

Issues Paper 29

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 questions or numbered paragraphs in this Paper.

Open inquiry policy

In the interests of informed public debate, the ALRC maintains an open inquiry policy. 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 the open inquiry policy, non-confidential submissions are made available to any person or organisation upon request, and also may be published on the ALRC website.

However, the ALRC also accepts submissions made in confidence. Confidential submissions may include personal experiences where there is a wish to retain privacy, or other sensitive information (such as commercial-in-confidence material). Any request for access to a confidential submission is determined in accordance with the federal *Freedom of Information Act 1982*, which has provisions designed to protect sensitive information given in confidence.

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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Australian Law Reform Commission

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Submissions may also be made using the on-line form on the ALRC's homepage: www.alrc.gov.au.

The closing date for submissions in response to **IP 29 is Friday 8 April 2005.**

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

Division

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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Mr Brian Opeskin (Commissioner in charge)
Professor Anne Finlay (until November 2004)
Justice Susan Kenny (part-time Commissioner)
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Mr John Thornton, First Deputy Director, Commonwealth Director of Public
Prosecutions
Professor Kate Warner, Law School, University of Tasmania
Mr George Zdenkowski, Magistrate, New South Wales Local Court

List of Questions

2. Federal Offences and Federal Offenders

- 2-1 Does the expansion in the number and scope of federal offences have implications for reform of federal sentencing law and practice?
- 2-2 Does the composition of the population of federal offenders have implications for reform of federal sentencing law and practice?

3. Legal and Institutional Framework

- 3-1 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?
- 3-2 Are the current arrangements by which the states and territories provide correctional services and facilities for federal offenders satisfactory? Should the Australian Government establish correctional services or facilities for federal offenders or particular classes of federal offenders?

4. Location of Crime and Punishment

- 4-1 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?
- 4-2 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?
- 4-3 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?

- 4-4 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?
- 4-5 Are the existing legislation and arrangements for the transfer between Australian states and territories of federal offenders released on parole satisfactory?
- 4-6 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?
- 4-7 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?

5. Equality in the Treatment of Federal Offenders

- 5-1 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?
- 5-2 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?
- 5-3 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?

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- 5-4 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?

6. History and Critique of Part IB

- 6-1 Should Part IB of the *Crimes Act 1914* (Cth) be redrafted to make the structure clearer and more logical, and the language simpler and more consistent? If so, how should this be achieved?
- 6-2 Should legislative provisions for the sentencing of federal offenders be detailed and prescriptive, or should they provide a broad framework supported by general principles?
- 6-3 Should legislative provisions for the sentencing, imprisonment, administration and release of federal offenders be relocated to a separate federal Sentencing Act? If the provisions are to remain in the *Crimes Act*, should they be consolidated and relocated to reflect better the chronology of investigation, prosecution, adjudication and sentencing of federal offenders?

7. Sentencing Options

- 7-1 What are the objectives or purposes of sentencing federal offenders? Should they be specified in federal legislation either generally or in specific classes of federal offences? Should the purposes be ranked?
- 7-2 Should federal legislation specify a hierarchy of sentencing options for federal offenders? If so, how should that hierarchy be arranged?
- 7-3 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?
- 7-4 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? What are the objectives of such orders and in what circumstances should they be available? Should federal legislation specify priorities in relation to the payment of fines and ancillary monetary orders?
- 7-5 What non-custodial options should be available in the sentencing of individual and corporate federal offenders?

- 7-6 What are the principles upon which non-custodial sentences should be considered or imposed? Should there be greater flexibility as to how non-custodial sentences are to be served?
- 7-7 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? See also Questions 7-9 and 12-5.
- 7-8 What custodial options should be available in the sentencing of federal offenders?
- 7-9 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? See also Questions 7-7 and 12-5.
- 7-10 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?

8. General Issues in Determining the Sentence

- 8-1 Should federal legislation provide guidance to judicial officers in (a) selecting between available sentencing options, and (b) determining the quantum of sentence to be imposed, when sentencing federal offenders in particular cases? What form should this guidance take?
- 8-2 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? Should legislation indicate whether these factors aggravate or mitigate the sentence?
- 8-3 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?
- 8-4 Should federal legislation specify factors that are irrelevant to the exercise of the sentencing discretion? If so, what matters should be included?
- 8-5 What is the purpose of setting a non-parole period? Should the purpose be set out in federal legislation? In what circumstances should a non-parole

period be set when sentencing a federal offender to a term of imprisonment? What is the appropriate relation between that period and the head sentence, and what factors should be considered in determining a non-parole period?

- 8-6 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 resentence 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?
- 8-7 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?

9. Particular Issues in Sentencing

- 9-1 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?
- 9-2 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?
- 9-3 Should federal legislation specify when a federal sentence commences and how any pre-sentence custody is to be taken into account?
- 9-4 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?
- 9-5 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'?
- 9-6 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?

- 9-7 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? What options should be available to a court in the event of a breach?
- 9-8 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?
- 9-9 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?

10. Consistency in Sentencing

- 10-1 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?
- 10-2 What are the most effective methods of striking a balance between the exercise of discretion in sentencing an individual offender and the need for reasonable consistency in sentencing persons convicted of the same or a similar federal offence in like circumstances?
- 10-3 Should legislation structure the sentencing discretion in relation to federal offenders, for example by specifying: (a) the purposes or objectives of punishment; (b) a hierarchy of custodial and non-custodial sentencing options; (c) sentencing factors; or (d) sentencing grids? Does structuring the sentencing discretion in legislation raise any concerns?
- 10-4 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?
- 10-5 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?

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- What matters should be addressed in those reasons, and how should best practice be promoted among judicial officers?
- 10-6 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?
- 10-7 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?
- 10-8 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?
- 10-9 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?

11. Procedural and Evidential Issues

- 11-1 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?
- 11-2 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?
- 11-3 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?
- 11-4 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?

- 11-5 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?

12. Administration of Federal Offenders

- 12-1 Should the Australian Government play a more active role in managing federal offenders? What role, if any, should the Attorney-General's Department perform?

- 12-2 Are the arrangements between the Australian Government and the states and territories in relation to the administration of federal offenders satisfactory?

- 12-3 What issues arise in relation to the ongoing administration of offenders who are serving sentences for both federal offences and state or territory offences?

- 12-4 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?

- 12-5 What concerns arise in relation to enforcing alternative sentencing orders or fines against federal offenders? How might these concerns be addressed? See also Questions 7-7 and 7-9.

13. Early Release from Custody

- 13-1 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?

- 13-2 Under what circumstances, if any, should automatic parole be provided to federal offenders?

- 13-3 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?

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- 13-4 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?
- 13-5 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?
- 13-6 What further provision, if any, should be made for review or appeal of decisions relating to parole and release on licence of federal offenders?
- 13-7 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?
- 13-8 Would it be desirable for the federal parole authority to have greater flexibility in setting the length of the supervision period?
- 13-9 Is the law and practice in relation to automatic revocation of federal parole or licence satisfactory? 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?
- 13-10 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?
- 13-11 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?
- 13-12 Is the law and practice in relation to federal offenders who are subject to deportation upon release from custody satisfactory?
- 13-13 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?

13–14 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?

13–15 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?

14. Mental Illness and Intellectual Disability

14–1 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?

15. Special Categories of Offenders

15–1 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?

15–2 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; offenders with problem gambling; and corporations and their directors?

16. Information, Education and Cooperation

16–1 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?

16–2 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?

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- 16-3 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?
- 16-4 Should university law schools place greater emphasis in their programs on the federal criminal justice system and sentencing law, including federal sentencing law?
- 16-5 Does the sentencing of federal offenders raise particular issues in relation to information sharing and cooperation between various federal, state and territory bodies, including: investigatory bodies; Directors of Public Prosecutions; courts; corrective services; government departments; prison administrations; and parole boards?

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 has previously undertaken 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, ALRC 44 *Sentencing*.¹ The report focused on a number of major themes, including:

- reducing the emphasis on imprisonment as a punishment and increasing the range and severity of non-custodial sanctions for serious offences;
- the need to enhance ‘truth in sentencing’;
- the need for more structured sentencing decisions to achieve greater consistency in the treatment of federal offenders;

¹ Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988). For a detailed overview of the previous inquiry, see Ch 6.

- the need to ensure minimum prison standards in all jurisdictions;
- the provision of appropriate alternatives to imprisonment for mentally ill and intellectually disabled offenders;
- increased emphasis on rehabilitative goals in the sentencing of young offenders;
- the need to ensure that female offenders who have young children are only imprisoned in exceptional circumstances; and
- the establishment of a sentencing council to monitor sentencing practices and to collect quantitative and qualitative information on sentencing, to provide judicial officers with information and education, and to advise government on sentencing programs.

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 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 cases diverged from or failed to implement ALRC recommendations.

1.4 The Second Reading Speech to the Bill noted that, because of the close association between federal, state and territory prisoners, 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.³ For this reason, federal legislation had applied state and territory law relating to the fixing of non-parole periods to federal offenders. However, frequent changes to state and territory sentencing legislation 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 broad and detailed criticisms, including that it is unclear about whether it intends to achieve greater equality of

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

3 Ibid.

treatment between federal offenders serving sentences in different states and territories; that it is complex and ambiguous; and that it 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 an undesirable practical outcome.⁴ In 1991, the Gibbs Committee, which reviewed aspects of federal criminal law, made several recommendations concerning Part IB, and further recommended that the Australian Government review Part IB within three years of its commencement.⁵

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 in the 1990s. However, in order to ensure a full review of all of the issues, the Attorney-General decided that a body such as the ALRC would be better placed to conduct the 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 remains appropriate, effective and efficient and what, if any, changes are desirable. In carrying out its review of Part IB, 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 may be examined for the purposes

⁴ See further Ch 6.

⁵ H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991) Attorney-General's Department, [11.11], [12.59].

of comparison, and also in relation to joint offenders, but will not be the focus of this Inquiry. The Inquiry will, however, consider the interaction between federal sentencing law and state and territory sentencing law where this impacts on the sentencing and administration of federal offenders. In addition, it will be necessary for the ALRC to examine state and territory sentencing options, and arrangements for early release. These matters directly affect federal offenders because offenders are, to a large extent, subject to the criminal justice and correctional system of the state or territory in which they are tried and sentenced.

Matters outside of the Inquiry

1.9 The focus of the Inquiry is on the federal sentencing process and on the management of a federal offender once sentence has been imposed. The ALRC will not be considering reform of substantive criminal law as a part of this Inquiry. The quantum of penalty established by the Australian Parliament as the maximum penalty for any particular offence is also outside of the Terms of Reference and will not be considered in this Inquiry.

1.10 The ALRC will not be considering aspects of the federal criminal justice system prior to the sentencing hearing. For example, issues relating to law enforcement, prosecutorial discretion and the criminal trial itself undoubtedly have an effect upon whether or not a person is charged with a federal offence and the exact offence that is the subject of the charge, thereby affecting the final sentencing outcome. However, these matters will not be the subject of specific inquiry unless they directly affect the sentencing discretion or are raised by the provisions of Part IB.

1.11 Similarly, procedures relating to the bail of federal offenders fall outside the Terms of Reference. However, there are some similarities between the application for bail of persons accused of federal offences and the sentencing processes for federal offenders. Bail hearings are conducted in the same court system as sentencing hearings, and raise similar issues regarding equality of treatment across jurisdictions. The ALRC may be able to draw parallels between the two processes, but will not be making recommendations in relation to bail procedures or factors applying to decisions to grant or refuse bail.

1.12 At the other end of the process, the ALRC will be considering the administrative arrangements for the custodial and non-custodial management of federal offenders. However, this will not involve a detailed consideration of 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. Nor will the Inquiry involve detailed analysis of the particular non-custodial programs available in each state and territory, except to gain an understanding of the differences in treatment of federal offenders across jurisdictions.

1.13 The Terms of Reference are also limited to matters of criminal law. The Inquiry will not, therefore, consider the imposition of civil or administrative penalties or infringement notice schemes. These issues were dealt with in detail in ALRC 95, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*.⁶ Other administrative matters that are not a part of this Inquiry include detention under the *Migration Act 1958* (Cth), and the military disciplinary system for defence force personnel.⁷

Changes to the sentencing landscape

1.14 At the federal level, the introduction of Part IB established a separate regime for the sentencing of federal offenders, particularly in relation to fixing non-parole periods. However, to a large extent the outcomes for federal offenders continue to be subject to sentencing practices of the states and territories.

1.15 Extensive reform of sentencing law and policy has occurred in the states and territories over the past 15 years, with these reforms sometimes being influenced by the research and recommendations contained in ALRC reports.⁸ These reforms contribute to the need to review Part IB to determine if it continues to meet its objectives in a changing landscape.

1.16 The following paragraphs provide an overview of some of the key changes in the states and territories in recent years with respect to the principles, procedures, institutions and context of sentencing.

1.17 **Purposes of sentencing.** There are many views about the proper purposes of sentencing offenders, and these views have changed over time with shifts in community attitudes about the objectives of criminal law and the value of punishment. These changes are sometimes reflected in the law. For example, in the last quarter of the twentieth century, there was an emphasis on the punitive rather than the rehabilitatory aspects of sentencing,⁹ while more recently theories of restorative justice

6 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002).

7 Section 72 of the *Defence Force Discipline Act 1982* (Cth) expressly applies some provisions of 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.

8 The following reports have also been influential: Victorian Sentencing Committee, *Sentencing* (1988); H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Final Report* (1991); New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996); Legislative Council Select Committee—Parliament of Tasmania, *Correctional Services and Sentencing in Tasmania* (1999); New South Wales Legislative Council, *Select Committee on the Increase in Prisoner Population: Final Report* (2001); A Freiberg, *Pathways to Justice: Sentencing Review 2002* (2002) Victorian Government.

9 A Blumstein, 'Restoring Rationality in Punishment Policy' in M Tonry (ed) *The Future of Imprisonment* (2004) 61, 63.

have become influential. Evolving perceptions of the purposes of sentencing can be seen in a number of reforms. In some jurisdictions there have also been attempts to prescribe the goals of sentencing in legislation.¹⁰

1.18 Restorative justice. Restorative justice emphasises the repair of harms and ruptured social bonds caused by crime, and focuses on relationships between crime victims, offenders and society.¹¹ It is greatly influenced by the victims' movement, which is discussed below. Concepts of restorative justice have influenced specific developments such as Indigenous courts, circle sentencing, and drug courts, and have been particularly influential in the area of juvenile justice.¹² A number of jurisdictions are looking at ways to import restorative justice developments from the juvenile justice system into the adult system.¹³

1.19 'Truth in sentencing'. The term 'truth in sentencing' was used in ALRC 44 to reflect a desire for accurate information about the type and quantum of sentence (including the relationship between the head sentence and time spent in prison), reasons for its choice, and information about its administration.¹⁴ However, in popular discourse, truth in sentencing is now commonly used as part of the law and order debate, where it is:

virtually synonymous with an escalation of severity in punishment (almost exclusively of the custodial variety), and the removal of opportunities for executive modification of court imposed punishment via, for example, the grant of remission.¹⁵

1.20 Law and order debates. Debates about law and order have become a perennial feature of elections in Australia. These debates have been said to be: 'closed and narrow rather than open and inclusive'; 'inclined to disqualify rather than welcome diverse viewpoints'; 'predisposed to populist pandering to private insecurities and resentments instead of the promotion of informed, public-spirited debate'; and seeking short-term, quick-fix remedies.¹⁶ Outcomes are often centred on escalation of the severity of penalties.

¹⁰ See further Ch 8. For a discussion of the sentencing of young offenders, see Ch 15.

¹¹ J Stubbs, *Restorative Justice, Domestic Violence and Family Violence—Issues Paper 9* (2004) Australian Domestic & Family Violence Clearinghouse, 2.

¹² See Ch 7 for a discussion of principles of sentencing and Ch 15 for discussion of juvenile justice, drug courts, and options used for Aboriginal and Torres Strait Islander offenders that have a basis in restorative justice.

¹³ See, eg, *Crimes (Restorative Justice) Act 2004* (ACT); State Government of Victoria, *New Directions for the Victorian Justice System 2004–2014: Attorney-General's Justice Statement* (2004), [3.2.5].

¹⁴ Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [69].

¹⁵ G Zdenkowski, 'Sentencing Trends: Past Present and Prospective' in D Chappell and P Wilson (eds), *Crime and the Criminal Justice System in Australia: 2000 and Beyond* (2000) 161, 165.

¹⁶ R Hogg and D Brown, *Rethinking Law & Order* (1998), 1–2.

1.21 **Rise in prison populations.** Sentencing policy has the capacity to influence the size of the prison population.¹⁷ Data indicate a striking increase in prison populations and rates in Australia from the early 1980s to the late 1990s, involving an increase in the national rate of almost two-thirds in 18 years.¹⁸ The number of federal prisoners has generally increased, and has kept pace with the growth in the total prison population.¹⁹

1.22 **Victims of crime.** Victims' groups have had a significant impact on sentencing reforms over the past 20 years. In addition to welfare services (such as witness assistance, counselling and compensation), a number of procedural reforms have been adopted to enhance victim satisfaction with the criminal justice system and increase victims' involvement in sentencing processes. While the effect of a crime on a victim has long been an informal factor that courts have taken into account in sentencing, most jurisdictions have now enacted legislation that formalises the process, commonly through a victim impact statement.²⁰ There are also more options for ordering offenders to make reparation to victims of crime.

1.23 **Judicial discretion.** A number of Australian jurisdictions have experimented in recent years with developments that, on the one hand, can be said to guide judicial decision making and increase consistency in sentencing and, on the other hand, have been condemned as serious encroachments on judicial discretion in sentencing. These experiments have included mandatory sentencing laws, the formulation of sentencing guideline judgments by appellate courts, and sentencing grids. While judicial resistance to sentencing grids in Australia has been strong, such grids have been discussed seriously at the political level since 1998.²¹ A sentencing matrix was partially enacted in Western Australia in 2000, but after wide criticism it was repealed in 2003.²²

1.24 **Sentencing commissions and advisory councils.** In recent years, a number of Australian governments have established sentencing bodies in the form of sentencing commissions or advisory councils, including the NSW Sentencing Council established in 1999 and the Victorian Sentencing Advisory Council established in 2004. ALRC 44 recommended the establishment of a national sentencing council to provide judicial officers with detailed, comprehensive information to promote consistency in sentencing federal and ACT offenders. Other proposed functions included the

17 New South Wales Legislative Council, *Select Committee on the Increase in Prisoner Population: Final Report* (2001), [6.2].

18 R Hogg, 'Prisoners and the Penal Estate in Australia' in D Brown and M Wilkie (eds), *Prisoners As Citizens: Human Rights in Australian Prisons* (2002) 3.

19 See further Ch 2.

20 See further Ch 11.

21 G Zdenkowski, 'Sentencing Trends: Past Present and Prospective' in D Chappell and P Wilson (eds), *Crime and the Criminal Justice System in Australia: 2000 and Beyond* (2000) 161, 178.

22 See further Ch 10.

provision of advice to government, monitoring sentencing practices, and a public information service.

1.25 Specialist courts. Although punishment has been a popular principle underlying sentencing in recent years, rehabilitation of the offender is also an important purpose of sentencing. ‘New rehabilitationism’ has been the guiding influence on the development of a number of specialist courts and programs with a focus on the rehabilitation needs of particular offenders.²³ Specialist initiatives have included those emphasising the needs of individuals for specialist assessment, treatment and rehabilitation—such as drug courts and diversion programs for individuals with impaired intellectual or mental functioning.²⁴ Indigenous courts have also been established in some jurisdictions, with a focus on community involvement in determination of sentence for Aboriginal and Torres Strait Islander offenders. In a number of jurisdictions consideration has been given to establishing dedicated sexual offences lists or courts to facilitate specialisation of procedures and personnel, and NSW has introduced a specialist jurisdiction at the District Court level for child sexual offences.

1.26 Parole and parole decision-making bodies. Parole is based on a theory of rehabilitation: the possibility of early release from prison provides an incentive for good behaviour in prison and for participation in rehabilitation programs that will enable the offender to reintegrate into society at the end of the custodial period. In the 1980s there were proposals in a number of countries (including in Australia) to abolish parole.²⁵ Despite this, parole remains an important feature of Australian sentencing practice, and there appears to be a renewed enthusiasm for the utility of parole. There have been significant changes to parole decision-making bodies in a number of states and territories in order to increase their independence and standing.²⁶ Alongside these developments have been legislative interventions in some jurisdictions to remove parole for offenders in certain categories of crime.

1.27 Separate sentencing legislation. A notable characteristic of modern sentencing law in Australia is the existence of separate sentencing legislation, which pulls together statutory provisions and common law pronouncements in relation to sentencing, and enunciates the sentencing principles to be applied in that jurisdiction.²⁷

23 G Zdenkowski, ‘Sentencing Trends: Past Present and Prospective’ in D Chappell and P Wilson (eds), *Crime and the Criminal Justice System in Australia: 2000 and Beyond* (2000) 161, 162.

24 A Tokley, ‘Specialty Courts Make Their Mark’ (2001) 23(4) *Bulletin (Law Society of South Australia)* 28.

25 J Roberts, ‘The Evolution of Penal Policy in Canada’ (1998) 32 *Social Policy & Administration* 420; Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [344].

26 See further Ch 13.

27 *Criminal Law (Sentencing) Act 1988* (SA); *Sentencing Act 1991* (Vic); *Penalties and Sentences Act 1992* (Qld); *Sentencing Act 1995* (WA); *Sentencing Act 1995* (NT); *Sentencing Act 1997* (Tas); *Crimes (Sentencing Procedure) Act 1999* (NSW). The ACT has sentencing provisions within its *Crimes Act*, as does the Commonwealth. See further Ch 6.

1.28 **Alternatives to short sentences of imprisonment.** A number of jurisdictions have looked at alternatives to short custodial sentences. Reasons for seeking alternatives include reduction of imprisonment rates, the disruptive impact on custodial programs when high proportions of inmates have short stays, and reducing the ‘revolving door’ created by repeated short sentences.²⁸ In 1995, Western Australia banned custodial sentences of three months or less, and in March 2004 this was extended to custodial sentences of six months or less.²⁹ NSW has also considered the issue but to date has stopped short of a ban.³⁰ Instead, NSW requires a judicial officer to give specific reasons when imposing a custodial sentence of six months or less.³¹ However, the Victorian Sentencing Review specifically rejected the option, considering it ‘undesirable because it leaves too large a gap in the sentencing continuum’.³² Guidance to Australian Government authorities now suggests that the statutory maximum term of imprisonment for an offence should not be less than six months, but the Commonwealth has not banned judicial imposition of a shorter sentence.³³

1.29 **Remissions.** In its original sentencing inquiry the ALRC had a number of concerns about the operation of state and territory general (or automatic) remissions in relation to federal offenders. The concern about remissions also influenced the ALRC’s recommendations in relation to non-parole periods. Since that time most jurisdictions have abolished automatic remissions. The abolition had a particular effect on the size of the prison population in NSW due to the overall increase in the time a prisoner actually spent in custody. Other jurisdictions have adopted legislative provisions to avoid this problem.³⁴

1.30 **Sentencing information systems.** In order to promote consistency in sentencing federal offenders, ALRC 44 recommended the development of an information system to provide and disseminate comprehensive, up-to-date and accessible information on the offences for which sentences are imposed; the type and quantum of penalties imposed; and the relevant characteristics of the offence and the offender that were taken into account and the weight given to them. While this has not

28 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, 14; New South Wales Legislative Council, *Select Committee on the Increase in Prisoner Population: Final Report* (2001), Ch 6.

29 *Sentencing Act 1995* (WA) s 86.

30 See, eg, New South Wales Legislative Council, *Select Committee on the Increase in Prisoner Population: Final Report* (2001). Recently the New South Wales Sentencing Council, *Abolishing Prison Sentences of 6 Months or Less* (2004) recommended further consideration of the issue, but only after further evaluation and trials take place.

31 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(2). This provision was introduced in 2000.

32 A Freiberg, *Pathways to Justice: Sentencing Review 2002* (2002) Victorian Government, 136.

33 Attorney-General’s Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2004) <www.ag.gov.au> at 17 September 2004, [5.1].

34 New South Wales Legislative Council, *Select Committee on the Increase in Prisoner Population: Final Report* (2001), [6.11]. See Ch 9 in relation to remissions for federal offenders.

been adopted at the federal level, the NSW Judicial Information Research System (JIRS), developed by the Judicial Commission of NSW, has become a valuable sentencing tool for the judiciary in NSW. A number of other jurisdictions have made efforts to publicise sentencing judgments or remarks. In general, courts around Australia have made use of technological developments to improve the capture and dissemination of a range of data about cases within their systems, although they have not focused on federal sentencing data.

1.31 Role of prosecutors in sentencing. Over the past decade prosecutors have become more involved in sentencing hearings, particularly in relation to federal offences. The Commonwealth Director of Public Prosecutions (CDPP) has administrative guidelines setting out the role of the prosecutor in the sentencing process, including addressing the court on the appropriate penalty. Involvement of the CDPP, which has a national office and a presence in all jurisdictions, assists with consistency in federal sentencing, particularly where judges and magistrates may not deal with federal sentencing on a regular basis.

1.32 Due process and the High Court. Over the past 15 years the High Court has interpreted Chapter III of the *Australian Constitution* as guaranteeing the right to procedural due process.³⁵ While the scope of the principle continues to be debated,³⁶ the application of the principle in federal criminal cases—in particular the requirements of natural justice, separation of judicial and executive power, and the exercise of judicial power through application of judicial reasoning—has constrained executive power in relation to the trial and punishment of offenders. This may have implications for future developments in the sentencing of federal offenders.

Organisation of this Issues Paper

1.33 Chapter 2 outlines the current nature of federal offences and federal offenders (including federal prisoners), identifies some emerging trends, and considers the implications of these trends for the sentencing and administration of federal offenders. Chapter 3 introduces the legal and institutional framework of the federal criminal justice system, including international obligations and constitutional provisions relevant to sentencing. The possibilities of a federal prison system or an expanded role for federal courts in criminal matters are raised in this chapter.

1.34 Chapters 4 and 5 address a number of general issues relating to the administration of the federal criminal justice and sentencing regimes. Chapter 4 looks at issues that arise from the location of a trial and the transfer of prisoners from one jurisdiction to another. Chapter 5 considers whether equality in sentencing of federal

35 M McHugh, 'Does Chapter III of the Constitution Protect Substantive as Well as Procedural Rights?' (2001) (Sum) *Bar Association of NSW: Bar News* 34, 35–36.

36 F Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32 *Federal Law Review* 204.

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.

1.35 Chapter 6 provides an overview of the history of Part IB and the criticisms it has attracted. Chapters 7, 8 and 9 then deal with some of the detailed provisions of Part IB. Chapter 7 discusses the purposes of sentencing and the wide range of sentencing options and ancillary orders potentially available in sentencing federal offenders. Chapter 8 considers key issues relating to the determination of federal sentences in a particular case, such as the choice of sentencing option, the quantum of sentence, and the factors that are to be considered in determining the sentence—both at first instance by the sentencing court and when those sentences may be reconsidered. Chapter 9 explores a range of specific issues that arise both at the time of determining a federal sentence as well as after the sentencing decision has been made, including specification of discounts, commencement of sentence, multiple offences, remissions and recognizance release orders.

1.36 Chapter 10 looks at the tension between the need for consistency in sentencing in like cases and the need for judicial discretion to enable justice to be done in an individual case. The chapter considers a number of judicial, legislative and other methods for promoting consistency. Chapter 11 deals with a range of procedural and evidential issues that arise in relation to sentencing, such as the burden and standard of proof of facts relating to sentencing, and the information upon which a federal sentence should be based (including the use of pre-sentence reports and victim impact statements).

1.37 The next group of chapters discusses issues relating to the administration of federal offenders post-sentence. Chapter 12 examines arrangements in place with the states and territories for the on-going management of federal offenders and raises questions about the need for independent oversight of post-sentence management of federal offenders. Chapter 13 considers the options available for early release of federal offenders, including parole, recognizance release orders and pardons, and how these options are administered in practice.

1.38 Chapter 14 deals with the disposition of persons with a mental illness or intellectual disability—an issue currently included in a number of provisions in Part IB. Chapter 15 considers issues that arise in relation to federal offenders who fall into arguably special categories, including young offenders, women, Aboriginal and Torres Strait Islanders, those with a drug or gambling addiction, and corporations. Finally, Chapter 16 looks at the collection of information about federal offences and federal offenders; the education of legal professionals and others about federal sentencing; and cooperation within and between jurisdictions in relation to federal offenders.

Process of reform

Advisory Committee

1.39 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 a number of federal and state courts, academics with expertise in the area, and government officers from state and federal agencies with responsibilities for justice and corrections.³⁷

1.40 The Advisory Committee met for the first time on 21 September 2004, and will meet again several times 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, as well as in providing quality assurance in the research and consultation effort. The Advisory Committee will also assist with the development of reform proposals as the Inquiry progresses. However, ultimate responsibility for the Report and recommendations remains with the Commissioners of the ALRC.

Community consultation

1.41 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.³⁸ One of the most important features of ALRC inquiries is the commitment to widespread community consultation.³⁹

1.42 The nature and extent of this engagement is normally determined by the subject matter of the reference. While some areas may be seen to be narrow and technical and of interest mainly to experts, other ALRC inquiries involve a significant level of interest and involvement from the general public and the media. This Inquiry falls somewhere between these extremes. The Inquiry involves a review of legislation and thus requires expert input from practitioners and judicial officers who have experience in using the legislation. The subject matter of sentencing also attracts general public interest, although the focus on federal criminal matters narrows the range of offences under consideration and the numbers of people directly affected.⁴⁰

1.43 There are several ways in which those with an interest in this Inquiry may participate.

37 The members of the Advisory Committee are listed in the front of this Issues Paper.

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

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

40 See Ch 2 for a discussion of the range of federal offences and the supposed ‘victimless’ nature of many federal crimes.

1.44 **Expressions of interest.** Individuals and organisations may indicate their expression of interest in the Inquiry by contacting the ALRC or applying online at <www.alrc.gov.au>. Those who wish to be added to the ALRC's mailing list will receive press releases and a copy of consultation documents related to the Inquiry.

1.45 **Submissions.** Individuals and organisations may make submissions to the Inquiry, both after the release of the Issues Paper and again after the release of the Discussion Paper. There is no specified format for submissions. The Inquiry will gratefully accept anything from handwritten notes and emailed dot-points, to detailed commentary on matters concerning the sentencing and administration of federal offenders. Submissions can be made by contributing comments online at the ALRC's website. The ALRC also accepts confidential submissions. Details about making a submission may be found at the front of this Issues Paper.

1.46 The ALRC has also made efforts to advise federal offenders of the Inquiry and invite their comments. The ALRC will be working with correctional authorities in the coming months to distribute a brochure on the Inquiry to federal offenders currently in custodial institutions or participating in non-custodial correctional programs.

1.47 The ALRC strongly urges interested parties, and especially key stakeholders, to make submissions *prior* to the publication of the Discussion Paper. Once the basic pattern of proposals is established it is hard for the Inquiry to alter course radically. Although it is possible for the Inquiry to abandon or substantially modify proposals for which there is little support, it is more difficult to publicise, and gauge support for, novel approaches suggested to us late in the consultation process.

1.48 **Direct consultation.** The ALRC maintains an active program of direct consultation with stakeholders and other interested parties. The ALRC is based in Sydney, but in recognition of the national character of the Commission, consultations will be conducted around Australia during the Inquiry. Any individual or organisation with an interest in meeting with the Inquiry in relation to relevant sentencing issues is encouraged to contact the ALRC.

1.49 The Terms of Reference require the ALRC to consult widely with the key stakeholders, including the relevant federal, state and territory authorities. The ALRC has developed a consultation strategy that will allow participation and input across the wide spectrum of stakeholders. In developing this Issues Paper the ALRC has held more than 14 consultations with corrections agencies, prosecution agencies, criminal defence lawyers, a prisoners' rights group, and academics with an interest in the area.

Timeframe for the Inquiry

1.50 The ALRC is required to report by 31 January 2006. The ALRC's standard operating procedure is to produce an Issues Paper and a Discussion Paper prior to producing the final report.

1.51 This **Issues Paper** is the first document produced in the course of this Inquiry, and is intended to identify the main issues relevant to the Inquiry, provide background information, and encourage informed community participation. The Issues Paper is intended to stimulate full and open discussion of the issues arising from the Terms of Reference. At this early stage, the Inquiry is genuinely open to all approaches.

In order to be considered for use in the Discussion Paper, submissions addressing the questions in this Issues Paper must reach the ALRC by **Friday 8 April 2005**. Details about how to make a submission are set out at the front of this publication.

1.51 The Issues Paper will be followed by the publication of a **Discussion Paper** in mid 2005. The Discussion Paper will contain a more detailed treatment of the issues, and will indicate the Inquiry's current thinking in the form of specific reform proposals. The ALRC will then seek further submissions and undertake a further round of national consultations in relation to these proposals. Both the Issues Paper and the Discussion Paper may be obtained free of charge in hard copy or on CD from the ALRC or may be downloaded free of charge from the ALRC's website <www.alrc.gov.au>.

1.52 As mentioned above, the **Report**, containing the final recommendations, is due to be presented to the Attorney-General by 31 January 2006. Once tabled in Parliament, the Report becomes a public document.⁴¹ 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.⁴² 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.

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

42 However, the ALRC has a strong record of having its advice followed. About 57% of the Commission's previous reports have been fully or substantially implemented, about 27% of reports have been partially implemented, 4% of reports are under consideration and 12% have had no implementation to date.

1.53 Finally, it should be noted that in the past the ALRC often drafted legislation as the focus of its law reform effort. The ALRC's practice has since changed, and it does not produce draft legislation unless specifically asked to do so in the Terms of Reference for a particular inquiry. This is partly because drafting is a specialised function better left to the parliamentary experts and partly because the ALRC's time and resources are better directed towards determining the policy that will shape any resulting legislation. The ALRC has not been asked to produce draft legislation in this Inquiry, but its final recommendations will indicate the nature of any desired legislative change.

2. Federal Offences and Federal Offenders

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2.1 The Terms of Reference require the ALRC, in carrying out its review of Part IB of the *Crimes Act 1914* (Cth), to have particular regard to the changing nature, scope and extent of federal offences. This chapter outlines the current nature of federal offences and federal offenders (including federal prisoners), identifies some emerging trends, and considers the implications of these trends for the sentencing and administration of federal offenders.

Commonwealth criminal law

2.2 It has been said that approximately 90% of criminal activity occurring in Australia falls within the responsibilities of the states and territories, while only 10% falls within Commonwealth responsibility.⁴³

2.3 Traditionally, the subject matter of Commonwealth criminal law has differed from that of the states and territories. Commonwealth criminal law is concentrated in areas such as social security and tax fraud, illegal drug importation and migration matters. It is sometimes said that federal offences tend to be 'victimless' in the sense that the injury is often directed not to an identifiable individual but to the Commonwealth as a polity, and that they are often concerned with matters that require a national approach. State and territory criminal laws cover the vast majority of conduct that requires the censure of criminal law. They are generally concerned with offences involving personal violence or violation of property (such as murder, assault and robbery), public order offences, regulatory offences in areas such as environmental protection and occupational health and safety, and traffic offences.

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

2.4 The different subject matter of Commonwealth criminal law and state and territory criminal law is affected by the power to enact criminal laws under the *Australian Constitution*. The Commonwealth has limited powers to enact criminal laws, and has relied principally on its powers under s 51 of the *Constitution*. For example, offences under the *Customs Act 1901* (Cth) concerning prohibited imports are based on the power of Parliament to make laws with respect to ‘Trade and Commerce with other countries, and among the States’.⁴⁴ The Commonwealth also relies on a suite of other legislative powers to make criminal laws.⁴⁵

2.5 More Commonwealth criminal laws have been enacted in recent years. There are now over 500 Commonwealth statutes containing criminal offences,⁴⁶ and although there are no readily available statistics, an ALRC survey in 2001 revealed that there were approximately 1,500 federal criminal offence provisions.⁴⁷ The type of conduct that attracts criminal penalties under Commonwealth legislation has also expanded.

Trends in federal offences

2.6 In 1980, an ALRC survey of the Commonwealth statute book disclosed more than 105 Acts that created offences for which a term of imprisonment may be imposed.⁴⁸ The ALRC noted that the Commonwealth’s principal criminal law statute was the *Crimes Act*. However, many other Commonwealth statutes created offences. ALRC 44 found that, for constitutional reasons, federal offences are either offences against the Commonwealth or its institutions (for example, treason, bribery, or perverting the course of federal justice); or offences created to enforce or implement a federal law, such as customs, quarantine, taxation, and social security offences.⁴⁹ Most federal offences at that time involved fraud, forgery, the importation of prohibited drugs or other prohibited items, and offences concerned with Commonwealth property or injury to Commonwealth officers.⁵⁰ At that time, corporate law offences were state matters.

2.7 In 1990, the Gibbs Committee, as part of its review of Commonwealth criminal law, came to a similar conclusion. The Committee identified common Commonwealth offence provisions, namely those relating to the administration of legislation, licences and permits, Commonwealth officers, and procedures under relevant legislation.⁵¹

44 *Australian Constitution* s 51(i).

45 See Ch 3.

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

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

48 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [72]. The ALRC stated that the number of statutes was greater than this, noting the limitations of the data.

49 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [4].

50 *Ibid*, [5].

51 H Gibbs, R Watson and A Menzies, *Principles of Criminal Responsibility and Other Matters: Second Interim Report* (1990) Attorney-General’s Department, [50.2].

2.8 This description remains true for the bulk of Commonwealth offences today.⁵² However, the period from the early 1990s to the present has seen a further expansion in the type of conduct that is subject to federal criminal penalties. In particular, there has been an increase in regulatory offences; offences relating to transnational crime, cybercrime, national security; and international sex offences.

2.9 In 2001, the ALRC undertook a survey of 2,240 penalty provisions in Commonwealth legislation for the purpose of its review of civil and administrative penalties.⁵³ The survey revealed 1,555 criminal offences, most of which could be classified as regulatory offences.⁵⁴ The majority of the regulatory offences were located in legislative licensing regimes,⁵⁵ and in marketplace legislation.⁵⁶

2.10 The conduct proscribed in these offences includes providing false, misleading or deceptive information; failing to make continuous disclosure; unauthorised dealing with confidential or protected information; breaches of corporations law and environmental legislation; and disobeying the direction of a regulator. Many of these provisions are low-level record keeping and information offences.

2.11 It has been suggested that modern technology (including developments in communication and transportation) and globalisation have made criminal activity more common, more lucrative, easier to commit, and harder to detect.⁵⁷ These trends have facilitated the growth of transnational crime. Australia has responded to these developments by ratifying a number of international treaties, and enacting legislation making specified conduct a criminal offence under domestic law.⁵⁸ Australia has also recognised the transnational character of particular criminal activities by making such activities an offence when committed outside Australia.⁵⁹ The globalisation of financial markets has also facilitated economic crime, such as money laundering. New offences under Part 10.2 of the *Criminal Code* (Cth) and the *Proceeds of Crime Act 2003* (Cth) have been enacted to deal with this conduct.

52 The *Crimes Act 1914* (Cth) and the *Criminal Code* (Cth) would now be described as the principal federal criminal law statutes.

53 See Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), Ch 2.

54 The ALRC acknowledged that the survey was 'far from exhaustive': Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), [1.10].

55 See, eg, *Civil Aviation Act 1988* (Cth); *Aged Care Act 1997* (Cth); *Radiocommunications Act 1992* (Cth).

56 See, eg, *Trade Practices Act 1974* (Cth); *Australian Securities and Investments Commission Act 2001* (Cth); *Corporations Act 2001* (Cth). The Corporate Law Economic Reform Project has generated a large number of offences relating to corporations. Many of these offences existed previously under state law.

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

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

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

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

2.13 Substantial changes in the criminal law sometimes occur because of particular events.⁶⁰ Examples include the terrorist attacks on the World Trade Center and the Pentagon on 11 September 2001, and those in Bali on 12 October 2002. These events have heightened public awareness of matters of national security. Parliament has responded by creating new offences under the *Criminal Code*, including offences relating to terrorist acts, providing or receiving training connected with terrorist acts, possessing things connected with terrorist acts, and collecting or making documents likely to facilitate terrorist acts.⁶¹ Other offences apply for threats to security that may result in a terrorist act, such as the airline security offences introduced under the *Aviation Transport Security Act 2004* (Cth). Offences relating to investigation processes, such as the unauthorised disclosure of operational information, are now provided under the *Australian Security Intelligence Organisation Act 1979* (Cth).

2.14 Parliament has also recently enacted legislation that creates sex offences. For example, there are now several offences relating to sexual servitude⁶² and child sex tourism.⁶³ In addition, Division 138 of the *Criminal Code* includes offences relating to ‘war crimes’ and ‘crimes against humanity’. Like the new terrorism offences, these laws might be regarded as a departure from the traditional subject matter of federal offences, which have generally been considered to be victimless, in the sense described at the beginning of this Chapter.

2.15 These trends are confirmed by a brief ALRC survey of Commonwealth legislation enacted in the first half of 2004 (up to July 2004). Of the 108 pieces of federal legislation enacted, 25 Acts included new offences. Most offences were located

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

61 See *Criminal Code* (Cth) Pt 5.3–Terrorism.

62 See *Ibid* s 270.6. Offences relating to child pornography will also be incorporated into a new Pt 10.6 of the *Criminal Code* (Cth) when the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No 2) 2004* (Cth) commences in March 2005.

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

in companies and securities legislation.⁶⁴ A large number of offences were also found in licensing regimes, and in national security and border control legislation.

2.16 It has been suggested that some of these trends will continue into the future. Professor Richard Fox has identified six areas in which movement is likely to occur in Australian criminal law and procedure in the opening decades of the 21st century: the shift from local to national and international sovereignty over the criminal law; the search for more effective sanctions against corporate crime; the greater use of civil remedies; reform of criminal procedure; the possibility of decriminalisation of some types of conduct; and the ongoing re-evaluation of the values and doctrines which underpin the criminal law.⁶⁵

Trends in federal criminal penalties

2.17 As noted above, a survey conducted by the ALRC in 1980 revealed more than 105 Commonwealth statutes that created offences for which a term of imprisonment may be imposed. A significant proportion of these Acts contained five or more offences punishable by a prison term.⁶⁶ The 1980 study revealed a ‘confused morass of sanctions, which lack[ed] any apparent consistency, rationale or planning’.⁶⁷ Similar issues were identified in relation to fines imposed as alternatives to imprisonment.

2.18 The ALRC’s 2001 survey of over 2,400 penalty provisions, as part of its inquiry into civil and administrative penalties, revealed that fines and imprisonment remain the principal criminal penalties used in Australian legislation.⁶⁸ Approximately 800 offences provided for imprisonment as a sentencing option. Of those, 279 provided for imprisonment only,⁶⁹ and the remainder provided for imprisonment or a fine, or both. Other less common criminal penalties included forfeiture of property, and the cancellation of licences. The ALRC found that the most serious sanction (imprisonment) is likely to be reserved for serious breaches of the law or for situations in which Parliament seeks to highlight the immorality of the offence.

2.19 The ALRC’s brief survey of criminal offence provisions enacted in 2004 (to July 2004) confirms the primacy of imprisonment and fines in federal criminal law. Of the 25 statutes that included new offences, imprisonment was a penalty option for offences in 17 statutes. Of those, offence provisions in six statutes provided for

64 See, eg, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth).

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

66 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [72].

