	0	0	0	2
Civil Aviation	0	0	0	0	0	0	0	1	1
Crimes Currency	0	1	0	0	0	0	0	0	1
Crimes/50BC	0	1	0	0	0	0	0	0	1
Crimes/50DB	0	0	0	0	0	0	0	1	1
Crimes/Aust Post	0	0	0	0	0	0	1	0	1
Customs	0	1	0	0	0	0	0	0	1
Environ Act	0	1	0	0	0	0	0	0	1
Escape	0	1	0	0	0	0	0	0	1
Family Law	0	0	0	0	1	0	0	0	1
I/Prot Act	0	0	0	0	0	0	0	1	1
Passports	0	0	0	0	0	0	0	1	1
Total	6	373	14	98	20	8	75	101	695

Source: Federal Prisoners 2004 (AIC file).

* This paper was prepared for the ALRC by Matthew Willis, Research Analyst, Australian Institute of Criminology (AIC). Mr Willis would like to acknowledge the assistance of staff of the AIC's Information Services program, in particular Max Kwiatkowski, who provided invaluable assistance with obtaining

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2452 Manitoba Centre for Health Policy, University of Manitoba www.umanitoba.ca/centres/mchp Concept Dictionary, at 18 October 2005, searched under the term 'Population Data and Significance: A Discussion'.

2453 Under the *Law of the Sea Convention 1982*, foreign nationals cannot be sentenced to imprisonment for illegal fishing activities. Persons convicted of fisheries offences may be given fines but then serve a term of imprisonment if the fine is not paid. The 'Fisheries' category in AGD's federal prisoner database indicates persons serving terms of imprisonment for fine-default related to fisheries offences.

2454 For instance, the Northern Territory mean sentence in Figure A1.20 is based on 11 cases, of which eight were over five years. Four of these sentences were over 15 years. The Northern Territory federal prisoner population also included three life sentences, which were excluded from the calculation of means.

2455 The mean time expected to serve in the Northern Territory reflects the small number of cases (n=14) encompassing wide variations, including two cases with a non-parole period less than three months, and three cases with a non-parole period greater than 20 years.

Appendix 2. List of Submissions

<i>Name</i>	<i>Submission Number</i>	<i>Date</i>
ACT Corrective Services	SFO34	20 April 2005
R Andrews	SFO 7	8 March 2005
Attorney-General's Department	SFO 52	7 July 2005
Australian Securities and Investments Commission	SFO 39	28 April 2005
Australian Taxation Office	SFO 18	8 April 2005
J Campillo	SFO 25	13 April 2005
J Champion SC	SFO 46	28 April 2005
Commonwealth Director of Public Prosecutions	SFO 51	17 June 2005
Confidential	SFO 6	23 February 2005
Confidential	SFO 8	8 March 2005
Confidential	SFO 11	15 March 2005
Confidential	SFO 15	6 April 2005
Confidential	SFO 27	14 April 2005
Correctional Services Northern Territory	SFO 14	5 April 2005
Corrections Victoria	SFO 48	2 May 2005
Criminal Bar Association of Victoria	SFO 45	29 April 2005
Council of Social Service of NSW	SFO 24	13 April 2005
R Cummings	SFO 50	13 May 2005

<i>Name</i>	<i>Submission Number</i>	<i>Date</i>
L De Campos	SFO 9	10 March 2005
Department of Corrective Services New South Wales	SFO 42	28 April 2005
Department of Family and Community Services	SFO 30	15 April 2005
Department of Immigration and Multicultural and Indigenous Affairs	SFO 49	10 May 2005
Department of Justice Western Australia	SFO 35	21 April 2005
A Freiberg	SFO 12	4 April 2005
T Fry	SFO 5	31 January 2005
R Hughes	SFO 4	28 January 2005
Intellectual Disability Rights Service	SFO 38	21 April 2005
Chief Magistrate M Irwin	SFO 33	20 April 2005
J Knight	SFO 10	15 March 2005
Law Society of South Australia	SFO 37	22 April 2005
Law Society of Tasmania	SFO 26	14 April 2005
Legal Aid Commission of New South Wales	SFO 36	22 April 2005
Legal Services Commission of South Australia	SFO 19	8 April 2005
L Loprete	SFO 1	10 August 2004
K Mack and S Roach Anleu	SFO 16	7 April 2005
B Matthews	SFO 2	8 February 2005
	SFO 13	7 April 2005
Mental Health Coordinating Council	SFO 44	29 April 2005

<i>Name</i>	<i>Submission Number</i>	<i>Date</i>
Mental Health Council of Australia	SFO 32	18 April 2005
New South Wales Parole Board	SFO 22	8 April 2005
B Nicholson	SFO 17	8 April 2005
Office of the Public Advocate Victoria	SFO 47	2 May 2005
Prisoners Legal Service	SFO 28	14 April 2005
W Roberts	SFO 41	28 April 2005
P Sherwood	SFO 21	8 April 2005
Sisters Inside Inc	SFO 40	28 April 2005
W Tieleman	SFO 23	11 April 2005
Victoria Legal Aid	SFO 31	18 April 2005
Victorian Institute of Forensic Mental Health	SFO 43	29 April 2005
W Walters	SFO 3	23 February 2005
Welfare Rights Centre Queensland	SFO 29	15 April 2005
J Willis	SFO 20	9 April 2005