67 *Ibid.*, [410].

68 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [2.99].

69 These offences often involved contempt or providing false or misleading information: *Ibid.*, [2.99].

imprisonment or a fine, while offence provisions in two statutes provided for both imprisonment and a fine. In all, the penalties ranged from five penalty units (currently \$550)⁷⁰ to 25 years imprisonment.

2.20 The dominance of imprisonment and fines in federal legislation does not necessarily mean that all federal offenders receive fines or custodial sentences.⁷¹ Alternative sentencing orders may be made where it is within the power of a court in the relevant state or territory to do so.⁷²

Trends in federal prosecutions

2.21 ALRC 44 remarked that in 1988 there was little published information about the number and characteristics of federal offenders. Many studies undertaken in respect of offenders in the states and territories did not distinguish between federal and non-federal offenders.⁷³ Little has changed in the intervening years—it is still difficult to locate data on persons who are prosecuted under federal legislation.

2.22 In order to establish trends in relation to federal offenders, the ALRC has reviewed prosecution statistics published by the Commonwealth Director of Public Prosecutions (CDPP) in its Annual Reports. However, the CDPP does not prosecute all federal offences. The Australian Taxation Office (ATO)⁷⁴ and the Australian Securities and Investments Commission (ASIC)⁷⁵ can conduct their own prosecutions for minor offences.⁷⁶ Further, some state and territory authorities occasionally prosecute federal offences. The number of federal prosecutions conducted by agencies other than the CDPP is not readily known, but it may be significant. For example, in 2003–04, 462 defendants were convicted after ASIC commenced prosecution against them.⁷⁷

2.23 The ALRC has also considered data on the population of federal offenders in Australian prisons. Comparing CDPP prosecutions data with federal prisoner data

70 *Crimes Act 1914* (Cth) s 4AA.

71 Where a penalty for an offence is imprisonment, a fine may be imposed in addition to or in substitution for imprisonment: *Ibid* s 4B. Various aspects of penalty setting are considered in: Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (2004) <www.ag.gov.au> at 17 September 2004.

72 *Crimes Act 1914* (Cth) s 20AB. See further Ch 7.

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

74 An agreement between the CDPP and the ATO enables ATO officers to conduct prosecutions for summary offences under various tax laws. Australian Taxation Office, *ATO Prosecution Policy* <www.law.ato.gov.au> at 17 September 2004, [4.4.1].

75 ASIC generally refers matters to the CDPP when it has completed its own investigations, or earlier in serious cases. By arrangement with the CDPP, ASIC conducts minor regulatory prosecutions. See Australian Securities and Investments Commission, *Annual Report 1999-2000* (2000), 34.

76 There is also an internal agreement between the Australian Competition and Consumer Commission (ACCC) and the CDPP covering the referral of matters to the CDPP for prosecution. The ACCC has not conducted any prosecutions to date.

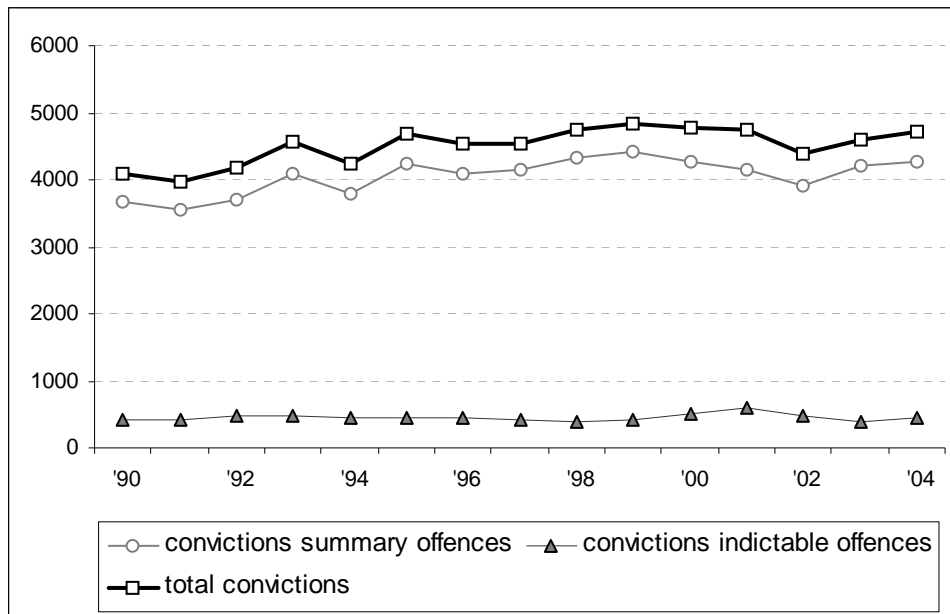
77 Australian Securities and Investments Commission, *Correspondence*, 21 December 2004.

reveals that the federal prisoner population represents only a small proportion of the total number of federal offenders each year.

2.24 Figure 2–1 shows the number of defendants convicted of summary or indictable offences as a result of prosecutions by the CDPP since 1990, the year Part IB of the *Crimes Act* was enacted. These data provide the best information available on the number of federal offenders. Surprisingly, the number of indictable offences leading to conviction has remained relatively stable since the enactment of Part IB, while the number of summary convictions has risen only slightly (17%) over a 14-year period.

2.25 Figure 2–1 also shows that the majority of federal offenders are convicted of summary offences. For example, in the year 2003–04, 4,279 defendants were convicted of a summary federal offence, compared with 449 defendants convicted of an indictable federal offence. Despite the introduction of a number of serious federal offences in recent years, the bulk of prosecution activity still relates to less serious criminal matters.⁷⁸

Figure 2–1: Defendants convicted as a result of prosecutions by the CDPP



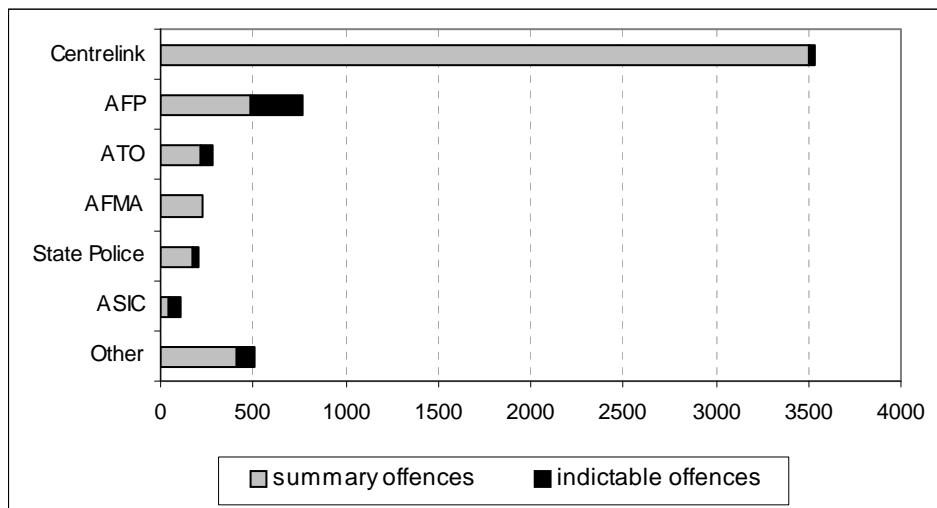
Source: Commonwealth Director of Public Prosecutions, *Annual Reports* (various years)

78 Some indictable matters can be dealt with summarily. See *Crimes Act 1914* (Cth) ss 4J, 4JA, and Ch 7.

2.26 One trend to emerge from the data, which is not captured in Figure 2–1, is the high proportion of federal offenders that plead guilty. In 2003–04, of the 4,279 defendants convicted of a summary federal offence, 97% pleaded guilty. Similarly, of the 449 defendants convicted of an indictable federal offence, 86% pleaded guilty. The proportion of defendants pleading guilty has been consistently high since 1989–90.

2.27 The data also suggest that the majority of charges dealt with by the CDPP are for offences of a financial nature. Social security prosecutions have comprised the bulk of the CDPP’s caseload over the last five years. In 2003–04, around 45% of summary matters dealt with by the CDPP came under the *Social Security Act 1991* (Cth). A large number of summary charges dealt with by the CDPP are also for imposition or fraud under the *Crimes Act*. With the commencement of the major provisions of the *Criminal Code* in 2001 there has been a shift in the source of offences. The number of summary matters dealt with under the *Criminal Code* increased sharply in 2003–04, with the vast majority of these being prosecutions relating to obtaining a financial advantage. The bulk of indictable matters dealt with by the CDPP continue to be fraud offences under the *Crimes Act*. There has also been a marked increase in indictable matters under the *Criminal Code* for obtaining a financial advantage by deception, and general dishonesty. Charges for indictable offences under the *Customs Act 1901* (Cth) have also been consistently high.

2.28 Figure 2–2 shows the number of defendants dealt with by the CDPP in 2003–04, categorised by referring agency. The principal Commonwealth agencies referring prosecutions to the CDPP are Centrelink, the Australian Federal Police (AFP), the ATO, and the Australian Fisheries Management Authority (AFMA). Centrelink refers the bulk of summary matters to the CDPP (69% in 2003–04). The AFP refers the bulk of indictable matters to the CDPP (49% in 2003–04).

Figure 2–2: Defendants dealt with by the CDPP in 2003–04, by agency

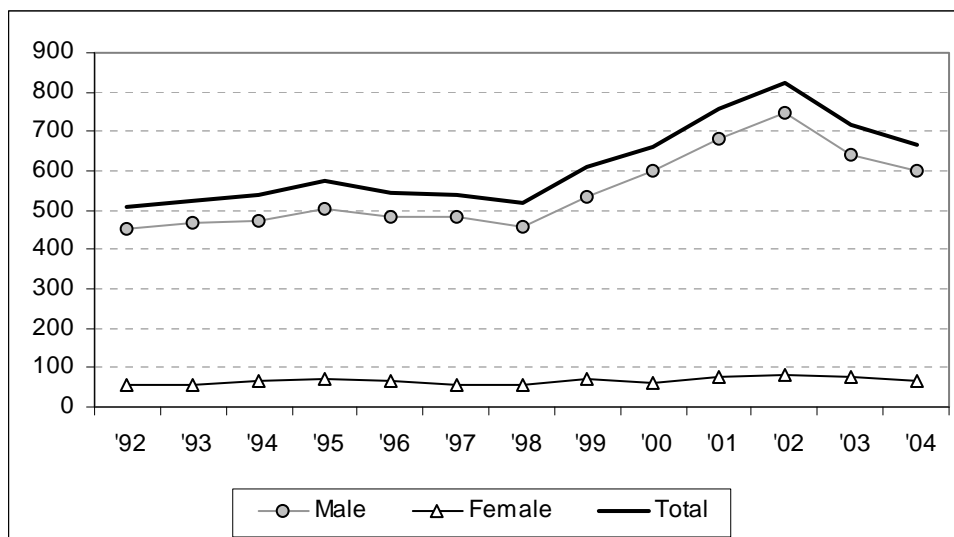
Source: Commonwealth Director of Public Prosecutions, *Annual Report 2003-04*

2.29 In summary, the CDPP figures reveal a number of things about federal offenders. Most federal offenders are convicted of summary offences. A large proportion of these offences relate to breaches of social security legislation, and regulatory legislation such as that relating to corporations, taxation and fisheries. A significant number of offenders are also convicted for financial crimes such as imposition, fraud and general dishonesty under the *Crimes Act* or the *Criminal Code*.

Trends in federal offenders in prison

2.30 Since the early 1990s, there has been a striking increase in prison populations in Australia, involving an increase in the national imprisonment rate of almost two-thirds in 18 years.⁷⁹ This trend is also true in relation to federal prisoners.

79 R Hogg, 'Prisoners and the Penal Estate in Australia' in D Brown and M Wilkie (eds), *Prisoners As Citizens: Human Rights in Australian Prisons* (2002) 3, 3.

Figure 2–3: Federal prisoners in Australia 1992–2004

Source: Commonwealth Attorney-General's Department. The data relate to prisoners as at 1 January in each year.

2.31 While representing only a small proportion of the total prisoner population in Australia (approximately 4.8% in 2001),⁸⁰ the number of federal prisoners has generally increased at a rate that has kept pace with the growth in the total prison population. Around the time of the ALRC's last inquiry in 1987, there were 505 federal prisoners,⁸¹ compared with 664 federal prisoners at 1 October 2004, representing a growth of 31% in the population of federal offenders in Australian prisons. Figure 2–3 plots this trend for the period 1992–2004, and shows that the increase is almost wholly due to changes in the number of male prisoners. At 1 January 2004, approximately 10% of federal prisoners were women, and 90% were men.

2.32 The geographic distribution of federal prisoners is very uneven, reflecting the fact that the incidence of federal crime is itself uneven.⁸² This raises the concern that policies in relation to federal prisoners may have a disparate impact in particular jurisdictions. Figure 2–4 shows the proportion of federal prisoners housed in the states

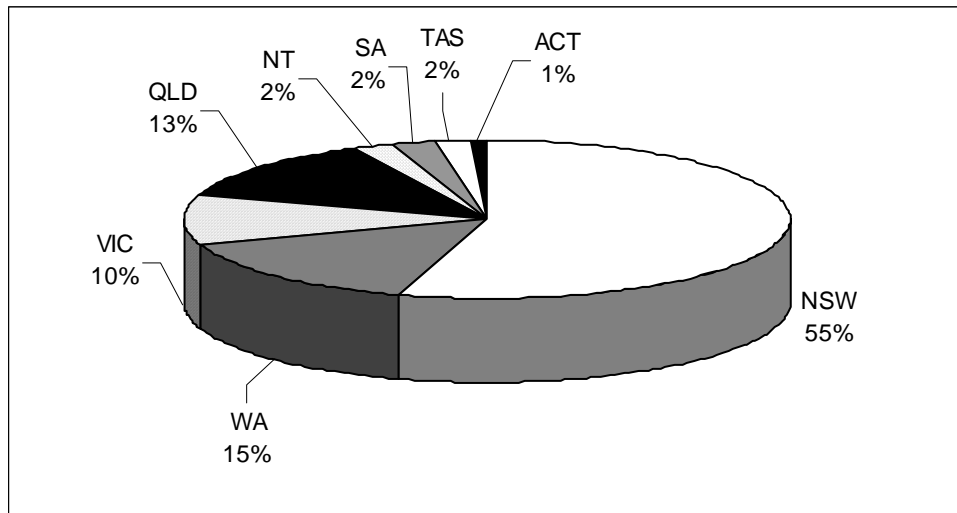
80 For the period 1984–2001, the federal prisoner population has represented between 3.31% (in 1998) and 5.49% (in 1990) of the total prison population. These figures were provided by the Australian Institute of Criminology based on Australian Institute of Criminology, *Prisoner Census 1984–1999* and Australian Bureau of Statistics, *Prisoners in Australia* 4517.0 (2000 and 2001).

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

82 For example, a large number of illegal drug importations involve persons arriving through Sydney International Airport.

and territories at 1 October 2004. At that date, 55% of federal prisoners were housed in NSW, 15% in Western Australia, 13% in Queensland, and 10% in Victoria.

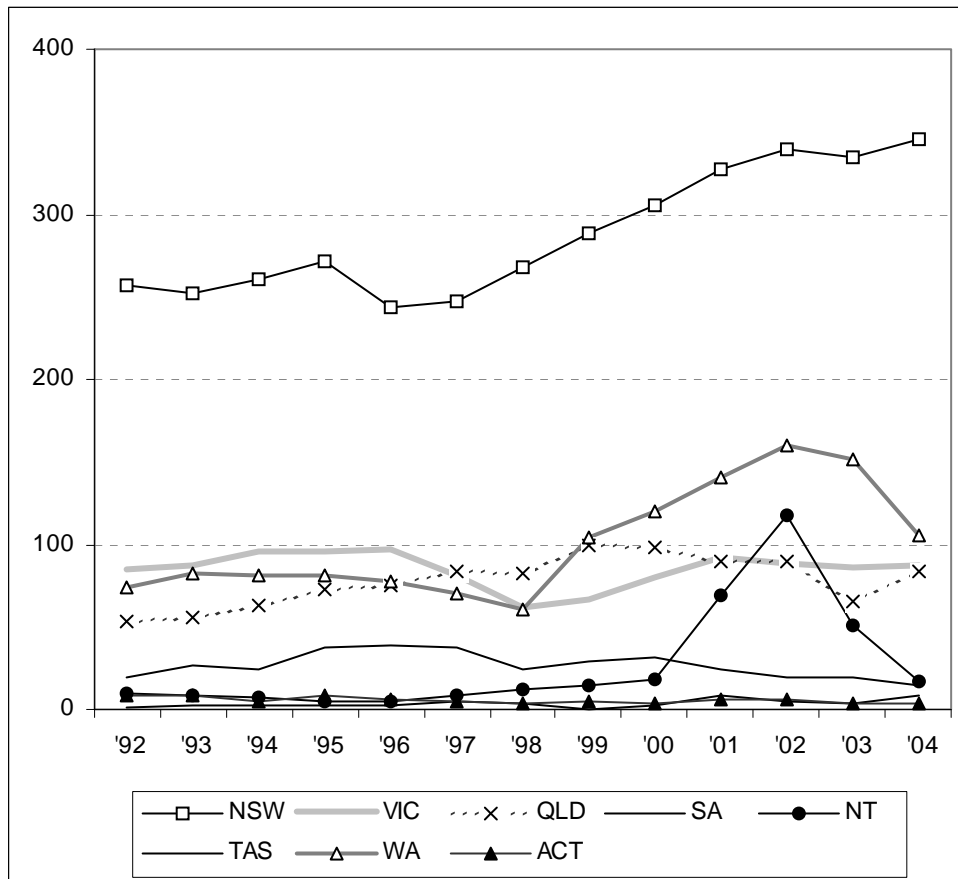
Figure 2–4: Federal prisoners by jurisdiction at 1 October 2004



Source: Commonwealth Attorney-General's Department

2.33 The percentage of federal prisoners housed in each jurisdiction has not remained static. Figure 2–5 illustrates the changing federal prisoner population in each state and territory over time. For the period 1997–2004, the number of federal prisoners located in NSW increased steadily from 247 to 346—a growth of 40%.

2.34 The number of federal prisoners in Western Australia increased by 162% for the period 1998–2002. However, the number has dropped in recent years, falling 34% in the period 2002–04. Figure 2–5 also shows a sharp increase in the federal prisoner population in the Northern Territory from 2000–02, growing 555% (off a small base) during that period. However, by 2004 the number of federal prisoners in the Northern Territory had dropped to approximately the same level as in 2000. The increase in the number of federal prisoners in both these jurisdictions was due mainly to an increase in prosecution and imprisonment for illegal fishing. Such large temporary fluctuations may place pressure on local authorities, including courts and prison administration, and may impact on their ability to administer federal prisoners.

Figure 2-5: Federal offenders in prison 1992–2004 by jurisdiction

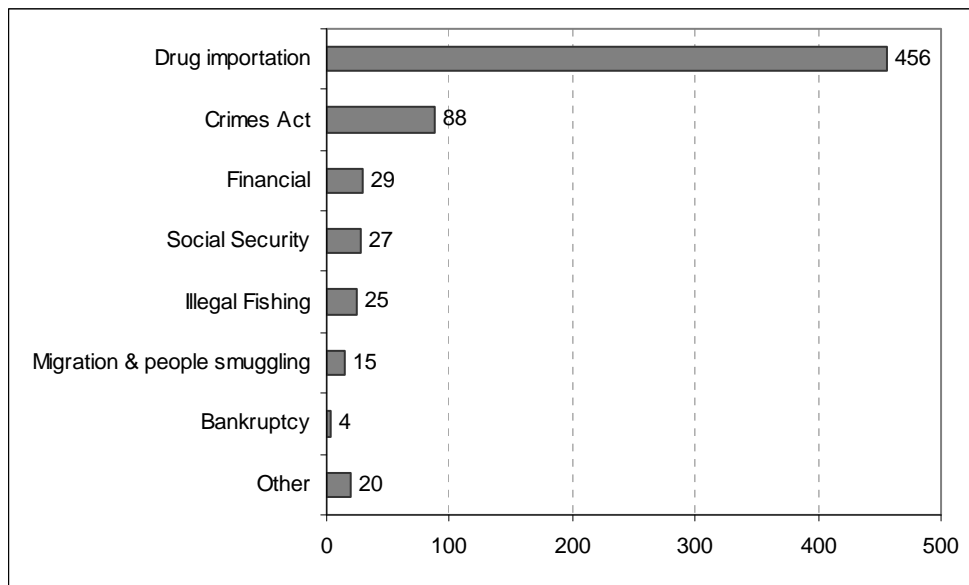
Source: Commonwealth Attorney-General's Department. The data relate to prisoners as at 1 January in each year.

2.35 There is also a wide variation in the number of federal prisoners by type of offence. As at 1 October 2004, the bulk of federal prisoners (69%) had been convicted of drug offences. A significant proportion of the remainder of federal offenders were serving prison terms for offences under the *Crimes Act* (including offences such as damaging Commonwealth property and child sex tourism) (13%); financial offences (including corporations, excise, fraud and taxation offences) (4%); social security offences (4%); and illegal fishing (4%).

2.36 Figure 2-6 shows the federal prisoner population at 1 October 2004 by category of offence. These data capture information about federal prisoners at a particular point in time. In order to establish trends in the composition of the federal prisoner

population, time-series data would be required, but this information is not currently available.

Figure 2–6: Federal offenders in prison by offence category



Source: Commonwealth Attorney-General's Department. The data relate to prisoners as at 1 October 2004.

2.37 One trend to emerge from the data, which is not captured in Figure 2–6, is the concentration of particular categories of offences in particular locations. In 2004:

- 66% of federal prisoners convicted of drug offences were located in NSW;
- 80% of federal prisoners convicted of illegal fishing were located in Queensland;
- 80% of federal prisoners convicted of migration and people smuggling were located in Western Australia;
- 48% and 21% of federal prisoners convicted of financial crimes were located in NSW and Queensland, respectively; and
- 25% of federal prisoners convicted of social security offences were located in Queensland, and 25% in Western Australia.⁸³

83 Attorney-General's Department *Federal Prisoners in Australia as at 1 October 2004*.

Implications for the sentencing of federal offenders

2.38 The changing scope of federal offences may have a number of implications for the sentencing and administration of federal offenders. A larger number of offences does not necessarily equate with a greater number of offenders. The data currently available demonstrate that there has been a modest rise in the number of federal offenders. However, if federal offences now extend to a broader range of activities, it is possible that the population of federal offenders will increase over time.

2.39 An increase in the population of federal offenders could place increased pressure on court and prison administration, and the authorities responsible for the supervision of offenders who are serving non-custodial sentences. It could also lead to greater utilisation of prisoner transfer schemes, and impact on agencies responsible for the enforcement of fines and other penalties. Such a trend might justify an expansion of the federal criminal justice system.⁸⁴

2.40 The changing subject matter of federal offences may also have implications for the sentencing of federal offenders. For example, an increase in regulatory offences directed at corporate activity may require more sentencing options for corporations.⁸⁵

2.41 The subject matter of some new federal offences may increase the number of groups of offenders with special needs. For example, new computer hacking offences may mean that younger people could increasingly be represented in the federal offender population.⁸⁶ This trend could require the enactment of special provisions at the federal level for the sentencing of children and young people.⁸⁷ Similarly, a focus on transnational crime could see an increase in federal offenders with a first language other than English, requiring special consideration at sentencing, and culturally appropriate programs when serving sentences.

2.42 The enactment of Commonwealth legislation relating to terrorism, war crimes, and sexual servitude could mean that federal offenders increasingly include offenders who are violent or in need of special management regimes. This may raise a number of issues. The seriousness of some of these offences may be grounds for consideration of 'serious offender' provisions, such as exist in some states.⁸⁸ Violent offenders may be required to spend longer periods of time in prison, necessitating the legislative

84 For example, ALRC 44 noted that there may be a need to establish a federal prison or federal parole board in the future as the number of federal prisoners increases: Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [97], [249]. See further Ch 3.

85 See Ch 15.

86 *Criminal Code* (Cth) s 477.1. See also R Smith, P Grabosky and G Urbas, *Cyber Criminals on Trial* (2004), 141.

87 See Ch 15.

88 See, eg, *Crimes (Administration of Sentences) Act 1999* (NSW) Pt 6, Div 2.

prescription of minimum non-parole periods,⁸⁹ and restrictions on automatic parole.⁹⁰ New types of federal offenders may also require special categorisation, segregation or protection, which may affect their access to prison programs.⁹¹

2.43 A trend towards federal offences that may involve identifiable victims raises the issue of whether provision should be made in federal legislation for victim impact statements.⁹² Examples of offences that may involve identifiable victims include corporations offences, copyright offences, war crimes, cybercrime, terrorism and sex offences.

2.44 A concentration on transnational federal offences could mean greater use of extradition, international transfer of prisoners,⁹³ and deportation, thus requiring greater cooperation between international agencies and Australian authorities with responsibility for the administration of federal offenders.

2.45 As outlined above, the number of federal prisoners is relatively small in comparison with the number of defendants convicted of a federal offence. This suggests that the majority of federal offenders receive suspended or non-custodial sentences. This is a significant trend, and raises the issue of whether the Inquiry should focus on non-custodial sentencing options.

2.46 Available data also suggest that the bulk of prosecution activity in relation to federal offences is for summary offences that are economic in nature, in particular social security matters and fraud. This raises the issue of whether new sentencing options should be developed to deal with economic crime.

Question 2–1 Does the expansion in the number and scope of federal offences have implications for reform of federal sentencing law and practice?

Question 2–2 Does the composition of the population of federal offenders have implications for reform of federal sentencing law and practice?

89 Part IB of the *Crimes Act* has been amended by the *Anti-Terrorism Act 2004* (Cth) to specify that for certain offences, including terrorism offences, the court must fix a single non-parole period of at least three quarters of the sentence, or if two or more sentences have been imposed, for the aggregate of those sentences: *Crimes Act 1914* (Cth) s 19AG.

90 See *Crimes Act 1914* (Cth) s 19AL(1), (2).

91 See, eg, the *Crimes (Administration of Sentences) Amendment (Category AA) Inmates Regulation 2004* (NSW), which establishes, as a new category, prisoners who pose a special risk to national security.

92 *Crimes Act 1914* (Cth) s 16A lists 'the personal circumstances of any victim of the offence' as a relevant matter to which the court should have regard when passing sentence. See further Ch 11.

93 Transfer of prisoners is discussed in Ch 4.

3. Legal and Institutional Framework

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International context

3.1 Sentencing has been defined as ‘the process by which people who offend against the criminal law have sanctions imposed upon them in accordance with that law’.⁹⁴ As part of this process, the offender becomes subject to the authority of the state in a very direct way. The state may impose a range of sanctions on the individual including the ultimate sanction, in Australia today, of depriving the individual of his or her liberty.⁹⁵ Because of the potential for abuses to arise in this context, the international community has developed a number of binding international instruments dealing with the imposition of punishment by the state.

94 Victorian Sentencing Committee, *Sentencing* (1988), 15.

95 Corporal punishment and capital punishment are no longer available in Australia for federal offences: *Crimes Act 1914* (Cth) s 16D; *Death Penalty Abolition Act 1973* (Cth). The death penalty has also been abolished in each of the states: see, eg, *Crimes Amendment (Death Penalty Abolition) Act 1985* (NSW).

3.2 Minimum standards and safeguards in relation to criminal justice systems are contained in the *International Covenant on Civil and Political Rights* (ICCPR)⁹⁶ and the Second Optional Protocol to that Covenant on the abolition of the death penalty;⁹⁷ the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984* (CAT);⁹⁸ and the *Convention on the Rights of the Child 1989* (CROC).⁹⁹

3.3 Australia is a party to all these instruments and any federal, state or territory legislation, policy or practice that is inconsistent with them will place Australia in breach of its international obligations. The first Optional Protocol to the ICCPR,¹⁰⁰ to which Australia is also a party, allows individual Australians to lodge complaints about alleged breaches of the ICCPR with the United Nations Human Rights Committee.

3.4 The international instruments listed above include a number of principles relevant to sentencing:

- everyone convicted of a crime should have the right to have his or her conviction and sentence reviewed by a higher tribunal;¹⁰¹
- a court must not impose a penalty that is heavier than the one that applied at the time when the criminal offence was committed;¹⁰²
- no one should be subject to arbitrary detention,¹⁰³ that is, detention that does not have an adequate legal basis or is otherwise unreasonable, inappropriate or unjust.¹⁰⁴ The detention must also be proportionate;¹⁰⁵ and
- no one should be subjected to torture or to cruel, inhuman or degrading treatment or punishment at the hands of the state.¹⁰⁶

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

97 *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).

98 *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).

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

100 *[First] Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, [1991] ATS 39, (entered into force generally on 23 March 1976).

101 ICCPR art 14(5).

102 ICCPR art 15(1).

103 ICCPR art 9(1).

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

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

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

3.5 In relation to juvenile offenders, CROC requires that the arrest, detention or imprisonment of a child should be a measure of last resort and for the shortest appropriate period of time.¹⁰⁷ The Convention also requires that alternatives to detention be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to their circumstances and the offence.¹⁰⁸

3.6 In addition to these treaties, other international standards and guidelines have been developed, which have broad support among the international community. These include the United Nations Standard Minimum Rules for the Treatment of Prisoners 1957,¹⁰⁹ the United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (the Beijing Rules)¹¹⁰ and the United Nations Standard Minimum Rules for Non-custodial Measures 1990 (the Tokyo Rules).¹¹¹ The Preamble to the Tokyo Rules makes clear that the goal of criminal justice systems and of sentencing should be the rehabilitation and reintegration of offenders into society.

3.7 The impact of these international instruments in domestic law, where they have not been expressly incorporated into Australian law, remains somewhat uncertain.¹¹² However, the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) grants the Human Rights and Equal Opportunity Commission (HREOC) the power to inquire into certain acts or practices, including an act or practice by or on behalf of the Australian Government, that may be inconsistent with the human rights recognised in international law.¹¹³

Historical and constitutional framework

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

107 CROC art 37(b).

108 CROC art 40(4).

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

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

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

112 See *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.

113 *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 11(1)(f).

3.9 The *Constitution* does not give the Australian Parliament a general power to make criminal laws.¹¹⁴ However, the Australian Parliament may make criminal laws in relation to the subject matter of other powers granted to it by the *Constitution*. For example, the Parliament's express power to make laws with respect to 'fisheries in Australian waters beyond territorial limits' (s 51(x)) also enables it to create fisheries offences. Similarly, Parliament's express power to make laws with respect to 'trade and commerce with other countries' (s 51(i)) enables it to criminalise the importation of certain substances, such as narcotics. The Parliament also has express power in relation to areas such as taxation, defence, social security, and migration.¹¹⁵

Investigation of federal crime

Australian Federal Police

3.10 There has been a federal law enforcement body in Australia since the establishment of the Commonwealth Investigation Service in 1917. The Commonwealth Peace Officer Guard was formed in 1925 to act as security officers for various Commonwealth establishments and the two bodies were amalgamated in 1960 to form the Commonwealth Police Force.¹¹⁶ This body was amalgamated with the ACT Police Force in 1979 to form the Australian Federal Police (AFP).

3.11 Under the *Australian Federal Police Act 1979* (Cth), the AFP is responsible for enforcing federal law, safeguarding Commonwealth interests and protecting Commonwealth property. The AFP is Australia's international law enforcement and policing representative, and the chief source of advice to the Australian Government on policing issues. The AFP also provides police services for the ACT, the Jervis Bay Territory and external territories such as Norfolk Island and Christmas Island.

3.12 AFP priorities are set through ministerial direction. Current areas of focus include organised crime, transnational crime, money laundering, major fraud, illicit drug trafficking, and e-crime.¹¹⁷ Investigation and enforcement in these and other areas of federal responsibility require the AFP to work across jurisdictional boundaries and in partnership with state and territory police services. It also requires national level coordination and cooperation. One example of this is the establishment of the Australian High Tech Crime Centre (AHTCC), which is hosted by the AFP but includes representatives from all state and territory police forces in its staff and on its Board of Management.

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

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

116 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), 39.

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

Other investigatory agencies

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

3.14 The AFP works in close partnership with the Australian Crime Commission (ACC) and the Australian Transaction Reports and Analysis Centre (AUSTRAC). The ACC was established by the *Australian Crime Commission Act 2002* (Cth) with the primary objective of combating nationally significant crime. The ACC Board, which oversees the work of the ACC, is made up of the Commissioner of the AFP, the eight state and territory police commissioners, the Director-General of Security, the Chair of ASIC, the CEO of the Australian Customs Service and the Secretary of the Attorney-General's Department. AUSTRAC was established under the *Financial Transaction Reports Act 1988* (Cth) as Australia's anti-money laundering regulator and specialist financial intelligence unit.

Prosecution of federal offences

3.15 Section 13 of the *Crimes Act 1914* (Cth) provides that, unless a contrary intention appears in the Act or regulation creating an offence, any person may institute proceedings in relation to federal offences. State and territory authorities—as well as some federal agencies such as the ACCC, ASIC and the ATO—undertake some federal prosecutions.¹¹⁸ This is especially so in relation to high volume matters of minimal complexity where, for example, pleas of guilty are common or prison sentences are rarely imposed.¹¹⁹ More complex matters are referred to the Commonwealth Director of Public Prosecutions (CDPP). The CDPP is the principal Australian Government agency responsible for conducting prosecutions of federal offences.

3.16 It is also possible for a private citizen to initiate a prosecution, although this occurs very rarely.¹²⁰ Section 9(5) of the *Director of Public Prosecutions Act 1983* (Cth) provides that the CDPP may take over a proceeding that was instituted, or is being carried on, by another person. Having taken over proceedings, the CDPP may continue the proceedings or decline to take them forward.

118 See further Ch 2.

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

120 See, eg, *Sankey v Whitlam* (1978) 142 CLR 1.

3.17 The office of the CDPP was established in 1984. The primary role of the CDPP is to prosecute offences against federal law and to recover the proceeds of crime committed against the Australian Government.¹²¹ The CDPP falls within the portfolio responsibilities of the federal Attorney-General. While the Attorney-General may issue guidelines or directions to the CDPP, the office was established to allow the prosecution process to operate independently of the political process.

3.18 The CDPP is not an investigative agency. It can prosecute only when there has been an investigation by the AFP or another investigative agency. However, the CDPP regularly provides advice and other assistance during the investigative stage, particularly in large and complex matters. Once a prosecution has been commenced and referred to the CDPP, the decision whether to proceed with that prosecution is made by the CDPP independently of those who were responsible for the investigation.¹²²

3.19 In relation to joint offenders who face both federal charges and state or territory charges, arrangements are in place to decide whether the prosecution is handled by the relevant state or territory authority or by the CDPP. This decision is based on factors such as the relative seriousness of the state or territory and federal charges; the degree of inconvenience or prejudice to either the accused or the prosecution if the proceedings are split; the investigative agencies involved; and other matters that go to the balance of convenience.¹²³

3.20 Reciprocal arrangements are also in place in relation to prosecutions involving both federal and state or territory indictable offences, which allow the CDPP to prosecute state and territory offences, and state and territory prosecution authorities to prosecute federal offences. This means that, where an offender is accused of both state or territory offences and federal offences that are sufficiently related, all the offences can be included on the same indictment and prosecuted at the one trial.¹²⁴

3.21 Decisions in the prosecution process are made in accordance with the guidelines laid down in the *Prosecution Policy of the Commonwealth*.¹²⁵ The policy states that the decision whether or not to prosecute is the most important step in the prosecution

121 The CDPP is also responsible for the conduct of prosecutions for offences against the laws of Jervis Bay Territory and Australia's external territories, other than Norfolk Island. The CDPP may also be involved in the prosecution of offences against state law in some circumstances, discussed further below.

122 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (2004) <<http://www.cdpp.gov.au/Prosecutions/Policy/Default.aspx>> at 6 October 2004, [1.3].

123 Office of the Commonwealth Director of Public Prosecutions, *Consultation*, Sydney, 16 September 2004.

124 The power of the CDPP to conduct prosecutions for state and territory offences has been considered in *R v Hughes* (2000) 202 CLR 535; *Bond v The Queen* (2000) 201 CLR 213; *R v Holden* (2001) 120 A Crim R 240; *R v Dexter* (2002) 136 A Crim R 276; *Director of Public Prosecutions (Cth) v Fukusato* [2003] 1 Qd R 272.

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

process.¹²⁶ The two major considerations in this decision are whether the evidence is sufficient to justify the institution or continuation of a prosecution (including whether there is a reasonable prospect of conviction)¹²⁷ and whether the public interest requires a prosecution to be pursued.¹²⁸

3.22 Another important step in the prosecution process, and one that can have a significant impact on sentence, is the decision as to what charges to pursue. The *Prosecution Policy of the Commonwealth* states that prosecutors should choose a charge or charges that adequately reflect the nature and extent of the criminal conduct disclosed by the evidence and that will provide the court with an appropriate basis for sentence. Usually these will be the most serious charges disclosed by the evidence, but there is scope for flexibility in this regard; for example, negotiations between the defence and the prosecution, referred to as ‘charge bargaining’, may sometimes result in the defendant pleading guilty to a lesser charge.

3.23 The *Prosecution Policy of the Commonwealth* states that charge bargaining ‘can be consistent with the requirements of justice’ subject to a number of constraints including that the prosecution does not initiate such negotiations. In addition, there must be evidence to support the charges pursued; the charges must bear a reasonable relationship to the nature of the criminal conduct of the accused; and the charges must provide an adequate basis for an appropriate sentence in all the circumstances of the case.¹²⁹ The *Prosecution Policy* makes clear that charges should not be laid with the intention of providing scope for charge bargaining.¹³⁰

Adjudication of federal offences by state and territory courts

3.24 The High Court of Australia was established in 1903, and in due course other federal courts were also created, including the Family Court in 1975, the Federal Court in 1976, and the Federal Magistrates Court in 1999. However, in order to avoid the financial and administrative costs associated with establishing a separate system of federal criminal courts, the Australian Parliament chose to rely heavily on the state and territory courts to adjudicate proceedings with respect to federal offences.

3.25 This was made possible by ss 71 and 77(iii) of the *Australian Constitution*. Section 71 vests the judicial power of the Commonwealth in the High Court, in such other federal courts as the Australian Parliament creates, and in such other courts as it invests with federal jurisdiction. Section 77(iii) provides that the Australian Parliament may make laws investing state courts with federal jurisdiction.

126 Ibid, [2.2].

127 Ibid, [2.4].

128 Ibid, [2.8].

129 Ibid, [5.14].

130 Ibid, [2.20].

Vesting of federal criminal jurisdiction in state and territory courts

3.26 Section 39(2) of the *Judiciary Act 1903* (Cth) invests state courts with federal jurisdiction in both civil and criminal matters, subject to certain limitations and exceptions. Specific provision is made under s 68(2) of the *Judiciary Act* for the exercise of federal criminal jurisdiction by state and territory courts. Section 68(2) provides:

The several Courts of a State or Territory exercising jurisdiction with respect to:

- (a) the summary conviction; or
- (b) the examination and commitment for trial on indictment; or
- (c) the trial and conviction on indictment;

of offenders or persons charged with offences against the laws of the State or Territory, and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith, shall, subject to this section and to section 80 of the Constitution, have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth.

Application of state and territory procedural laws

3.27 Sections 68(1) and 79 of the *Judiciary Act* pick up and apply state and territory procedural laws to federal prosecutions in state and territory courts. Section 68(1) states that the law of the relevant state or territory is to be applied in relation to arrest, custody, bail, summary conviction, committal hearings, trial on indictment and appeals. Section 79 states that the law of the relevant state or territory, including in relation to procedure, evidence and the competency of witnesses, is to be binding on courts exercising federal jurisdiction.

3.28 The distinction between what is procedural and what is substantive law is not always clear and must sometimes be determined by the courts on a case-by-case basis. For example, the High Court has considered the meaning of the term ‘conviction’ in s 68(1) and decided that the term includes the imposition of sentence. As a result, state and territory sentencing laws may be picked up and applied as federal law by s 68(1), unless otherwise provided by federal law.¹³¹

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

Although the distinction between federal and State jurisdiction has created problems, they were largely foreseen by the authors of the *Judiciary Act*. Pt X of the Act provided a solution to the difficulties arising from a duality of jurisdiction by applying to criminal cases heard by State courts in federal jurisdiction the laws and procedure applicable in the State (s 68). The purpose of the section was, so far as possible, to enable State courts in the exercise of federal jurisdiction to apply federal laws according to a common procedure in one judicial system.¹³²

131 *Putland v The Queen* (2004) 204 ALR 455.

132 *R v Loewenthal* (1974) 131 CLR 338, 345.

3.30 Examples of state and territory procedural laws in the area of sentencing that have been picked up by s 68(2) include:

- the power of a Magistrates' Court to defer sentencing an offender aged between 17 and 25 years;¹³³
- the diversion program operating in the Victorian Magistrates' Court permitting a magistrate to discharge an accused without a finding of guilt where he or she has completed a diversion program to the satisfaction of the magistrate;¹³⁴ and
- state and territory sentencing schemes that permit aggregate sentences to be imposed for multiple indictable offences.¹³⁵

3.31 In addition to the operation of the *Judiciary Act*, Part IB of the *Crimes Act* expressly picks up and applies certain aspects of state and territory law in sentencing federal offenders. Section 16E, for example, provides that the law of a state or territory relating to the commencement of sentence or a non-parole period applies to a person who is sentenced for a federal offence in that state or territory. Similarly, s 19AA provides that certain aspects of state and territory law that provide for the remission or reduction of sentence may also apply in relation to federal offenders sentenced in that state or territory.

3.32 The application of state and territory procedural laws to the sentencing of federal offenders has the potential to give rise to differences in the way federal offences are dealt with from one jurisdiction to the next. The High Court has held, however, that the administration of federal criminal law on a state-by-state basis is valid even where this gives rise to significant differences in the procedures applying to the adjudication of federal offences.¹³⁶ This issue is considered further in Chapters 4 and 5.

3.33 Part IB of the *Crimes Act* was developed partly in response to concerns about 'the increasing divergence of, and frequent changes, both administrative and statutory, to the State and Territory legislation'¹³⁷ governing federal offenders. While Part IB does provide a greater degree of uniformity in some areas, for example, in the fixing of

133 *Sentencing Act 1991* (Vic) s 83A.

134 *Magistrates Court Act 1989* (Vic) s 128A.

135 See *Sentencing Act 1995* (NT) s 52(1); *Sentencing Act 1997* (Tas) s 11; *Criminal Law (Sentencing) Act 1988* (SA) s 18A. See also M Pedley, *Federal Sentencing in Victoria* (2004) Commonwealth Director of Public Prosecutions, 2.

136 *Williams v The King [No 2]* (1934) 50 CLR 551; *Leeth v Commonwealth* (1991) 174 CLR 455; *Putland v The Queen* (2004) 204 ALR 455.

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

non-parole periods for federal offenders,¹³⁸ it is not a complete code and so significant elements of state and territory procedural law continue to apply to the sentencing of federal offenders. This issue is discussed further in Chapter 11.

3.34 In relation to children or young persons charged with a federal offence, s 20C of the *Crimes Act* provides that they may be tried, punished or otherwise dealt with as if the offence were an offence against a law of the state or territory. This means that young federal offenders may be dealt with in state and territory children's courts and that the sanctions available in those courts may also be applied. Young offenders are discussed further in Chapter 15.

Trial by jury

3.35 Federal offences are broadly divided into two categories—summary offences and indictable offences—on the basis of how serious the offences are considered to be. Summary offences are those of a less serious nature—they are tried before a magistrate sitting without a jury, and attract lower penalties. The vast majority of criminal matters are summary in nature. Indictable offences are more serious, attract higher penalties and, in general, must be tried before a judge and jury.

3.36 The *Crimes Act* defines indictable offences as those punishable by imprisonment for a period of more than 12 months, unless the contrary intention appears.¹³⁹ Summary offences are defined as those not punishable by imprisonment, or punishable by imprisonment for 12 months or less, unless the contrary intention appears.¹⁴⁰ Many federal statutes expressly state whether offences are to be disposed of summarily or by indictment.¹⁴¹

3.37 The *Crimes Act* provides that certain indictable offences may be dealt with summarily unless otherwise provided. For example, a court of summary jurisdiction may, upon the request of the prosecutor, hear and determine proceedings in respect of an indictable federal offence if the offence relates to property whose value does not exceed \$5,000.¹⁴² An indictable offence punishable by imprisonment for a period not exceeding ten years may also be heard and determined by a court of summary jurisdiction with the consent of the prosecutor and the defendant.¹⁴³ Reduced

138 *Crimes Act 1914* (Cth) ss 19AB–19AK provides a separate regime for fixing non-parole periods for federal offenders, which was intended to replace state and territory provisions on this subject: see Explanatory Memorandum (Senate), Crimes Legislation Amendment Bill (No 2) 1989 (Cth).

139 *Crimes Act 1914* (Cth) s 4G.

140 *Ibid* s 4H.

141 See, eg, *Airports Act 1996* (Cth) s 245; *Sea Installations Act 1987* (Cth) s 65; *Export Control Act 1982* (Cth) s 17.

142 *Crimes Act 1914* (Cth) s 4J(4).

143 *Ibid* s 4J(1).

maximum penalties apply in these circumstances.¹⁴⁴ This issue is discussed further in Chapter 7.

3.38 Trials on indictment of federal offences are almost always heard by a judge of a state or territory court sitting with a jury. Section 80 of the *Constitution* requires that ‘the trial on indictment of any offence against any law of the Commonwealth shall be by jury’. The current view of the High Court is that this provision does not provide a guarantee of trial by jury in all serious criminal cases. Rather, the trial must be by jury where a criminal trial proceeds on indictment, but there is no constitutional requirement that particular offences be tried on indictment.¹⁴⁵ Although some states allow majority verdicts in relation to state matters,¹⁴⁶ unanimous verdicts are required in relation to federal offences.¹⁴⁷

3.39 The role of the jury in a trial on indictment is to decide whether or not the defendant is guilty of the offence beyond reasonable doubt. The jury is required to apply the law, as explained by the judge, to the facts that the jury find to be true. The judge is the final authority on the applicable law. The jury must decide the facts of the case. Juries are not currently involved in sentencing hearings except to the extent that the judge is required to rely on the facts as found by the jury at trial. If the jury finds the defendant guilty, the judge will decide what sentence should be imposed. Sentencing does not usually occur immediately. The hearing is adjourned to a later date to give the parties and the judge time to consider and prepare for sentencing. Whether or not there is a potential role for juries in the sentencing hearing is considered in Chapter 11.

Adjudication of federal offences by federal courts

Existing criminal jurisdiction of federal courts

3.40 As explained above, most federal criminal offences are prosecuted in state and territory courts in accordance with state and territory criminal procedures. At present, 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.¹⁴⁸ While these courts are essentially courts of civil jurisdiction and currently play a limited role in the federal criminal justice system, it has been suggested that they have the potential to play a more extensive role in the future.¹⁴⁹

144 Ibid s 4J.

145 *R v Archdall* (1928) 41 CLR 128; *Kingswell v The Queen* (1985) 159 CLR 264.

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

147 *Cheatle v The Queen* (1993) 177 CLR 541.

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

149 D Renton, ‘The Federal Criminal Justice System: A New Direction’ (2003) 27 *Criminal Law Journal* 66.

3.41 The *Australian Constitution* provides that the Australian Parliament may create federal courts and define the jurisdiction of those courts, within the limits set by ss 75 and 76 of the *Constitution*. Parliament has legislated to create a number of federal courts and to confer federal jurisdiction on those courts in particular areas.

The High Court of Australia

3.42 The High Court of Australia stands apart from other federal courts in that it is established under the *Constitution*, rather than an Act of the Australian Parliament. The High Court has original and appellate jurisdiction. The court's original jurisdiction is defined in ss 75 and 76 of the *Constitution*. The original jurisdiction of the High Court is defined in s 75 to include a number of specific areas of national significance. Section 76 provides that the Parliament may make laws conferring additional jurisdiction on the High Court in a range of areas.

3.43 The Parliament has passed laws extending the original jurisdiction of the High Court, including conferring on the court jurisdiction to hear trials of indictable offences against federal laws,¹⁵⁰ but the court has not exercised this jurisdiction since 1933.¹⁵¹

3.44 More significant, in the area of criminal law, is the High Court's very wide appellate jurisdiction, which stems from s 73 of the *Constitution*. The High Court is Australia's highest appellate court, including in relation to matters of federal, state and territory criminal law. In 2003–04, 17% of applications for special leave to appeal filed in the High Court were criminal matters, and 22% of Full Court appeals heard in that year were criminal matters.¹⁵²

The Federal Court of Australia

3.45 The *Federal Court of Australia Act 1976* (Cth), establishing the Federal Court of Australia, does not itself confer jurisdiction on the Federal Court. Instead s 19 of the Act provides that the Court 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 court by over 150 federal statutes. A more general civil jurisdiction has been conferred on the Federal Court by s 39B(1A)(c) of the *Judiciary Act* but this provision excludes general jurisdiction in relation to criminal matters.

3.46 The Federal Court has, however, been granted a limited summary jurisdiction in relation to federal criminal matters by various federal statutes.¹⁵³ At present there is no provision in the *Federal Court of Australia Act* for criminal juries, which would be necessary if the Federal Court were to be invested with original jurisdiction to try

150 *Judiciary Act 1903* (Cth) s 30.

151 *R v Porter* (1933) 55 CLR 182. See R Fox, *Victorian Criminal Procedure: State and Federal Law* (11th ed, 2002), [3.6.1].

152 High Court of Australia, *Annual Report 2003–04* (2004), 104.

153 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).

federal indictable offences.¹⁵⁴ The Federal Court also exercises general appellate jurisdiction in criminal matters on appeal from the Supreme Court of Norfolk Island and, until 2002, exercised similar jurisdiction in relation to matters on appeal from the Supreme Court of the ACT.

The Family Court of Australia

3.47 The *Family Law Act 1975* (Cth) established the Family Court of Australia as a specialist court with original jurisdiction in relation to family law matters.¹⁵⁵ This is almost exclusively a civil jurisdiction. However, the Family Court has a limited criminal jurisdiction that is ancillary to its role in determining civil disputes in family law matters. Where a person contravenes an order made under the *Family Law Act* without reasonable excuse, the court may impose one or more of the following sanctions: a bond; a fine; a sentence of imprisonment; or a range of alternative sentences where these are available under state or territory law.¹⁵⁶

The Federal Magistrates Court

3.48 The *Federal Magistrates Act 1999* (Cth) established the Federal Magistrates Court, also known as the Federal Magistrates Service.¹⁵⁷ The court is intended to operate as informally as possible and to encourage the use of alternative dispute resolution processes in order 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’.¹⁵⁸ Section 10 of the *Federal Magistrates Act* provides that the court has such original jurisdiction as is vested in it by laws made by the Australian Parliament. Jurisdiction has been conferred on the court in relation to certain family law matters, which would otherwise be heard by the Family Court, and in relation to a variety of general federal matters, which would otherwise be heard by the Federal Court¹⁵⁹ but does not include jurisdiction in relation to criminal matters.

Extending the criminal jurisdiction of federal courts

3.49 In its 2001 report, *The Judicial Power of the Commonwealth* (ALRC 92), the ALRC noted the dynamic nature of the federal judicial system, and commented that:

The Constitution grants flexible powers to the Commonwealth Parliament to establish and maintain a federal judicial system. At one end of the spectrum the powers can accommodate a system in which there are no federal courts (other than the High Court) and all federal judicial power is exercised by state courts ... At the other end, the powers can accommodate a system

154 Sections 39–41 of the *Federal Court of Australia Act 1976* (Cth) do address jury trials but these provisions apply only to civil suits.

155 Jurisdiction is also conferred on the court by a number of other statutes including the *Child Support (Registration and Collection) Act 1988* (Cth), the *Child Support (Assessment) Act 1989* (Cth), and the *Marriage Act 1961* (Cth).

156 *Family Law Act 1975* (Cth) s 112AD.

157 *Federal Magistrates Act 1999* (Cth) s 8.

158 J Crawford and B Opeskin, *Australian Courts of Law* (4th ed, 2004), 121.

159 *Ibid* 122–123.

in which federal courts exercise exclusive jurisdiction in all matters of federal jurisdiction. The current system lies between these extremes and any movement along the spectrum in either direction is ultimately a matter for the Commonwealth Parliament.¹⁶⁰

3.50 Since World War II, federal criminal law has grown dramatically in scope and importance, with the addition of revenue offences (tax and welfare fraud), fisheries offences and corporations law offences.¹⁶¹ As discussed in Chapter 2, the scope of federal criminal law has expanded further in recent years, particularly in relation to terrorism, national security and transnational crime. For this reason, it may be timely to reconsider the role of the federal courts in the federal criminal justice system.

3.51 In the ALRC's 1980 report, *Sentencing of Federal Offenders* (ALRC 15), one commissioner suggested the establishment of a completely separate federal criminal justice system.¹⁶² Under this proposed framework, federal magistrates courts would undertake the bulk of federal criminal prosecutions, including committal proceedings for indictable offences; and a single judge of the Federal Court—or a newly created intermediate level court—would hear appeals from these courts and try indictable offences. The Full Federal Court would hear appeals from that court, with the High Court being the final court of appeal.

3.52 Although the majority of commissioners in 1980 rejected the option of an entirely separate federal criminal justice system, the majority did recommend that the jurisdiction of the Federal Court of Australia be expanded to cover appeals against conviction and sentence in federal criminal matters.¹⁶³ This was on that basis that it would assist in promoting uniformity and consistency in dealing with federal offenders.¹⁶⁴

3.53 In relation to the hearing of matters on appeal by the Federal Court, Professor Richard Fox and Professor Arie Freiberg have suggested that:

If it cared to do so, the Commonwealth could, in the interest of improving federal sentencing consistency, direct that all criminal appeals in matters of federal jurisdiction should lie from state courts ... direct to the Federal Court ...¹⁶⁵

3.54 A development of this kind would build on the existing criminal jurisdiction of the Federal Court and the Court's past experience in hearing appeals in criminal matters from the Supreme Court of the ACT.

160 Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, ALRC 92 (2001), 145.

161 Butterworths, *Federal Criminal Law: Looseleaf Service*, [1–010].

162 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), 99–100 (Professor Duncan Chappell).

163 *Ibid*, Rec 65.

164 *Ibid*, 263.

165 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [1.303].

3.55 It would also be possible to expand the jurisdiction of the Federal Court to deal with a greater range of criminal matters at first instance. For example, in October 2003, the Treasurer announced the establishment of a working party to consider whether appropriate criminal offences for cartel behaviour could be introduced into federal law.¹⁶⁶ It is possible that developments of this kind may lead to an increase in the original criminal jurisdiction of the Federal Court. With the establishment of the Federal Magistrates Court in 1999, it is also now possible to consider whether that court should be given original jurisdiction to deal with federal offences either generally, or in particular areas.

3.56 The *Australian Constitution* imposes limits on the extent to which the jurisdiction of the federal courts can be expanded. Federal courts cannot, for example, be invested with state jurisdiction.¹⁶⁷ This may give rise to difficulties for the federal courts in dealing with offenders charged with both federal offences and state or territory offences (unless the state or territory offences fell within the accrued jurisdiction of the federal court). This may mean, for example, that some federal offences are more suitable than others for adjudication by federal courts.

3.57 ALRC 15 noted that a major issue to be considered in relation to any expansion of federal involvement in the federal criminal justice system would be the resources required to create and maintain the necessary infrastructure. Resources would be required, for example, if there were to be an increase in the number of federal magistrates to hear criminal matters in the Federal Magistrates Court or to facilitate the use of juries in trials of indictable offences before the Federal Court.

3.58 Some of the resource concerns discussed in ALRC 15 have been allayed in the intervening years. Since 1980, the Australian Government has established the CDPP to prosecute federal offences and created the Federal Magistrates Court. In addition, the Federal Court of Australia now sits in each state and territory as required. However, significant resource issues would remain to be considered if federal involvement in the criminal justice system were to be expanded significantly.

3.59 At this early stage of the Inquiry, the ALRC has not formed a view as to whether it would be desirable to expand the jurisdiction of federal courts in relation to criminal matters generally, or particular classes of criminal matters. The ALRC is interested in hearing the views of stakeholders on this issue.

166 P Costello (Treasurer), 'Working Party to Examine Criminal Sanctions for Cartel Behaviour' (Press Release, 3 October 2003).

167 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

Question 3–1 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?

Sentencing of federal offenders

3.60 Federal criminal offence provisions include a maximum penalty that may be imposed for breach of the provision, which is usually expressed in terms of a monetary fine, penalty units,¹⁶⁸ or a term of imprisonment. These specified penalties are not a complete statement of the sentencing options available to a court determining a federal matter. A range of sentencing options is available, some of which are expressly set out in Part IB of the *Crimes Act* and some of which are picked up from state and territory law by the *Crimes Act* and regulations made under the Act.¹⁶⁹

3.61 Part IB of the *Crimes Act* deals in detail with some aspects of the sentencing of federal offenders, including setting out some of the principles underlying this process. Section 17A states, for example, that a court shall not impose a sentence of imprisonment unless, having considered all other available sentences, the court is satisfied that no other sentence is appropriate in all the circumstances of the case. Imprisonment is to be a punishment of last resort unless a contrary intention appears in the law creating the offence.

3.62 Section 16A sets out a range of matters that the court must take into account in sentencing a federal offender, such as the nature and circumstances of the offence; any injury, loss or damage caused; whether the offender pleaded guilty, showed contrition or cooperated with the authorities; and the offender's character, antecedents, cultural background, age, means and physical or mental condition. This section also provides some indication of the intended purposes of sentencing, including the imposition of adequate punishment and the deterrent effect on the offender.¹⁷⁰

3.63 Part IB also sets out the range of options available to a sentencing court in dealing with a federal offender. These include: dismissing the charges; discharging the offender without proceeding to conviction; convicting the offender but releasing him or her without passing sentence; and sentencing the offender to a term of imprisonment but suspending the sentence.¹⁷¹

168 A penalty unit is defined as \$110 unless the contrary intention appears: *Crimes Act 1914* (Cth) s 4AA.

169 A range of sanctions is also available to the Family Court under the *Family Law Act 1975* (Cth) s 112AD.

170 *Crimes Act 1914* (Cth) s 16A(2), discussed in Ch 8.

171 *Ibid* ss 19B(1)(c), 19B(1)(d), 20(1)(a), 20(1)(b), respectively.

3.64 Section 20AB(1) sets out a range of alternative sentencing options available in relation to federal offenders where these are provided by state or territory law. These include options such as community service orders; work orders; periodic detention; weekend detention; attendance and attendance centre orders; and all similar sentences and orders. Where these are available in relation to state and territory offenders in a particular jurisdiction, the court may impose such a sentence on a federal offender. The section also provides that other orders may be prescribed in the regulations. Various alternative state and territory orders are picked up in reg 6 of the *Crimes Regulations 1990* (Cth). The full range of sentencing options available in relation to federal offenders is considered in detail in Chapter 7.

3.65 Part IB of the *Crimes Act* also includes detailed provisions in relation to: fixing non-parole periods and making recognizance release orders;¹⁷² conditional release on parole or licence;¹⁷³ fitness to be tried;¹⁷⁴ and offenders with a mental illness or intellectual disability.¹⁷⁵

3.66 Sentence is normally imposed at a sentencing hearing and, except to the extent that federal law provides otherwise, state and territory procedural law applies at such hearings. While the procedures are not as strictly defined as those governing trial, some procedural safeguards have been developed, particularly in relation to matters in dispute at the hearing. The sentencing decision is, in general terms, based on facts relating to the nature and circumstances of the offence and facts relating to the offender. Both the prosecution and the defence may make submissions and adduce evidence relevant to sentence. This may be by way of an agreed statement of facts. Where the facts are disputed, it is generally accepted that factors that are adverse to the offender's interests must be established beyond reasonable doubt,¹⁷⁶ while factors that are favourable to the offender's interests need only be proved on the balance of probabilities.¹⁷⁷ Issues in relation to the rules of procedure and evidence applicable at sentencing hearings are discussed in detail in Chapter 11.

3.67 The role of the prosecution in the sentencing hearing is to assist the court to ensure that a proper sentence is imposed in the public interest. The role of the prosecutor is not to ensure that the maximum possible penalty is imposed, but that the penalty imposed is appropriate in all the circumstances of the case.¹⁷⁸ This is consistent with s 16A(1) of the *Crimes Act*, which imposes an obligation on the court,

172 Ibid ss 19AB–19AK, discussed in Ch 9.

173 Ibid ss 19AL–20AA, discussed in Ch 13.

174 Ibid ss 20B–20BH, discussed in Ch 14.

175 Ibid ss 20BJ–20BY, discussed in Ch 14.

176 *Anderson v The Queen* (1993) 177 CLR 520.

177 *R v Storey* [1998] 1 VR 359.

178 Office of the Commonwealth Director of Public Prosecutions, *Correspondence*, 29 October 2004.

in sentencing a federal offender, to impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.

3.68 Although the sentencing options available to the court are influenced by decisions taken by the prosecution about what charges to bring, the final decision on sentence is for the judge or magistrate alone. Other issues that arise in determining sentence are examined in detail in Chapters 8 and 9.

Imprisonment and punishment of federal offenders

3.69 The Australian Government historically relied, and continues to rely, on the states and territories to accommodate federal offenders and those accused of crimes against federal law. The states and territories also administer and supervise federal offenders sentenced to alternative custodial sentences, such as periodic and weekend detention and non-custodial orders such as community service orders. They also enforce the collection of fines imposed for federal offences on behalf of the Australian Government.

3.70 These arrangements have a firm constitutional basis. Section 120 of the *Australian Constitution* requires ‘every State to make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences’. This provision imposes an obligation on the states to receive federal prisoners¹⁷⁹ and to administer other types of penalties imposed on federal offenders. By and large, the states and territories bear the immediate cost of providing these services, but some account is made for the cost of providing corrective services for federal offenders through the Commonwealth Grants Commission process. Section 120 does not, however, preclude greater involvement by the Australian Government in this area.

3.71 Section 120 does not govern arrangements in relation to federal offenders sentenced to terms of imprisonment by courts in the territories. The Northern Territory has its own custodial facilities and some federal offenders are detained in those facilities. Offenders sentenced to terms of imprisonment by courts in the ACT, however, are currently sent to NSW correctional institutions because there are currently no custodial facilities for convicted persons in the ACT. In April 2004, the ACT Government announced the development and construction of an ACT prison, which is expected to be completed by 2007.¹⁸⁰

3.72 Section 120 also provides that the Australian Parliament may make laws to give effect to this provision. Several laws have been passed regulating the detention of federal prisoners held in state prisons, including the *Removal of Prisoners (Territories)*

179 *R v Turnbull; Ex parte Taylor* (1968) 123 CLR 28, 37.

180 ACT Government, ‘Stanhope Funds ACT Prison’ (Press Release, 16 April 2004).

Act 1923 (Cth), the *Transfer of Prisoners Act 1983* (Cth),¹⁸¹ and the *Commonwealth Prisoners Act 1967* (Cth), which was repealed by the *Crimes Legislation Amendment Act (No 2) 1989* (Cth) and replaced by Part 1B of the *Crimes Act*.

3.73 Section 3B of the *Crimes Act*, for example, 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. Such arrangements are in place in relation to each state and territory.¹⁸²

3.74 A number of other provisions in Part 1B also relate to the imprisonment of federal offenders in state and territory custodial facilities. Section 18(2) provides, for example, that where a state or territory offender may be imprisoned in a particular kind or class of prison, a federal offender may, in corresponding cases, be imprisoned in the kind or class of prison appropriate to the circumstances. Section 19A provides that federal offenders ordered to be detained in state or territory prisons may be detained in any prison in that state or territory and may be moved from one prison to another in the state or territory as if the person were detained as a state or territory offender.

3.75 The Australian Government's reliance on state and territory correctional services and facilities means that it does not incur the financial and administrative costs associated with establishing a separate correctional system for federal offenders. The relatively small number of federal offenders and their geographical distribution¹⁸³ make it difficult to justify the cost of establishing separate federal services and facilities, unless there are overwhelming policy reasons for going down this path. It may be that such reasons arise, if at all, in relation to particular categories of offenders (for example, those representing a national security risk) rather than in relation to federal offenders generally.

3.76 There are currently about 700 federal prisoners serving a full-time custodial sentence in Australia. The geographical spread of federal offenders across the states and territories would make it difficult to accommodate them in a centralised facility, without removing many of them from access to family and support networks. The problem of housing federal offenders would be exacerbated by the need to separate offenders on the basis of sex, security classification, and so on. It is unclear how many federal offenders are serving alternative custodial or community based sentences in Australia.¹⁸⁴

181 Transfer of prisoners is discussed further in Ch 4.

182 See further Ch 12.

183 See further Ch 2.

184 The lack of accurate information available about federal offenders is discussed in Chs 2, 11 and 16.

3.77 Although reliance on state and territory correctional services and facilities for federal offenders seems an efficient use of available resources, the ALRC is interested in hearing from stakeholders about the current arrangements. In particular, the ALRC is interested in receiving information on whether these arrangements give rise to any problems and whether there are cogent reasons why consideration should be given to establishing separate federal correctional services or facilities for federal offenders, or for any particular categories of federal offender.

Question 3–2 Are the current arrangements by which the states and territories provide correctional services and facilities for federal offenders satisfactory? Should the Australian Government establish correctional services or facilities for federal offenders or particular classes of federal offenders?

4. Location of Crime and Punishment

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Introduction

4.1 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. The sentencing options available in relation to federal offenders in each state and territory vary depending on the jurisdiction in which the offender is tried and sentenced.¹⁸⁵ For this reason the location of trial and punishment has a direct impact on the equality of treatment of federal offenders across Australia. Chapter 5 examines the issue of equality of treatment in more detail. This chapter examines the issues that determine the location of court proceedings and punishment, as well as the transfer of federal offenders between jurisdictions.

Location of court proceedings

4.2 One of the purposes of a criminal justice system is to ‘protect the continued physical well-being of members of a community’.¹⁸⁶ For historical reasons, each state and territory in Australia developed its own criminal justice system to protect the community within its jurisdictional limits. Generally speaking, these jurisdictional

185 The sentencing options available in each state and territory are discussed in Ch 7.

186 M Findlay, S Odgers and S Yeo, *Australian Criminal Justice* (1994), 11.

limits are based on territorial limits: offences committed in a state or territory are dealt with by the criminal justice system of that state or territory. There are exceptions to the territorial basis of jurisdiction where there is sufficient connection between the offence and the state or territory, for example, where a criminal act occurs outside the state or territory but causes substantial harm within the jurisdiction.¹⁸⁷

4.3 Where an offence is committed against a law of the Commonwealth, the situation is not as clear. Federal criminal law operates throughout Australia, and in some circumstances outside Australia.¹⁸⁸ However, as discussed in Chapter 3, the vast majority of federal criminal matters are dealt with by state and territory courts. This is possible because ss 39(2) and 68(2) of the *Judiciary Act 1903* (Cth) invest state and territory courts with federal criminal jurisdiction and s 68(1) picks up and applies the laws of the states and territories in relation to arrest, custody and court procedure to federal offenders.

4.4 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 limit does not apply to the vast majority of 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. Section 70A of the *Judiciary Act* provides that in these circumstances the trial may be held in any state or territory. Section 70 of that Act deals with the situation in which a federal offence is begun in one state or territory and completed in another. In these circumstances the offender may be tried in either state or territory. Specific legislation deals with offences committed at sea or on interstate or international aircraft flights.¹⁸⁹

4.5 The *Judiciary Act* also provides that, subject to the limit 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.¹⁹⁰

4.6 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 were

187 See, eg, *Lipohar v The Queen* (1999) 200 CLR 485.

188 For example, Part IIIA of the *Crimes Act 1914* (Cth) creates child sex tourism offences. Australian citizens and residents may be prosecuted for these offences even where the offence was committed overseas.

189 See, eg, *Crimes at Sea Act 2000* (Cth) and related state and territory legislation; *Crimes (Aviation) Act 1991* (Cth).

190 *Judiciary Act 1903* (Cth) s 68(5)–(6).

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.¹⁹¹

4.7 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. 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.¹⁹²

4.8 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.

Question 4–1 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?

Location of punishment

4.9 Generally, federal offenders serve their sentences in the state or territory in which the offence was prosecuted. This is because:

Cooperative arrangements between different jurisdictions for the enforcement of orders of courts made in relation to criminal matters is a modern departure from a general principle of law that the courts of one jurisdiction will not directly enforce the penal laws of another. The latter concept was based on the idea that criminal laws are territorial and can only affect those whom they can reach.¹⁹³

191 Office of the Commonwealth Director of Public Prosecutions, *Consultation*, Sydney, 16 September 2004.

192 Constitutional Commission, *Final Report of the Constitutional Commission* (1988), [9.705].

193 R Fox, *Victorian Criminal Procedure: State and Federal Law* (11th ed, 2002), 25.

4.10 While the general principle as to locality of punishment seems appropriate in relation to state and territory offenders, there seems no reason in principle why federal offenders sentenced in a particular jurisdiction should also be punished in that jurisdiction. 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 prisoners serving full-time custodial orders, offenders serving alternative sentencing orders picked up from state and territory law, and offenders released on parole or licence. The ALRC is interested in 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.

Question 4–2 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?

Transfer of prisoners

4.11 Complementary federal, state and territory legislation provides for the transfer of offenders serving a term of imprisonment between jurisdictions.¹⁹⁴ The *Transfer of Prisoners Act 1983* (Cth) allows for the transfer of federal prisoners 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).

4.12 Federal prisoners may also be transferred under other legislation. The *Removal of Prisoners (Territories) Act 1923* (Cth) provides for the transfer of prisoners in specified circumstances to and from a territory, including where there is a lack of suitable prison facilities in the territory in question. As the *Transfer of Prisoners Act* does not apply to persons detained under certain legislation relating to minors, some

¹⁹⁴ See *Transfer of Prisoners Act 1983* (Cth); *Prisoners (Interstate Transfer) Act 1993* (ACT); *Prisoners (Interstate Transfer) Act 1982* (NSW); *Prisoners (Interstate Transfer) Act 1983* (NT); *Prisoners (Interstate Transfer) Act 1982* (Qld); *Prisoners (Interstate Transfer) Act 1982* (SA); *Prisoners (Interstate Transfer) Act 1983* (Vic); *Prisoners (Interstate Transfer) Act 1983* (WA); *Prisoners (Interstate Transfer) Act 1982* (Tas).

jurisdictions make other provision for the interstate transfer of child offenders.¹⁹⁵ A person who has been sentenced to imprisonment for offences against both federal and state or territory laws is a 'joint prisoner'. The transfer of a joint prisoner must comply with the requirements of both the *Transfer of Prisoners Act* and the relevant state or territory transfer legislation.¹⁹⁶

Welfare transfer order

4.13 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.¹⁹⁷

4.14 The Commonwealth Attorney-General has a discretion whether to make a welfare transfer order. In exercising this power, the Attorney-General must have regard to all relevant matters, including the interests of the administration of justice and the prisoner's welfare.¹⁹⁸ 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.¹⁹⁹ The Attorney-General may revoke a welfare transfer order on his or her own motion, or at the prisoner's request.²⁰⁰

Trial transfer order

4.15 The Commonwealth Attorney-General may, either on his or her own motion or upon the prisoner's request, apply to a court of summary jurisdiction in the state or territory in which the prisoner is held, for a trial transfer order to another state or territory. This may be done where:

- a warrant for the arrest of the federal prisoner has been issued;
- the warrant relates to a charge or charges in respect of a federal, state or territory offence; and

195 See, eg, *Children (Interstate Transfer of Offenders) Act 1988* (NSW).

196 *Transfer of Prisoners Act 1983* (Cth) s 30.

197 *Transfer of Prisoners Regulations 1984* (Cth) reg 4.

198 *Transfer of Prisoners Act 1983* (Cth) s 6(3).

199 *Ibid* s 6(4).

200 *Ibid* s 7.

- the Attorney-General certifies in writing that it is desirable in the interests of the administration of justice that the prisoner be transferred to another jurisdiction to stand trial for the charge or charges to which the warrant relates.²⁰¹

4.16 A prisoner might seek to have the trial for an outstanding federal offence transferred from one state or territory to another for various reasons. For example, significant pre-trial publicity or other prejudice against the defendant within a particular jurisdiction could undermine his or her opportunity for a fair trial.²⁰²

4.17 The Attorney-General must not make an application for a trial transfer order unless the appropriate Minister of the state or territory to which the prisoner would be transferred has consented to the transfer.²⁰³ If the court is satisfied that the applicant for a transfer order is entitled to make the application, the court must grant the transfer order unless it is satisfied that:

- the charge concerned is of a trivial nature;
- the application has not been made in good faith in the interests of the administration of justice;
- the transfer of the prisoner would be likely to prejudice the conduct of any proceeding in which the prisoner is, or is likely to be, an appellant or an applicant for review, or of any proceeding incidental to such proceeding; or
- for any reason, it would be unjust or oppressive to grant the application.²⁰⁴

4.18 The applicant or prisoner may apply to the relevant Supreme Court for review of the court's decision.²⁰⁵ The court may revoke a trial transfer order at any time before its execution.²⁰⁶

Return transfer order

4.19 The *Transfer of Prisoners Act* provides for the return of a federal prisoner to the original state or territory in which he or she was sentenced in order to stand trial, to complete his or her original sentence, or for the purpose of an appeal or review of his or her original conviction or sentence.²⁰⁷ Generally, the Commonwealth Attorney-General may order a federal prisoner's return where all outstanding matters in the receiving state or territory have been finally dealt with, and any new sentence of

201 Ibid ss 8(1), 9(1).

202 D Lanham, *Cross Border Criminal Law* (1997), 61.

203 *Transfer of Prisoners Act 1983* (Cth) ss 8(2), 9(2).

204 Ibid s 10(4).

205 Ibid s 11(1).

206 Ibid s 12.

207 Ibid ss 14, 16, 16C.

imprisonment is for a lesser period than that remaining in the original state or territory. However, the Attorney-General may declare the person to be exempt from return, where it is in the interests of the administration of justice and the welfare of the prisoner to do so.²⁰⁸

Security transfer order

4.20 The *Anti-terrorism Act (No 2) 2004* (Cth) amended the *Transfer of Prisoners Act* to allow the Commonwealth Attorney-General to order that federal prisoners, including prisoners held on remand, be transferred from one state or territory to another if the Attorney-General believes on reasonable grounds that it is necessary in the interests of ‘security.’ The term ‘security’ is defined to include the protection of the Commonwealth, the states and territories, and their people, from espionage, sabotage, politically motivated violence, the promotion of communal violence, attacks on Australia’s defence system or acts of foreign interference.²⁰⁹ In exercising this power, the Attorney-General must have regard to all relevant matters, including the administration of justice and the prisoner’s welfare. Generally, the Attorney-General must review a security transfer order every three months.²¹⁰

4.21 The security transfer order provisions of the *Transfer of Prisoners Act* have been criticised on several grounds. It has been suggested that the provisions may breach Australia’s obligations under the *International Covenant on Civil and Political Rights 1966* (ICCPR).²¹¹ When appearing before the Senate Committee in relation to the Anti-terrorism Bill, a representative of the Human Rights and Equal Opportunity Commission commented that:

security transfer orders create the possibility for delay in bringing a remand prisoner to trial and, accordingly, the possibility for prolonged pre-trial detention, which may contravene article 9 of the International Covenant on Civil and Political Rights.²¹²

4.22 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 security transfer orders should be available on *operational* security grounds, in addition to national security.²¹³ The Commonwealth Attorney-General’s Department advised the Senate Committee that this matter is already on the agenda of relevant ministerial councils, and is scheduled to be dealt with at a later date.²¹⁴

208 Ibid s 14.

209 Ibid s 3(1).

210 Ibid s 16C(2).

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

212 Senate Legal and Constitutional Legislation Committee—Parliament of Australia, *Provisions of the Anti-terrorism Bill (No 2) 2004* (2004), 35–36. Art 9(3) of the ICCPR provides that any person arrested or detained on a criminal charge shall be entitled to trial within a reasonable time or to release.

213 Ibid, 39.

214 Ibid, 38.

Effect of a transfer order

4.23 Where a federal prisoner is transferred under the *Transfer of Prisoners Act*, the sentence imposed in the original state or territory—including any directions as to the date of commencement or the minimum term of imprisonment—is deemed to have been imposed by the corresponding court of the receiving state or territory. Any period of imprisonment served prior to transfer is deemed to have been served in the receiving state or territory. In his Second Reading Speech for the Bill, the Hon Lionel Bowen commented that:

the broad effect is that once a prisoner is transferred the sentence imposed in the first jurisdiction is deemed for all purposes, including the exercise of the royal prerogative, remissions and release on parole, to have been imposed in the jurisdiction to which he has been transferred. Remissions [earned] and non-parole periods fixed in the original jurisdiction are applied in the receiving jurisdiction.²¹⁵

4.24 Upon transfer, the sentence imposed in the original state or territory ceases to have effect in that state or territory other than for limited purposes, including any outstanding appeal or review of conviction or sentence imposed in that jurisdiction. For example, in *X v The Queen* the applicant had been sentenced in NSW for a federal offence and was subsequently transferred to Western Australia under a welfare transfer order. The applicant argued that he should have been entitled to a reduction in respect of the NSW sentence as a result of subsequent legislative changes relating to the re-determination of sentences in that jurisdiction. The Western Australian Court of Criminal Appeal rejected this argument on the basis that NSW sentencing law ceased to affect the prisoner's sentence upon his transfer to Western Australia.²¹⁶

Question 4–3 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?

Question 4–4 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?

Transfer of parole orders

4.25 Complementary state and territory legislation provides for the transfer of state and territory parole orders through a system of interstate transfer, registration and

²¹⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 19 October 1983, 1897 (L Bowen—Minister Assisting the Prime Minister for Commonwealth-State Relations), 1898.

²¹⁶ *X v The Queen* (1993) 69 A Crim R 130.

enforcement.²¹⁷ The standard conditions attached to parole orders include supervision and reporting to a parole officer, keeping the parole officer informed of any change of job or address and the need for permission to travel interstate or overseas. The parole order normally specifies that the offender report to a particular parole office or officer in the relevant state or territory. This means that an offender released on parole in one state or territory cannot travel freely, even within Australia. The transfer scheme was developed to allow offenders released on parole to transfer to another jurisdiction for reasons such as family responsibilities or to pursue work or study opportunities.

4.26 Under the complementary scheme, the parole order, once registered, ceases to have effect in the original state or territory, as does the related sentence of imprisonment. The laws of the receiving state or territory then apply as if the sentence of imprisonment had been imposed and served, and the parole order made, in that jurisdiction. Where the state or territory offender breaches the conditions of parole, the order can be legally enforced in the receiving jurisdiction.

4.27 This legislative scheme does not, however, apply to federal offenders. Federal parole orders are made by the Commonwealth Attorney-General, or the 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*. The purpose of the amendment is to provide for the parolee to report to a new probation officer in the new jurisdiction. Grant and revocation of parole is discussed in detail in Chapter 13.

Question 4–5 Are the existing legislation and arrangements for the transfer between Australian states and territories of federal offenders released on parole satisfactory?

Transfer of alternative sentences

4.28 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 NSW and the ACT.

217 See *Parole Orders (Transfer) Act* 1983 (ACT); *Parole Orders (Transfer) Act* 1983 (NSW); *Parole Orders (Transfer) Act* 1981 (NT); *Parole Orders (Transfer) Act* 1984 (Qld); *Parole Orders (Transfer) Act* 1983 (SA); *Parole Orders (Transfer) Act* 1983 (Tas); *Parole Orders (Transfer) Act* 1983 (Vic); *Parole Orders (Transfer) Act* 1984 (WA).

4.29 In 2003–04, the ACT and NSW 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.²¹⁸ The scheme 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 to take advantage, for example, of better family or community support or increased choice of employment or study opportunities.

4.30 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.

4.31 The scheme will formalise a process that already occurs between all Australian jurisdictions, allowing offenders with certain alternative sentences to have their orders supervised and administered informally in another jurisdiction. This informal scheme 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 case of breach.²¹⁹ It is unclear whether the new scheme, if it expands to become a national scheme, will include federal offenders.

Question 4–6 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?

International transfer of prisoners

4.32 Australia participates in an international transfer of prisoners scheme, which operates under the Council of Europe's *Convention on the Transfer of Sentenced Persons*.²²⁰ 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

218 *Community Based Sentences (Transfer) Act 2003* (ACT); *Crimes (Interstate Transfer of Community Based Sentences) Act 2004* (NSW).

219 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 12 December 2002, 4374 (T Quinlan).

220 Australia became a party to the Convention in September 2002, and it entered into force for Australia on 1 January 2003. Australia is also a party to the *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*, [2002] ATS 22, (entered into force 26 September 2002).

balance of their sentences in an Australian prison.²²¹ The Australian Parliament has enacted legislation to give effect to the transfer scheme—namely, the *International Transfer of Prisoners Act 1997* (Cth)—and the states and territories have enacted complementary legislation.

4.33 Generally, a prisoner may be transferred between a participating country and Australia if: the prisoner is eligible for a transfer; Australia and the transfer country have agreed to the transfer on agreed terms; the prisoner or the prisoner's representative has consented in writing to the transfer on those terms; the relevant conditions for transfer are satisfied; and the transfer of the prisoner is not likely to prevent his or her surrender to any extradition country known by the Attorney-General to have requested the prisoner's extradition, or to have expressed an interest or be reasonably likely to do so.²²²

4.34 Upon transfer to Australia, the prisoner's sentence is treated as a federal sentence of imprisonment and the prisoner is treated as a federal prisoner. Any relevant Australian law, practice or procedure concerning the detention of prisoners applies in relation to the prisoner upon his or her transfer to Australia.²²³

4.35 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 wish 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.²²⁴

Question 4–7 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?

221 The scheme also permits foreign prisoners 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.

222 *International Transfer of Prisoners Act 1997* (Cth) s 10.

223 *Ibid* s 46.

224 Parliamentary Library, *International Transfer of Prisoners Amendment Bill 2004*, Bills Digest 102 2003–04, (2004).

5. Equality in the Treatment of Federal Offenders

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Introduction

5.1 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.

5.2 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.²²⁵ This creates the potential for federal offenders to receive different sentences for the same offence, depending on the jurisdiction in which they are sentenced.

5.3 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

225 The sentencing options available in the various states and territories are discussed in Ch 7.

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.²²⁶

Constitutional constraints?

5.4 In *Leeth v Commonwealth*²²⁷ the High Court considered whether the *Australian Constitution* requires the equal application of federal law throughout Australia. The issue arose in relation to a section of the *Commonwealth Prisoners Act 1967* (Cth), which was repealed by the *Crimes Legislation Amendment Act (No 2) 1989* (Cth) and replaced by Part IB of the *Crimes Act 1914* (Cth). Section 4 of the *Commonwealth Prisoners Act* provided that, where an offender was sentenced to a term of imprisonment for a federal offence and the law of the state or territory in which the offender was sentenced required that a minimum non-parole period be set, the federal offender was to be sentenced in accordance with that law. This meant that federal offenders in different states and territories could receive different non-parole periods in relation to similar offences.

5.5 In *Leeth*, Deane and Toohey JJ found that the principle of the equality of all persons under the law could be implied in the *Australian Constitution*. They were of the view that s 4 of the *Commonwealth Prisoners Act* was not consistent with that principle because the differential treatment of federal offenders in each state and territory under s 4 had no rational or reasonable basis.²²⁸ Gaudron J considered s 4 in breach of a different constitutional provision, s 71, which deals with the judicial power of the Commonwealth. Her Honour was of the view that the like treatment of like persons in like circumstances was fundamental to the judicial process and that the *Commonwealth Prisoners Act* conferred a power on the courts that was inconsistent with this principle.²²⁹

5.6 Brennan J did not agree that the legislation under consideration was inconsistent with s 71 of the Constitution. He was of the view that s 4 of the *Commonwealth Prisoners Act* related to the exercise of executive, rather than judicial, power. In addition, the distinction drawn by s 4 was reasonable and rational given the constitutionally recognised system of incarcerating federal prisoners in state and territory prisons. He did, however, express the view that the *Constitution* required some elements of federal criminal law to be uniform throughout Australia, for example, the maximum penalty prescribed for a breach of federal criminal law.²³⁰

226 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), 136.

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

228 *Ibid.*, 486–487.

229 *Ibid.*, 502–503.

230 *Ibid.*, 475–477.

5.7 Mason, Dawson and McHugh JJ were of the view, however, that there was no general requirement in the *Constitution* that federal laws must operate in a uniform way throughout Australia. They stated that:

the administration of the criminal law of the Commonwealth is organized upon a State by State basis and there may be significant differences in the procedures applying to the trial of a person charged with an offence against a Commonwealth law according to the State in which he is tried.²³¹

5.8 Issues of uniformity and equality of treatment have been considered in a number of recent High Court cases.²³² While the Court has often been divided on the issue, it appears that the majority of the Court will allow some scope for the differential treatment of federal offenders under the criminal laws of the states and territories. Constitutional constraints of the kind discussed in *Leeth* are unlikely to arise in relation to any proposed changes intended to introduce greater uniformity of treatment among federal offenders, but may need to be considered if greater reliance on state and territory sentencing law and practice is to be considered in relation to federal offenders.

The policy choice

Previous consideration by the ALRC

5.9 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.²³³ 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.²³⁴ 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.²³⁵

5.10 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.²³⁶ In their view, while the existing arrangements had a number of problems that affected the treatment of federal offenders, it had generally ‘withstood

231 Ibid, 467.

232 See, eg, *Kruger v Commonwealth* (1997); *Cameron v The Queen* (2002) 209 CLR 339; *R v Gee* (2003) 212 CLR 230; *Putland v The Queen* (2004) 204 ALR 455.