Appendix 3. List of Consultations

<i>Name</i>	<i>Location</i>
Aboriginal Justice Advisory Committee	Darwin
ACT Corrective Services	Canberra
Adult Parole Board of Victoria	Melbourne
Justice R Atkinson, Supreme Court of Queensland	Brisbane
Attorney General's Department	Canberra, Sydney
Australian Bureau of Statistics	Sydney
Australian Institute of Criminology	Canberra
Australian Securities and Investments Commission	Sydney
M Bagaric and R Edney, School of Law, Deakin University	Melbourne
Catholic Prison Ministry	Brisbane
Chief Justice M Black and Others, Federal Court of Australia	Melbourne
Commonwealth Director of Public Prosecutions	Canberra, Sydney, Melbourne, Hobart, Darwin, Brisbane
Confidential Consultation	Melbourne
Correctional Services Northern Territory	Darwin
Corrections Inspectorate Victoria	Melbourne
Corrections Victoria	Melbourne
Department of Corrective Services New South Wales	Sydney

Department of Corrective Services Queensland	Brisbane
Department of Family and Community Services	Canberra
Department of Immigration and Multicultural and Indigenous Affairs	Canberra
Department of Justice Northern Territory	Darwin
Department of Justice Western Australia	Perth
A Freiberg, Law School, Monash University	Melbourne
J Gans, Law School, University of Melbourne	Sydney
T Glynn SC, Queensland Bar Association	Brisbane
M Johnson, Northern Territory Bar	Darwin
Justice Action	Sydney
Law Society of South Australia	Adelaide
Law Society of the Northern Territory	Darwin
Mental Health Council of Australia	Canberra
National Judicial College of Australia	Canberra
New South Wales Bar Association	Sydney
New South Wales Legal Aid Commission, Criminal Law Division	Sydney
New South Wales Parole Board	Sydney
New South Wales Public Defenders Office	Sydney
North Australian Aboriginal Legal Aid Service	Darwin
Northern Territory Legal Aid Commission	Darwin

Offenders Aid and Rehabilitation Services South Australia	Adelaide
Office of the Inspector of Custodial Services Western Australia	Perth
Parole Board of South Australia	Adelaide
Parole Board of Tasmania	Hobart
Parole Board of the Northern Territory	Darwin
Prison Reform Group WA	Perth
Prisoners' Legal Service	Brisbane
Queensland Community Corrections Board	Brisbane
Queensland Legal Aid	Brisbane
Sentence Administration Board ACT	Canberra
Sisters Inside	Brisbane
Victim Support Australasia	Sydney
Victim Support Service Inc	Adelaide
Victorian Bar Association	Melbourne
K Warner, Faculty of Law, University of Tasmania	Hobart
Justice M Weinberg, Federal Court of Australia	Sydney
Welfare Rights Centre	Brisbane
Deputy Chief Magistrate E Woods	Perth
Youth Parole Board Victoria	Melbourne
George Zdenkowski, Magistrate, New South Wales Local Court	Sydney

Appendix 4. Abbreviations

The entities listed below are Australian entities unless otherwise stated.

AAT	Administrative Appeals Tribunal
ABS	Australian Bureau of Statistics
ACT	Australian Capital Territory
AGD	Attorney-General's Department
AIC	Australian Institute of Criminology
AIIA	Australian Institute of Judicial Administration
ALRC	Australian Law Reform Commission
ALRC 15	Australian Law Reform Commission, <i>Sentencing of Federal Offenders</i> , ALRC 15 (1980)
ALRC 31	Australian Law Reform Commission, <i>The Recognition of Aboriginal Customary Laws</i> , ALRC 31 (1986)
ALRC 44	Australian Law Reform Commission, <i>Sentencing</i> , ALRC 44 (1988)
ALRC 92	Australian Law Reform Commission, <i>The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation</i> , ALRC 92 (2001)
ASIC	Australian Securities and Investments Commission
ASOC	Australian Standard Offence Classification
ATO	Australian Taxation Office
ATSI	Aboriginal and Torres Strait Islander
CCTO	Combined custody and treatment order
CD	Customs drugs
CDPP	Commonwealth Director of Public Prosecutions
COPS	Comments on Passing Sentence
CROC	<i>Convention on the Rights of the Child 1989</i>
CSAC	Corrective Services Administrators' Conference
CSMC	Corrective Services Ministers' Conference
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
DSM IV	<i>Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-TR</i> (2000)
ECHR	<i>European Convention on Human Rights 1950</i>
FCA	Federal Court of Australia
FMC	Federal Magistrates Court of Australia
GST	Goods and services tax
HECS	Higher Education Contribution Scheme
HREOC	Human Rights and Equal Opportunity Commission
ICCPR	<i>International Covenant on Civil and Political Rights 1966</i>
IDRO	Intensive drug rehabilitation order

IDRS	Intellectual Disability Rights Service
IP 29	Australian Law Reform Commission, <i>Sentencing of Federal Offenders</i> , IP 29 (2005)
ISO	Intensive supervision order
JCNSW	Judicial Commission of New South Wales
JIRS	Judicial Information Research System
JOIN	Judicial Officers' Information Network
MCDP	Magistrates Court Diversion Program
MOU	Memorandum of understanding
NCCJS	National Centre for Crime and Justice Statistics
NCJSF	National Criminal Justice Statistical Framework
NCOSS	Council of Social Service of New South Wales
NJCA	National Judicial College of Australia
NMDS	Juvenile Justice National Minimum Data Set
NMHWG	National Mental Health Working Group
NSW	New South Wales
NSWCCA	New South Wales Court of Criminal Appeal
NSWLRC	New South Wales Law Reform Commission
NZLC	New Zealand Law Commission
OARSSA	Offenders Aid and Rehabilitation Services of South Australia
OMFO	Office for the Management of Federal Offenders