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

234 Ibid, Rec 16.

235 Ibid, Ch 5.

236 Ibid, Rec 18.

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'.²³⁷

5.11 One commissioner was of the view, however, that the only effective way to ensure that federal offenders are 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.²³⁸ In his view:

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.²³⁹

5.12 The majority, however, considered that a major extension of the Commonwealth's authority in the criminal justice area would not be practical. Staffing courts and providing corrective services in all parts of Australia would duplicate existing state facilities, and impose unjustified costs on the federal criminal justice system. In their view, a selective interventionist approach might also have the advantage of accelerating moves to reform the law governing sentencing and punishment of all offenders throughout Australia.²⁴⁰

5.13 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.²⁴¹ However, 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.²⁴²

Part IB of the Crimes Act

5.14 Following these two reports, Part IB of the *Crimes Act* introduced a number of changes intended to create greater uniformity in the treatment 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 Bill that introduced Part IB into the *Crimes Act*, the Hon Robert Brown MP, stated that:

237 Ibid, 100–101.

238 Ibid, Rec 20.

239 Ibid, 103.

240 Ibid, 100–101.

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

242 Ibid, Rec 162.

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.²⁴³

5.15 Part IB now provides a separate regime for fixing federal non-parole periods, rather than relying on applied state and territory law. 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.²⁴⁴

Observations on Part IB

5.16 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’.²⁴⁵

5.17 In *DPP v El Kharhani* the NSW Court of Criminal Appeal (NSWCCA) stated that the purpose of the new legislation was not clear.²⁴⁶ 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.²⁴⁷

5.18 The Court noted that particular difficulties arise in relation to joint offenders and offenders transferred between jurisdictions:

The difficulties are particularly acute for prisoners convicted of drug related offences. It is not at all unusual for such offenders to be charged and convicted of both Federal and State offences: the Federal offences relating to the importation and the State offences to conduct thereafter. Furthermore, the possibility which now exists that the Federal offender will be sentenced in one State but, under the *Transfer of Prisoners Act 1983* (Cth), transferred to, and

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

244 The only exception to this is remissions for industrial action by prison warders, in those jurisdictions where such remissions are available under state or territory law: *Crimes Act 1914* (Cth) s 19AA(4).

245 *Putland v The Queen* (2004) 204 ALR 455, [22].

246 *Director of Public Prosecutions (Cth) v El Kharhani* (1990) 21 NSWLR 370, 387.

247 *Ibid*, 375.

housed in a prison in another State makes the task of any adjustment to take into account the disparities that exist in sentencing from State to State within Australia, all the more difficult. It might be said that those disparities are not great in global terms. But they are well-known to the authorities and to the prisoners concerned. In so far as they occasion even comparatively short periods of differentiation in custodial punishment, they give rise to agitation, perceptions of injustice and appeals to this and other courts.²⁴⁸

5.19 While the NSWCCA was of the view that the policy choice behind Part IB was not clear, a former Commonwealth Director of Public Prosecutions, 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.²⁴⁹

5.20 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. The force of this argument may be somewhat diminished by the passage of time, as the legislation has been in operation since July 1990. Nonetheless, a common theme that emerges from the cases is that judicial officers have had difficulty with particular provisions of Part IB of the *Crimes Act*.²⁵⁰

5.21 While not criticising Part IB, in *R v Kearns* the NSWCCA noted that:

The approach to be taken to the sentencing task when one has to accommodate two distinct regimes [being the relevant State regime and the Commonwealth regime] is not an easy one.²⁵¹

Reconsidering the policy choice

5.22 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

248 Ibid, 375.

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

250 See further Ch 6.

251 *R v Kearns* [2003] NSWCCA 367, [73]. In *R v Carroll* [1991] 2 VR 509, 514 the Victorian Court of Criminal Appeal also noted that the 'situation is likely to be even more difficult where an offender has to be sentenced at the same time for State and federal offences'.

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 Commonwealth *Crimes Act*.

5.23 One area that highlights this complexity, and the lack of equal treatment that can arise as a result, is the law in relation to remissions. Section 19AA of the *Crimes Act* provides that state and territory laws that remit or reduce non-parole periods do not apply to federal offenders. The only circumstance in which such state or territory laws may be applied to a federal offender is where the law relates to remissions for industrial action by prison warders.²⁵²

5.24 The *Corrections Act 1986* (Vic) provides a discretion to reduce sentences and non-parole periods on the basis of ‘emergency management days’. Under s 58E, the Secretary of the Victorian Department of Justice has a discretion to reduce the length of a sentence, or the length of the non-parole period, for good behaviour on the part of an offender during an industrial dispute or emergency in the prison, or in other circumstances of an unforeseen and special nature.

5.25 While a Victorian offender may have his or her non-parole period reduced to take account of ‘emergency management days’, a federal offender could only have his or her non-parole period reduced for ‘emergency management days’ if those days related to industrial action by prison warders. Thus, federal offenders in Victoria may not receive the same treatment as Victorian state offenders in relation to the reduction of their non-parole periods. At the same time they will not receive the same treatment as federal offenders in other jurisdictions who do not get the benefit of any ‘emergency management days’. Section 19AA achieves neither inter-jurisdictional nor intra-jurisdictional equality of treatment.

5.26 In *El Kharhani*, discussed above, the NSWCCA indicated that such differences give rise to difficulties in the prison system and promote legal appeals. 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

252 *Crimes Act 1914* (Cth) s 19AA(4).

as possible. A clearly identifiable group of prisoners who receive different and preferential treatment would be a constant source of friction and conflict with the prison, causing prison administrators considerable difficulty.²⁵³

5.27 Given the nature of the Australian criminal justice system, greater uniformity in the treatment of federal offenders may be desirable in relation to some aspects of the sentencing, imprisonment, administration and release of federal offenders, but not in relation to others. There are several possible approaches to the issue of uniformity of treatment of federal offenders. Greater uniformity may be achieved by changes at the federal level, for example, by making Part IB a complete code, or more complete code, for the sentencing of federal offenders. Alternatively, one could seek greater harmonisation of state and territory laws or establish model sentencing laws applying to state, territory and federal offenders. These approaches are not necessarily mutually exclusive. They may be pursued separately or in parallel.

Question 5–1 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?

Question 5–2 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?

Question 5–3 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?

253 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), 128.

Question 5-4 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?

6. History and Critique of Part IB

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Law and practice before Part IB

6.1 Prior to the introduction of Part IB of the *Crimes Act 1914* (Cth), federal offenders were generally sentenced by state and territory courts as if they had breached the laws of that state or territory.²⁵⁴ At that time, the sentencing of federal offenders was regulated by Part IA of the *Crimes Act*, and by the *Commonwealth Prisoners Act 1967* (Cth). Part IA dealt with sentences of imprisonment, and provided a discretionary power to release an offender on licence or conditionally. The *Commonwealth Prisoners Act* provided for the application of state and territory laws in relation to the fixing of minimum terms of imprisonment and release on parole. The aim of that Act was to extend to all federal prisoners the benefit of state and territory parole legislation on the same terms as it was available to state or territory prisoners.²⁵⁵

254 Lawbook Co, *Laws of Australia*, vol 9 Criminal Law Principles, [89].

255 Australian Law Reform Commission, *The Commonwealth Prisoners Act*, ALRC 43 (Interim) (1988), 4; Commonwealth, *Parliamentary Debates*, House of Representatives, 20 April 1967, 1559 (N Bowen—Attorney-General).

Reviews of federal sentencing

Previous ALRC reviews

6.2 In August 1978, the Commonwealth Attorney-General directed the ALRC to inquire into the ‘laws of the Commonwealth and the Australian Capital Territory relating to the imposition of punishment for offences and any related matters’.²⁵⁶

6.3 In 1980, the ALRC released its interim report, *Sentencing of Federal Offenders* (ALRC 15). The interim report contained the results of the ALRC’s national surveys of judges and magistrates, federal prosecutors and offenders. Its major recommendations included: the establishment of a national sentencing council; the development of guidelines for the prosecution and sentencing of federal offenders; channelling appeals in federal criminal matters—including sentencing—to the Federal Court of Australia; the revision of penalties stipulated in Commonwealth legislation; the standardisation of remissions for federal prisoners; the abolition of parole for all federal prisoners or a substantial reform of parole law and procedures as they affect such prisoners; an emphasis on the Commonwealth’s responsibility for maintaining minimum standards in prison conditions; the establishment of grievance machinery for federal prisoners; the development of alternatives to imprisonment; and a greater emphasis on compensation and restitution orders for victims of crime.²⁵⁷ The *Crimes Amendment Act 1982* (Cth) implemented some of these recommendations.

6.4 In 1987, the ALRC released three discussion papers²⁵⁸ and another interim report, *The Commonwealth Prisoners Act* (ALRC 43). This interim report was written at the request of the Attorney-General, to provide urgent advice on parole and early release from prison of federal offenders.²⁵⁹ The Attorney-General specifically requested the ALRC to report in advance of its final report on the best way to overcome a number of deficiencies and anomalies in the operation of the *Commonwealth Prisoners Act* and s 19A of the *Crimes Act*, which respectively governed parole and release on licence for federal offenders.²⁶⁰ The ALRC made recommendations in relation to entitlement to parole; provisions which impact upon the release date; release on parole; conditions of parole; liability to serve balance of imprisonment; the service of remainder of imprisonment; and release on licence.

6.5 In 1988, the ALRC released its final report, *Sentencing* (ALRC 44). The ALRC’s recommendations addressed a broad range of sentencing issues, including: the role of punishment in the criminal justice system; reducing the emphasis on imprisonment; the

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

257 Ibid, 7.

258 Australian Law Reform Commission, *Sentencing: Procedure*, DP 29 (1987); Australian Law Reform Commission, *Sentencing: Penalties*, DP 30 (1987); Australian Law Reform Commission, *Sentencing: Prisons*, DP 31 (1987).

259 Australian Law Reform Commission, *The Commonwealth Prisoners Act*, ALRC 43 (Interim) (1988), [3].

260 Ibid, [3].

rationalisation and reduction of maximum prescribed terms of imprisonment; reforms to enhance ‘truth in sentencing’; sentence determination; prison conditions; the circumstances of special categories of offender, including those with a mental illness or intellectual disability; and the need for greater judicial information and education, including the establishment of a sentencing council.²⁶¹

Gibbs Committee review

6.6 In 1987, the Attorney-General established a committee to review aspects of federal criminal law. The committee, which was chaired by Sir Harry Gibbs (Gibbs Committee), released 21 discussion papers, five interim reports and a final report.²⁶² As part of its review, the Gibbs Committee considered the operation of the newly introduced Part IB of the *Crimes Act* and other aspects of federal sentencing law. The committee made several recommendations concerning Part IB, and recommended that the Australian Government review Part IB within three years of its commencement.²⁶³ This review was commenced but was not concluded.

Enactment of Part IB

6.7 The *Crimes Legislation Amendment Act (No 2) 1989* (Cth) introduced Part IB into the *Crimes Act* and repealed the *Commonwealth Prisoners Act*. It came into operation on 17 July 1990. The legislation introducing Part IB only selectively implemented aspects of ALRC 44 and did not treat the recommended reforms as an integrated package.²⁶⁴

Subsequent amendments to Part IB

6.8 Since Part IB has come into operation it has undergone a number of amendments. Some of the key amendments include:

- clarification of the circumstances in which non-parole periods should be fixed and recognizance release orders made;²⁶⁵
- the inclusion of a procedure to ensure that the passports of persons charged with, or convicted of, certain serious offences, particularly narcotic offences, may be surrendered;²⁶⁶

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

262 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Final Report* (1991).

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

264 See G Zdenkowski, ‘Contemporary Sentencing Issues’ in D Chappell and P Wilson (eds), *The Australian Criminal Justice System: The Mid 1990s* (1994) 171, 202; *Putland v The Queen* (2004) 204 ALR 455, [18].

265 *Crimes Legislation Amendment Act (No 2) 1991* (Cth).

- enabling courts to take cultural background into account when sentencing federal offenders;²⁶⁷
- repealing the provision that provided that, where a federal sentence was to be served in a state or territory in which sentences cannot be remitted or reduced, the court had to take that matter into account in determining the length of the sentence and adjust the sentence accordingly;²⁶⁸ and
- the provision for minimum non-parole periods for persons sentenced to imprisonment for committing specified offences, namely terrorism offences.²⁶⁹

General criticisms of Part IB

6.9 The Terms of Reference direct the ALRC to have regard to the concerns raised about the operation of Part IB of the *Crimes Act*. Surprisingly, there is very little academic criticism on the operation of Part IB. Many of the concerns expressed in relation to Part IB emanate from judicial observations in sentencing cases. Some of the strongest criticisms were made in cases decided soon after the legislation entered into force in 1990, as judges grappled with the new legislative framework for sentencing federal offenders.

6.10 As discussed in Chapter 5, broad criticisms of Part IB include that it reflects a wrong policy choice and is unclear about whether it intends to achieve greater equality of treatment between federal offenders serving sentences in different states and territories. It has also been said that the existence of a separate regime for sentencing federal offenders in itself adds considerable complexity to the criminal justice system, especially where a court is called upon to sentence an offender for both federal and state or territory offences.²⁷⁰ The other broad criticisms of Part IB are that it omits any detailed reference to the aims and purposes of sentencing,²⁷¹ and that it is complex and ambiguous. Specific provisions have been variously criticised for their complexity, poor drafting, inflexibility, insufficient scope or because they lead to undesirable practical outcomes.

6.11 The complexity of Part IB prompted the Commonwealth Director of Public Prosecutions (CDPP) to assume a greater responsibility in providing assistance to courts in federal sentencing matters. The CDPP has undertaken a major educational

266 Ibid.

267 *Crimes and Other Legislation Amendment Act 1994* (Cth). See also Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [170].

268 *Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002* (Cth), repealing *Crimes Act 1914* (Cth) s 16G. See also Ch 9.

269 See *Anti-Terrorism Act 2004* (Cth). See also Ch 8.

270 See further Ch 5.

271 See further Ch 7.

process for prosecutors and judicial officers to improve their understanding of how Part IB works.²⁷²

Drafting complexity

6.12 The drafting of Part IB has been criticised as too complex. The legislation has been criticised for its lack of clarity and its ambiguity.²⁷³ Its provisions have been criticised as ‘internally inconsistent’,²⁷⁴ ‘convoluted’ and ‘confusing’,²⁷⁵ ‘opaque’ and ‘unnecessarily time consuming’,²⁷⁶ ‘complicated’ and ‘unnecessarily detailed’,²⁷⁷ ‘a legislative jungle’ and ‘labyrinthine’.²⁷⁸

6.13 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.²⁷⁹ ...

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.²⁸⁰

6.14 These comments were endorsed in subsequent cases.²⁸¹ In *R v Carroll* the Victorian Court of Criminal Appeal noted the enormous cost to the community of the time that a court now had to spend in sentencing a federal offender.²⁸² In *Selimoski v Picknoll* the Full Court of the Western Australian Supreme Court stated:

The decision of this appeal really requires no more than an understanding of the *Crimes Act*. But that in itself is no small task. Various Judges in different Australian jurisdictions have remarked upon the complexity and lack of clarity of the provisions in question. We agree. It is important that sentencing courts at all levels should be readily able to understand what is required to properly structure a federal sentence. It is evident from the number of matters which come before appellate courts, that such is not the case.²⁸³

272 Office of the Commonwealth Director of Public Prosecutions, *Consultation*, Sydney, 16 September 2004.

273 *Director of Public Prosecutions (Cth) v El Kharhani* (1990) 21 NSWLR 370, 387.

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

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

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

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

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

279 *R v Paull* (1990) 100 FLR 311, 318.

280 *Ibid.*, 321.

281 *Director of Public Prosecutions (Cth) v El Kharhani* (1990) 21 NSWLR 370, 372, 387; *R v Carroll* [1991] 2 VR 509, 514; *R v Ng Yun Choi* (Unreported, Supreme Court of New South Wales, Sully J, 4 September 1990), 2–3.

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

283 *Selimoski v Picknoll* (Unreported, Supreme Court of Western Australia, Full Court, 6 August 1992), 7.

6.15 Errors made by judicial officers in sentencing federal offenders have sometimes been directly attributed to the complexity of Part IB.²⁸⁴

6.16 An example of unnecessarily detailed and repetitious drafting in Part IB is the array of provisions that, in varying language, require a court to explain or cause to be explained the purposes and consequences of imposing particular sentencing options.²⁸⁵ Drafting would be simplified if a single provision set out the principle that the court has a duty to explain or cause to be explained to the offender the purposes and consequences of any sentencing order, including the consequences of breaching any conditions imposed by the order.

Illogical structure

6.17 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.

6.18 One concern is that the sections in the *Crimes Act* dealing with sentencing are located in a variety of places, rather than being consolidated. For example, a number of sections in Part IA of the *Crimes Act* deal with penalty units, conversion of penalties, the sentencing consequences of proceeding summarily on certain indictable offences,²⁸⁶ and imposing sentences for multiple offences.²⁸⁷ In addition, subjects within Part IB are dealt with in a disjointed manner and the structure of Part IB does not reflect the hierarchy of sentencing options.²⁸⁸

6.19 The order of provisions in Part IB does not reflect the chronology of sentencing, imprisonment, administration, and release of federal offenders. The positioning of Divisions 6 to 8—which deal with issues of mental illness other than by sentencing—appears to disrupt the flow of provisions in relation to sentencing generally. There is no chronological grouping of provisions that a court has to be aware of at the time of sentencing, nor of those that are relevant after sentencing. For example, in *R v Hutton* the NSW Court of Criminal Appeal observed that Division 3 of Part IB, which deals with sentences of imprisonment, contains two sections (ss 16F and 19A) that:

do not have, strictly speaking, anything at all to do with the process of determining a sentence in a particular case. The two sections are, rather, facultative in senses which have to do, not with the pre-determination of a sentence, but with the post-determination of a sentence.²⁸⁹

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

285 See, eg, *Crimes Act 1914* (Cth) ss 16F(2), 19B(2), 20(2), 20AB(2).

286 See further Ch 7.

287 See further Ch 9.

288 For example, a court would first want to consider sentencing options that do not involve conviction (such as those in s 19B), but this provision comes after others dealing with conditional release on parole or licence: Office of the Commonwealth Director of Public Prosecutions, *Consultation*, Sydney, 16 September 2004.

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

6.20 Some matters of which a court should be aware at the time of sentencing are belatedly positioned in Division 10, which is headed ‘Miscellaneous’. For example, Division 10 houses the provision that empowers a court to order an offender to make reparation.²⁹⁰ It also contains the provision that expresses the requirement that a court specify a reduction in sentence where an offender undertakes to cooperate with law enforcement authorities.²⁹¹ Placing that requirement earlier within Part IB, in closer proximity to provisions dealing with the determination of sentence, could improve compliance with it. The sentencing options that are available to a court to discharge an offender without proceeding to conviction or to conditionally release 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.

6.21 Other provisions are also housed in Divisions to which they bear no obvious connection. For example, the provisions dealing with alternative sentencing options,²⁹² and the consequences of breaching such an alternative sentencing option,²⁹³ are oddly placed within Division 5, which is headed ‘Conditional release on parole or licence’.

Archaic language and inconsistent terminology

6.22 Criticisms have also been made of the language in Part IB. Specifically, use of the terminology ‘hard labour’²⁹⁴ has been criticised on the basis that it is archaic; and ‘recognizance release order’ has been criticised on the basis that many people, including offenders, do not understand what it means.²⁹⁵ The use of simpler, clearer terminology would be preferable.

6.23 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 references to ‘the court’ relate to the jury while others relate to the judge.²⁹⁶

6.24 There is also inconsistent use of 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 terminology is used to describe the same concept.

290 *Crimes Act 1914* (Cth) s 21B.

291 *Ibid* s 21E.

292 *Ibid* s 20AB.

293 *Ibid* s 20AC.

294 *Ibid* s 18.

295 New South Wales Legal Aid Commission—Criminal Law Division, *Consultation*, Sydney, 22 September 2004.

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

6.25 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’. It could simplify drafting if the section referred to ‘a child or young person charged with or convicted of a federal offence’. There are other examples of this.²⁹⁷

Question 6–1 Should Part IB of the *Crimes Act 1914* (Cth) be redrafted to make the structure clearer and more logical, and the language simpler and more consistent? If so, how should this be achieved?

General principles or detailed code?

6.26 An important preliminary issue is whether federal sentencing laws should be detailed and prescriptive, or provide a broad framework supported by general principles. 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 the governing principles in relation to a number of matters, including onus and standard of proof in a sentencing hearing, and the principles guiding the choice of alternative sentencing options, such as periodic detention or community service orders.

6.27 Legislation that provides a broad framework supported by general principles could 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 the drawback can be lack of flexibility, especially where a provision purports to set out exhaustive factors or conditions.

6.28 The choice between federal sentencing provisions that are either principle-focused or prescriptive and detailed has ramifications for the treatment of sentencing issues. For example, as discussed in Chapter 8, the issue arises whether federal sentencing legislation should specify factors relevant to the choice of sentencing options or quantum of sentence. The listing of factors can lead a court to use the factors as a checklist rather than having regard to the broader principles supporting them. If the factors are not described in a meaningful way, or relevant factors are omitted, the usefulness of the list of factors can itself be brought into question.

6.29 Another area in which the choice between competing styles of federal sentencing law may have an impact is consideration of the issue of whether federal

²⁹⁷ *Crimes Act 1914* (Cth) ss 18, 20A(9).

legislation should set out the full range of conditions that may be imposed on an offender who is conditionally discharged²⁹⁸ or released on parole or licence.²⁹⁹ The inclusion of such conditions reflects a broader policy choice that favours detailed and prescriptive legislation over a broad framework supported by general principles.

Question 6–2 Should legislative provisions for the sentencing of federal offenders be detailed and prescriptive, or should they provide a broad framework supported by general principles?

Location of federal sentencing provisions

6.30 Currently, federal sentencing provisions are located primarily in Part IB of the *Crimes Act*. The provisions of the *Crimes Act* deal with a wide range of subjects including search warrants, powers of arrest, controlled operations, assumed identities, the investigation of Commonwealth offences, forensic procedures, and protection of children in proceedings for sexual offences. A portion of the *Crimes Act* is also dedicated to setting 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.

6.31 By contrast, the sentencing provisions of most states and territories are contained in separate sentencing Acts.³⁰⁰ The exception to this is the ACT, whose sentencing provisions are contained in the *Crimes Act 1900* (ACT).³⁰¹ However, in 2004 the ACT released a sentencing package for community consultation, which proposes a separate sentencing Act for that jurisdiction.³⁰²

6.32 One issue that arises is whether the legislative provisions for the sentencing, imprisonment, administration and release of federal offenders should be given a heightened profile by relocating them to a separate federal Sentencing Act.³⁰³ This would increase transparency, and potentially accessibility, and emphasise that a

298 See further Ch 9.

299 See further Ch 13.

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

301 *Crimes Act 1900* (ACT) Pt 15, 19, 21.

302 The package includes Draft Crimes (Sentencing) Bill 2004 (ACT) and Draft Crimes (Sentencing Administration) Bill 2004 (ACT).

separate sentencing regime applies to federal offenders. The case for a separate Sentencing Act is more compelling if there is to be a detailed federal sentencing code. If, however, federal sentencing provisions are to remain in the *Crimes Act* a question remains whether all provisions relating to sentencing (including those contained within Part IA) should be consolidated, and whether their location should be reconsidered to reflect better the chronology of investigation, prosecution, adjudication and sentencing of federal offenders.

Question 6–3 Should legislative provisions for the sentencing, imprisonment, administration and release of federal offenders be relocated to a separate federal Sentencing Act? If the provisions are to remain in the *Crimes Act*, should they be consolidated and relocated to reflect better the chronology of investigation, prosecution, adjudication and sentencing of federal offenders?

303 The ALRC previously recommended that all general provisions on sentencing and punishment should be collected in a single Commonwealth statute. See Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), Rec 39.

7. Sentencing Options

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Introduction

7.1 This chapter considers the purposes of sentencing and the wide range of non-custodial and custodial sentencing options and ancillary orders potentially available in sentencing federal offenders.³⁰⁴ The distinction between custodial and non-custodial sentencing options is not always clear. Community perceptions of whether a particular sentencing option, such as a suspended sentence, is custodial or non-custodial can vary, and at times commentators have categorised sentencing options in conflicting ways.

7.2 Some sentencing options, such as imprisonment and fines, are specified in federal criminal offence provisions. Other sentencing options are set out in Part IB of the *Crimes Act 1914* (Cth). The *Crimes Act* and the *Crimes Regulations 1990* (Cth) also pick up various state and territory sentencing options in sentencing federal offenders.

7.3 This chapter explores the issues of whether sentencing options should be set out in a sentencing hierarchy; whether they should be prescribed by federal legislation or determined by the options available in the states and territories; and what options should be available in the event of non-compliance.

Purposes of sentencing

7.4 It has been said that it is preferable to distinguish the aims of the criminal justice system as a whole from the aims of sentencing, which relate solely to one stage of the process—notwithstanding that some aims, such as the prevention of crime, apply to every stage of the process.³⁰⁵

7.5 There is substantial literature about the social justifications of sentencing. Commonly cited aims include retribution, incapacitation, deterrence, rehabilitation, reparation and restorative justice. These aims can conflict. In *Veen v The Queen (No 2)* the High Court said:

The purposes of criminal punishment are various ... The purposes overlap and none can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to appropriate sentence but sometimes they point in different directions.³⁰⁶

7.6 Modern retribution theory is based on the premise that punishment of those who break the criminal law is justified in order to restore the balance that the offence disturbed. It primarily views punishment as a disadvantage to neutralise the advantage gained by the crime. Another version of the theory assumes criminal conduct to be

304 Some sentencing options are expressly prohibited by federal law, namely, corporal punishment and capital punishment. See *Crimes Act 1914* (Cth) s 16D; *Death Penalty Abolition Act 1973* (Cth).

305 A Ashworth, *Sentencing and Criminal Justice* (2nd ed, 1995), 57.

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

morally wrong and views punishment as justifiable in order to counterbalance that wrong.³⁰⁷ Desert theory, which is a form of retributive philosophy, has amongst its key elements that there is an intuitive connection between desert and punishment, and that state punishments institutionalise the communication of official censure or blame, mainly to the offender, but also to the victim and the wider community.³⁰⁸

7.7 Incapacitation seeks to protect the public by dealing with an offender in such a way as to reduce substantially his or her ability to commit a further offence. Imprisonment, or particular requirements in a probation order, may have this effect. However, some studies have indicated that incapacitation strategies have a limited impact on crime rates.³⁰⁹

7.8 Individual deterrence seeks to deter the offender from re-offending. A sentencing philosophy that considers individual deterrence as the main aim of sentencing would presumably escalate sentences for repeat offenders on the basis that if a lenient sentencing option failed to deter, then a more severe sentencing option might do so. The main determinant of sentencing would be the offender's propensity to re-offend, rather than the seriousness of the offence. Sentencing systems rarely adopt individual deterrence as their primary aim.³¹⁰

7.9 General deterrence seeks to deter others from offending.³¹¹ It is based on the premise that individuals are rational beings who will vary their behaviour according to the disincentives produced by sentencing law. One criticism of the general deterrence rationale is that it can justify the imposition of a disproportionately severe sentence on an offender—that is, an exemplary sentence—with a view to discouraging others from committing a similar offence. There is a lack of reliable evidence about the relative deterrent effects of various types and levels of penalty for various crimes.³¹² In *R v Dube*, King CJ of the South Australian Supreme Court noted that there was no clear evidence that increased levels of punishment have any effect on the prevalence of crime.³¹³ ALRC 44 expressed the view that it was the criminal justice system as a whole that deters crime, not only punishment and sentencing.³¹⁴

307 A Ashworth, *Sentencing and Penal Policy* (1983), 16–17.

308 A Ashworth, *Sentencing and Criminal Justice* (2nd ed, 1995), 69.

309 A von Hirsch and J Roberts, 'Legislating Sentencing Principles: The Provisions of the Criminal Justice Act 2003 Relating to Sentencing Purposes and the Role of Previous Convictions' (2004) *Criminal Law Review* 639, 643.

310 A Ashworth, *Sentencing and Criminal Justice* (2nd ed, 1995), 62.

311 General deterrence is also discussed in Ch 8.

312 General deterrence may be undermined where there is a low risk of detection: see A Ashworth, *Sentencing and Criminal Justice* (2nd ed, 1995), 62, 66; A von Hirsch and J Roberts, 'Legislating Sentencing Principles: The Provisions of the Criminal Justice Act 2003 Relating to Sentencing Purposes and the Role of Previous Convictions' (2004) *Criminal Law Review* 639, 643.

313 *R v Dube* (1987) 46 SASR 118, 120.

314 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [24].

7.10 The rehabilitative approach seeks to assist the offender in successfully addressing the factors that have contributed to the offending behaviour—for example, by requiring the offender to participate in a treatment program. The key focus is the perceived needs of the offender rather than the gravity of the offence committed. Rehabilitative theory tends to regard offenders as needing support and help.³¹⁵

7.11 Reparation and restoration are linked. Reparation involves the offender making recompense—for example by monetary compensation—to the community or to the victims of the crime. Restorative justice focuses on the needs of the victims of crime and the repair of the harm done to them by crime. The offender is required to accept responsibility for his or her actions, pay an appropriate penalty, and make reparation, in a manner that involves the victim in a meaningful way so as to assist that person in overcoming the effects of the crime.³¹⁶

7.12 In seeking to identify the purposes of sentencing federal offenders, it is clear that some sentencing aims have more relevance to certain types of federal offences than others. For example, restorative justice may have a greater role to play in those types of federal offences where there is an identifiable victim. It may have limited relevance to categories of federal offences that are sometimes regarded as ‘victimless’, in the sense that the polity or the market as a whole—as opposed to identifiable individuals—are damaged by the commission of the offence. Certain sentencing aims may have a particular relevance for special categories of federal offenders.³¹⁷ For example, rehabilitation may have a greater role to play in relation to federal offenders with drug or gambling addictions.

7.13 The Council of Europe has recommended that: legislators should endeavour to declare the rationales for sentencing; where different rationales may be in conflict, indications should be given of ways in which to prioritise the application of those rationales; and, where possible, and especially for certain classes of offences or offenders, a primary rationale should be declared.³¹⁸ By contrast, the New South Wales Law Reform Commission has recommended that sentencing legislation should expressly state the purposes for which a court may impose a sentence, but has rejected the idea of placing those purposes in a hierarchy.³¹⁹

7.14 Part IB of the *Crimes Act* does not contain a general framework referring to purposes, aims and principles of sentencing.³²⁰ It does, however, require the court to

315 A Ashworth, *Sentencing and Criminal Justice* (2nd ed, 1995), 66.

316 Restorative justice is discussed further below.

317 See further Ch 15.

318 Council of Europe, *Consistency in Sentencing* (1993) Council of Europe Press, Rec R(92) 17, A1–3.

319 New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), [14.3], Rec 85.

320 G Zdenkowski, ‘Contemporary Sentencing Issues’ in D Chappell and P Wilson (eds), *The Australian Criminal Justice System: The Mid 1990s* (1994) 171, 202.

take into account specific deterrence, the need to ensure that the offender is adequately punished for the offence, and the prospect of rehabilitation.³²¹

7.15 Some of the sentencing Acts of the states and territories contain a provision setting out the purposes of sentencing, but do not declare a primary purpose of sentencing or seek to prioritise the declared purposes of sentencing.³²² By contrast, the *Sentencing Act 1997* (Tas) and the *Criminal Law (Sentencing Act) 1988* (SA) do not contain an express provision in relation to the purposes of sentencing generally, but they do state the primary purposes of sentencing or the primary purposes of the criminal law in relation to specific offences.³²³ The Tasmanian Act contains a provision setting out the aims of the Act, which incorporate a consideration of the aims and objectives of sentencing. One of the purposes of the Act is to ‘promote the protection of the community as a primary consideration in sentencing offenders’.³²⁴ Another purpose of the Act is to help prevent crime and promote respect for the law by allowing courts to impose sentences aimed at deterring offenders and others; rehabilitating offenders; and denouncing the conduct of offenders.³²⁵

7.16 Some overseas sentencing legislation sets out various purposes of sentencing without attempting to rank them or assign primary aims to particular offences.³²⁶ This ‘smorgasbord’ approach to the declaration of sentencing purposes has been criticised on the basis that—in the absence of adequate guidelines on how courts are to choose between them—the enumeration of multiple and potentially conflicting aims can lead to inconsistent sentencing outcomes in comparable cases.³²⁷

Question 7–1 What are the objectives or purposes of sentencing federal offenders? Should they be specified in federal legislation either generally or in specific classes of federal offences? Should the purposes be ranked?

321 *Crimes Act 1914* (Cth) s 16A(f), (k), (n) respectively.

322 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1991* (Vic) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9; *Sentencing Act 1995* (NT) s 5; *Crimes Act 1900* (ACT) s 341.

323 See, eg, *Criminal Law (Sentencing) Act 1988* (SA) s 10(3) (arson or causing a bushfire).

324 *Sentencing Act 1997* (Tas) s 3(b).

325 *Ibid* s 3(e).

326 See, eg, *Criminal Justice Act 2003* (UK) s 142.

327 A von Hirsch and J Roberts, ‘Legislating Sentencing Principles: The Provisions of the Criminal Justice Act 2003 Relating to Sentencing Purposes and the Role of Previous Convictions’ (2004) *Criminal Law Review* 639, 641–642, 652; J Smith, ‘Clothing the Emperor: Towards a Jurisprudence of Sentencing’ (1997) 30 *Australian and New Zealand Journal of Criminology* 166, 168–169.

Sentencing hierarchies

7.17 Part IB of the *Crimes Act* sets out a number of sentencing options but provides limited guidance to courts in selecting between them.³²⁸ The court is directed to impose a sentence that is of a ‘severity appropriate in all the circumstances of the offence’.³²⁹ Part IB does not expressly set out a hierarchy of sanctions according to level of severity, although it does provide that imprisonment is to be the sanction of last resort. A court is directed not to impose a sentence of imprisonment unless, after having considered all other available sentencing options, it is satisfied that no other sentence is appropriate in the circumstances of the case.³³⁰

7.18 There has been some support for legislative sentencing hierarchies. For example, Professor Arie Freiberg and Professor Richard Fox have stated:

Should the sanction hierarchy be made explicit? We believe that to attempt to do so would be an improvement on a system which already contains a hierarchy in default, but one which is intricate, inchoate and inconsistent. How can consistency in sentencing be even approached if there is no agreement as to the relative severity of sentences, the principled purposes of each measure, and the order in which a sentencer should approach his or her tasks?³³¹

7.19 The Victorian Sentencing Committee recommended that Victorian sentencing legislation should set out a specific hierarchy of sanctions. In determining the hierarchy, the Committee acknowledged that the severity of penalties could not be set out in a ‘simple step ladder fashion’ because there was a degree of overlap between a lesser penalty at one level and a more serious level of another penalty.³³² It also noted that people may have different views about the comparative severity of penalties.³³³ In addition, the state’s view about the severity of a sentence may differ from the view of an individual offender.³³⁴

7.20 The Council of Europe has said that member states should consider grading their non-custodial sentences in terms of relative severity.

This is not a straight forward task, because there are some sanctions which vary considerably in severity within themselves (for example, a fine may be high or low, a community service order may be long or short). It should be possible, however, to achieve an appropriate ranking of the available sentences, perhaps dividing them into three groups of relative severity, with

328 The choice of sentencing options in particular cases is discussed in Ch 8.

329 *Crimes Act 1914* (Cth) s 16A(1).

330 *Ibid* s 17A.

331 A Freiberg and R Fox, ‘Sentencing Structures and Sanction Hierarchies’ (1986) 10 *Criminal Law Journal* 216, 235.

332 In DP 30, the ALRC raised the related issue of the difficulty of comparing unlike sanctions. For example, is one week’s imprisonment more or less punitive than 300 hours of community service? See Australian Law Reform Commission, *Sentencing: Penalties*, DP 30 (1987), [138].

333 Victorian Sentencing Committee, *Sentencing* (1988), [7.4.1]–[7.4.3]. See also Australian Law Reform Commission, *Sentencing: Penalties*, DP 30 (1987), [151].

334 This is discussed below in relation to conversion of penalties.

each group containing various different sanctions (for example, a high fine and a short community service order might be in the same severity grouping).³³⁵

7.21 Such ranking would enable the court to individualise the sentence and preserve proportionality. The court would initially decide how severe the sanction ought to be—by reference to the seriousness of the case—and then select the most appropriate sentencing option at that level of severity.³³⁶

7.22 In DP 30, the ALRC explored the possibility of a hierarchy of sanctions, including possible models for such a hierarchy.³³⁷ However, ALRC 44 did not pursue any proposal in relation to a sanction hierarchy. The decision not to pursue the issue has been described as ‘regrettable’.³³⁸

7.23 In 1973, the Criminal Law and Penal Methods Reform Committee of South Australia, chaired by Justice Mitchell, expressed the view that it would be impracticable and undesirable to have sentences legislatively graded in an ascending order of seriousness. Such an approach ignored the fact that many of the sanctions in the ‘supposed middle range’ of the hierarchy were alternatives available to the sentencing court to enable it to adapt its sentences with as much flexibility as possible to the circumstances of the offence and the particular offender. It said that any attempt to order sentencing options in a predetermined range of severity would counter this flexibility.³³⁹ The Gibbs Committee expressed a similar view.³⁴⁰

7.24 There are federal and state legislative precedents for sentencing hierarchies. The *Defence Force Discipline Act 1982* (Cth) sets out the punishments that may be imposed on convicted military offenders in decreasing order of severity.³⁴¹ The *Sentencing Act 1991* (Vic) and the *Children and Young Persons Act 1989* (Vic) also provide for a hierarchy of sentences.³⁴² It is not clear whether these legislative sentencing hierarchies have had any impact on consistency in sentencing offenders.³⁴³

7.25 There may be some correlation between a hierarchy of federal sentencing options and ranking the purposes of federal sentencing. In some cases the aims of the two regimes may conflict. For example, a hierarchy of sanctions that states that certain

335 Council of Europe, *Consistency in Sentencing* (1993) Council of Europe Press, 29.

336 *Ibid.*, 29.

337 Australian Law Reform Commission, *Sentencing: Penalties*, DP 30 (1987), [138]–[156].

338 G Zdenkowski, ‘Contemporary Sentencing Issues’ in D Chappell and P Wilson (eds), *The Australian Criminal Justice System: The Mid 1990s* (1994) 171, 200.

339 Criminal Law and Penal Methods Reform Committee of South Australia, *First Report: Sentencing and Corrections* (1973), [3.8].

340 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991) Attorney-General’s Department, [16.10].

341 *Defence Force Discipline Act 1982* (Cth) ss 68, 68A.

342 *Sentencing Act 1991* (Vic) s 5(3)–(7); *Children and Young Persons Act 1989* (Vic) ss 137–138.

343 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [3.204].

options may only be resorted to if the court is satisfied that the imposition of sanctions of lesser severity is not appropriate may conflict with a regime that expresses rehabilitation to be the primary goal of sentencing.

Question 7–2 Should federal legislation specify a hierarchy of sentencing options for federal offenders? If so, how should that hierarchy be arranged?

Legislative prescription of penalty

The offence provisions

7.26 Federal criminal offence provisions typically set the maximum penalty that may be imposed for breach of the provision. The maximum penalty is normally expressed in terms of a monetary fine, penalty units,³⁴⁴ or a term of imprisonment. Fines are overwhelmingly the most common criminal sanction specified in federal legislation.³⁴⁵

7.27 In the case of offences committed by corporations, unless the contrary intention appears, the court may impose a pecuniary penalty up to five times the maximum pecuniary penalty that could be imposed by the court on a natural person convicted of the same offence.³⁴⁶

Effect of proceeding summarily

7.28 Where federal indictable offences are dealt with summarily, reduced maximum penalties apply. As mentioned in Chapter 3, indictable federal offences are those that are punishable by a period of imprisonment exceeding 12 months, unless the contrary intention appears.³⁴⁷ Summary federal offences are those that are either not punishable by a term of imprisonment, or are punishable by a term of imprisonment not exceeding 12 months.³⁴⁸ There are important procedural differences associated with the hearing of indictable and summary offences. Indictable offences are usually tried by a judge sitting with a jury; summary offences by a judge or magistrate sitting alone.

7.29 The prosecution plays a major role in the decision as to the mode of trial. Factors relevant to the determination of whether or not to proceed summarily include the nature and seriousness of the case, the adequacy of sentencing options if the case

344 A penalty unit is defined in the *Crimes Act 1914* (Cth) (s 4AA) as \$110, unless the contrary intention appears.

345 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [2.104]. Of the 2,400 penalty provisions mapped by the ALRC, 923 involved a fine only as the penalty and 640 involved a fine with, or as an alternative to, some other kind of sanction such as imprisonment, compensation orders to pay a third party or forfeiture of a licence.

346 *Crimes Act 1914* (Cth) s 4B(3).

347 *Ibid* s 4G.

348 *Ibid* s 4H.

were determined summarily, and the greater publicity and therefore the greater deterrent effect of a conviction obtained on indictment.³⁴⁹

7.30 The *Crimes Act* provides that certain indictable offences may be dealt with summarily. These include federal offences punishable by imprisonment for a period not exceeding 10 years where both the prosecutor and the defendant consent;³⁵⁰ and federal indictable offences relating to property whose value does not exceed \$5,000.³⁵¹ A number of offences—including treason, espionage and unlawful communication of official secrets—cannot be dealt with summarily.³⁵²

7.31 Where an indictable federal offence is dealt with summarily, the following reduced maximum penalties apply.

- In the case of offences punishable by imprisonment for a period not exceeding five years, the maximum penalty is reduced to a sentence of imprisonment for a period not exceeding 12 months or a fine not exceeding 60 penalty units, or both.³⁵³
- In the case of offences punishable by imprisonment for a period greater than five years but not greater than 10 years, the maximum penalty is reduced to a sentence of imprisonment not exceeding two years or a fine not exceeding 120 penalty units, or both.³⁵⁴
- Where an offence relates to property whose value does not exceed \$5,000, the court may impose a sentence of imprisonment for a period not exceeding 12 months or a fine not exceeding 60 penalty units, or both.³⁵⁵

Penalty conversions

7.32 Section 4B of the *Crimes Act* allows for the conversion of terms of imprisonment to pecuniary penalties. Where an offence is punishable by imprisonment only, s 4B(2) sets out a conversion formula to be applied by a court, where it considers it appropriate to impose on an offender a pecuniary penalty instead of, or in addition to, imprisonment. In general, conversion occurs at the rate of five penalty units for every month of imprisonment. Where the court may impose a penalty of imprisonment

349 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (2004) <<http://www.cdpp.gov.au/Prosecutions/Policy/Default.aspx>> at 6 October 2004, [5.10].

350 *Crimes Act 1914* (Cth) s 4J(1).

351 *Ibid* s 4J(4).

352 *Ibid* s 4J(7).

353 *Ibid* s 4J(3)(a).

354 *Ibid* s 4J(3)(b).

355 *Ibid* s 4J(5). However, a court cannot impose both a sentence of imprisonment and a fine if the offence is punishable on trial by indictment by only one of those sanctions: s 4J(6)(c).

for life, the court may impose a pecuniary penalty not exceeding 2,000 penalty units instead of, or in addition to, imprisonment.

7.33 While the *Crimes Act* provides for conversion of imprisonment to fines, it does not make provision for other conversions of sentencing options.³⁵⁶ For example, there is no provision for converting imprisonment to any other non-custodial or custodial sanction, or for converting a fine to any other non-custodial sanction.

7.34 In contrast, the *Sentencing Act 1991* (Vic) makes provision not only for converting imprisonment to a fine,³⁵⁷ but also for converting both sentences of imprisonment and fines to hours to be performed by unpaid community work.³⁵⁸ In Queensland, ‘fine option orders’ allow the offender to apply to the court, either at the time a fine is imposed or at a later stage, for an order that the offender be allowed to work off a fine by way of community service.³⁵⁹ The court determines the hours of community service to be served at the time of imposing the fine option order.³⁶⁰

7.35 ALRC 44 recommended that the fine option order should be adapted in federal sentencing by encouraging offenders of limited means to make a submission, during the sentencing hearing, requesting that community service be imposed rather than a fine.³⁶¹ However, this recommendation appears to be directed to choice of initial sanction rather than providing for conversion of sanctions once imposed.

7.36 The issue arises whether there should be greater flexibility in the conversion between sentencing options for federal offenders. The following possibilities arise:

- conversion from custodial to non-custodial options;
- conversion from non-custodial to custodial options;
- conversion between non-custodial options; and
- conversion between custodial options.

7.37 The conversion of sentencing options is related to the issue of sentencing hierarchies. If sentencing options are ranked in increasing severity, certain conversions might infringe the hierarchy. Given that imprisonment is considered to be the sanction

356 However, there is provision for the conversion of pecuniary penalties expressed in dollar amounts to penalty units: *Ibid* s 4AB.

357 *Sentencing Act 1991* (Vic) s 109(3)(a).

358 *Ibid* s 109(3)(b), (4).

359 *Penalties and Sentences Act 1992* (Qld) Pt 4, Div 2.

360 *Ibid* ss 66(b), 69.

361 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 63.

of last resort,³⁶² and that it is generally agreed that custodial options are more severe than non-custodial options, there would appear to be a fundamental objection to a sentencing scheme that enables a non-custodial option to be converted to a custodial option. However, if a sentencing hierarchy established that certain sentencing options, or certain options at a particular level of severity,³⁶³ were considered to be alternative options, then there would be a principled basis for the conversion of sentencing options at that same level of severity.

7.38 A complicating factor in determining appropriate penalty conversions is that the state's view about the severity of a sentencing option may differ from the view of an individual offender. For example, a federal offender may wish to convert a large fine to a short period of imprisonment because it enables him or her to move on more quickly from past criminal conduct. This may be the case notwithstanding the generally accepted proposition that imprisonment is the more severe sentencing option. This raises the issue of what role a federal offender should have in seeking a sentencing option that best suits him or her. Giving such a role to an offender may derogate from the proper authority of the state to determine the penalty that is appropriate in the circumstances.

Question 7–3 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?

Ancillary orders

7.39 In addition to imposing a sentence on an offender, courts have powers to make ancillary orders, such as orders in relation to reparation, restitution, compensation, forfeiture and costs.

7.40 As mentioned above, reparation involves the offender making recompense—for example by way of monetary compensation—to the community or to the victims of the crime. Reparation seeks to redress any injury, loss or damage resulting from the offence. Restitution, which normally involves a court order for return of stolen property to the owner, also seeks to achieve redress. Compensation provides monetary recompense for loss suffered as a result of the crime. Reparation, restitution and compensation are important ways of taking into account the interests of victims of crime. Such orders do not seek to punish the offender.

362 *Crimes Act 1914* (Cth) s 17A.

363 See the recommendation made by the Council of Europe, discussed above.

7.41 Forfeiture involves a divestment or confiscation of proprietary interests for the benefit of the Crown.³⁶⁴ Proceeds of crime legislation specifically provides for the confiscation of criminal profits. The purposes of the *Proceeds of Crime Act 2002* (Cth) include depriving persons of the proceeds of, and benefits derived from, the commission of federal offences.³⁶⁵

7.42 Some Commonwealth Acts provide for some form of reparation or compensation to be ordered upon conviction for specific crimes.³⁶⁶ However, the main provision of general application to all federal offenders is s 21B of the *Crimes Act*. Section 21B provides that, where a person is convicted of a federal offence, or an order is made under s 19B in relation to a federal offence,³⁶⁷ the court may, in addition to any penalty it imposes, order the offender to make reparation, whether by payment of money or otherwise. Reparation can be made to the Commonwealth, or to a public authority under the Commonwealth, in respect of any loss suffered or expense incurred as a result of the offence; or to any person in respect of any loss suffered as a direct result of the offence. The wording of s 21B is wide enough to include acts of restitution, as well as payments of money by way of compensation.³⁶⁸

7.43 In addition to s 21B, Part IB empowers the court to make ancillary orders in a number of other circumstances, such as where the court conditionally discharges an offender either without proceeding to conviction, or imposes an alternative sentencing order such as community service or periodic detention.³⁶⁹

7.44 ALRC 44 recommended that the ancillary powers of restitution and compensation should continue to be available in the sentencing of federal offenders and that any such ancillary order should be able to be applied to any type of sentencing order.³⁷⁰ However, it made no recommendation in relation to forfeiture orders because it regarded forfeiture as essentially independent of the sentencing process.³⁷¹

Financial means of offender

7.45 Section 16C of the *Crimes Act* requires a court to take into account the financial circumstances of an offender before imposing a fine. The rationale for this requirement was to 'reduce the likelihood of default imprisonment for impecunious offenders'.³⁷² In contrast, there is no express legislative requirement that a court take into account the

364 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [141].

365 *Proceeds of Crime Act 2002* (Cth) s 5.

366 See, eg, *Bounty (Books) Act 1986* (Cth) s 29(1); *Bounty (Photographic Films) Act 1989* (Cth) s 26(1); *Veterans' Entitlements Act 1986* (Cth) ss 93D(10), 211.

367 Orders made under s 19B include dismissal of charges and conditional discharge of the offender without proceeding to conviction. These orders are discussed below and in Ch 9.

368 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), 447.

369 *Crimes Act 1914* (Cth) ss 16BA(5), 19B(1)(d)(ii), 20(1)(a)(ii), 20AB(4)(b).

370 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 85, [141]–[142].

371 *Ibid.*, [141].

372 Explanatory Memorandum (Senate), Crimes Legislation Amendment Bill (No 2) 1989 (Cth), 8.

financial circumstances of a federal offender before making a reparation order.³⁷³ Some state sentencing legislation expressly provides that a court is to take into account the financial circumstances of an offender before making a compensation order.³⁷⁴ Section 21B explicitly provides that a person is not to be imprisoned for a failure to pay an amount required to be paid by way of reparation.³⁷⁵ Instead, the section provides a regime for the civil enforcement of reparation orders.

7.46 It has been said that a court has a discretion as to whether it makes a reparation order pursuant to s 21B, and the amount of any order. In exercising its discretion, the court must act judicially and may have regard to the personal circumstances and means of the offender.³⁷⁶

Priority issues

7.47 Unlike Part IB of the *Crimes Act*, some state sentencing legislation expressly provides that, where a court considers it appropriate to make a compensation order and impose a fine (or make any other order for the payment of a pecuniary sum) and the offender cannot pay both the compensation and the fine (or other pecuniary sum), the court must give preference to making a compensation order.³⁷⁷ 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 any compensation order, second preference to a costs recovery order and third preference to a fine.³⁷⁸

7.48 The issue arises whether federal legislation should specify the priority between a fine and an ancillary order in circumstances where a federal offender has insufficient means to pay both. In DP 30, the ALRC expressed the view that where the means of an offender are limited, priority should be given to reparation.³⁷⁹

373 The court is, however, required to take into account the probable effect that any order under consideration would have on any of the person's family or dependants: *Crimes Act 1914* (Cth) s 16A(2)(p).

374 *Sentencing Act 1991* (Vic) s 86(2). However, other state sentencing legislation is silent on the relevance of the offender's means in determining a reparation order: *Sentencing Act 1997* (Tas).

375 *Crimes Act 1914* (Cth) s 21B(2).

376 *Vlahov v Federal Commissioner of Taxation* (1993) 93 ATC 4501, 4,507; *R v Hookham* (1993) 68 A Crim R 129; *Davies v Taylor* (1997) 7 Tas R 265; *Inwood* (1974) 60 Cr App 70. In *Vadasz v Director of Public Prosecutions (Cth)* [1999] SASC 255, the South Australian Supreme Court also appeared to be of this view. See also *Liaver v Errington* [2003] QCA 005, [4]. In *Hookham v The Queen* (1994) 181 CLR 450, the High Court left open the question of whether the means of the offender should be taken into account in determining the quantum of reparation to be made.

377 *Criminal Law (Sentencing) Act 1988* (SA) s 14; *Penalties and Sentences Act 1992* (Qld) ss 14, 48(4); *Sentencing Act 1997* (Tas) s 43; *Sentencing Act 1991* (Vic) s 50(4); *Sentencing Act 1995* (NT) s 17(3). Except for the South Australian provision, these provisions expressly allow the court to impose a fine, notwithstanding that priority is to be given to restitution or compensation.

378 *Sentencing Act 1991* (Vic) s 87J(3).

379 Australian Law Reform Commission, *Sentencing: Penalties*, DP 30 (1987), [83].

Question 7–4 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? What are the objectives of such orders and in what circumstances should they be available? Should federal legislation specify priorities in relation to the payment of fines and ancillary monetary orders?

Non-custodial sentencing options

7.49 The *Crimes Act* provides for a number of non-custodial sentencing options for federal offenders, including dismissing the charge, conditional discharge without conviction, and conditional release after conviction. Additional sentencing alternatives are also available under s 20AB of the *Crimes Act* (community service orders and similar orders) and under the *Crimes Regulations* (community based orders—CBOs, and intensive supervision orders—ISOs). However, a number of recognised non-custodial sentencing options are not available to courts when sentencing federal offenders, including non-association orders and place restriction orders. These sentencing options are discussed below.

7.50 Other chapters in this Issues Paper consider non-custodial sentencing options for particular groups of offenders or for particular groups of offences. Chapter 14 considers non-custodial options for persons with a mental illness or an intellectual disability, including hospital orders, psychiatric probation orders, and program probation orders. Chapter 15 considers the suitability of various non-custodial alternatives for particular groups of offenders, including young offenders, women offenders, offenders with family and dependants, offenders with drug addiction, and Indigenous offenders. Non-custodial sentencing options are particularly important when sentencing corporations, as they cannot be imprisoned.

7.51 Non-custodial sentencing options have been justified on a number of grounds. Wider use of non-custodial measures may be seen as a means of minimising the growth of public expenditure on prisons and prison administration. It is often said to be more humane to allow offenders to stay with their families and maintain their employment than to remove them from society. It is also claimed that custodial sentences are no more effective than non-custodial measures in punishing or rehabilitating offenders.³⁸⁰

7.52 On the other hand, it has been suggested that lowering the proportion of offenders given custodial sentences may weaken the general deterrent effect of the criminal law, although there is no evidence that countries with more punitive

380 A Ashworth, *Sentencing and Penal Policy* (1983), 429–430.

sentencing systems have less crime.³⁸¹ Another concern is the problem of ‘net widening’—community based sentencing options may be imposed on offenders who would otherwise receive a lesser punishment such as a bond or a small fine. As a result, minor offenders may receive harsher punishment.³⁸²

7.53 Unfortunately, there are no definitive data concerning the frequency with which courts use non-custodial options for federal offenders.³⁸³ Further research is required to determine the specific sentencing practices of courts sentencing federal offenders, especially in relation to non-custodial sentencing options.³⁸⁴

7.54 There is some evidence to suggest that courts are reluctant to impose non-custodial alternatives, perceiving them to be a ‘soft’ sentencing option.³⁸⁵ Some commentators have noted that the objective severity of some non-custodial options does not automatically translate to public perceptions of severity. It has been argued that greater use of non-custodial alternatives will involve a number of strategies: limiting access to incarceration as a sanction, providing guidelines on the use of non-custodial sentences, and promoting a political acceptance of non-custodial options.³⁸⁶

Fines and the federal offence provision

7.55 The most prevalent non-custodial sentencing option for federal offenders is the fine. The authority to impose a fine on a federal offender is generally found in the legislation creating the relevant offence. However, as discussed above, fines may also be available under s 4B of the *Crimes Act* when a term of imprisonment is converted to a pecuniary penalty in accordance with the statutory formula.

7.56 Fines can be suitable for serious offences as well as minor offences; are cheaper to administer than custodial and other non-custodial options; and can also generate revenue for the state. However, there are limits to the effectiveness of fines: they are not always effective in relation to corporations, and can be difficult to enforce.³⁸⁷ Moreover, fines can operate inequitably because a given fine will have a different impact on people with different capacity to pay.³⁸⁸ Section 16C of the *Crimes Act* requires a court, before imposing a fine on a federal offender, to take into account the

381 Ibid, 429–430.

382 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [122].

383 See further Ch 2.

384 See further Ch 16.

385 New South Wales Legislative Council, *Select Committee on the Increase in Prisoner Population: Final Report* (2001), [7.32]–[7.33].

386 G Zdenkowski, ‘Sentencing Trends: Past Present and Prospective’ in D Chappell and P Wilson (eds), *Crime and the Criminal Justice System in Australia: 2000 and Beyond* (2000) 161, 170–171.

387 See Ch 15 and Ch 12, respectively.

388 ALRC 44 made a number of recommendations to counter this inequity, including that courts should be encouraged to inquire informally into an offender’s means before imposing a fine: Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Recs 59–63.

financial circumstances of the person. However, in one case a court held that s 16C does not prevent the imposition of a fine that an offender is unable to pay, and that the offender's capacity to pay should not assume prominence in the exercise of the sentencing discretion.³⁸⁹ This raises the issue of whether federal legislation should provide further guidance to the courts about when to impose a fine, and how large that fine should be.

7.57 One option that may address the potential inequity of fines is a 'day fine' or 'unit fine' system. Under such a scheme the offender is penalised the equivalent of a number of days work (or a number of days worth of disposable income) instead of so many dollars. The monetary amount per fine unit is then calculated on the basis of the offender's income.³⁹⁰

Non-custodial sentencing options under Part IB

7.58 A number of alternatives to imprisonment are currently available under Part IB of the *Crimes Act*. Sections 19B and 20 provide for dismissal, conditional discharge without conviction, and conditional release after conviction. When imposing these sentencing options, a court is required to have regard to the matters 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 under such sentences or orders.³⁹¹

Dismissing the charge

7.59 Section 19B(1)(c) of the *Crimes Act* empowers the court to dismiss a charge against a federal offender notwithstanding that the offence has been proved. When exercising this power the court is to have regard to a number of factors: the character, antecedents, cultural background, age, health or mental condition of the person; the extent to which the offence is trivial; and the extent to which the offence was committed under extenuating circumstances.³⁹²

7.60 The discretion conferred by s 19B(1)(c) is a broad one.³⁹³ However, the provision may still be restrictive in comparison with some state legislation.³⁹⁴ For example, NSW legislation provides that a court may have regard to 'any other matter

389 *CEO of Customs v Rota Tech Pty Ltd* [1999] SASC 64, [35]–[36].

390 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. ALRC 44 rejected the establishment of a day fine scheme for federal offenders: Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [114].

391 *Crimes Act 1914* (Cth) s 16A(3). Section 16A is discussed in Ch 8.

392 *Ibid* s 19B(1)(b). It has been said that these are alternative, not cumulative, concepts: *R v Stubbs* (1947) 47 SR (NSW) 329.

393 *Cobiac v Liddy* (1969) 119 CLR 257.

394 New South Wales Legal Aid Commission—Criminal Law Division, *Consultation*, Sydney, 22 September 2004.

that the court thinks proper to consider' when dismissing a person without conviction.³⁹⁵

7.61 Section 19B(1)(c) must be read in conjunction with s 16A(2) of the *Crimes Act*, which gives the court a very broad discretion to consider relevant matters when imposing a sentence or making other orders, including dismissing a charge. The issue arises whether s 19B(1)(c) should provide that the matters to which a court is to have regard when dismissing a charge against a federal offender include 'any other matters', or a reference to the matters set out in s 16A.

7.62 It is not known how often s 19B(1)(c) is used. One commentator has noted that the courts are reluctant to apply the provision even in exceptional circumstances.³⁹⁶ A number of cases have held that s 19B should not be used in cases involving dishonesty by offenders holding high public office, and that it is generally inappropriate if general deterrence is important.³⁹⁷

Conditional discharge without conviction

7.63 Section 19B(1)(d) of the *Crimes Act* provides for the conditional discharge of persons charged with a federal offence without proceeding to conviction, notwithstanding that the offence has been proved. In exercising this power the court is to have regard to the same factors to which a court is to have regard when dismissing a charge under s 19B(1)(c). The court can discharge the person (with or without sureties, by recognizance or otherwise) subject to a number of conditions. These include that he or she will: (a) be of good behaviour; (b) make reparation or restitution, or pay compensation or costs in respect of the prosecution; and (c) comply with any other conditions the court thinks fit to specify in the order.³⁹⁸

7.64 ALRC 44 recommended that conditional discharge should continue to be available for federal offenders, and that a time limit of two years, with a presumption of one year, should be the length of time during which conditions should apply.³⁹⁹ The time limit for the condition of good behaviour under s 19B(1)(d) is currently three years, while the time limit for other conditions set by the court is two years.

7.65 At present, s 19B(1)(d) appears to require that each of the three conditions be imposed. ALRC 44 recommended that the *Crimes Act* be amended to remove any suggestion that particular conditions must always be imposed on an offender who is

395 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(3). See also *Sentencing Act 1991* (Vic) s 76.

396 I Potas, *Sentencing Manual: Law, Principles and Practice in New South Wales* (2001), 139.

397 *R v Matijevic* [1997] FCA 992.

398 The conditions are set out in full in Ch 9.

399 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Recs 81–84.

conditionally discharged: the court should have the maximum flexibility in fixing conditions.⁴⁰⁰

7.66 Despite the broad discretion granted under the provision, it is doubtful whether a community service order could be imposed under s 19B(1)(d), as this would be inconsistent with a person's discharge.⁴⁰¹ The ALRC is interested in hearing whether federal legislation should provide further guidance in relation to the conditions that can be imposed under s 19B(1)(d).

Conditional release after conviction

7.67 Section 20(1)(a) of the *Crimes Act* provides for the conditional release of an offender after conviction. The section provides that where a court convicts a person of a federal offence, the court may release the person without passing sentence. However, the offender must give security (with or without sureties, by recognizance or otherwise) that he or she will comply with a number of conditions. These are the same conditions as those listed above in relation to s 19B(1)(d), with the addition of a fourth, namely, that he or she shall pay to the Commonwealth such pecuniary penalty as the court specifies.⁴⁰²

7.68 In contrast to s 19B(1)(d), which sets out a number of factors to which the court is to have regard when ordering the conditional discharge of an offender without recording a conviction, s 20(1)(a) does not provide any criteria by which the court's discretion is to be exercised.⁴⁰³

7.69 Another issue is the availability of sentencing options as conditions under a s 20(1)(a) order. Courts have held that the power conferred by s 20(1)(a)(iv) will be exceeded if the condition: is not connected with principles applicable to the sentencing of federal offenders; contravenes a provision of a statute or other rule of law; or is contrary to public policy or the legislative policy of the federal law.⁴⁰⁴

7.70 In *Bantinck v Blunden*, the Supreme Court of Tasmania held that the imposition of a condition that operated so that the defendant was not in fact released, or that amounted to the passing of sentence, such as a work order, would be inconsistent with the object, and possibly beyond the power, of s 20(1)(a).⁴⁰⁵ However, the South Australian Supreme Court has held that a condition of community service and an

400 Ibid.

401 M Pedley, *Federal Sentencing in Victoria* (2004) Commonwealth Director of Public Prosecutions, 25. See discussion on conditional release after conviction below.

402 The conditions are set out in full in Ch 9.

403 As noted above, a court must also consider the matters listed under s 16A(2) of the *Crimes Act 1914* (Cth) when conditionally releasing a person after conviction under s 20(1)(a).

404 *R v Theodossio* (1998) 104 A Crim R 367, [10].

405 *Bantinck v Blunden* (1981) 58 FLR 414, 416–417. See also *Shambayati v The Queen* (1999) 105 A Crim R 373 and the discussion of CBOs below.

associated order that the offender comply with the lawful direction of a community service officer could be imposed under s 20(1)(a).⁴⁰⁶

7.71 The conditions that can be attached to such an order will ultimately depend on whether they are available in the jurisdiction in which the federal offender is being sentenced. For example, it is doubtful that a Victorian court could impose community service as a condition under s 20(1)(a) because there is no separate sentencing order amounting to a community service order under Victorian legislation.⁴⁰⁷ The issue arises whether s 20(1)(a) should provide more guidance about what conditions may be attached to such an order.

Non-custodial sentencing options under state or territory law

7.72 Section 20AB(1) of the *Crimes Act* picks up and applies to federal offenders a number of ‘additional sentencing alternatives’ that are available in the states and territories. Some of these alternatives are specifically named. Of these, some are custodial sentencing options, such as periodic detention and home detention, which are discussed further below; while others are non-custodial sentencing options, such as community service orders and similar sentences or orders.

7.73 In addition to the ‘additional sentencing alternatives’ that are specifically named, s 20AB(1) provides that any sentencing alternatives that are prescribed for the purposes of the section may also be imposed on a federal offender. The *Crimes Regulations* currently prescribe three non-custodial options for the purpose of s 20AB—a CBO made under Part 3 Division 3 of the *Sentencing Act 1991* (Vic); a CBO made under Part 9 of the *Sentencing Act 1995* (WA); and an ISO made under Part 10 of the *Sentencing Act 1995* (WA).

7.74 The state or territory law relating to each of these options governs the procedure for the imposition of these sentences. However, a court is not required to apply state or territory laws that require the making of another order before these orders can be imposed (for example, that a suspended prison term be imposed prior to making an alternative sentencing order).⁴⁰⁸

Community service orders

7.75 Community service orders are sentencing options under which the court directs an offender to perform a set number of hours of community work. The benefits of community service orders are said to be that they are less costly, more effective and

406 *Adams v Carr* (1987) 81 ALR 151.

407 However, a requirement to perform unpaid community work can form part of a CBO in Victoria under the *Crimes Act 1914* (Cth) s 20AB: M Pedley, *Federal Sentencing in Victoria* (2004) Commonwealth Director of Public Prosecutions, 25.

408 *Crimes Act 1914* (Cth) s 20AB(1A).

more humane than imprisonment; provide better prospects of rehabilitation; promote the offender's self esteem; and provide a useful service to the community.⁴⁰⁹ It is not known how many federal offenders are currently serving community service orders.

7.76 Community service orders are available in every state and territory.⁴¹⁰ However, in the Northern Territory they are known as 'community work orders', and in Victoria and Western Australia they are available as a 'requirement' or 'program option' under a CBO. CBOs are discussed below.

7.77 Community service schemes are similar in each jurisdiction, but there is some variation across the jurisdictions. For example, some state and territory legislation sets out detailed criteria for determining whether it is appropriate to make a community service order,⁴¹¹ while other legislation includes broad criteria.⁴¹² The standard conditions of community service orders also vary between the states and territories.⁴¹³

7.78 The maximum number of hours of community service that a court can impose for an offence differs depending on the jurisdiction.⁴¹⁴ This raises the concern that federal offenders in different jurisdictions may receive community service orders of differing duration in similar circumstances. ALRC 44 recommended that the maximum duration of community service orders should be uniform throughout Australia so far as federal offenders are concerned, and that the maximum should be 500 hours, to be served over a period not exceeding two years.⁴¹⁵

7.79 The circumstances that constitute a failure to comply with a community service order are also differently expressed in state and territory legislation.⁴¹⁶ The ALRC is interested in hearing whether any of these differences lead to unequal treatment of federal offenders across the jurisdictions.

409 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [121].

410 *Crimes (Sentencing Procedure) Act 1999* (NSW) Pt 7; *Sentencing Act 1997* (Tas) s 7; *Penalties and Sentences Act 1992* (Qld) Pt 5, Div 2; *Criminal Law (Sentencing) Act 1988* (SA) s 47; *Crimes Act 1900* (ACT) s 403; *Sentencing Act 1995* (NT) Pt 3, Div 4. See also *Sentencing Act 1991* (Vic) Pt 3, Div 3 and *Sentencing Act 1995* (WA) Pt 9, discussed below in relation to CBOs.

411 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 86(1).

412 *Sentencing Act 1997* (Tas) s 7.

413 Compare *Crimes (Administration of Sentences) Regulation 2001* (NSW) reg 205; *Penalties and Sentences Act 1992* (Qld) s 103; *Sentencing Act 1997* (Tas) s 28.

414 For example, in NSW, 500 hours: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8(2); in Queensland, 240 hours: *Penalties and Sentences Act 1992* (Qld) s 103; and in South Australia, 320 hours: *Criminal Law (Sentencing) Act 1988* (SA) s 47.

415 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 69.

416 For example, the *Crimes Act 1900* (ACT) s 39 sets out a number of circumstances that will constitute a breach of a community work order, whereas Tasmanian legislation is silent: *Sentencing Act 1997* (Tas) s 36.

Community based orders

7.80 CBOs are available only in Victoria and Western Australia. They contain both punitive elements (loss of leisure time) and rehabilitative elements (education and treatment). They are intended to constrain the offender's time, behaviour and freedom of choice, while still permitting the person to remain within the community.⁴¹⁷ Under both the Victorian and Western Australian legislation, a CBO cannot run for longer than two years.

7.81 In Victoria, the *Sentencing Act 1991* (Vic) specifies the place of CBOs in the sentencing hierarchy—they sit below any form of imprisonment, but above fines, adjournments, discharges or dismissals.⁴¹⁸

7.82 In Victoria, an offender sentenced to a CBO has to comply with core conditions (for example, not to commit an imprisonable offence during the currency of the order), and program conditions (including unpaid community work, supervision by a Community Corrections Officer (CCO) and attendance for education or other programs). In Western Australia, an offender must comply with similar standard obligations.⁴¹⁹ In addition, a CBO must contain at least one of three requirements: a supervision requirement,⁴²⁰ a program requirement, or a community service requirement.

7.83 Problems have arisen in harmonising the Victorian and the Commonwealth schemes. For example, in *Curry v Morrison*, the offender was convicted of a social security offence punishable by either a fine of \$2,000 or imprisonment for not more than 12 months, or both. The Magistrate wanted to make a CBO with a community work condition. However, the *Sentencing Act 1991* (Vic) gave two inconsistent indicators of the equivalent number of hours of community work (\$2,000 equated to 50 hours; 12 months imprisonment equated to 125 hours) and directed that the relevant provision was the one that set out the lesser number of hours. The Magistrate ordered 125 hours of community work. The Full Supreme Court held that the court could impose a CBO, but it had to ensure that the limits set by the *Sentencing Act 1991* (Vic) were not exceeded. Therefore, the Magistrate should not have ordered more than 50 hours of community work.⁴²¹ In this case, the divergence of the maximum penalties set out in the Commonwealth offence provision, together with the state legislation picked

417 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [8.201].

418 *Sentencing Act 1991* (Vic) s 5(6).

419 *Sentencing Act 1995* (WA) s 63.

420 A supervision requirement allows an offender to be monitored regularly in the community: *Ibid* s 65. A program requirement can include that an offender obey orders in relation to assessment by a medical practitioner; receive appropriate treatment in relation to the abuse of drugs or other substances; attend programs or courses; and reside at a specified place (s 66). A community service requirement is intended to punish or rehabilitate an offender (s 67).

421 *Curry v Morrison* (Unreported, Victorian Supreme Court Appeal Division, 11 February 1993). See R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [8.403].

up by s 20AB of the *Crimes Act*, precluded effective use of a CBO in relation to the federal offender.

Intensive supervision orders

7.84 The *Crimes Regulations* prescribe ISOs made under Part 10 of the *Sentencing Act 1995* (WA) as a sentencing option for federal offenders. An ISO is an order that an offender must comply with certain standard obligations, supervision requirements, and primary requirements.

7.85 The standard conditions of an ISO include that the offender must report to a community corrections centre within 72 hours after being released by the court, or as otherwise ordered by a CCO; and must not change address or place of employment without the prior permission of a CCO. All ISOs contain supervision requirements, for example, that an offender must contact, or receive visits from, a CCO.⁴²² The primary requirements are similar to those applicable to CBOs under Part 9 of the *Sentencing Act 1995* (WA) outlined above in that they may include a program requirement and a community service requirement.⁴²³ However, ISOs can also include a curfew requirement.⁴²⁴

Non-custodial options not available to federal offenders

7.86 A significant issue is whether alternatives to imprisonment other than those already discussed should be available to federal offenders. ALRC 44 noted that it is important that alternative sentencing options are properly evaluated at the state or territory level prior to becoming available for application at the federal level.⁴²⁵

7.87 A number of non-custodial sentencing options available in some states and territories are currently not available to courts when sentencing federal offenders because they are neither named in s 20AB nor prescribed by regulation. These include:

- *Non-association and place restriction orders.* These orders, available under NSW and Queensland legislation,⁴²⁶ contain a requirement that the offender not contact a particular person (often the victim of the crime) for a stated time; or a requirement that the offender not go to a certain place, or within a distance of a certain place, for a period of time.
- *Conviction without penalty.* For example, s 15 of the *Criminal Law (Sentencing) Act 1988* (SA) provides that where a court finds a person guilty of an offence but

422 *Sentencing Act 1995* (WA) s 70.

423 *Ibid* s 72.

424 *Ibid* ss 72, 75.

425 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [143].

426 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A; *Penalties and Sentences Act 1992* (Qld) Pt 3A.

finds the offence so trifling that it is inappropriate to impose any penalty, it may record a conviction and discharge the defendant without penalty.

- *Imposing a fine without conviction.* Section 19B(1)(d) of the *Crimes Act* does not provide for the imposition of a fine as a condition of discharge without conviction. The section only permits a condition of payment by way of reparation, restitution, compensation or costs. In Victoria, it has been common in state matters for Magistrates to impose a condition requiring the payment of money to the court fund. This is because fining without conviction is a sentencing option in respect of a state offender in Victoria. However, this is not an option in respect of a federal offender.⁴²⁷

7.88 There are also several non-custodial sentencing options that may be imposed for particular federal offences, which could be made available more generally to courts when sentencing federal offenders. For example, federal legislation provides that federal employees who are convicted of corruption offences may be liable to forfeit employer contributions or benefits in relation to superannuation to which they would normally be entitled.⁴²⁸

7.89 The ALRC is also interested in hearing whether restorative justice options should be provided under federal legislation or made more widely available to federal offenders. For example, the recently enacted restorative justice legislation in the ACT allows conferencing between victims and offenders, which runs in parallel with the court process.⁴²⁹ Such processes are generally unavailable to federal offenders.⁴³⁰

7.90 Federal legislation does not currently provide for deferred sentences, that is where proceedings are adjourned for a period of time to enable a court to assess an offender's capacity and prospects for rehabilitation, or to allow an offender to demonstrate that rehabilitation has taken place, before sentencing them. In contrast, s 11 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) enables the court to defer sentence for rehabilitation and other purposes.⁴³¹

7.91 The ALRC is also interested in hearing views about whether guidelines relating to minimum standards for non-custodial sentencing options should be adopted by the Commonwealth.⁴³² The minimum standards could be based on the United Nations

427 M Pedley, *Federal Sentencing in Victoria* (2004) Commonwealth Director of Public Prosecutions, 24.

428 *Crimes (Superannuation Benefits) Act 1989* (Cth) s 21(4). See also *Sentencing (Superannuation Orders) Act 2004* (Vic).

429 *Crimes (Restorative Justice) Act 2004* (ACT) s 27.

430 For example, the ACT legislation applies only to offences against ACT laws: *Ibid* s 12.

431 See also *Sentencing Act 1997* (Tas) s 7.

432 ALRC 44 recommended that the Commonwealth, states and territories should adopt such guidelines: Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 80.

Standard Minimum Rules for Non-custodial Measures 1990 (the Tokyo Rules),⁴³³ which provide a set of basic principles that promote the use of non-custodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment.

Question 7–5 What non-custodial options should be available in the sentencing of individual and corporate federal offenders?

Question 7–6 What are the principles upon which non-custodial sentences should be considered or imposed? Should there be greater flexibility as to how non-custodial sentences are to be served?

Failure to comply with a non-custodial sentencing option

7.92 Sections 20A and 20AC set out the consequences of a federal offender failing to comply with a non-custodial sentencing option.⁴³⁴ These are discussed further below.

7.93 ALRC 44 recommended that imprisonment should not be imposed as an automatic sanction for breach of any non-custodial sentencing option, including a fine.⁴³⁵ However, ALRC 44 also recommended that a wilful and substantial breach of a non-custodial sanction should be a separate and serious offence, punishable by a maximum of two years imprisonment. The recommendation stated that other non-custodial sentencing options should be available and the policy that imprisonment is the sanction of last resort should apply.⁴³⁶ Although this recommendation has not been implemented in federal legislation, in many states and territories breach of a non-custodial sentencing option does constitute an offence.⁴³⁷ The ALRC is interested in hearing whether federal legislation should provide for an offence for wilful and substantial breach of a non-custodial sanction.

Discharge or release

7.94 Section 20A of the *Crimes Act* sets out the consequences of failing to comply with a condition of discharge without conviction under s 19B(1), or conditional release after conviction under s 20(1). Where a person has been conditionally discharged without conviction and has failed to comply with a condition of the order without reasonable excuse, the court may: (a) revoke the order, convict the person of the

433 The impact of the *United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)*, UN Doc A/RES/45/110 (1990) on domestic law is somewhat uncertain. See further Ch 3.

434 The enforcement of fines is discussed in Ch 12.

435 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 89.

436 *Ibid*, Rec 90. Not all the Commissioners agreed: see Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [152]–[153].

437 See, eg, *Sentencing Act 1995* (WA) s 131.

offence, and resentence the person; or (b) take no action.⁴³⁸ Where a person has been conditionally released after conviction and has failed to comply with a condition of the order without reasonable excuse, the court may take either course just mentioned, or impose a pecuniary penalty not exceeding 10 penalty units.⁴³⁹

7.95 Where a person has failed to comply with a condition of discharge without conviction under s 19B(1), or conditional release after conviction under s 20(1), the court may also order that any recognizance is forfeited and that any other security can be enforced.⁴⁴⁰ The ALRC is interested in hearing whether the law relating to a federal offender's failure to comply with a condition of discharge without conviction or conditional release after conviction raises any issues or practical difficulties.

State and territory sentencing alternatives

7.96 Section 20AC of the *Crimes Act* sets out the consequences of an offender failing, without reasonable cause or excuse, to comply with an additional sentencing alternative made under s 20AB. The court that passed the sentence or made the order may deal with the offender by: imposing on the offender a pecuniary penalty not exceeding 10 penalty units; revoking the alternative sentence and resentencing the offender; or taking no action.⁴⁴¹

7.97 Section 20AC does not make provision for automatic revocation of a sentencing order made under s 20AB where a person is convicted of a further criminal offence during the currency of the order. Nor does it provide a mechanism for dealing with a failure to comply where a person has a reasonable excuse, such as an illness. This has been a particular problem in relation to periodic detention, which is discussed below and in Chapter 12.

7.98 The consequences of failing to comply with a non-custodial sentencing option can differ from one jurisdiction to another. For example, failure to comply with a community service order in Tasmania constitutes an offence attracting a fine not exceeding 10 penalty units, or a term of imprisonment not exceeding three months. Alternatively, the court can confirm the order as originally made; increase the number of hours of community service; or cancel the order and deal with the offender as if the order had not been made.⁴⁴² This raises the issue of equality of treatment between federal offenders and state or territory offenders in similar circumstances.

438 *Crimes Act 1914* (Cth) s 20A(5)(a).

439 *Ibid* s 20A(5)(b).

440 *Ibid* s 20A(7).

441 *Ibid* s 20AC(6), (7).

442 *Sentencing Act 1997* (Tas) s 36.

Question 7–7 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? See also Questions 7–9 and 12–5.

Custodial sentences

7.99 Imprisonment is the most severe custodial sanction available. Sentences of imprisonment can be wholly or partly suspended. In addition to imprisonment, s 20AB allows a court imposing a sentence on a federal offender to impose an alternative custodial sentence such as periodic detention, an attendance centre order, or an attendance order where under state or territory law the court is empowered to make such an order. The court can also impose any type of alternative custodial sentence that is prescribed in the *Crimes Regulations*.

7.100 Where an alternative sentencing order is made under s 20AB, the laws of the state or territory with respect to that sentence apply in so far as they are not inconsistent with the laws of the Commonwealth.⁴⁴³

7.101 The section below outlines various types of custodial options that may be available to federal, state and territory offenders, other than full-time imprisonment. These options include fully or partially suspended sentences of imprisonment, periodic detention, home detention, attendance centre orders and attendance orders, intensive correction orders, and combined custody and treatment orders.⁴⁴⁴

7.102 Issues may also arise in respect of detention orders pertaining to the mentally ill, and custodial orders that may be made in relation to young persons. These are not separately addressed in this chapter but in Chapters 14 and 15, respectively.

Suspended sentence of imprisonment

7.103 A suspended sentence of imprisonment is one that is imposed but not activated or not wholly activated. It is suspended on conditions similar to those applicable to probation or parole.⁴⁴⁵ The rationale for its introduction was its assumed greater deterrent effect than other non-custodial options and the avoidance of imprisonment.⁴⁴⁶

443 *Crimes Act 1914* (Cth) s 20AB(3).

444 Although ALRC 44 treated periodic detention and home detention as non-custodial sentencing options, for the purposes of this Inquiry the ALRC takes the view that such orders are essentially custodial.

445 K Warner, *Sentencing in Tasmania* (2nd ed, 2002), [9.201].

446 *Ibid.*, [9.201].

7.104 Sentences that are very similar to suspended sentences may be passed in respect of federal offenders under Part IB of the *Crimes Act*.⁴⁴⁷ Section 20(1)(b) of the Act provides that a court may sentence a federal offender to a term of imprisonment but direct that the person be released forthwith, or after having served a specified term of imprisonment, upon giving security of compliance with certain conditions. An order made under this section is known as a recognizance release order.⁴⁴⁸ Even though the sentence of imprisonment is qualified by immediate release or partial suspension, such orders are still subject to the requirement in s 17A that imprisonment be considered as the sanction of last resort.⁴⁴⁹

7.105 ALRC 44 recommended that, in light of other recommendations made in that report, partially suspended sentences should not be available to federal offenders, and that suspended sentences should be rationalised.⁴⁵⁰

Periodic detention

7.106 Periodic detention is aimed at providing a cheaper and more humane alternative to full-time incarceration.⁴⁵¹ It involves imprisoning offenders for limited periods and permitting them to spend the remainder of their time at home, work or otherwise in the community. In NSW and the ACT a detention period is defined, with some qualifications, as one that commences at 7:00 pm on a specified day of the week and ends at 4.30 pm two days later.⁴⁵² The main advantage of periodic detention is that it enables the offender to maintain contact with family, friends, work and the wider community. Contact with other full-time prison inmates is also reduced, thereby minimising the risks of 'criminogenic' effects.⁴⁵³

7.107 Periodic detention is currently available only in NSW and the ACT.⁴⁵⁴ However, even in these jurisdictions, it is not an option in practice if the distance that a federal offender has to travel to reach the periodic detention facility is too great.⁴⁵⁵ There were 30 federal prisoners sentenced to periodic detention in NSW during the period 1 January 2003 to 31 December 2003.⁴⁵⁶

447 Ibid, [9.201].

448 See further Ch 9.

449 *Weetra v Beshara* (1987) 29 A Crim R 407.

450 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 20.

451 Judicial Commission of New South Wales, *Periodic Detention Revisited* (1998) Judicial Commission of New South Wales, xi.

452 *Periodic Detention Act 1995* (ACT) s 3; *Crimes (Administration of Sentences) Act 1999* (NSW) s 3.

453 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [129].

454 *Crimes Regulations 1990* (Cth) reg 6; *Crimes (Sentencing Procedure) Act 1999* (NSW) Pt 2; *Crimes (Administration of Sentences) Act 1999* (NSW) Pt 3; *Periodic Detention Act 1995* (ACT).

455 New South Wales Department of Corrective Services, *Consultation*, Sydney, 15 September 2004.

456 In that period, no federal offenders were sentenced to periodic detention in the ACT: Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 2004, 28220 (Question No 2852).

7.108 In NSW, a court cannot make a periodic detention order unless it is satisfied that the offender is over 18 years old; is a suitable person to serve the sentence by way of periodic detention; and has signed an undertaking to comply with the obligations under the order. There must be accommodation available at the periodic detention centre for the offender. There must also be transport arrangements available to the offender to and from the periodic detention centre, being arrangements that will not impose undue inconvenience, strain or hardship.⁴⁵⁷

7.109 In NSW, the Commissioner of Corrective Services may, during the period of detention, make an attendance order or a work order in respect of a person who is sentenced to periodic detention. An attendance order requires the person to participate in any activity that the Commissioner considers conducive to the offender's welfare or training; a work order requires the offender to carry out community service work.⁴⁵⁸

7.110 In the ACT, the Director of Corrective Services may direct a detainee to participate in any activity, attend any class or group or undergo any instruction that the Director considers conducive to the detainee's welfare or training. The Director may direct a detainee to perform work at: a hospital or a charitable or educational institution; the home of an elderly, infirm or disabled person; an institution for the elderly, the infirm or persons with disabilities; or any place that is administered, owned or occupied by the ACT or an authority of the ACT.⁴⁵⁹

7.111 Section 20AB(1A) provides that a court imposing an alternative sentencing order, such as periodic detention, is not required to apply state and territory laws that require the making of another order before an alternative sentence can be imposed, for example, that the person be sentenced to imprisonment before an order for periodic detention can be made.⁴⁶⁰ This is consistent with the views expressed in ALRC 44 that sentencing options such as periodic detention be available to federal offenders as an independent option—that is, without a link to a sentence of imprisonment.⁴⁶¹

Home detention

7.112 Home detention involves an offender being confined to an approved residence for specified periods of time. It is currently available in the Northern Territory, NSW,

457 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 66(1). See also *Periodic Detention Act 1995* (ACT) s 6, which sets out the matters of which a court must be satisfied before making a periodic detention order.

458 *Crimes (Administration of Sentences) Act 1999* (NSW) ss 80, 84.

459 *Periodic Detention Act 1995* (ACT) s 15.

460 For example, in NSW periodic detention can be ordered only where an offender has been sentenced to a term of imprisonment of not more than three years: *Crimes (Sentencing Procedure) Act 1999* (NSW).

461 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 75.

Victoria and the ACT as a sentencing option.⁴⁶² In contrast, it is available in South Australia and Queensland only as a form of early release from prison.⁴⁶³

7.113 Each jurisdiction in which home detention is available has its own set of standard or core conditions.⁴⁶⁴ There are some specific conditions that are not common across the jurisdictions,⁴⁶⁵ but common conditions include that the offender must:

- be of good behaviour and not commit any new offence;
- inform a specified person as soon as possible if arrested or detained by a police officer;
- reside only at approved premises;
- accept any visit to the approved premises at any time by a specified person;
- submit to electronic monitoring and not tamper with monitoring equipment;
- not consume alcohol or use prohibited drugs, and submit to test procedures for detecting alcohol or drug use; and
- when not otherwise employed, undertake community service work (not exceeding 20 hours per week) as directed by a specified person.

7.114 Before making a home detention order, the court must be satisfied in relation to a number of issues. These include that: the offender is a suitable person to serve the sentence by way of home detention; suitable arrangements are in place for the offender to reside at the approved premises; the persons with whom it is likely the offender will reside have given their consent to the making of the order, or have been consulted; and

462 *Crimes Regulations 1990* (Cth) reg 6; *Sentencing Act 1995* (NT) Pt 3, Div 5; *Crimes (Sentencing Procedure) Act 1999* (NSW) Pt 2; *Sentencing Act 1991* (Vic) Pt 3, Div 2; *Rehabilitation of Offenders (Interim) Act 2001* (ACT) Ch 2.

463 *Correctional Services Act 1982* (SA) s 37A; *Corrective Services Act 2000* (Qld) s 141(1)(b).

464 *Crimes (Administration of Sentences) Regulation 2001* (NSW) reg 200; *Sentencing Act 1991* (Vic) s 18ZZB; *Rehabilitation of Offenders (Interim) Regulation 2001* (ACT) reg 7; *Sentencing Act 1995* (NT) s 44(3); *Prisons (Correctional Services) (Home Detention Orders) Regulations 1996* (NT) reg 4. In addition to the standard conditions, an offender may be subject to conditions imposed by the sentencing court or the Parole Board: *Crimes (Administration of Sentences) Act 1999* (NSW) s 103.

465 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).

the offender has signed an undertaking to comply with the order or has consented to the order.⁴⁶⁶

7.115 As discussed in Chapter 8, some state and territory sentencing legislation provides that home detention is not available to certain offenders or in respect of certain types of state and territory offences.⁴⁶⁷ However, there are no equivalent guidelines as to when home detention may or may not be available in respect of certain types of federal offenders or federal offences. For example, home detention could be considered as an appropriate sentencing option for mothers with young children.

7.116 In those jurisdictions in which a home detention order is available, the making of the order for state and territory offenders is linked to a sentence of imprisonment.⁴⁶⁸ However, federal offenders can be sentenced to home detention in these jurisdictions independently of an imprisonment order.

7.117 ALRC 44 recommended that home detention should not be an available sentencing option for federal offenders.⁴⁶⁹ At the time of that report, home detention was experimental. ALRC 44 identified a number of concerns with home detention.⁴⁷⁰ These included that the most common use for home detention was likely to be for offenders who did not merit a full custodial sentence and for whom other non-custodial sentences may be more appropriate; that home detention relied on intensive surveillance; and that offenders of no fixed abode would not have this option.

Attendance centre orders and attendance orders

7.118 An attendance centre order is one under which a period of imprisonment is imposed, but to be served in the community. Such orders are usually based on the assumption that a term of imprisonment is appropriate, but they provide an alternative method of discharging that sentence. Attendance centre orders usually combine community work with a requirement for regular attendance at an attendance centre for the purpose of personal development activities.⁴⁷¹ Attendance centre orders were available as a sentencing option under the *Penalties and Sentences Act 1981* (Vic). This legislation was the subject of criticism, and has been repealed.⁴⁷²

466 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 78(1)(a), (c), (d); *Rehabilitation of Offenders (Interim) Act 2001* (ACT) s 11(1)(a), (c), (d); *Sentencing Act 1991* (Vic) ss 18ZU, 18ZW(1)(a), (d), 18ZZ; *Sentencing Act 1995* (NT) s 45(1)(a)(iii).

467 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 76, 77; *Sentencing Act 1991* (Vic) s 18ZV; *Rehabilitation of Offenders (Interim) Act 2001* (ACT) ss 9, 10.

468 *Sentencing Act 1991* (Vic) s 18ZT; *Sentencing Act 1995* (NT) s 44(1); *Rehabilitation of Offenders (Interim) Act 2001* (ACT) s 6; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7.

469 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 78.

470 *Ibid.*, [131].

471 *Ibid.*, [126].

472 See R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [8.103].

7.119 Attendance orders are currently available in relation to children and young persons under Victorian and ACT legislation.⁴⁷³ Attendance orders are available as part of a periodic detention order under NSW legislation, and the Family Court of Australia is able to make an attendance order as part of a community service order under s 70NK of the *Family Law Act 1975* (Cth) as a consequence of failure to comply with orders, and other obligations, that affect children.

7.120 The ALRC is interested in hearing whether attendance centre orders and attendance orders should be made more widely available to federal offenders.

Intensive correction orders

7.121 In Victoria and Queensland, when an offender is sentenced to a term of imprisonment not greater than one year, a court may order that the sentence be served by way of intensive correction in the community.⁴⁷⁴ In those jurisdictions, intensive correction orders are available in the sentencing of federal offenders, although the court need not first make an order sentencing the offender to imprisonment.⁴⁷⁵

7.122 Intensive correction orders may require an offender to attend a specified community corrections centre⁴⁷⁶ or to reside at community residential facilities.⁴⁷⁷ They also make provision for the offender to perform community work, to receive counselling and treatment, and to make restitution and pay compensation.⁴⁷⁸

7.123 Both Victorian and Queensland legislation set out the conditions that must be included in an intensive correction order.⁴⁷⁹ Some common core conditions include that an offender:

- must not commit another offence, or another offence punishable by imprisonment;
- must report to, or receive visits from, a CCO or an authorised corrective services officer⁴⁸⁰ at least twice in each week that the order is in force;
- must not leave the jurisdiction except with permission; and

473 *Children and Young Persons Act 1989* (Vic) ss 170–172 (youth attendance orders); *Children and Young People Act 1999* (ACT) ss 96(1)(i), 110 (attendance centre orders).

474 *Sentencing Act 1991* (Vic) s 19; *Penalties and Sentences Act 1992* (Qld) s 112.

475 *Crimes Regulations 1990* (Cth) reg 6(c), (d); *Crimes Act 1914* (Cth) s 20AB(1A).

476 *Sentencing Act 1991* (Vic) s 20.

477 *Penalties and Sentences Act 1992* (Qld) s 114.

478 *Sentencing Act 1991* (Vic) s 20; *Penalties and Sentences Act 1992* (Qld) ss 114–115.

479 *Sentencing Act 1991* (Vic) s 20; *Penalties and Sentences Act 1992* (Qld) s 114.

480 An offender in Victoria is to report to a CCO; an offender in Queensland to an authorised corrective services officer.

- must comply with every reasonable direction or instructions of a CCO or an authorised corrective services officer.

Combined custody and treatment orders

7.124 A combined custody and treatment order is an order sentencing the offender to a term of imprisonment and specifying that part of that term is to be served in the community. While serving the sentence, the offender must undergo treatment for alcohol or drug addiction.

7.125 In Victoria, where a court is satisfied that drunkenness or drug addiction contributed to the commission of a state offence, the court may impose a term of imprisonment of not more than 12 months, and order that not less than six months be served in custody and the balance be served in the community subject to a number of conditions.⁴⁸¹ A combined custody and treatment order is taken for all purposes to be a sentence of imprisonment for the whole term stated by the court.⁴⁸²

7.126 Core conditions of such an order include that the offender must:

- not commit another offence, punishable on conviction by imprisonment;
- undergo treatment for alcohol or drug addiction while serving the sentence in custody and in the community;
- report to, and receive visits from a CCO and obey all lawful instructions and directions of that officer, while serving the sentence in the community; and
- not leave the jurisdiction except with permission.⁴⁸³

7.127 In addition, a court may attach other conditions to the order, including that the offender submit to testing for alcohol or drug use during the period of the order.⁴⁸⁴

7.128 A combined custody and treatment order is not made applicable to federal offenders by s 20AB of the *Crimes Act* or its regulations. A request has been made for such orders to be prescribed under s 20AB so that they would apply to federal offenders in Victoria.⁴⁸⁵

481 *Sentencing Act 1991* (Vic) s 18Q(1).

482 *Ibid* s 18Q(6).

483 *Ibid* s 18R.

484 *Ibid* s 185.

485 M Pedley, *Federal Sentencing in Victoria* (2004) Commonwealth Director of Public Prosecutions, 2.

Question 7–8 What custodial options should be available in the sentencing of federal offenders?

Failure to comply with alternative custodial sentences

7.129 Failure to comply with an alternative custodial order can take two forms. One is breach of the conditions attaching to such an order without reasonable cause or excuse. The other is where an offender does not comply with conditions due to a reasonable excuse, such as a medical condition.

7.130 The consequences of an offender failing, without reasonable cause or excuse, to comply with an alternative sentencing order made under s 20AB are set out in s 20AC. The issues arise whether those consequences are appropriate, and whether there is a need for any additional consequences that could apply either generally in relation to breach of all alternative sentencing orders, or specifically in relation to breach of alternative custodial sentencing orders, such as periodic or home detention. For example, should s 20AC refer to the court's power to vary the breached sentencing order, in addition to its existing power to revoke the order and resentence the offender? Further, in so far as the section allows the court, upon breach, to revoke an alternative custodial sentencing order and resentence the offender, the issue arises whether any limitations should be placed on the court's powers in resentencing. For example, should the court be able to impose a non-custodial sentence on an offender who has breached an alternative custodial order?

7.131 Further, as noted above, under s 20AC a court is unable to take action against an offender who has a reasonable cause or excuse for not complying with the order. Section 20AC does not enable the courts to reconsider the appropriateness of an alternative custodial sentencing order for a federal offender suffering ongoing medical conditions that prevent him or her from complying with the order. There is no procedure in Part IB allowing review of an alternative sentencing order if it is no longer appropriate.⁴⁸⁶ The Commonwealth Attorney-General's Department is reviewing s 20AC with a view to providing the courts with greater flexibility in dealing with cases of breach or frustration of alternative sentencing orders.⁴⁸⁷ The administrative difficulties in enforcing alternative custodial orders are discussed in Chapter 12.

486 Attorney-General's Department, *Correspondence*, 18 October 2004.

487 *Ibid.* See further Ch 12.

Non-compliance with home detention

7.132 Different consequences can flow from breaches of home detention orders by federal, state and territory offenders depending on whether those breaches are dealt with judicially by the courts or administratively by the executive. This is discussed further in Chapter 12. For example, in the Northern Territory, where a breach of a home detention order is dealt with by the courts, the consequences of breach are limited—mainly because the making of the order is linked to a sentence of imprisonment. The court is directed to revoke the order and to imprison the offender for the term suspended by the court on the making of the order, subject to some circumstances where it is able to vary the terms and conditions of the order.⁴⁸⁸

7.133 Unlike Part IB of the *Crimes Act*, there is a mechanism in the *Sentencing Act 1995* (NT) for the court to review a home detention order where circumstances have arisen or become known since the home detention order was made. Arguably, those circumstances may be ones that reasonably prevent an offender from complying with a home detention order. The review may be initiated by the Director of Correctional Services or an offender. On review, the court may discharge, vary or revoke the home detention order. If it revokes the order, the court may confirm the sentence of imprisonment imposed on the offender or resentence the offender.⁴⁸⁹ Similarly, in the ACT a court may revoke a home detention order if it is satisfied that, because of a change in the person's circumstances, it is no longer appropriate that the sentence be served by way of home detention.⁴⁹⁰

Non-compliance with periodic detention

7.134 As with home detention, different consequences can flow from breaches of periodic detention orders by federal, state and territory offenders depending on whether those breaches are dealt with by the courts or administratively. For example, in NSW, a sentence is extended by one week for each detention period for which an offender fails to report or reports late.⁴⁹¹ This cannot be done in relation to federal offenders due to constitutional prohibitions on non-judicial officers exercising federal judicial power, such as by increasing a sentence.

7.135 Unlike Part IB of the *Crimes Act*, the *Crimes (Administration of Sentences) Act 1999* (NSW) makes provision for the revocation of a periodic detention order where health reasons or compassionate grounds justify revocation.⁴⁹² Those reasons and grounds could arguably be ones that reasonably prevent an offender from complying

488 *Sentencing Act 1995* (NT) s 48(6), (9).

489 *Ibid* s 47.

490 *Rehabilitation of Offenders (Interim) Act 2001* (ACT) s 24.

491 *Crimes (Administration of Sentences) Act 1999* (NSW) s 89. See also *Periodic Detention Act 1995* (ACT) s 25, which provides for the extension of the detainee's sentence by one detention period for each detention period for which the detainee has failed to report, though the term of a sentence may not be extended by more than two detention periods.

492 *Crimes (Administration of Sentences) Act 1999* (NSW) s 163(1A).

with a periodic detention order. The particular difficulties associated with administering periodic detention orders where an offender has a reasonable cause or excuse for not complying are discussed in Chapter 12.

Question 7–9 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? See also Questions 7–7 and 12–5.

Federal or state prescription of sentencing options?

7.136 Not all alternative sentencing options available to state and territory offenders are available to federal offenders. There are also disparities between the alternative sentencing options available in each jurisdiction. For example, periodic detention, home detention, ISOs and CBOs are not available in all jurisdictions. This raises the issue of whether federal offenders, or any class of federal offenders, are disadvantaged by these disparities.

Federal prescription of sentencing options

7.137 One way of addressing the disparity in alternative sentencing options available to federal offenders would be to prescribe sentencing options in federal legislation, either broadly or in detailed terms. One advantage of federal prescription is that uniformity would be achieved in relation to federal offenders in every state and territory. In addition, the sentencing options available in relation to federal offenders, and perhaps even the detailed requirements within each option, would remain stable over time. At present, s 20AB of the *Crimes Act* picks up state and territory sentencing options that are described in general terms, but the particular requirements of each option change as the states and territories amend their legislation. Federally prescribed sentencing options would overcome any practical difficulty associated with the fact that states and territories rarely consult the Commonwealth before amending their sentencing legislation.

7.138 However, there are some difficulties with federal prescription. It would be difficult to administer sentencing options for federal offenders if those options were not available to state or territory offenders in the same jurisdiction.⁴⁹³ Further, to achieve uniformity of application, resources would be needed to make available all the alternative sentencing options. For example, periodic detention facilities and attendance centres would need to be established in some jurisdictions, bearing in mind

493 New South Wales Department of Corrective Services, *Consultation*, Sydney, 15 September 2004.

that periodic detainees are kept in separate facilities as far as practicable to minimise their contact with full-time prison inmates.⁴⁹⁴ Whether it is feasible for the Australian Government to take on responsibility in this area, especially in light of the relatively small number of federal offenders, is discussed in Chapter 3. It also raises the issue of whether s 120 of the *Australian Constitution*—in directing states to accommodate federal offenders in their prisons—allows the Commonwealth to dictate what those prisons should be like, for example, by requiring facilities appropriate for periodic detention of federal offenders.⁴⁹⁵

7.139 The infrastructure and resources needed to make home detention available in all states and territories would appear to be considerably less than that required for periodic detention and attendance centre orders. Four states and territories already have home detention as a sentencing option, and at least two others have it as a pre-release scheme. The ALRC is interested in the views of stakeholders on this issue.

State prescription of sentencing options

7.140 The other possibility would be to continue to have the alternative sentencing options available to federal offenders determined by the options available in the various states and territories. This would give due recognition to the fact that the states and territories administer those sentencing options.

7.141 Section 20AB could be expanded to include all existing sentencing options available in the states and territories so that, for example, it would pick up the combined custody and drug treatment order that is currently not available to federal offenders. Alternatively, as raised in DP 30, an ambulatory provision could be drafted, which would pick up all existing and potential state and territory options. The main disadvantage is that this would build on existing lack of uniformity across Australia, resulting in the disparate treatment of federal offenders.⁴⁹⁶ It also removes from the Australian Government the opportunity to evaluate existing or proposed sentencing options before making them available in respect of federal offenders.⁴⁹⁷

Question 7–10 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?

494 Ibid.

495 See further Ch 3.

496 Australian Law Reform Commission, *Sentencing: Penalties*, DP 30 (1987), [81].

497 Ibid, [81].

8. General Issues in Determining the Sentence

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Introduction

8.1 This chapter considers the issues relating to the determination of federal sentences—both at first instance by the sentencing court and when those sentences may be reconsidered. Key issues in determination of sentence include the choice of sentencing option, the quantum of sentence, the factors that are to be considered in determining the sentence, the manner in which those factors are to be treated, and factors that are irrelevant to sentence determination.

Selecting sentencing options

8.2 Part IB of the *Crimes Act 1914* (Cth) provides limited guidance to judicial officers in selecting between various sentencing options when sentencing a federal offender.⁴⁹⁸ Part IB has been criticised for its lack of procedure for choosing between different sentencing options.⁴⁹⁹

498 The various custodial and non-custodial options available to a court when sentencing a federal offender are set out in Ch 7.

499 G Zdenkowski, 'Contemporary Sentencing Issues' in D Chappell and P Wilson (eds), *The Australian Criminal Justice System: The Mid 1990s* (1994) 171, 200, 202–203.

8.3 Under Part IB, the court is directed to impose a sentence that is of a ‘severity appropriate in all the circumstances of the offence’,⁵⁰⁰ and to have regard to a list of non-exhaustive factors, so far as they are relevant and known to the court.⁵⁰¹ When considering the imposition of certain sentencing options, the court is also directed to have regard to the nature and severity of the conditions that may be imposed or apply to the offender under that sentence.⁵⁰²

8.4 Part IB provides guidance about when the imposition of a sentence of imprisonment is appropriate and when it is inappropriate. Section 17A reflects the policy, affirmed in ALRC 44, that imprisonment should be the sanction of last resort.⁵⁰³ A court is not to impose a sentence of imprisonment unless, after having considered all other available sentencing options, it is satisfied that no other sentence is appropriate in the circumstances of the case.⁵⁰⁴

8.5 One issue is whether there are any circumstances in which imprisonment is not an appropriate sentencing option for a federal offence. In the absence of exceptional circumstances, s 17B restricts the ability of the court to pass a sentence of imprisonment on an offender who has committed a prescribed offence relating to money or property whose total value does not exceed \$2,000 where that offender has not previously been sentenced to imprisonment for any offence.⁵⁰⁵ ALRC 44 recommended that consideration should also be given to eliminating imprisonment as a sanction for particular offences, including social security offences and taxation offences, especially where no systemic fraud is involved.⁵⁰⁶

8.6 Part IB does not contain any guidance as to:

- when it is appropriate to select a particular custodial sentencing option other than imprisonment, such as a periodic detention order;
- when it is appropriate to select a particular non-custodial sentencing option other than a fine or an order under s 19B discharging the offender without proceeding to conviction;

500 *Crimes Act 1914* (Cth) s 16A(1).

501 *Ibid* s 16A(2). See also s 19B(1)(b) (factors relevant to discharge without conviction); s 16C (financial circumstances relevant to imposition of a fine).

502 *Ibid* s 16A(3).

503 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 11. See also Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), Rec 29.

504 Compare *R v Purdon* (Unreported, New South Wales Court of Criminal Appeal, 27 March 1997), 5, regarding social security fraud.

505 For criticism of s 17B’s predecessor, see H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991) Attorney-General’s Department, [12.27], [12.59(c)].

506 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 14.

- when it is appropriate to use more than one sentencing option—for example, imposing a fine in addition to another non-custodial sentence;⁵⁰⁷ and
- when, in respect of an offence punishable by imprisonment only, it is appropriate to convert the sentence to a pecuniary penalty calculated using the formulas set out in s 4B of the *Crimes Act*.⁵⁰⁸

8.7 ALRC 44 recommended that imprisonment should not be able to be imposed on federal offenders in association with any non-custodial sanctions but that community service orders, attendance centre orders, periodic detention orders and fines could be combined with other sanctions within that group in exceptional circumstances.⁵⁰⁹

8.8 Part IB makes it clear that, when sentencing a federal offender, a court is not required before selecting an alternative sentencing option to order that the offender be sentenced to imprisonment.⁵¹⁰ So, for example, if under state law there is a precondition that a sentence of imprisonment has to be imposed before the court can order periodic detention⁵¹¹ or home detention,⁵¹² that precondition will not apply in the sentencing of a federal offender.⁵¹³

8.9 In contrast to Part IB, some state sentencing legislation provides guidance in relation to the imposition of certain sentencing options. For example, South Australian legislation specifies the offences in respect of which a bond may not be ordered.⁵¹⁴ Similarly, NSW legislation specifies certain offenders in respect of whom, and certain offences in respect of which, periodic and home detention orders may not be made,⁵¹⁵ and sets out conditions governing whether an offender is suited to serving a periodic or home detention order⁵¹⁶ or a community service order.⁵¹⁷

8.10 Given the wide scope of federal offences—ranging from child sex tourism and the perpetration of sexual servitude to social security fraud—the issue arises whether

507 Compare *Sentencing Act 1997* (Tas) s 8, which expressly sets out the combined sentencing orders that are authorised under the Act.

508 See further Ch 7.

509 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 86, [142].

510 *Crimes Act 1914* (Cth) s 20AB(1A).

511 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 6, which provides that a court may order periodic detention only when it has sentenced an offender to imprisonment for less than three years.

512 See, eg, *Sentencing Act 1991* (Vic) s 18ZT.

513 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [125] expressed the view that ‘each sentencing option should be available for consideration separately on its own merits having regard to the circumstances of the offence and the offender’. See Recs 58, 68, 75.

514 *Criminal Law (Sentencing) Act 1988* (SA) s 37 (murder or treason).

515 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 65A, 65B, 76, 77.

516 *Ibid* s 66 and s 78, respectively. See also *Sentencing Act 1991* (Vic) s 18ZW in respect of suitability for a home detention order.

517 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 86.

federal legislation should specify whether there are categories of federal offences or federal offenders in respect of which particular sentencing options should or should not be available.

Determining quantum

8.11 When a court imposes a fine or a sentence of imprisonment, the maximum legislative penalty is prescribed by the relevant federal offence provision. The maximum penalty sets the upper boundary for a judicial officer in determining quantum.⁵¹⁸ But what figure, up to the maximum, should be chosen for a particular defendant in the particular circumstances of his or her case?

8.12 Federal legislation does give limited guidance. The legislative direction to the court to impose a sentence that is of a ‘severity appropriate in all the circumstances of the offence’⁵¹⁹ and to have regard to a list of non-exhaustive factors so far as they are relevant and known to the court⁵²⁰ is relevant to the court’s determination of quantum of sentence as well as to its choice of sentencing option. Similarly, the direction to the court to have regard to the financial circumstances of an offender before imposing a fine⁵²¹ is relevant both to the choice of a fine as a sentencing option, and the quantum of any fine imposed.

8.13 The issue arises whether there is a need for further guidance in federal legislation in relation to the quantum of sentence to be imposed. This is particularly important in relation to the duration of alternative sentences, such as community service, where there is no federally prescribed upper limit and the maximum hours prescribed by state sentencing legislation varies.⁵²² Thus a federal offender in one state could be sentenced to a greater number of hours of community service than a federal offender in another state for a similar crime.⁵²³

8.14 Similarly, given that a court has the power to sentence an offender to periodic detention without first having to impose a sentence of imprisonment, the issue arises whether there needs to be guidance in federal legislation as to the maximum amount of time that an offender can serve by way of periodic detention. State and territory legislation provides guidance in relation to the maximum duration of a periodic detention order because it links the order to a sentence of imprisonment. However, in

518 Legislative prescription of penalty is discussed in Ch 7.

519 *Crimes Act 1914* (Cth) s 16A(1).

520 *Ibid* s 16A(2).

521 *Ibid* s 16C.

522 Compare NSW (100 hours of community service) with Victoria (50 hours) for offences where the maximum term of imprisonment does not exceed six months. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8; *Crimes (Sentencing Procedure) Regulation 2000* (NSW) reg 23; *Sentencing Act 1991* (Vic) s 109(3)(b). See also Ch 7.

523 This has implications for equality of treatment of federal offenders, which is discussed in Ch 5.

those jurisdictions in which periodic detention is available, there is disparity in the maximum length of a periodic detention order under state and territory legislation.⁵²⁴

Question 8–1 Should federal legislation provide guidance to judicial officers in (a) selecting between available sentencing options, and (b) determining the quantum of sentence to be imposed, when sentencing federal offenders in particular cases? What form should this guidance take?

Factors relevant to sentencing

List of factors

8.15 If federal legislation should provide guidance to judicial officers in selecting between the sentencing options available and in determining the quantum of sentence imposed, the issue arises whether such guidance should include the listing of factors relevant to making these decisions. It would be extremely difficult to prescribe in advance every factor that might conceivably be relevant to sentencing, given the diversity of facts in individual matters. However, a list of relevant factors could assist courts in developing common criteria for individual decision making by judicial officers. ALRC 44 recommended the enactment of an open-ended list of factors relevant to sentencing.⁵²⁵

8.16 Section 16A(2) of the *Crimes Act* sets out a non-exhaustive list of 13 factors that the court must take into account in sentencing an offender, to the extent that the factors 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.⁵²⁶ The section also lists matters that might properly be regarded as purposes of sentencing, including deterrence, punishment and rehabilitation.⁵²⁷

8.17 Some state sentencing legislation also sets out, in varying degrees of detail, a list of factors to which the court must have regard in sentencing.⁵²⁸ By contrast, Western Australian legislation states the general principle that a court must have regard to aggravating and mitigating factors in determining the seriousness of an offence and

524 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 6; *Periodic Detention Act 1995* (ACT) s 4(1).

525 See Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 95, [170]–[171].

526 *Crimes Act 1914* (Cth) s 16A(2)(a), (m), (d), respectively.

527 *Ibid* s 16A(2)(j), (k), (n), respectively.

528 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A; *Sentencing Act 1991* (Vic) s 5(2); *Crimes Act 1900* (ACT) s 342; *Criminal Law (Sentencing) Act 1988* (SA) s 10; *Penalties and Sentences Act 1992* (Qld) s 9(2), (4) and (6).

explains what aggravating and mitigating factors are, but it does not attempt to set out a detailed list of factors to which the court must have regard.⁵²⁹

8.18 A possible drawback of listing relevant factors is that it can lead a court to use the factors mechanically as a check list—going through each subsection point by point.⁵³⁰ In *R v Ferrer-Esis*, Hunt J, having noted that the trial judge had elaborated his view in relation to each of the items enumerated in s 16A, stated that:

[the] legislation only requires the sentencing judge to take those matters into account; it does not require judges to always refer to each of them when explaining the sentence imposed. Indeed, the act of sentencing is to a large extent incapable of being fitted into such a straitjacket ...⁵³¹

8.19 Section 16A has been criticised on the basis that it deals with an area that could ‘hardly be less suitable for codification’⁵³² and that by listing a relatively large number of factors there is a risk that the section will be treated as a de facto codification, especially by less experienced sentencers who may concentrate on the matters listed and overlook other considerations that may be relevant in a particular case.⁵³³

8.20 An additional drawback in listing factors is that if the factors are not described in a meaningful way—or if relevant factors are omitted—the usefulness of the list becomes questionable. In this vein, s 16A has been criticised on the basis that it includes some factors, but excludes others such as general deterrence. Some of the factors included in s 16A have been described as ‘either incomplete or just simply banal’.⁵³⁴ For example, the requirement to take into account ‘the nature and circumstances of the offence’ has been described as ‘insulting’ and ‘useless’.⁵³⁵ It has been said that included within the broad ambit of that requirement are: the maximum penalty, the degree of premeditation, whether the commission of the offence involved a breach of trust or the use of a weapon, the degree of participation in the offence, the prevalence of the offence, and the status of the offender.⁵³⁶ Further, it has been said that the requirement to take into account the fact that the offender has pleaded guilty⁵³⁷ should have made it clear that this might be taken into account even if the plea is not

529 *Sentencing Act 1995* (WA) s 6(2), 7, 8, respectively.

530 A Haesler, *Sentencing Commonwealth Offenders: Some Recent Developments* (2004), 2. Compare *R v Ngui & Tiong* [2000] VSCA 78, [13] (endorsed by the High Court in *Wong v The Queen; Leung v The Queen* (2001) 207 CLR 584, [123]), where the Victorian Court of Appeal endorsed the concept of a ‘check’ or ‘sounding board’ in the context of examining guideline judgments.

531 *R v Ferrer-Esis* (1991) 55 A Crim R 231, 237.

532 *R v Paull* (1990) 100 FLR 311, 318.

533 M Rozenes, ‘Fundamental Flaws in Sentencing Laws’ (1992) 27(4) *Australian Law News* 12, 14–15.

534 *Ibid.*, 15.

535 *Ibid.*, 15.

536 *Ibid.*, 15.

537 *Crimes Act 1914* (Cth) s 16A(2)(g).

accompanied by remorse.⁵³⁸ It should also provide that the weight to be attached to the guilty plea is dependent on the stage of the proceedings at which the offender pleaded guilty or first indicated an intention to do so.⁵³⁹

General deterrence

8.21 Part IB requires a court to have regard to the deterrent effect that any sentence under consideration may have on the person being sentenced.⁵⁴⁰ This is often known as ‘special deterrence’, and it aims to dissuade that offender from recommitting his or her offence by imposing an appropriate sanction. In contrast, ‘general deterrence’ aims to discourage other potential offenders from committing the crime for which the offender is being sentenced. As stated above, Part IB does not require a court to have regard to general deterrence in sentencing. However, notwithstanding the omission of general deterrence in s 16A, courts have taken the view that it must be taken into account in determining the sentence.⁵⁴¹

8.22 It is empirically uncertain whether the imposition of sentences in fact has the effect of deterring others from committing a similar crime. There is no reliable evidence concerning the deterrent impact of various types and levels of penalty for various offences.⁵⁴²

8.23 ALRC 44 recommended that general deterrence should not be invoked as a goal or objective by sentencers.

To impose a punishment on one person by reference to a hypothetical crime of another runs completely counter to the overriding principle that a punishment imposed on a person must be linked to the crime that he or she has committed. To single out an offender for increased punishment *pour encourager les autres* also runs counter to the principles of justice and consistency ...⁵⁴³

8.24 However, the absence of reference to general deterrence as a factor to be considered in the sentencing of federal offenders has been criticised. The Gibbs Committee stated in its Fifth Interim Report:

it is clear that there is a strongly held judicial view that general deterrence is one of the fundamental purposes of sentencing and whatever the wisdom of attempting to list matters

538 M Rozenes, ‘Sentencing for Commonwealth Offenders’ (Paper presented at Law Council of Australia Criminal Law Seminar, Hobart, 7 March 1992). However, it may be that this is achieved by dealing separately with contrition in *Crimes Act 1914* (Cth) s 16A(2)(f).

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

540 *Crimes Act 1914* (Cth) s 16A(2)(j).

541 See, eg, *R v Paull* (1990) 100 FLR 311, 318; *R v Lambert & Paunovic* (1990) 51 A Crim R 160, 171; *R v Oancea* (1990) 51 A Crim R 141; *Director of Public Prosecutions (Cth) v El Kharhani* (1990) 21 NSWLR 370, 378.

542 A Ashworth, *Sentencing and Criminal Justice* (2nd ed, 1995), 62.

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

that should be taken into account in sentencing, any such list that does not recognise the deterrent effect of punishment is deficient.⁵⁴⁴

8.25 In *R v Paull*, Hunt J was critical of the fact that s 16A(2) omits reference to the one factor which it is generally accepted as being the main purpose of punishment, to which all of the usual subjective considerations are necessarily subsidiary—namely general deterrence.⁵⁴⁵

Mandatory or discretionary?

8.26 If factors relevant to sentencing are to be specified in federal legislation, the issue arises whether consideration of some or all of those factors by the court should be mandatory or discretionary.⁵⁴⁶ One advantage of specifying mandatory factors is that it structures judicial discretion and therefore increases consistency of approach in sentencing (see Chapter 10). If it is desirable to provide for both mandatory and discretionary factors the issue arises as to the basis on which factors should be classified as one or the other.

8.27 An examination of Australian sentencing laws shows that the dominant trend is to list a core set of factors—in varying degrees of detail—and to require the court to take those factors into consideration when sentencing.⁵⁴⁷ Where discretionary factors are set out, these are in addition to listed mandatory factors.⁵⁴⁸

8.28 There is no separate list of discretionary factors in Part IB of the *Crimes Act* to which a court may have regard in sentencing federal offenders. However, s 16A allows the court to take into account ‘any other matters’ in addition to the 13 listed mandatory factors.

Aggravating or mitigating?

8.29 If factors relevant to sentencing are to be specified in federal legislation an issue arises whether the legislation should specify whether a particular factor should increase the penalty (an aggravating factor) or lessen the penalty (a mitigating factor). ALRC 44 did not differentiate between recommended factors on the basis of whether they were aggravating or mitigating.⁵⁴⁹ ALRC 44 noted that many of the factors included in its recommended list—including intoxication by drugs or alcohol—could be mitigating or

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

545 *R v Paull* (1990) 100 FLR 311, 318. See also *R v Sinclair* (1990) 51 A Crim R 418; M Rozenes, ‘Fundamental Flaws in Sentencing Laws’ (1992) 27(4) *Australian Law News* 12, 15.

546 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 95 (no obligation to consider all or any of the matters set out as relevant to sentencing).

547 *Crimes Act 1914* (Cth) s 16A; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A; *Criminal Law (Sentencing) Act 1988* (SA) s 10; *Crimes Act 1900* (ACT) s 342; *Sentencing Act 1991* (Vic) s 5(2); *Penalties and Sentences Act 1992* (Qld) s 9(2), (4) and (6).

548 *Sentencing Act 1995* (NT) s 5(4)(a), (b); *Sentencing Act 1991* (Vic) s 5(2C).

549 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Recs 94–95, [170].

aggravating depending on the circumstances of a case. Commentators 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.⁵⁵⁰

8.30 The relationship between mitigating and aggravating factors is complicated by the fact that the opposite of a mitigating factor is not necessarily an aggravating one, and vice versa.⁵⁵¹ 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.

8.31 The factors set out in s 16A(2) are not separately categorised as aggravating or mitigating. There is precedent in state sentencing legislation for the listing of aggravating and mitigating factors.⁵⁵² Some state legislation simply states that a court must have regard to the presence of any mitigating or aggravating factor concerning the offender without listing examples of such factors.⁵⁵³

Question 8–2 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? Should legislation indicate whether these factors aggravate or mitigate the sentence?

Taking other offences into account

8.32 One of the factors listed in s 16A(2) of the *Crimes Act* is 'other offences (if any) that are required or permitted to be taken into account'.⁵⁵⁴

Offences the subject of a guilty plea

8.33 The issue arises as to when it is appropriate to take into account other sentences in respect of which a federal offender has pleaded guilty. Should this be permitted irrespective of the sentencing order the court imposes on the offender for the principal

550 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [3.103] (citations omitted).

551 *Ibid*, [3.103].

552 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A. Compare *Sentencing Act 1995* (WA) ss 7–8, identifying specific factors that are not to be regarded as aggravating or mitigating.

553 *Sentencing Act 1991* (Vic) s 5(2)(g); *Penalties and Sentences Act 1992* (Qld) s 9(2)(g); *Sentencing Act 1995* (WA) s 5(2)(f).

554 *Crimes Act 1914* (Cth) s 16(A)(2)(b).

offence, and irrespective of whether or not the offender has been charged with the admitted offences?

8.34 Where a person has been convicted of a federal offence, s 16BA allows the court, with the consent of the prosecutor, to take into account other federal offences in respect of which an offender has pleaded guilty.⁵⁵⁵ The court can only take into account indictable offences in relation to which it has jurisdiction to sentence a person.⁵⁵⁶

8.35 Where such offences are taken into account in sentencing, the court may not impose a penalty in excess of the maximum penalty prescribed for the offence in respect of which the person has been convicted.⁵⁵⁷ However, further proceedings in respect of admitted offences are barred; admissions of guilt are inadmissible in later proceedings; and the offences taken into account are not regarded as convictions, although reference may be made to the admitted offences in subsequent proceedings as if they were convictions.⁵⁵⁸

8.36 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.⁵⁵⁹ This contrasts with the equivalent NSW provision, which allows the court to take other offences into account even if the court dismisses the charges or conditionally discharges the offender without proceeding to conviction.⁵⁶⁰ 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 which the person convicted 'is believed to have committed'.⁵⁶¹ This contrasts with the equivalent Victorian provision, which requires the offender to have been charged or presented for trial in respect of the admitted offences.⁵⁶²

Course of conduct

8.37 Section 16A(2)(c) of the *Crimes Act* allows the court to take into account a course of conduct where the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character.

8.38 Where an accused faces a series of similar charges arising out of multiple related criminal acts, the prosecution may wish to expedite the prosecution by

555 The offender must want the offences to be taken into account.

556 *Crimes Act 1914* (Cth) s 16BA(3A).

557 *Ibid* s 16BA(4).

558 *Ibid* s 16BA(8), (9), (10), (11).

559 *Dreezer v Duvnjak* (1996) 6 Tas R 294. See also *Sentencing Act 1991* (Vic) s 100.

560 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 33; I Potas, *Sentencing Manual: Law, Principles and Practice in New South Wales* (2001).

561 *Crimes Act 1914* (Cth) s 16BA(1)(b). See also *Sentencing Act 1997* (Tas) s 89(1)(a).

562 *Sentencing Act 1991* (Vic) s 100(1)(a).

proceeding with a limited number of charges on the basis that those charges are ‘representative’ of the course of criminality. The issue arises whether—in sentencing an offender following convictions for representative charges—a court may take into account the offender’s involvement in related criminal activities, and whether there should be legislative guidance in relation to the proper use of representative or sample counts.⁵⁶³

8.39 The practice of representative counts depends on the consent of the accused.⁵⁶⁴ Findings made as a result of a sentencing hearing where facts are disputed cannot be used as a basis for punishing an offender for offences with which he or she has not been charged.⁵⁶⁵ The accused has the right to put the prosecution to proof of the accusations and can be sentenced only in relation to proven or admitted crimes.⁵⁶⁶ In particular, aggravating circumstances that could have been the subject of a separate charge, or which would have warranted a conviction for a more serious offence but were not so used, are not to be relied upon as aggravating factors in determining sentence.⁵⁶⁷

Question 8–3 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?

Factors irrelevant to sentencing

8.40 Judicial officers have, on occasion, taken into account factors that have been held to be irrelevant to sentencing.⁵⁶⁸ ALRC 44 recommended that there should be a statutory list of factors to which the court should not have regard in sentencing.⁵⁶⁹ Among the factors to be included in the list were: prevalence of the offence; the defendant’s demeanour in court; the defendant’s choice not to give evidence; the fact that the defendant may have committed perjury in the course of the proceedings; and any antecedent or subsequent offences either committed by the defendant or in respect of which charges had been laid against him or her.

⁵⁶³ R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.335].

⁵⁶⁴ R Fox, *Victorian Criminal Procedure: State and Federal Law* (11th ed, 2002), [8.2.10].

⁵⁶⁵ *Godfrey v The Queen* (1993) 69 A Crim R 318.

⁵⁶⁶ *R v De Simoni* (1981) 147 CLR 383.

⁵⁶⁷ *Ibid.*

⁵⁶⁸ For example, one magistrate took into account the costs to the Commonwealth (in payment of benefits) of maintaining the offender’s family while he was in prison, as well as the costs of imprisoning the offender. See *Edwards v Pregnell* (1994) 74 A Crim R 509.

⁵⁶⁹ Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Recs 98–99, [177]–[178].

8.41 Part IB does not list factors irrelevant to the exercise of the sentencing discretion. The *Crimes Act 1900* (ACT) sets out a number of factors that the court must not consider in increasing the severity of a sentence.⁵⁷⁰ However, most state and territory legislation does not list irrelevant factors—although there are provisions that specify certain factors to be irrelevant. For example, the *Sentencing Act 1991* (Vic) provides that in sentencing an offender a court must not have regard to:

- any possibility that the length of time actually spent in custody by the offender will be affected by executive action of any kind; and
- certain forfeiture and pecuniary penalty orders.⁵⁷¹

Question 8–4 Should federal legislation specify factors that are irrelevant to the exercise of the sentencing discretion? If so, what matters should be included?

Determining non-parole periods

8.42 The non-parole period in relation to a sentence of imprisonment is the period during which the offender must remain in custody and is not to be released on parole.⁵⁷² The court, in effect, sets out the minimum term for which the offender is to be incarcerated. Under Part IB, the court is directed to explain to a federal offender the purpose of the non-parole period, although this purpose is not expressed in federal legislation.⁵⁷³

8.43 In *Deakin v The Queen*, the High Court stated that:

The intention of the legislature in providing for the fixing of minimum terms is to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to the circumstances of the offence.⁵⁷⁴

8.44 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

⁵⁷⁰ *Crimes Act 1900* (ACT) s 344.

⁵⁷¹ *Sentencing Act 1991* (Vic) ss 5(2AA)(a), 5(2A)(b). See also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(4).

⁵⁷² *Crimes Act 1914* (Cth) s 16(1).

⁵⁷³ *Ibid* s 16F.

⁵⁷⁴ *Deakin v The Queen* (1984) 58 ALJR 367, 367; *Power v The Queen* (1974) 131 CLR 623, 629.

shortened beyond the lower limit of what might be reasonably regarded as condign punishment.⁵⁷⁵

8.45 Part IB of the *Crimes Act* provides that a non-parole period or a recognizance release order must be set for sentences exceeding three years, including federal life sentences, and must not be set for sentences of three years or less.⁵⁷⁶ However, a court may decline to set a non-parole period or make a recognizance release order in respect of an offender if it is satisfied that neither order is appropriate.⁵⁷⁷ The possible deportation of a federal offender is not an impediment to fixing a non-parole period.⁵⁷⁸

8.46 Amendments made to Part IB by the *Anti-Terrorism Act 2004* (Cth) introduced minimum non-parole periods for persons convicted of, and sentenced for, specified ‘minimum non-parole offences’, namely, treachery, a terrorism offence, treason or espionage.⁵⁷⁹ The minimum non-parole period is to be at least three-quarters of the sentence of imprisonment imposed by the court, although the court will retain the discretion to impose a longer non-parole period if considered appropriate in the circumstances.⁵⁸⁰ Under the provisions, a sentence of life imprisonment is taken to be a sentence of imprisonment for 30 years, meaning that the minimum non-parole period for a sentence of life imprisonment for a ‘minimum non-parole offence’ is 22½ years.⁵⁸¹

8.47 Apart from the ‘minimum non-parole offences’, Part IB of the *Crimes Act* does not provide guidance in relation to the length of a non-parole period for federal offences, for example by stipulating that a minimum period or proportion of the head sentence must be a non-parole period.⁵⁸² 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% (and in no case less than 50%) of the head sentence.⁵⁸³

8.48 Factors relevant to the exercise of the sentencing discretion should also be taken into account in setting the non-parole period, although they may carry a different weight because of the different question being considered at the stage of setting a non-

575 *R v Shrestha* (1991) 173 CLR 48, 63.

576 *Crimes Act 1914* (Cth) ss 19AB, 19AC.

577 *Ibid* s 19AB(3).

578 *Ibid* s 19AK. See also *Director of Public Prosecutions (Cth) v El Kharhani* (1990) 21 NSWLR 370, 386. The relevance of deportation to the discretion to release on parole is discussed in Ch 13.

579 *Crimes Act 1914* (Cth) s 19AG(1).

580 *Ibid* s 19AG(2).

581 *Ibid* s 19AG(3).

582 Compare *Sentencing Act 1991* (Vic) s 11(3); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2), Pt 4 Div 1A.

583 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Recs 25–26.

parole period.⁵⁸⁴ However, the issue arises whether there are additional factors relevant to setting the non-parole period that are not relevant to setting the head sentence.

Question 8–5 What is the purpose of setting a non-parole period? Should the purpose be set out in federal legislation? In what circumstances should a non-parole period be set when sentencing a federal offender to a term of imprisonment? What is the appropriate relation between that period and the head sentence, and what factors should be considered in determining a non-parole period?

Reconsideration of sentence

8.49 Relevant to the determination of a sentence of a federal offender is the ability to have that sentence reconsidered. Judicial reconsideration raises two scenarios. The first encompasses reconsideration by the sentencing court itself—bearing in mind that, as a general rule, a court has no 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.⁵⁸⁵ The rule is based on the principle that it is desirable to have finality of litigation.⁵⁸⁶ The second encompasses appellate review of a sentencing decision.

8.50 When is judicial reconsideration of a sentence justified? For example, should a sentence be reconsidered where there is fresh evidence, a breach by the offender of the conditions imposed by a sentencing order,⁵⁸⁷ or a change in the circumstances of the offender after sentencing? For example, there may be a change in the offender's health after sentence, but Part IB does not deal with the circumstances where a federal offender develops a mental illness after he or she has been sentenced. Reconsideration of a sentence also raises the question of when it is appropriate for reconsideration to be conducted judicially rather than by the executive government.⁵⁸⁸

Reconsideration by the sentencing court

8.51 At common law, a sentencing court exercising summary jurisdiction is *functus officio* as soon as a sentence has been pronounced—that is to say that, having discharged its duty, it ceases to have any authority over the sentence and cannot subsequently amend it.⁵⁸⁹ The general rule is that a sentencing judge may only correct

584 *R v Suarez-Mejia* (2002) 131 A Crim R 564, [48]; *Norton v The Queen* [2003] WASCA 86, [12].

585 *Jovanovic v The Queen* (1999) 106 A Crim R 548, [15].

586 *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*.

587 See *Crimes Act 1914* (Cth) s 20AC.

588 *R v Munday* [1981] 2 NSWLR 177, 178. Pardons and release on licence are discussed in Ch 13.

589 K Warner, *Sentencing in Tasmania* (2nd ed, 2002), [2.511].

a sentence before it has ‘passed into record’. The difficulty is that there is no clearly defined point at which that may be said to have happened.⁵⁹⁰

8.52 Superior courts of record are said to have an inherent jurisdiction, generally reflected in rules of court,⁵⁹¹ 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.⁵⁹²

8.53 Federal and state sentencing legislation, to varying degrees, empowers a sentencing court to correct errors. The powers of correction currently available under Part IB of the *Crimes Act* are limited.⁵⁹³ The court is given an express power to correct sentencing errors concerning the fixing of a non-parole period or the making of a recognizance release order.⁵⁹⁴ 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 errors arising from an accidental slip or omission. Examples of the latter could include arithmetical errors in the calculation of a pecuniary penalty or transcription errors in sentencing.

8.54 By contrast, some state sentencing legislation confers wide powers on the court to correct sentencing errors, both of a substantive and clerical nature. For example, in NSW a court may reopen proceedings and resentence an offender where the court imposed a penalty that was contrary to law, or failed to impose a penalty that was required to be imposed by law.⁵⁹⁵ In Tasmania, a court may vary or rescind a sentence on a number of grounds including that the offender’s circumstances were wrongly stated or not accurately presented to the court and it is in the interests of justice to vary or rescind the sentence.⁵⁹⁶ Victorian legislation provides an example of an express power to correct errors arising from an accidental slip—including material miscalculation of figures; material mistakes in the description of anyone or anything, or failures to deal with a matter that the sentencer would have undoubtedly dealt with if his or her attention had been drawn to it.⁵⁹⁷ The inclusion in federal legislation of express powers to correct errors may increase the likelihood that errors will be corrected.

8.55 If federal legislation were to set out express powers to correct errors, the issue arises as to the procedure for making such corrections. The procedure could range from

590 *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.

591 See, eg, *Supreme Court Rules 1970* (NSW) R 20.10; *Supreme Court (Criminal Procedure) Rules 1998* (Vic) R 1.14.

592 *Jovanovic v The Queen* (1999) 106 A Crim R 548, [20].

593 *R v Bartlett* (Unreported, District Court of New South Wales, Judge Keleman, 16 July 2004).

594 *Crimes Act 1914* (Cth) s 19AH.

595 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 43.

596 *Sentencing Act 1997* (Tas) s 94.

597 *Sentencing Act 1991* (Vic) s 104A.

a hearing in chambers, to a re-opening of the sentencing hearing in open court where all parties are given an opportunity to be heard in relation to the correction.⁵⁹⁸ The appropriate procedure might be affected by the nature of the error to be corrected—for example, whether it is a minor clerical or transcription error as opposed to an error constituted by the imposition of a sentence contrary to law—and whether the parties are in agreement that an error has been made. Where a party disputes the existence of an error, the chosen procedure should arguably cater for the ventilation of that party's views.

Appellate review

8.56 The procedures for hearing and determining appeals arising out of a conviction of a federal offender are determined by state and territory laws. This also applies to appeals against sentence.⁵⁹⁹ However, the nature of appellate review varies from jurisdiction to jurisdiction, and according to whether the offence in question is indictable or summary.⁶⁰⁰

8.57 Both the offender and the prosecution may appeal against sentence⁶⁰¹ although an offender does not have an absolute right to have his or her sentence reviewed by an appellate court. The leave of the appellate court must be obtained.⁶⁰² Common grounds of appeal are that a sentence was manifestly inadequate or manifestly excessive. Prosecution appeals are generally treated differently from appeals by the offender. This has often been justified on the basis that a prosecution appeal against sentence places the offender in jeopardy of punishment for a second time.⁶⁰³ The prosecution's right to appeal against sentence is to be exercised sparingly, and, as a matter of policy, the Commonwealth Director of Public Prosecutions will not institute such an appeal unless it can be asserted with some confidence that the appeal will be successful.⁶⁰⁴ Prosecution appeals should not be allowed to circumscribe unduly the sentencing discretion of judges—there must always be a place for leniency and mercy.⁶⁰⁵

8.58 A court of criminal appeal is not entitled to substitute its own opinion for that of the sentencing judge merely because it would have exercised its discretion differently from the manner in which the sentencing judge exercised his or her discretion,⁶⁰⁶ or

598 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 43, which requires the court on the reopening of a sentencing hearing to give the parties an opportunity to be heard.

599 *Judiciary Act 1903* (Cth) s 68(1)(d); *Williams v The King [No 2]* (1934) 50 CLR 551; *Peel v The Queen* (1971) 125 CLR 447.

600 M Findlay, S Odgers and S Yeo, *Australian Criminal Justice* (1994), 254.

601 See *Crimes Act 1914* (Cth) s 21E and Ch 9 regarding failure to give assistance to the authorities.

602 See, eg, *Criminal Appeal Act 1912* (NSW) ss 5(1)(c), 5(D); *Crimes Act 1958* (Vic) ss 567(d), 567A(1).

603 *Dinsdale v The Queen* (2000) 202 CLR 321, [62].

604 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (2004) <<http://www.cdpp.gov.au/Prosecutions/Policy/Default.aspx>> at 6 October 2004, [5.32].

605 *R v Osenkowski* (1982) 30 SASR 212, 212–213. Appellate review as a vehicle for imposing consistency is discussed in Ch 10; appeals to the Federal Court are discussed in Ch 3.

606 *Lowndes v The Queen* (1999) 195 CLR 665, 671–672.

merely because it considers the sentence inadequate or excessive.⁶⁰⁷ It must appear that the sentencing court has made some error in exercising its discretion.⁶⁰⁸

8.59 Sometimes new evidence is tendered in an appeal against sentence, but appellate courts admit such evidence sparingly.⁶⁰⁹ In *Goodwin v The Queen*, Hunt J set out the criteria that must be established in order for fresh evidence to be heard on appeal, including that the additional material was of such significance that the sentencing judge may have regarded it as having a real bearing upon his or her decision.⁶¹⁰

8.60 There is a distinction between fresh evidence relating to events occurring before sentence and fresh evidence in relation to events occurring after sentence. In *R v Smith* it was held that the court of criminal appeal could not intervene on the basis of events that had occurred since the imposition of a sentence, and that therefore fresh evidence of those events was not receivable. However, the court could have regard to events occurring after sentence for the purpose of showing the true significance of facts that were in existence at the time of sentence.⁶¹¹ If fresh evidence is allowed, the question is no longer one of a sentencing error by the original court, but whether, on the evidence before it, the appellate court ought to pass a different sentence.⁶¹²

8.61 In 2001, in relation to its review of the *Judiciary Act 1903* (Cth), the ALRC recommended that legislation should give appellate courts discretion to admit further evidence in federal appeals in appropriate cases, to the extent the *Constitution* permits.⁶¹³

Question 8–6 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 resentence 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?

607 *R v Suarez-Mejia* (2002) 131 A Crim R 564, [64].

608 *House v The King* (1936) 55 CLR 499, 505; *AB v The Queen* (1999) 198 CLR 111.

609 M Findlay, S Odgers and S Yeo, *Australian Criminal Justice* (1994), 257. Some state legislation provides for the adducing of fresh evidence on an appeal against sentence. See, eg, *Crimes Act 1958* (Vic) s 574; R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [13.213].

610 *Goodwin v The Queen* (1990) 51 A Crim R 328, 330. See also *R v Fordham* (1997) 98 A Crim R 359.

611 *R v Smith* (1987) 44 SASR 587, 588.

612 *Eliassen v The Queen* (1991) 53 A Crim R 391, 394.

613 Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, ALRC 92 (2001), Rec 17–1.

Question 8–7 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?

9. Particular Issues in Sentencing

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Introduction

9.1 Chapter 8 examined general issues relating to the determination of federal sentences—both at first instance by the sentencing court and when those sentences may be reconsidered. This chapter explores a range of specific issues that arise both at the time of setting a federal sentence as well as after the sentencing decision has been made. Some of these issues—such as specification of discounts—are relevant to the methodology and transparency of sentencing decisions. Other issues are concerned with the mechanics of sentencing—such as the commencement date of sentencing; whether sentences should be cumulative or concurrent; how multiple offences should be treated; whether remissions should apply; and whether it is appropriate to set a recognizance release order. An immediate post-sentencing issue is explaining the sentence to the offender, while longer-term post-sentencing issues may arise from the failure of an offender to comply with an undertaking to cooperate.

Specification of discounts

9.2 The dominant trend in Australian sentencing practice has been to employ the ‘instinctive synthesis’ approach, which leads to a single declared sentence, rather than the ‘two-stage approach,’ which involves additions to and reductions from a

predetermined sentencing range.⁶¹⁴ This trend has meant that courts do not generally specify a discount for each mitigating factor taken into account in reducing a federal sentence. The High Court has 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.⁶¹⁵

9.3 Yet, 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’.⁶¹⁶ Two such factors are guilty pleas and cooperation by the offender, which are discussed separately below.

9.4 One advantage of specifying discounts is increased transparency of decision making by judicial officers. Kirby J has stated 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.⁶¹⁷

9.5 It may be that increased transparency could be achieved just as effectively by requiring a court to address in its reasons for sentence the factors that have led it to discount a sentence, without requiring the court to quantify the reduction.

9.6 Specifying discounts has the advantage of enabling appellate courts to compare a particular sentence with other sentences for like offences, or to check disputed questions of parity.⁶¹⁸ On the other hand, specification could lead to a formulaic or mathematical approach to sentencing.

9.7 If specification is to be required—either across the board or selectively—should the amount of the discount be left to judicial discretion or should federal legislation provide guidance in relation to quantum of the discount, for example, by setting a range within which the discount should ordinarily fall? Drawbacks to legislative specification of acceptable ranges include that it interferes with judicial discretion; does not cater for the variations of circumstances in individual cases; and does not reflect the fact that a discount may be given not only by reducing quantum but also by the imposition of an alternative sentencing order of lesser severity.

614 See Ch 10 for a fuller discussion of these two approaches to sentencing.

615 *Wong v The Queen; Leung v The Queen* (2001) 207 CLR 584, [76].

616 *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [57].

617 *Cameron v The Queen* (2002) 209 CLR 339, [70].

618 *Ibid.*, [70].

Pleading guilty

9.8 Part IB of the *Crimes Act 1914* (Cth) lists as a factor to be considered in sentencing that the offender has pleaded guilty to the charge in respect of the offence.⁶¹⁹ In contrast to most state and territory sentencing legislation, Part IB does not state that the weight to be attached to the plea is dependent on the timeliness of the plea. Some state sentencing legislation expressly allows for a discount for a guilty plea⁶²⁰ and requires a court to give reasons for not reducing a sentence if there has been a guilty plea.⁶²¹

9.9 Where a discount is given for a guilty plea, Part IB does not require the specification of the discount, nor do any of the sentencing Acts of the states or territories. However, the practice in several states (including NSW, South Australia and Western Australia) is to encourage judicial officers to quantify discounts for guilty pleas.⁶²² There are disparities in the discounts given, although the amount of the discount given does not appear to vary greatly.⁶²³

9.10 There is a distinction between a discount given for the utilitarian value of a plea—that is, the value attributed to the fact that a guilty plea saves the expense and time of a trial—and discounts given for non-utilitarian considerations such as contrition and the willingness to facilitate the course of justice.⁶²⁴

9.11 The NSW Court of Criminal Appeal (NSWCCA) has issued a guideline judgment with respect to the treatment of guilty pleas to offences against state laws. The guidelines include the following:

- A sentencing judge should explicitly state that a guilty plea has been taken into consideration.
- Sentencing judges are encouraged to quantify the impact of the plea to the extent that they believe it is appropriate to do so.

619 *Crimes Act 1914* (Cth) s 16A(2)(g). A separate factor to be taken into account is the degree to which the offender has shown contrition: s 16A(2)(f). A plea of guilty may or may not be accompanied by contrition.

620 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(1); *Penalties and Sentences Act 1992* (Qld) s 13.

621 *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.

622 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].

623 See *Cameron v The Queen* (2002) 209 CLR 339, [95]; *R v Thomson*; *R v Houlton* (2000) 49 NSWLR 383, [148]–[149].

624 *R v Thomson*; *R v Houlton* (2000) 49 NSWLR 383; *Cameron v The Queen* (2002) 209 CLR 339.

- A single combined discount may be appropriate where there are other matters considered appropriate to be quantified in a particular case, such as cooperation with the authorities.
- Encouragement is given to the quantification of discount for the utilitarian value of a plea. This value should generally be assessed in the range of a 10–25% discount on sentence. The timing of the plea will be the primary consideration in determining where in the range a particular case should fall.
- Exceptionally complex cases may justify a higher discount, but in some cases a plea will not lead to any discount.⁶²⁵

9.12 A preliminary issue that arises in considering whether judicial officers, in sentencing federal offenders, should be required to specify the discount that they give for a guilty plea is whether or not discounts for guilty pleas should be allowed at all, and on what basis.

9.13 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 it rejected the view that a discount could be given for a guilty plea on the grounds that it will save the expense of a trial.⁶²⁶ This is because a discount may have a discriminatory effect on those 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 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.⁶²⁷

9.14 It is widely accepted that not every plea of guilty will justify a discount. Examples include where the plea is entered as recognition of the inevitable,⁶²⁸ or in relation to a crime that so offends the public interest that it is appropriate for the maximum penalty to be applied, notwithstanding a plea.⁶²⁹

625 *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [160].

626 Compare *R v Sharma* (2002) 54 NSWLR 300; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22.

627 *Cameron v The Queen* (2002) 209 CLR 339, [13]–[14].

628 *Murphy v The Queen* [2000] TASSC 169.

629 *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [158].

9.15 ALRC 44 recommended that discounts for guilty pleas be allowed. However, because of the wide variety of cases in which a guilty plea could arise, the ALRC recommended that no particular amount should be specified as the amount, or the maximum amount, of the discount.⁶³⁰ It stated that the requirement to give reasons for sentence should apply in such a case.

9.16 In 2000, the Standing Committee of Attorneys-General (SCAG) recommended that the existing system of discounts for guilty pleas should continue and that sentencing judges should be required to state publicly, in reasons for sentence, the discount that has been given for a guilty plea.⁶³¹

Cooperation by the offender

9.17 Under Part IB of the *Crimes Act*, a sentencing court must 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.⁶³² Cooperation with the authorities encompasses both past cooperation and undertakings to provide future cooperation.⁶³³

9.18 Under Part IB and some state sentencing legislation it is necessary to specify the reduction given for promised future cooperation.⁶³⁴ This is often expressed in terms that the court must state the sentence it would have imposed but for the undertaking. In contrast, while the *Sentencing Act 1991* (Vic) authorises a court to impose a less severe sentence due to an undertaking to cooperate, the Act does not require the court to state the sentence that it would have otherwise imposed.⁶³⁵

9.19 Specification of a discount for promised future cooperation has the practical advantage of assisting an appellate court in re-sentencing an offender who has failed to comply with such an undertaking. Under Part IB, where an offender fails to cooperate fully with authorities after having received a reduced sentence on the basis of promised future cooperation, on appeal the court must substitute the sentence or non-parole period that would have been imposed but for the promised cooperation.⁶³⁶

630 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 96, [173]–[174].

631 Standing Committee of Attorneys-General, *Deliberative Forum on Criminal Trial Reform* (2000), Rec 51.

632 *Crimes Act 1914* (Cth) s 16A(2)(h).

633 *R v Nagy* [1992] 1 VR 637, 648.

634 *Crimes Act 1914* (Cth) s 21E; *Sentencing Act 1995* (WA) s 8(5); *Crimes Act 1900* (ACT) s 358; *Penalties and Sentences Act 1992* (Qld) s 13A(7). In addition, the *Crimes Act 1914* (Cth) s 21E and *Crimes Act 1900* (ACT) s 358 require the sentencing court to quantify any reduction of the non-parole period as a result of promised cooperation.

635 *Sentencing Act 1991* (Vic) s 5(2AB), 5(2AC). See also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23.

636 *Crimes Act 1914* (Cth) s 21E(3)(a).

9.20 An advantage of specifying discounts for past cooperation is that it could act as an incentive for offenders to cooperate. It is in the public interest to encourage offenders to supply information to law enforcement authorities and to give evidence against other offenders.⁶³⁷

9.21 ALRC 44 recommended that providing information to the authorities should be treated in the same way as a plea of guilty—that is, discounts should be available for cooperation but no particular amount should be specified as the amount, or the maximum amount of the discount.⁶³⁸

9.22 In 2000, SCAG recommended that a trial judge be required to identify specifically any discount of sentence given as a result of cooperation by the offender, and that the amount of the discount be left to the trial judge's discretion.⁶³⁹ It is not clear whether the recommendation encompasses both past and future cooperation by the offender.

Question 9–1 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?

Failure to comply with undertaking to cooperate

9.23 As discussed above, s 21E of the *Crimes Act* requires the court to specify the sentence it would have imposed but for the offender's undertaking to provide future cooperation with law enforcement agencies. The section authorises the Commonwealth Director of Public Prosecutions (CDPP), while the offender is under sentence, to appeal against sentence where the offender, having received a discounted sentence, fails without reasonable excuse to comply with his or her undertaking to cooperate. Where the appellate court is satisfied that the offender has completely failed to cooperate, it must impose the sentence that it would have imposed but for the reduction. Where the offender has partially failed to cooperate, the appellate court may substitute a longer sentence or non-parole period than that imposed by the sentencing court. This section has been criticised on a number of grounds, addressed below.

637 I Potas, *Sentencing Manual: Law, Principles and Practice in New South Wales* (2001), 38.

638 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 97, [175].

639 Standing Committee of Attorneys-General, *Deliberative Forum on Criminal Trial Reform* (2000), Rec 52.

Restrictive in scope

9.24 Section 21E has been criticised for creating ‘unexpected perplexity’.⁶⁴⁰ The section only refers to reduced sentences and reduced non-parole periods, although it has been held to apply where a court made a recognizance release order notwithstanding that the section does not refer to the reduction of a recognizance release order by virtue of an offender’s undertaking to cooperate.⁶⁴¹

9.25 As s 21E refers to sentences being ‘reduced’, it is not clear whether the section allows for the original sentence to be reinstated where a sentence was not reduced in quantum but rather a more lenient sentencing option was invoked. Examples are where the offender was sentenced to periodic detention rather than full-time imprisonment, or was given a sentence under three years with a recognizance release order rather than a sentence with a non-parole period.

9.26 In addition, s 21E requires the person to be ‘under sentence’. It does not therefore readily apply to fines that have been paid or recognizances that have been exhausted.⁶⁴²

Undesirable outcome

9.27 As presently drafted, s 21E could lead to the undesirable outcome that an offender who has received a generous reduction for undertaking to provide assistance—and whose reduced sentence has expired—could fail to comply with the undertaking without there being any avenue of appeal to impose a sentence of greater severity. As the offender would no longer be ‘under sentence’ the CDPP would be unable to appeal against the reduced sentence.

Practical difficulties in application

9.28 In *R v Parsons* the sentencing judge expressed the view that the prisoner could be greatly disadvantaged by pronouncements from the Bench as to the reasons for any reduction in sentence.⁶⁴³ On appeal, the Western Australian Court of Criminal Appeal stated that:

In fairness to the learned sentencing judge, this requirement [to specify the reduction and state the sentence or non-parole period that would have been imposed but for the reduction] creates difficulties where there is a need to protect the offender, as far as possible, from the consequences for him or her as a result of giving and carrying out the undertaking. ... It would be desirable to review the

640 *Director of Public Prosecutions (Cth) v Haunga* (2001) 127 A Crim R 358, [6].

641 *Ibid.*

642 Office of the Commonwealth Director of Public Prosecutions, *Consultation*, Sydney, 16 September 2004.

643 *R v Parsons* (1993) 66 A Crim R 550, 558.

provisions of s 21(E). We were told that the Commonwealth Director has made some recommendations regarding amendment of the legislation. Clearly some amendment is desirable.⁶⁴⁴

9.29 However, the problem identified by the Court is not novel. Courts are often called upon to deal with confidential or sensitive information gathered in the course of law enforcement operations—for example, drug trafficking and organised crime operations—where the safety of witnesses might be an issue. Courts have a variety of mechanisms at their disposal to deal with such information. For example, they may be able to deal with the information in closed court, restrict publication of the information, or require parties privy to the information to enter into confidentiality undertakings that set out the restricted basis upon which the information may be used.⁶⁴⁵

9.30 Queensland sentencing legislation provides a possible model in this regard. It provides that, after the imposition of a sentence in open court, the judicial officer must close the court and state in closed court the fact that the sentence is being reduced for cooperation and the sentence that it would have otherwise imposed.⁶⁴⁶

Poor drafting

9.31 In *R v YZ* the NSWCCA referred to the ‘manifest deficiencies in the drafting of the section’⁶⁴⁷ and stated that the section was ambiguous as to whether or not it gave the court, as opposed to the CDPP, the power to determine whether an offender’s failure to cooperate was without reasonable excuse. The NSWCCA concluded that the section was to be construed as giving the court this power.⁶⁴⁸

Location

9.32 There have been cases in which judicial officers have failed to quantify the reduction given in a sentence or non-parole period on account of an offender’s undertaking to cooperate.⁶⁴⁹ As stated in Chapter 6, compliance with this requirement could be improved if the requirement for quantification of discount, which is currently buried within Division 10 headed ‘Miscellaneous’, was repositioned earlier within Part IB in closer proximity to provisions dealing with the determination of sentence.

644 Ibid, 561. In *R v Paull* (1990) 100 FLR 311, 313, Hunt J declined to outline the assistance that the offender gave the authorities. Details of the assistance given was contained in a sealed envelope, which Hunt J ordered was not to be opened except by order of the Court or the NSWCCA.

645 See Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC 98 (2004), Ch 8, 9.

646 *Penalties and Sentences Act 1992* (Qld) s 13A(7).

647 *R v YZ* (1999) 162 ALR 265, [29].

648 Ibid, [25].

649 See, eg, *R v Hodgson* (2002) 135 A Crim R 92, [24].

Question 9–2 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?

Commencement of sentence

9.33 There is no federal legislation that specifies the commencement date of federal sentences, including the commencement of non-parole periods.⁶⁵⁰ Rather, s 16E of the *Crimes Act* applies state and territory legislation relating to the commencement of sentences. The purpose of the section was ‘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’.⁶⁵¹

Pre-sentence custody

9.34 A key issue in determining the commencement of a sentence is how to treat any pre-sentence custody. ALRC 44 recommended that the time of commencement of a custodial order should be the time when the sentence is pronounced, but if the offender had already spent time in custody in relation to the offence, that time should be counted as time served under the prison term.⁶⁵² In other words, the offender should be deemed to have been serving the sentence during the period in custody.⁶⁵³

9.35 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,⁶⁵⁴ while under other state legislation it is discretionary.⁶⁵⁵ Some state sentencing legislation states that pre-sentence custody must be taken into account ‘unless the court otherwise orders’.⁶⁵⁶ One example of the court ‘otherwise ordering’ was *R v Sidea*, where the court stated that the difficulty created by the need to reconcile the sentences imposed under state and federal legislation with the need to give effect to the trial judge’s intention in relation to the sentence constituted

650 As to commencement of sentence for multiple offences, see *Crimes Act 1914* (Cth) s 19, discussed below.

651 Explanatory Memorandum (Senate), Crimes Legislation Amendment Bill (No 2) 1989 (Cth), 8.

652 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 27.

653 Australian Law Reform Commission, *The Commonwealth Prisoners Act*, ALRC 43 (Interim) (1988), [36].

654 *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).

655 *Sentencing Act 1995* (WA) s 87; *Criminal Law (Sentencing) Act 1988* (SA) s 30; *Sentencing Act 1995* (NT) s 63(5).

656 *Sentencing Act 1991* (Vic) s 18(1); *Penalties and Sentences Act 1992* (Qld) s 161(1).

exceptional circumstances, justifying departure from the normal course of giving credit for pre-trial custody.⁶⁵⁷

9.36 Section 16E(3) of the *Crimes 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, as indicated above, all state and territory legislation enables the possibility of pre-sentence custody being considered, whether on a mandatory or discretionary basis. The direction in s 16E(3) that a court must take into account pre-sentence custody is ambiguous. It is not clear whether it requires the court to give full value or credit for time in custody or simply take the pre-sentence custody into account as a relevant consideration in determining the commencement date of the sentence.

9.37 In jurisdictions where it is mandatory to take pre-sentence custody into account, federal offenders are potentially in a more advantageous position than those in jurisdictions in which the court has a discretion to take it into account or is empowered to ‘otherwise order’. However, the discretion must be properly exercised.⁶⁵⁸ In the absence of any reasons why the court exercised its discretion against taking pre-sentence custody into account, error can be inferred.⁶⁵⁹

9.38 There are several ways in which pre-sentence custody can be taken into account. Some state sentencing legislation allows for the backdating of the commencement of a sentence;⁶⁶⁰ whereas in other jurisdictions the commencement date of a sentence of imprisonment cannot be backdated.⁶⁶¹ Other state sentencing legislation provides that, unless the court orders otherwise, pre-sentence custody must be taken into account by counting that time as time already served under the sentence,⁶⁶² and some state legislation allows for a reduction in the term of the sentence.⁶⁶³ Some—but not all—state and territory sentencing legislation allows the court to take pre-sentence custody into account in more than one way.⁶⁶⁴ Some state sentencing legislation also sets out a number of exceptions to the principle that pre-sentence custody should be taken into account. In most states, credit is not given for: periods of custody of less than one day;

657 *R v Sidea* (Unreported, Victorian Court of Criminal Appeal, Crockett, Hampel and Coldrey JJ, 21 October 1993).

658 *R v Barry* (Unreported, Victorian Court of Criminal Appeal, Crockett, Southwell and Hampel JJ, 1 October 1992).

659 *Shams v Clarson* (2002) 130 A Crim R 1 [37], [39].

660 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 47(2)(a); *Sentencing Act 1997* (Tas) s 16(1); *Sentencing Act 1995* (NT) s 63(5).

661 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [9.804].

662 *Sentencing Act 1991* (Vic) s 18(1); *Penalties and Sentences Act 1992* (Qld) s 161(1).

663 *Sentencing Act 1995* (WA) s 87(c); *Criminal Law (Sentencing) Act 1988* (SA) s 30(2)(a).

664 *Criminal Law (Sentencing) Act 1988* (SA) s 30(2)(a), (b); *Sentencing Act 1995* (WA) s 87(c), (d). See also R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [9.806] regarding a court’s inherent jurisdiction to take into account pre-sentence custody.

sentences of imprisonment of less than one day; wholly suspended periods of imprisonment; or the suspended part of a partly suspended sentence of imprisonment.⁶⁶⁵

9.39 There have been cases in which a court in sentencing a federal offender has either failed to comply with, or has misapplied, the relevant state sentencing legislation in determining the commencement date of the sentence.⁶⁶⁶

9.40 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 is taken to commence when 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.⁶⁶⁷ The benefit of these provisions does not flow to persons whose period in custody has been interrupted.

9.41 In NSW there are decisions to the effect that periods of time spent in residential rehabilitation courses should count as quasi-custody, given that persons who undergo such courses are subject to discipline and restrictions.⁶⁶⁸

9.42 There are parallel issues about whether persons suffering from a mental illness or an intellectual disability are to be given credit on sentencing for any time already served by them under detention orders made under Part IB. These issues are discussed further in Chapter 14.

Question 9–3 Should federal legislation specify when a federal sentence commences and how any pre-sentence custody is to be taken into account?

Cumulative or concurrent sentences

9.43 Where a court sentences a federal offender for more than one offence the issue arises whether those sentences should be served concurrently—that is, at the same time—or cumulatively—that is, one after the other—or partly cumulatively and partly concurrently.

665 *Sentencing Act 1991* (Vic) s 18(2); *Sentencing Act 1997* (Tas) s 16(2); *Penalties and Sentences Act 1992* (Qld) s 161(2); *Crimes Act 1900* (ACT) s 360(2).

666 *R v Salles* [2003] QCA 127 (failure to comply with *Penalties and Sentences Act 1992* (Qld) s 161); *R v Karipidis* [2003] NSWCCA 168, [28]–[29].

667 *Sentencing Act 1991* (Vic) s 18(6); *Penalties and Sentences Act 1992* (Qld) s 161(4); *Crimes Act 1900* (ACT) s 360(3).

668 *R v Campbell* [1999] NSWCCA 76, [24]; *R v Delaney* (2003) 59 NSWLR 1.

9.44 The orthodox but not necessarily immutable 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.⁶⁶⁹ The totality principle requires a court in sentencing an offender for more than one offence to ensure that the aggregate of the sentences is a just and appropriate measure of the total criminality involved, and to ensure that the offender is not subject to a ‘crushing sentence’.⁶⁷⁰ However, rather than making sentences wholly or partially concurrent, a court may lower the individual sentences below the otherwise appropriate level to reflect the fact that a number of sentences are being imposed, although this is not the preferred approach.⁶⁷¹

9.45 Section 19 of the *Crimes Act* allows sentences to be made cumulative, partly cumulative, or concurrent on existing sentences or sentences passed at the same sitting for federal, state, or territory offences. In addition, 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. Courts had been critical of sentence structures that required offenders at the end of their state parole periods to return to prison to serve a federal sentence.⁶⁷²

9.46 Section 19 does not provide any guidance as to when it is appropriate to make sentences concurrent or cumulative. 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.⁶⁷³ 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 held to be more appropriate on appeal.⁶⁷⁴

9.47 There is a common law presumption in favour of concurrency of sentences.⁶⁷⁵ 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.⁶⁷⁶ State and territory legislation also typically sets out the

669 *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.

670 *Mill v The Queen* (1988) 166 CLR 59, 63; *Postiglione v The Queen* (1997) 145 ALR 408, 413, 415–417, 443.

671 *Mill v The Queen* (1988) 166 CLR 59, 63; *Johnson v The Queen* [2004] 205 ALR 346, [26].

672 See Explanatory Memorandum (Senate), Crimes Legislation Amendment Bill (No 2) 1989 (Cth), 13.

673 *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].

674 *R v Lappas* (2003) 139 A Crim R 77, [137].

675 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [9.601].

676 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 55(1); *Sentencing Act 1991* (Vic) s 16(1); *Penalties and Sentences Act 1992* (Qld) s 155; *Crimes Act 1900* (ACT) s 354; *Sentencing Act 1995* (WA) s 50; *Sentencing Act 1997* (Tas) s 15.

circumstances or the types of sentences in which the presumption of concurrency does not apply.⁶⁷⁷

9.48 ALRC 44 recommended a legislative presumption in favour of concurrent sentences and that sentences should only be required to be served cumulatively in exceptional circumstances, which the court should have to specify if it so orders.⁶⁷⁸ ALRC 44 expressed the view that this approach, combined with a legislative recognition of the totality principle, would emphasise imprisonment as the punishment of last resort.⁶⁷⁹ The Gibbs Committee stated, however, that it was proper that s 19 not contain a presumption in favour of sentences being made concurrent or cumulative.⁶⁸⁰

Question 9–4 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?

Multiple offences

9.49 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.⁶⁸¹

9.50 Section 4K(4) provides that the court may then impose one penalty for all such offences, with the qualification that 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.

⁶⁷⁷ *Sentencing Act 1991* (Vic) s 16; *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 56, 57; *Penalties and Sentences Act 1992* (Qld) s 156A; *Sentencing Act 1997* (Tas) s 15(2); *Crimes Act 1900* (ACT) s 354(2)(a), (3).

⁶⁷⁸ Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 19.

⁶⁷⁹ *Ibid.*, [66].

⁶⁸⁰ H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991) Attorney-General's Department, [12.29]–[12.31].

⁶⁸¹ Compare *Sentencing Act 1997* (Tas) s 11(1); *Sentencing Act 1991* (Vic) s 9. 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 6. The use of representative charges for a course of conduct and taking other offences into account in sentencing are discussed in Ch 8.

9.51 In *R v Bibaoui*, the Victorian Court of Appeal held that s 4K(4) does not apply to indictable offences and is confined to summary offences⁶⁸² and this has subsequently been confirmed by the High Court.⁶⁸³

9.52 The view has been expressed that it would be helpful if s 4K permitted aggregate sentencing of offences tried on indictment and, in addition, allowed a court to apply one sentence for a course of criminal conduct—thereby enabling several related but different crimes to be dealt with together, notwithstanding that those offences are not against the same provision of a Commonwealth law.⁶⁸⁴ It has been noted that this would be particularly useful in the area of social security fraud, where there is an element of artificiality in breaking up charges to reflect minor differences in conduct or the underlying legislation (for example, benefit rates).⁶⁸⁵

9.53 The aggregation of charges presents some advantages to a defendant. The defendant potentially ends up with one ‘rolled-up’ charge on his or her record, rather than multiple charges that form part of the same course of conduct. If charges are not aggregated in relation to the multiple offences, the defendant faces the possibility that a judge will order sentences to be served cumulatively, or partly cumulatively, rather than concurrently.

9.54 However, in *Putland v The Queen* Kirby J (dissenting) expressed the view that sentences for indictable offences should not be aggregated:

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.⁶⁸⁶

9.55 There is no statutory provision in NSW, Victoria, Queensland or Western Australia allowing for the imposition of one sentence on a person convicted on indictment of multiple offences.⁶⁸⁷ However, the sentencing legislation of the Northern Territory, South Australia and Tasmania allows aggregate sentencing for indictable offences.⁶⁸⁸ Where the state or territory sentencing scheme allows an aggregate

682 *R v Bibaoui* (1997) 2 VR 600.

683 *Putland v The Queen* (2004) 204 ALR 455, [9].

684 Office of the Commonwealth Director of Public Prosecutions, *Consultation*, Sydney, 16 September 2004; New South Wales Legal Aid Commission—Criminal Law Division, *Consultation*, Sydney, 22 September 2004.

685 New South Wales Legal Aid Commission—Criminal Law Division, *Consultation*, Sydney, 22 September 2004.

686 *Putland v The Queen* (2004) 204 ALR 455, [119].

687 The *Sentencing Act 1991* (Vic) s 9 empowers the Magistrates’ Court to impose an aggregate sentence of imprisonment, including for indictable offences being tried summarily.

688 *Sentencing Act 1995* (NT) s 52(1); *Criminal Law (Sentencing) Act 1988* (SA) s 18A; *Sentencing Act 1997* (Tas) s 11.

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.⁶⁸⁹

Question 9–5 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’?

Remissions

9.56 Remissions reduce the amount of time to be served in prison, by reducing either the duration of the non-parole period or 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.⁶⁹⁰

9.57 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’.⁶⁹¹ However, ALRC 44 recommended that earned remissions should remain because they form part of the rehabilitation process and provide incentive for offenders to be of good behaviour.⁶⁹² ALRC 44 recommended that earned remissions should be restricted to a maximum of 20% 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.⁶⁹³

9.58 Section 19AA(1) of the *Crimes Act* applies state and territory remission laws to federal sentences in prisons of those states and territories. Section 19AA(1) does not distinguish between automatic remissions and special or earned remissions. 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

689 *Putland v The Queen* (2004) 204 ALR 455; *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.

690 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [70]; Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [301]–[302].

691 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 32, [86].

692 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [302].

693 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Recs 33–35.

imprisonment in respect of recognizance release orders'.⁶⁹⁴ 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.⁶⁹⁵ This departed from the recommendation made in ALRC 44.⁶⁹⁶ The intention of the legislation was to provide 'certainty in the period that the person is to serve before parole eligibility arises'.⁶⁹⁷ In *DPP v El Kharhani*, however, the court referred to the inconvenience that could result from the exclusion of the application of remissions to non-parole periods.⁶⁹⁸

9.59 In cases where state legislation still provides for remissions⁶⁹⁹ there can be difficulties in construing that legislation to determine whether or not it is picked up under s 19AA. This was illustrated in *Frost v The Queen*. In that case, the difficulties arose because Tasmanian law did not have an equivalent of s 20(1)(b) of the *Crimes Act*—which provides for federal recognizance release orders—and therefore did not have an equivalent to 'pre-release periods of imprisonment in respect of recognizance release orders'. While Tasmanian law allowed for partly suspended sentences, the court rejected the contention that the operative period of a sentence of imprisonment that is partly suspended is equivalent to the pre-release period of imprisonment in respect of a recognizance release order. The Tasmanian Court of Criminal Appeal held that the Tasmanian regulation allowing for remissions applied to sentences of imprisonment imposed on federal offenders and that no part of the regulation was caught by the exclusion in s 19AA(1).⁷⁰⁰

9.60 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. At the time Part IB was enacted, some states such as NSW had abolished remissions, while others had not. For this reason, s 16G of the *Crimes Act*, as enacted in 1990, was included to ensure that federal prisoners were not disadvantaged in being sentenced in one state rather than another.

9.61 Section 16G required a court imposing federal sentences that were to be served in a prison of a state or territory where sentences were not subject to remissions, to take that fact into account in determining the length of the sentence, and adjust the sentence accordingly. The Explanatory Memorandum stated that the sentence to be imposed was to be shorter because the period fixed by the court would not be reduced

694 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: *Crimes Act 1914* (Cth) s 19AA(4).

695 Explanatory Memorandum (Senate), Crimes Legislation Amendment Bill (No 2) 1989 (Cth), 1.

696 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 35.

697 Explanatory Memorandum (Senate), Crimes Legislation Amendment Bill (No 2) 1989 (Cth), 14.

698 *Director of Public Prosecutions (Cth) v El Kharhani* (1990) 21 NSWLR 370, 384.

699 See, eg, *Corrections Regulations 1998* (Tas) reg 23(1); *Corrections Act 1986* (Vic) s 58E.

700 *Frost v The Queen* (2003) 11 Tas R 460, [14], [15], [18].

by remissions.⁷⁰¹ The method by which a court was to make this adjustment was not explained. Courts initially applied the rule that federal sentences should be reduced by one third of the sentence that would otherwise be appropriate for a sentence imposed in a state where there were no remissions.⁷⁰² However, it was later held that it was not ‘invariably or inevitably the case that a one-third allowance would be given’.⁷⁰³ Section 16G attracted significant judicial criticism.⁷⁰⁴

9.62 Section 16G was repealed in relation to all federal sentences imposed after 16 January 2003. No transitional provisions were enacted.⁷⁰⁵ The amendment was said to be a response to the abolition of remissions in most states and territories, and the move towards the abolition of remissions in the remaining jurisdictions.⁷⁰⁶ The abolition of remissions in most jurisdictions was said to have resulted in s 16G having the unintended effect of creating disparity between federal and state or territory prisoners in the same jurisdiction because federal prisoners served shorter sentences than their state and territory counterparts.⁷⁰⁷ This was because courts sentencing state offenders were not required to take into account the abolition of remissions.⁷⁰⁸

9.63 It has been observed that federal sentences are likely to increase following the repeal of s 16G,⁷⁰⁹ and one case has stated that the repeal of s 16G would lead to an increase in the length of a federal sentence by 50%.⁷¹⁰ However, it has also been said that the correct approach in sentencing a federal offender is to determine the sentence without taking into account the fact that s 16G existed and has now been repealed, and that it would be unfair and crude to increase federal sentences by 50% to accommodate the repeal of s 16G.⁷¹¹

701 Explanatory Memorandum (Senate), Crimes Legislation Amendment Bill (No 2) 1989 (Cth), 10.

702 *R v Paull* (1990) 100 FLR 311.

703 *Budiman v The Queen* (1998) 102 A Crim R 411, 415.

704 *R v Paull* (1990) 100 FLR 311, 315; *Director of Public Prosecutions (Cth) v El Kharhani* (1990) 21 NSWLR 370, 387; *R v Ng Yun Choi* (Unreported, Supreme Court of New South Wales, Sully J, 4 September 1990).

705 *Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002* (Cth) sch 3, cl 1.

706 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2002, 9535 (L Anthony—Minister for Children and Youth Affairs).

707 M Pedley, *Federal Sentencing in Victoria* (2004) Commonwealth Director of Public Prosecutions, 4; *R v O'Connor* (2002) 129 A Crim R 505, 507.

708 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [9.1109].

709 See generally A Haesler, *Sentencing Commonwealth Offenders: Some Recent Developments* (2004).

710 *R v Kevenaar* [2004] NSWCCA 210, [46]–[48].

711 *R v Dujeu* [2004] NSWCCA 237, [20], [43].

Question 9–6 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?

Recognizance release orders

9.64 A recognizance release order is a particular sentencing option available to the court in sentencing a federal offender. It is a form of conditional release. A recognizance is an undertaking whereby an offender acknowledges owing the Crown a specified amount of money unless he or she complies with certain conditions. If the conditions are not met, the agreed sum can be forfeited. A recognizance may be supported by a surety, that is, another person who also undertakes that the offender will comply with conditions of the recognizance. Sureties acknowledge that if the offender does not comply with the conditions, they too become liable to forfeit a nominated sum of money to the Crown.

9.65 As discussed in Chapter 6, the use of the term ‘recognizance release order’ has been criticised on the basis that many offenders do not know what it means. In NSW, ‘recognizance’ has been replaced with the word ‘bond’.⁷¹²

9.66 A recognizance release order entails a period of imprisonment equal to the pre-release period (if any) specified in the order and a period of service in the community equal to the balance of the sentence. It is defined by s 16(1) of the *Crimes Act* as an order made under s 20(1)(b) of that Act. Section 20(1)(b) allows the court to sentence a person to imprisonment but direct that the person be released upon giving security of the kind referred to in s 20(1)(a) either forthwith or after he or she has served a specified period of imprisonment in relation to the offence. Section 20(1)(a) refers to the offender ‘giving security, with or without sureties, by recognizance or otherwise, to the satisfaction of the court’ that he or she will comply with certain conditions.

9.67 Those conditions are:

- to be of good behaviour for such period, not exceeding five years, as the court specifies in the order;
- to make reparation, restitution, or pay any compensation order that the court is empowered to order, and pay any costs of the prosecution ordered by the court;

712 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9, Pt 8.

- to pay the Commonwealth any pecuniary penalty specified by the court; and
- to comply, during a period not exceeding two years, with any other order that the court thinks fit to specify in the order, which conditions may include that the person be subject to the supervision of a probation officer appointed in accordance with the order and obey all reasonable directions of that probation officer.⁷¹³

9.68 Under s 19AC(1) a court must make a recognizance release order—and not set a non-parole period—where it sentences an offender to imprisonment for one or more federal sentences that do not in the aggregate exceed three years. However, the court has a discretion to decline to make a recognizance release order in respect of a federal sentence or sentences of less than three years where it is satisfied that it is not appropriate to do so, having regard to the nature of the offence or the offences and the antecedents of the person. A recognizance release order is not required to be made for a federal sentence of six months or less. Where a court sentences an offender to imprisonment for one or more federal sentences that in the aggregate exceed three years the court must either set a non-parole period or make a recognizance release order.⁷¹⁴ The court may decline to do either where it is satisfied that it is not appropriate to do so. A recognizance can be varied or discharged.⁷¹⁵

9.69 The provisions in Part IB in relation to the making of recognizance release orders and the setting of non-parole periods have caused some confusion. For example, courts have at times fixed a non-parole period when they should have fixed a recognizance release order,⁷¹⁶ or fixed a recognizance release order when it was more appropriate to fix a non-parole period,⁷¹⁷ or used incorrect terminology when passing sentence.⁷¹⁸

9.70 ALRC 44 recommended that partially suspended sentences should not be available to federal offenders.⁷¹⁹ It expressed the view that it would be confusing to allow courts to construct an alternative regime for the parole of offenders.⁷²⁰ However, it has been said that the practical difficulties posed by the recognizance release provisions in Part IB have not been insurmountable and that such orders remain a desirable policy option as they promote rehabilitation in the community.⁷²¹

713 The two year limit on supervision replaced a five year limit due to a view that 'supervision of more than 2 years becomes superficial and of no assistance to the person': see Explanatory Memorandum (Senate), Crimes Legislation Amendment Bill (No 2) 1989 (Cth), 35.

714 *Crimes Act 1914* (Cth) s 19AB(1).

715 *Ibid* s 20AA.

716 *R v Ceissman* (2001) 119 A Crim R 535.

717 *R v Sinclair* (1990) 51 A Crim R 418.

718 *Director of Public Prosecutions (Cth) v Haunga* (2001) 127 A Crim R 358, [2].

719 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 20.

720 *Ibid*, [67].

721 Office of the Commonwealth Director of Public Prosecutions, *Consultation*, Sydney, 16 September 2004.

9.71 The issue arises whether the circumstances in which recognizance release orders may currently be ordered need to be varied in any way. For example, would it simplify sentencing options if recognizance release orders were limited to sentences of less than three years? There also appears to be room for legislative guidance in relation to the terms upon which a recognizance release order can be made. The breadth of the provision enabling the court to set any other condition that it thinks fit in relation to the recognizance release, for a period not exceeding two years, is uncertain.⁷²² State courts have come to different conclusions about whether this provision enables the court to set community service, periodic detention, or home detention as a condition of a recognizance release.⁷²³ The issue also arises whether federal legislation should require that a particular sum be specified for a recognizance. NSW legislation does not impose such a requirement in relation to good behaviour bonds.⁷²⁴

9.72 Where a person has breached a recognizance release order without reasonable excuse, the court may: impose a monetary penalty not exceeding \$1000; 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. Further, the recognizance may be forfeited under s 20A(7).

9.73 There has been some judicial criticism of the inflexibility of the option described above, which allows the court to revoke the order and imprison the person for the balance of sentence not served.⁷²⁵ In *Kay v Hickey*, Blow J observed that the section does not allow scope to substitute a lesser period of imprisonment where a more lenient sentence is warranted, or to order that part of the sentence be served and the balance be suspended.⁷²⁶

Question 9–7 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? What options should be available to a court in the event of a breach?

722 *Crimes Act 1914* (Cth) s 20(1)(a)(iv).

723 Compare *Shambayati v The Queen* (1999) 105 A Crim R 373; *Adams v Carr* (1987) 81 ALR 151.

724 *Crimes (Sentencing Procedure) Act 1999* (NSW).

725 *Crimes Act 1914* (Cth) s 20A(5)(c)(i).

726 *Kay v Hickey* [2002] TASSC 108 [4]–[5], [12]. See also *Sweeney v Corporate Security Group* [2003] 86 SASR 425; *Ferenczfy v Director of Public Prosecutions (Cth)* [2004] SASC 208, [24]. Compare *Criminal Law (Sentencing) Act 1988* (SA) s 58(4)(a).

Conditional release

9.74 In addition to recognizance release orders, the following sentencing options allowing for the conditional release of an offender are also available to the court:

- An order discharging the offender without proceeding to conviction on the basis that he or she gives security that he or she comply with certain conditions (s 19B(1)(d)).
- An order made after a person is convicted, releasing a person without passing sentence on the basis that he or she give security that he or she will comply with certain conditions (s 20(1)(a)).⁷²⁷

9.75 Part IB sets out some of the conditions that may be imposed on an offender who is conditionally discharged, but it leaves a discretion in the court to impose such other condition as it thinks appropriate. The conditions regulating a recognizance release order are set out above. Those conditions also apply in respect of an order made under s 20(1)(a). The conditions that may be imposed in the case of a s 19B order vary slightly in that the maximum length of the good behaviour period is three years as opposed to five, and unlike an order made under s 20, s 19B does not specifically empower the court to impose a condition that the person pay a pecuniary penalty to the Commonwealth.

9.76 Like Part IB, some state and territory sentencing legislation sets out some conditions that a court must impose on an offender who is conditionally released—including that the person must be of good behaviour—while granting the court a broad discretion to impose any other conditions it thinks fit.⁷²⁸ In NSW, the Northern Territory and Queensland, one of the specified conditions is that the offender who is conditionally discharged must appear before the court if called on to do so at any time during the term of the bond.⁷²⁹ Some state legislation also specifies certain conditions that the court may impose when conditionally releasing an offender,⁷³⁰ or specifies the types of conditions that a court cannot impose when conditionally releasing an offender, such as a condition to perform community service work or make any form of payment.⁷³¹

⁷²⁷ See further Ch 7.

⁷²⁸ *Crimes Act 1900* (ACT) s 402(1); *Penalties and Sentences Act 1992* (Qld) s 19(1), (2), (2A); *Sentencing Act 1995* (NT) ss 11(1), 13(1); *Sentencing Act 1991* (Vic) ss 72(2), 75(2).

⁷²⁹ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95(a); *Sentencing Act 1995* (NT) s 11(1)(a); *Penalties and Sentences Act 1992* (Qld) s 19(1)(b)(ii).

⁷³⁰ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95A; *Penalties and Sentences Act 1992* (Qld) s 19(2A).

⁷³¹ *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 10(1)(b), 95(c); *Sentencing Act 1995* (WA) s 49.

9.77 The conditions in s 20(1) of the *Crimes Act* have been criticised in the courts. In *Edwards v Pregnell* the Tasmanian Supreme Court noted the complexity that arose from the fact that while s 20(1) authorised the court to impose a five year condition that the offender be of good behaviour, a condition that the offender not breach particular legislation could only be imposed for a period not exceeding two years.⁷³²

9.78 The issue arises whether federal legislation should set out the full range of conditions that may be imposed on an offender who is conditionally discharged. As stated in Chapter 6, to include all such conditions in federal legislation reflects a broader policy choice that favours detailed and prescriptive legislation over a broad framework supported by general principles. Allowing the court discretion to set special conditions provides it with the flexibility to tailor conditions to suit the exigencies of individual cases. However, this approach may give rise to a lack of consistency in the conditions that are imposed on offenders. It has been said that:

Some of these [special] conditions involve sentencers assuming powers over offenders not open to them under the normal sentences authorised for the offence in question. To this extent, these conditional forms of release may be perceived as flexible sanctions capable of being moulded to the offender's individual needs, but also as ones containing the seeds of potential oppression allowing, as they do, the courts to exercise power in a manner neither contemplated nor approved by the legislature. Special conditions of an undertaking required to be given in such orders may be declared to be invalid if they are uncertain, unnecessary, impossible of fulfilment, serve ulterior purposes, or are contrary to the policy of another Act.⁷³³

Question 9–8 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?

Explanation of sentence

9.79 Distinct from the requirement to give reasons for sentencing decisions⁷³⁴ is the requirement that courts explain to offenders what the sentencing order imposed upon them actually means. For example, an offender may not understand what a recognizance release order entails. Explanations are particularly important for offenders from culturally and linguistically diverse backgrounds.⁷³⁵ An explanation of sentence can encompass an explanation of the purpose and effect of a sentencing order; the consequences of non-compliance with that order; and the circumstances in which the order may be varied or revoked.

732 *Edwards v Pregnell* (1994) 74 A Crim R 509, 513. However, there is an argument that an order not to breach the law is of questionable utility, as breach will carry its own sanctions.

733 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [7.306].

734 Reasons for decisions are discussed in Ch 10.

735 See further Ch 15.

9.80 A number of provisions in Part IB of the *Crimes Act 1914* 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 consequences of imposing particular sentencing options.⁷³⁶ Some state sentencing legislation also imposes a requirement on the court to explain certain sentencing orders.⁷³⁷

9.81 Where offenders have not been present in court, judges have made directions to cause an explanation under s 16F of the *Crimes Act 1914* to be given to the offender. 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 requisite explanation had been given.⁷³⁸

9.82 The ALRC is interested in hearing whether there have been any issues in relation to the quality of explanations given by third parties to offenders pursuant to a judicial direction under Part IB of the *Crimes Act 1914*.

Question 9–9 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?

736 *Crimes Act 1914* (Cth) ss 16F(2), 19B(2), 20(2), 20AB(2). Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 93 recommended that the requirements for explanations to be given should attach to any kind of sentence imposed on a federal offender.

737 *Sentencing Act 1997* (Tas) s 92; *Sentencing Act 1991* (Vic) s 95, which require the court to explain a sentencing order that attaches conditions or requires the offender to give an undertaking. In *R v Doyle* (1998) 105 A Crim R 199 the Tasmanian Court of Criminal Appeal directed the respondent to attend the Registry to arrange a date and time for explanation of the sentencing orders in conformity with s 92: See also K Warner, *Sentencing in Tasmania* (2nd ed, 2002), [2.507]; *Sentencing Act 1991* (Vic) s 27(4) (explanation of suspended sentences).

738 *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] NSWCCA 3, [166].

10. Consistency in Sentencing

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Introduction

10.1 This chapter considers judicial, legislative and other methods for promoting consistency in the sentencing of federal offenders. These methods include sentencing factors, mandatory sentencing, guideline judgments, reasons for decision, sentencing information systems, and sentencing advisory councils. The role of prosecutors and judicial specialisation is also considered.

10.2 Many of these mechanisms seek to strike a balance between the exercise of discretion in order to attain individualised justice, and the need for reasonable consistency in the administration of criminal justice. Some methods aim to constrain or structure judicial discretion, while others are directed to greater transparency of sentencing decisions, or the provision of better information to judicial officers.

Judicial discretion

10.3 Judicial discretion in determining sentence is central to dealing with offenders in the federal criminal justice system.⁷³⁹ Legislation generally sets out a maximum penalty for an offence, and leaves it to the magistrate or judge who sentences an offender to determine the sentence that seems most suited to the individual circumstances of the offender and the seriousness of the offence.

10.4 Discretion is a useful tool in mitigating the rigidity and inflexibility of legal rules. It also enables judicial officers to particularise their responses to individual circumstances. In the context of sentencing, judicial discretion is fundamental to ensuring that a sentence is individualised and proportionate; in other words, that the ‘punishment fits the crime’. The High Court recently stated:

A sentencing judge must take into account a wide variety of matters which concern the seriousness of the offence for which the offender stands to be sentenced and the personal history and circumstances of the offender ... Yet from these the sentencing judge must distil an answer which reflects human behaviour in the time or monetary units of punishment.⁷⁴⁰

10.5 There are said to be 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—including matters relevant to the seriousness of the offence and the personal history and circumstances of the offender—in arriving at an appropriate sentence.⁷⁴¹ 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 begins with a typical sentence for a ‘standard’ case, and then adjusts the sentence up or down to take account of special circumstances of the case at hand. Examples of the two-stage approach include, but are not limited to, the sentencing grids used in the United States and the guideline judgments issued by some appellate courts in Australia.⁷⁴²

Consistency

10.6 Criticisms of the judicial role in sentencing often suggest there is a lack of consistency between the decisions of individual judicial officers. It is a fundamental principle of the criminal law and sentencing process that like cases should be treated in a like manner.⁷⁴³ Consistency in sentencing may relate to the

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

739 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [1.219].

740 *Wong v The Queen; Leung v The Queen* (2001) 207 CLR 584, [75]–[77].

741 *R v Williscroft* [1975] VR 292, 300.

742 There may be an element of the ‘two stage approach’ in judicial sentencing: *Wong v The Queen; Leung v The Queen* (2001) 207 CLR 584, [102].

743 *Lowe v The Queen* (1984) 154 CLR 606.

with which like cases are disposed of in different localities within a jurisdiction or between jurisdictions.⁷⁴⁴

10.7 Inconsistency in sentencing is commonly associated with the exercise of broad judicial discretion. However, several commentators have disputed this link.⁷⁴⁵ Some studies have also found a lack of evidence to support claims of inconsistency in sentencing. For example, ALRC 44 found that there was little research on ‘the extent to which unjustified disparity between sentences exists in Australia’.⁷⁴⁶ Reviews of state sentencing law and practice have made similar findings.⁷⁴⁷

10.8 However, the ALRC noted that most of the limited research available at that time suggested that unjustified disparity did exist. ALRC 15 examined the differing rates at which offenders were sentenced to imprisonment throughout Australia. It concluded that there was a strong likelihood that the differing rates reflected differing attitudes towards punishment.⁷⁴⁸ The ALRC study did not examine disparities within jurisdictions. Some research of this kind has been carried out in Victoria and NSW.⁷⁴⁹ The ALRC is not aware of recent research in relation to the consistency of sentences imposed on federal offenders.

10.9 Despite claims of inconsistency, many commentators and review bodies have concluded that judges are best placed to undertake the task of sentencing, and that judicial discretion should be retained.⁷⁵⁰ The courts have regularly defended the role of judges in sentencing and the ‘instinctive synthesis approach’, and resisted calls for limiting or structuring judicial discretion.⁷⁵¹

10.10 The ALRC, in conjunction with the Australian Institute of Criminology, is planning to analyse anonymised data on the federal prisoner population provided by the Commonwealth Attorney-General’s Department. It is hoped that the analysis will give some indication of the existence and extent of any inconsistency in the sentencing of federal offenders.

744 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [1.220].

745 See, eg, M Tonry, *Sentencing Matters* (1996), 177.

746 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [156].

747 See New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), [1.11]; K Warner, *Sentencing—Issues Paper No 2* (2002) Tasmania Law Reform Institute, 25, 38.

748 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [162]–[166].

749 See Victorian Sentencing Committee, *Sentencing* (1988), [5.6]; K Anderson, ‘Sentencing in Magistrates Courts’ in I Potas (ed) *Sentencing in Australia: Issues, Policy and Reform* (1987), 205.

750 See, eg, Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [34]; New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), [1.7].

751 See, eg, *AB v The Queen* (1999) 198 CLR 111, [15]–[18].

Question 10–1 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?

Question 10–2 What are the most effective methods of striking a balance between the exercise of discretion in sentencing an individual offender and the need for reasonable consistency in sentencing persons convicted of the same or a similar federal offence in like circumstances?

Legislative methods

Stating the purpose of sentencing

10.11 A number of reviews and commentators have identified that a clear legislative statement about the purpose of sentencing may promote consistency in sentencing. For example, ALRC 15 concluded that there was a strong likelihood that inconsistency in sentencing reflected differing attitudes of judges towards punishment.⁷⁵² Part IB of the *Crimes Act 1914* (Cth) does not include a statement about the purposes of sentencing.⁷⁵³ One issue for consideration is whether Part IB of the *Crimes Act* should be amended to include a statement about the purposes of punishment. Some may regard this change as desirable for the sake of legislative clarity, but unlikely to affect consistency in sentencing.

Sentencing objectives and sanction hierarchies

10.12 A number of sentencing options are available when sentencing federal offenders, including custodial and non-custodial options.⁷⁵⁴ However, the *Crimes Act* does not provide guidance in relation to the objectives of the various sentencing options, or a hierarchy of sanctions. It is arguable that if legislation gave greater guidance on when a particular sentencing option was appropriate, judicial officers would be more likely to impose like sentences in like cases. Sanction hierarchies are further discussed in Chapter 7.

752 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), 162–166.

753 Most state legislation outlines its multiple objectives. See, eg, *Sentencing Act 1991* (Vic) s 5(1).

754 See further Ch 7.

Sentencing factors

10.13 Another legislative means of promoting consistency by structuring judicial discretion is to specify the factors to be taken into account in determining the sentence. Section 16A of the *Crimes Act* is an example of this kind of guideline. Similar provisions appear in state sentencing legislation, with varying degrees of detail.⁷⁵⁵ These provisions are considered in Chapter 8.

Mandatory sentencing

10.14 Mandatory sentencing can take various forms, the chief characteristic being that it either removes or severely restricts the exercise of judicial discretion in sentencing. The most common form of mandatory sentencing is mandatory minimum penalties in which the legislature sets a minimum threshold, but leaves the court to impose a harsher sanction where it considers it appropriate.⁷⁵⁶

10.15 Mandatory sentencing in Australia has 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.⁷⁵⁷ These regimes are no longer in operation, but some state legislation still provides for mandatory penalties.⁷⁵⁸ These mandatory sentencing schemes applied to state offences, and therefore had no application to the sentencing of federal offenders.

10.16 Federal legislation does provide for mandatory penalties in limited circumstances. The *Migration Act 1958* (Cth) provides for mandatory penalties of imprisonment for people smugglers. Under s 233C of the Act, unless it can be proven on the balance of probabilities that a person was under the age of 18 years when the offence was committed, the court must impose a sentence of eight years if the conviction is for a repeat offence; and five years in any other case. Mandatory penalties do not in themselves raise difficulties under the *Australian Constitution*,⁷⁵⁹ but the means by which they are imposed may do so.⁷⁶⁰

10.17 Arguments in favour of mandatory sentencing include that it: creates greater consistency by avoiding unduly lenient or harsh sentences; increases certainty of the

755 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A; *Sentencing Act 1991* (Vic) s 5; *Penalties and Sentences Act 1992* (Qld) s 9; *Sentencing Act 1995* (WA) s 5.

756 M Bagaric, ‘What Sort of Mandatory Penalties Should We Have?’ (2002) 23 *Adelaide Law Review* 113, 117.

757 See G Santow, ‘Mandatory Sentencing: A Matter for the High Court?’ (2000) 74 *Australian Law Journal* 298; S Johnson and G Zdenkowski, *Mandatory Injustice: Compulsory Imprisonment in the Northern Territory* (2000).

758 See, eg, *Criminal Code* (WA) ss 400, 401 (mandatory penalties for burglary).

759 See, eg, *Palling v Corfield* (1970) 123 CLR 52; Transcript of Proceedings, *Wynbyne v Marshall*, (High Court of Australia, 21 May 1998). Compare M Flynn, ‘Fixing a Sentence: Are there any Constitutional Limits?’ (1999) 22 *University of New South Wales Law Journal* 280.

760 G Santow, ‘Mandatory Sentencing: A Matter for the High Court?’ (2000) 74 *Australian Law Journal* 298.

sentence to be imposed for courts, prosecutors, and defendants; provides greater deterrence due to the severity of the sentences; reduces repeat offending by preventing those offenders being at liberty to commit further crimes; and increases transparency.⁷⁶¹

10.18 However, mandatory sentencing schemes have been the subject of much criticism. It has been said 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 (which are less transparent and accountable than judicial decisions) become increasingly important.⁷⁶² Some critics also claim that mandatory sentencing fails to deter criminal behaviour, leads to greater inconsistency,⁷⁶³ and has had profoundly discriminatory impacts on certain groups.⁷⁶⁴

10.19 ALRC 44 recommended that there should be no mandatory prison terms prescribed for any federal offence. The ALRC found that mandatory minimum terms of imprisonment have a number of undesirable consequences, including perverse jury verdicts, unduly harsh sentences, and the use of technical defences.⁷⁶⁵

Standard non-parole periods

10.20 One legislative method of structuring judicial discretion is to provide for standard non-parole periods, as is done in some states. However, with few exceptions, Part IB of the *Crimes Act* does not provide guidance in relation to the length of the non-parole period, for example by stipulating that a standard proportion or a minimum period of the sentence must be a non-parole period.⁷⁶⁶ ALRC 44 expressed the view that, in the interests of certainty and truth in sentencing, a significant proportion of the period of a custodial order should be spent in prison, and that this proportion should be specified in legislation. As a general rule it was thought that 70% of the period of the custodial order should be spent in prison, and that in no case should the non-parole period be less than 50% of the total period of the custodial order.⁷⁶⁷

761 See M Bagaric, 'What Sort of Mandatory Penalties Should We Have?' (2002) 23 *Adelaide Law Review* 113, 140; M Bagaric, 'Consistency and Fairness in Sentencing: The Splendour of Fixed Penalties' (2000) 2 *California Criminal Law Review* 1.

762 G Zdenkowski, 'Sentencing Trends: Past Present and Prospective' in D Chappell and P Wilson (eds), *Crime and the Criminal Justice System in Australia: 2000 and Beyond* (2000) 161, 173; N Morgan, 'Mandatory Sentences in Australia: Where Have We Been and Where are We Going?' (2000) 24 *Criminal Law Journal* 164, 176; N Morgan, 'Why We Should Not Have Mandatory Penalties: Theoretical Structures and Political Realities' (2002) 23 *Adelaide Law Review* 141, 151.

763 See D Roche, 'Mandatory Sentencing' (1999) 138 *Trends and Issues in Crime and Criminal Justice* 1.

764 N Morgan, 'Mandatory Sentences in Australia: Where Have We Been and Where are We Going?' (2000) 24 *Criminal Law Journal* 164, 179.

765 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 13, [58].

766 One exception relates to terrorism and like offences, where the minimum non-parole period is three-quarters of the head sentence: *Crimes Act 1914* (Cth) s 19AG.

767 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Recs 25–26, [82]. Standard non-parole periods are discussed further in Ch 8.

Grid sentencing

10.21 Grid guideline systems establish presumptive sentences or sentencing ranges according to various combinations of offender and offence characteristics. They are usually prescribed in legislation or regulations. Judges are permitted to depart from the guidelines provided reasons are given. The constraint on judges depends on factors such as the breadth of the sentencing ranges set down, and the variety of circumstances under which departures are permitted.

10.22 The closest that an Australian jurisdiction has come to grid sentencing 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,⁷⁶⁸ and consisted of three levels of control over the judiciary. The legislation for the first two stages was enacted in November 2000, but the third level was rejected by the Legislative Council by a narrow margin.⁷⁶⁹ The matrix was widely criticised and the legislation was eventually repealed.⁷⁷⁰ It has been argued that the matrix raised constitutional issues because it attacked the independence of the courts.⁷⁷¹

10.23 A well-known and controversial example of grid sentencing is the Federal Sentencing Guidelines produced by the United States Sentencing Commission.⁷⁷² The guidelines are mandatory, and consist of a sentencing grid with forty-three rows for offence categories and six columns for the offender's characteristics. The cells where columns and rows intersect indicate a sentencing range with a minimum and maximum sentence. Federal judges may depart from the guideline ranges only if the case involves an aggravating or mitigating circumstance of a kind or to a degree not adequately taken into account by the Sentencing Commission in formulating the guidelines. No personal characteristics such as the offender's age, employment record, family life, or number of dependants can be taken into account in order to reduce the length of a sentence. The factors a judge may use to reduce the guideline sentence include, but are not limited to, the offender's 'acceptance of responsibility' (a guilty plea), which can attract a small reduction; and the offender's willingness to provide 'substantial assistance' to the government, which can bring a large reduction.

768 N Morgan, 'Accountability, Transparency and Justice: Do We Need a Sentencing Matrix?' (1999) 28 *Western Australian Law Review* 259.

769 N Morgan, 'Going Overboard? Debates and Developments in Mandatory Sentencing, June 2000 to June 2002' (2002) 26 *Criminal Law Journal* 293, 297.

770 *Sentencing Legislation Amendment and Repeal Act 2003* (WA); N Morgan, 'Accountability, Transparency and Justice: Do We Need a Sentencing Matrix?' (1999) 28 *Western Australian Law Review* 259.

771 N Morgan, 'Why We Should Not Have Mandatory Penalties: Theoretical Structures and Political Realities' (2002) 23 *Adelaide Law Review* 141, 152.

772 28 USC s 991 (United States Sentencing Commission, establishment and purposes). The guidelines took effect on 1 November 1987. A number of states in the United States have introduced sentencing guidelines. Many of these differ from the federal guidelines and some are considered less severe.

10.24 Another example of grid sentencing is the numerical guidelines introduced for serious offences in the state of Minnesota in the United States.⁷⁷³ These guidelines are generally considered to be less severe than the Federal Sentencing Guidelines. The two-dimensional grid consists of criminal offences divided into categories along the vertical axis and criminal history categories along the horizontal axis. A line appears on the grid, with those cells appearing above the line carrying a presumption of non-imprisonment, and those below the line carrying a presumption of imprisonment. Although the guidelines are expected to be followed, they are recommendations based on typical circumstances. When substantial and compelling aggravating or mitigating circumstances exist, a judge may depart from the presumptive sentence and provide any sentence authorised by law. The judge must provide written reasons that articulate the substantial and compelling circumstances, and that demonstrate why the sentence given is more appropriate or fair than the presumptive sentence.

10.25 Arguments in favour of such guidelines are that they have made sentencing more consistent, and that they allow administrators to predict the effect of changes to sentencing legislation.⁷⁷⁴ However, the Federal Sentencing Guidelines have been widely criticised. Criticisms include that the guidelines have failed to deliver more consistency in sentencing; discriminate against certain groups; increase the severity of punishment and federal incarceration rate; eliminate considerations as to the individuality of the particular defendant; and fail to deal properly with non-custodial sentences. Other criticisms are that the guidelines are overly complex; have merely shifted discretion to the prosecutorial process; have been prone to political hijacking; and have focused too greatly upon retribution to the exclusion of other aims of sentencing.⁷⁷⁵

10.26 In *Blakely v Washington*,⁷⁷⁶ the United States Supreme Court invalidated a Washington State sentencing scheme, which was similar to the federal sentencing guidelines and to the schemes used by at least 10 other states. In particular, the Supreme Court curtailed the practice of increasing criminal sentences based on 'aggravating factors' that are not admitted by the defendant or proved to the satisfaction of a jury. Following this decision, the validity of the Federal Sentencing Guidelines has been raised in two cases currently before the Supreme Court.⁷⁷⁷ These developments may not prohibit the use of federal sentencing guidelines in the United

773 See Minnesota Sentencing Guidelines Commission, *Sentencing Guidelines* <www.msgc.state.mn.us> at 4 January 2005.

774 A Freiberg, *Pathways to Justice: Sentencing Review 2002* (2002) Victorian Government, 201–202.

775 See M Shein and M Doherty, 'The Federal Sentencing Guidelines: A Troubling Historical Perspective' (2004) 51 *Federal Lawyer* 30; N Gertner and H Sarokin, 'Federal Sentencing Guidelines: A View from the Bench' (2002) 29(2) *Human Rights* 6, 23; P Hofer, K Blackwell and R Ruback, 'The Effect of the Federal Sentencing Guidelines on Inter-judge Sentencing Disparity' (1999) 90 *The Journal of Criminal Law & Criminology* 239; A Freiberg, *Pathways to Justice: Sentencing Review 2002* (2002) Victorian Government, 202.

776 *Blakely v Washington* 124 S Ct 2531 (2004).

777 *United States v Booker* (No 04-104) (Supreme Court, 2004); *United States v Fanfan* (No 04-105) (Supreme Court, 2004).

States, but may require new fact-finding procedures to be developed for use alongside the guidelines.

10.27 The ALRC considered grid sentencing in its 2002 report on civil and administrative penalties. The ALRC did not consider a ‘grid sentencing’ approach to be appropriate in the context of Australian federal civil and administrative penalties, but did not address the question in the context of federal criminal offences.⁷⁷⁸

Question 10–3 Should legislation structure the sentencing discretion in relation to federal offenders, for example by specifying: (a) the purposes or objectives of punishment; (b) a hierarchy of custodial and non-custodial sentencing options; (c) sentencing factors; or (d) sentencing grids? Does structuring the sentencing discretion in legislation raise any concerns?

Judicial methods

10.28 This section considers a number of judicial methods for promoting consistency in the sentencing of federal offenders. These methods can be divided into three broad categories:

- ‘top-down’ solutions in which a superior court gives guidance to lower courts in particular cases (appellate review) or generally (guideline judgments);
- sharing information about like cases among sentencing judges through the provision of adequate reasons for decision; and
- judicial officers making sentencing decisions jointly through a collaborative process (collective sentencing).

Appellate review

10.29 Appellate courts have an obvious role in settling questions of law and in interpreting particular statutory provisions that bear on sentencing. Appellate courts also see their role as minimising disparities in sentencing standards.⁷⁷⁹ In *R v Osenkowski*, King CJ stated:

The proper role for prosecution appeals, in my view, is to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic views of individual judges as to particular crimes or types of crime to be corrected, and occasionally to

⁷⁷⁸ Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), Rec 29–1, [29.47].

⁷⁷⁹ R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [1.221]. See also *Griffiths v The Queen* (1977) 137 CLR 293, 310.

correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience.⁷⁸⁰

10.30 Appellate review can contribute to a common approach to the sentencing of offenders within a state or territory. However, it can also lead to variations between states and territories in relation to persons facing identical charges under Commonwealth law. However, state and territory courts do try to attain a degree of uniformity when applying Commonwealth law.⁷⁸¹ As Street CJ has stated:

[W]here 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.⁷⁸²

10.31 It has also been noted that even if appellate courts become more involved in laying down sentencing principles, the process of developing the law on a case-by-case basis, which is the tradition of the common law, is slow and haphazard.⁷⁸³

10.32 Some commentators have observed that the High Court has been reluctant to grant special leave to appeal in sentencing matters, and has therefore been unable to ensure consistency in the sentencing of federal offenders.⁷⁸⁴ Only a relatively small number of cases are granted special leave each year and thus continue on to a full hearing. Generally, most successful applications for special leave raise a question of law of public importance.⁷⁸⁵ Conflicting decisions in different state courts may justify a grant of special leave. However, such a conflict may not justify a grant of special leave if the High Court considers the decision under challenge to be correct or not attended with sufficient doubt to warrant reconsideration.⁷⁸⁶

10.33 ALRC 15 proposed that the only effective way in which to influence judicial discretion in a national and uniform way by an appellate mechanism was to provide for a new route for the review of federal sentencing decisions to the Federal Court of Australia.⁷⁸⁷ The proposal was not repeated in ALRC 44 and has not been implemented.⁷⁸⁸ This issue is discussed further in Chapter 3.

780 *R v Osenkowski* (1982) 30 SASR 212, 213.

781 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [1.222].

782 *R v Abbrederis* [1981] 1 NSWLR 530, 542. See also *R v Parsons* [1983] 2 VR 499; *R v Gardiner* (1979) 27 ALR 140.

783 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [1.222]. See also Victorian Sentencing Committee, *Sentencing* (1988), [4.16.21].

784 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [1.222].

785 *Judiciary Act 1903* (Cth) s 35A.

786 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].

787 Australian Law Reform Commission, *Sentencing of Federal Offenders*, ALRC 15 (Interim) (1980), [435].

788 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [194].

Guideline judgments

10.34 In recent years, some appellate courts have provided guidelines in order to structure judicial sentencing discretion. Some judicial guidelines simply rank or assign weights to various factors.⁷⁸⁹ Other judicial guidelines, such as guideline judgments, are more prescriptive.

10.35 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 can identify the main aggravating and mitigating factors for the offence, or indicate how particular types of sanction are to be used. 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 on sentencing of guilty pleas. 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’.⁷⁹⁰

10.36 Guideline judgments originated in the English Court of Appeal in the 1970s.⁷⁹¹ In 1998, the NSW Court of Criminal Appeal delivered its first guideline judgment in the case of *R v Jurisic*.⁷⁹² This case provided guidance on the appropriate penalty for dangerous driving causing death or serious injury.⁷⁹³ Shortly after *Jurisic*, the NSW Parliament passed legislation to authorise the Court of Criminal Appeal to give a guideline judgment on its own motion; and to authorise the Attorney General to request that Court to deliver guidelines without the need for a relevant appeal.⁷⁹⁴ Victoria, South Australia and Western Australia now have similar legislation.⁷⁹⁵ The Tasmania Law Reform Institute is considering this issue as part of its inquiry into sentencing.⁷⁹⁶ Federal legislation does not provide for guideline judgments and, for reasons explained further below, it may not be able to do so in some circumstances.

789 See, eg, *Police v Cadd* (1997) 69 SASR 150.

790 *R v Romanic (Milorad)* [2000] NSWCCA 524.

791 Guideline judgments have also been used in Canada, Hong Kong and New Zealand.

792 *R v Jurisic* (1998) 45 NSWLR 209.

793 The guidance included a list of relevant factors, and statements that a non-custodial sentence (and custodial sentences less than a certain number of years) should be exceptional for these offences. The guideline was reformulated in *R v Whyte* (2002) 55 NSWLR 252.

794 *Crimes (Sentencing Procedure) Act 1999* (NSW) Pt 3, Div 4.

795 *Sentencing Act 1991* (Vic) Pt 2AA; *Criminal Law (Sentencing) Act 1988* (SA) Pt 2, Div 4; *Sentencing Act 1995* (WA) s 143.

796 K Warner, *Sentencing—Issues Paper No 2* (2002) Tasmania Law Reform Institute, 132–133.

10.37 One argument in favour of guideline judgments is that they balance the need for discretion to enable justice to be done in the individual case with the need for consistency of sentencing decisions. They have also been said to counter calls for mandatory sentencing and legislative sentencing grids; and to offer a more transparent approach to sentencing than judicial intuition.⁷⁹⁷

10.38 The disadvantages of guideline judgments include that they can unduly restrict judicial discretion because they cannot foresee all the factors that may arise in sentencing a particular offender,⁷⁹⁸ and may be used to increase penalty severity.⁷⁹⁹ Further, some commentators have questioned the utility of guideline judgments in promoting consistency.⁸⁰⁰

10.39 The NSW Court of Criminal Appeal has delivered guideline judgments in relation to a number of offences, including one in relation to federal offences. In *R v Wong*,⁸⁰¹ the Court delivered 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 consisted of five levels related to the quantity of the drug involved. A range of penalties was suggested for each level.⁸⁰²

10.40 These guidelines were overturned by the High Court in *Wong v The Queen*.⁸⁰³ The majority held that because the guidelines elevated the quantity of the narcotic to a position of primacy, the guidelines were inconsistent with s 16A of the *Crimes Act*. The Court also considered issues arising from Chapter III of the *Australian Constitution*—the ‘Judicature’ Chapter. Gaudron, Gummow and Hayne JJ held that if judicial guidelines had any binding effect on future cases (such as if departure from the guidelines would attract close scrutiny by an appellate court), they would begin ‘to pass from the judicial to the legislative’. If, by contrast, the guidelines were not intended to have that effect, their purpose was unclear.⁸⁰⁴ 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.⁸⁰⁵

797 K Warner, ‘The Role of Guideline Judgments in the Law and Order Debate in Australia’ (2003) 27 *Criminal Law Journal* 8, 22.

798 K Warner, *Sentencing—Issues Paper No 2* (2002) Tasmania Law Reform Institute, 129.

799 A review of the impact of *R v Jurisic* (1998) 45 NSWLR 209 concluded that proportionally more offenders were sentenced to a term of full-time custody in the period after the issue of the guidelines than in the period prior: K Warner, ‘The Role of Guideline Judgments in the Law and Order Debate in Australia’ (2003) 27 *Criminal Law Journal* 8, 22.

800 M Bagaric and R Edney, ‘What’s Instinct Got to Do with It? A Blueprint for a Coherent Approach to Punishing Criminals’ (2003) 27 *Criminal Law Journal* 119, 140.

801 *R v Wong; R v Leung* (1999) 48 NSWLR 340.

802 See *Ibid*, [142].

803 *Wong v The Queen; Leung v The Queen* (2001) 207 CLR 584.

804 *Ibid*, [80].

805 *Ibid*, [147]–[149].

10.41 The use of guideline judgments in relation to federal offences raises a number of issues. Section 16A of the *Crimes Act* and Chapter III of the *Australian Constitution* clearly present obstacles to the development of guideline judgments for federal offences if the guidelines are quantitative, highly specific, and give preference to a single factor such as drug quantity. However, guideline judgments may still be an option for providing consistency in the sentencing of federal offenders, depending on how they are expressed and how they are used by state and territory courts.

10.42 Another important question in considering the value of guideline judgments for federal offences is determining the appropriate court to deliver them. It is arguable that a guideline judgment will not promote consistency in federal sentencing unless it is delivered by a single court whose jurisdiction extends across all states and territories. One court that might be able to do this is the Federal Court of Australia. However, as discussed in Chapter 3, that Court currently has very limited criminal jurisdiction, and difficulties may arise in relation to offenders who face both federal charges and state or territory charges. Alternatively, state and territory appellate courts could deliver guideline judgments in relation to federal offences if they were accepted and applied by the courts of other states or territories as a matter of judicial comity. This might be feasible in relation to federal offences that are concentrated in particular jurisdictions, such as drug importation offences in NSW, illegal fishing in Queensland, and people smuggling in Western Australia (see Chapter 2).

10.43 Guideline judgments were considered by the ALRC in its 2002 review of federal civil and administrative penalties. The ALRC concluded that Chapter III of the *Constitution* poses considerable difficulties for the development of guideline judgments in relation to federal offences. However, given the value of detailed guidelines in promoting consistency of decision making, the ALRC stated that there is merit in courts, especially superior courts, providing detailed reasons for penalty decisions, including the factors considered and the weight given to those factors.⁸⁰⁶ This matter is taken up in the next section.

Question 10–4 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?

Reasons for decision

10.44 ALRC 44 considered the provision of fuller reasons as one method of guiding judicial discretion in sentencing. Noting that the availability of reasons for decision

⁸⁰⁶ Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [29.46].

will lessen the possibility of those decisions being, or appearing to be, unjustified or arbitrary, the ALRC recommended that:

the most appropriate way to promote consistency in sentencing is to encourage judicial officers to frame their decisions in a way that will allow meaningful comparisons to be drawn between them so that the matters that were taken into account, and their significance in the case, can be easily seen and compared.⁸⁰⁷

10.45 The ALRC recommended a number of requirements for the giving and recording of reasons for sentences imposed on federal offenders, including: if imprisonment is an available sentencing option, superior and District or County courts should be required to provide written reasons for any sentence imposed, but courts of summary jurisdiction should only be required to state and record reasons; if imprisonment is not an available sentencing option, superior and District or County courts should be required to state and record reasons for sentence, but courts of summary jurisdiction should not be required to provide reasons; and where an appeal is lodged against any sentence imposed in any court, written reasons for the sentence should be made available.⁸⁰⁸

10.46 The ALRC also recommended that statements of reasons, whether written or recorded in some other way, should specify the court's view of the seriousness of the offence, the matters that were taken into account, the weight given to those matters and the court's view of the appropriateness of the type and severity of the sentence.⁸⁰⁹

10.47 These recommendations have not been incorporated into the *Crimes Act*. At present, the requirement to provide reasons is restricted to circumstances in which a court passes a sentence of imprisonment on a person for a federal offence, or for an offence against the law of an external territory.⁸¹⁰

10.48 The giving of reasons is generally considered to be part of the judicial function and process of judicial accountability.⁸¹¹ However, there is little information available on when various courts provide and record reasons, or provide written reasons, and whether those reasons are sufficient. Many superior courts appear to provide and record reasons, and usually give written reasons for sentencing decisions, but less is known about the practice of the lower courts.

10.49 This raises a number of issues in relation to federal offenders. Should the requirements for the giving and recording of reasons, and the provision of written reasons, be extended? Related issues include whether the practice of the courts should

807 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 102.

808 *Ibid*, Rec 91.

809 *Ibid*, Rec 92.

810 *Crimes Act 1914* (Cth) s 17A.

811 *Wong v The Queen; Leung v The Queen* (2001) 207 CLR 584, [102]; Advisory Committee members, *Advisory Committee meeting*, 21 September 2004.

depend on the type of sentence being imposed, the court imposing the sentence, or whether the offence is prosecuted summarily or on indictment. Another issue relates to the sufficiency of oral or written reasons when sentencing a federal offender, and the most appropriate means of encouraging best practice in this regard.

Question 10–5 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?

Collective sentencing

10.50 Some countries have experimented with a collective process of sentencing.⁸¹² Under some models, sentences are determined by more than one judge; in others a judge may sit with a number of lay assessors.⁸¹³ Neither model is used in Australia.

10.51 Various criticisms have been levelled at collective sentencing. It has been suggested that it does not appear to develop sentencing principles but that, at best, it represents a consultation process. It has also been said that it is wasteful of judicial resources and that it may not significantly reduce disparity in sentencing.⁸¹⁴

10.52 In respect of federal offenders, collective sentencing that includes lay assessors might raise constitutional difficulties. It may be unconstitutional to vest federal judicial power in a person who is not a judge appointed under Chapter III of the *Australian Constitution*. However, this issue need not arise if the role of the lay assessor were limited to providing advice to a judicial officer who had final responsibility for making the determination.

Role of prosecutors

10.53 Prosecutors, including the Commonwealth Director of Public Prosecutions (CDPP), are under a general duty to assist the court to avoid appealable error.⁸¹⁵ The

812 Collective sentencing was considered in Victorian Sentencing Committee, *Sentencing* (1988), [4.15].

813 Such a model has been used in Michigan where a judge meets with other judges and probation officers prior to passing sentence: see United States District Court (Eastern District of Michigan), *Practice Guidelines for Judge Robert H. Cleland—Pleas and Sentencing* <www.mied.uscourts.gov/_practices/Cleland/pleas.htm> at 20 December 2004.

814 Victorian Sentencing Committee, *Sentencing* (1988), [4.15.4]–[4.15.5].

815 *R v Tait and Bartley* (1979) 24 ALR 473, 476–477. Other obligations are included in: Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (2004) <<http://www.cdpp.gov.au/Prosecutions/Policy/Default.aspx>> at 6 October 2004; Attorney-General's

duty has been said to include the 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.⁸¹⁶ A failure by a prosecutor to fulfil this duty could impact on a crown appeal on sentence.⁸¹⁷

10.54 Some commentators have noted that it is appropriate for prosecutors to refer to the sentences imposed in comparable cases in order to promote consistency.⁸¹⁸ If the prosecution knew of such information and failed to provide it to the court at the court's request, the prosecution may have failed to fulfil its obligation to the court.⁸¹⁹ If the prosecution fails to make submissions on sentence it may face difficulties if it subsequently wishes to appeal against the penalty imposed. If the Crown does not do what is reasonably required of it to assist the sentencing court to avoid error, then ordinarily an appellate court will decline to intervene, notwithstanding that the appeal may otherwise be meritorious.⁸²⁰

10.55 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 type of sentence, it is inappropriate and undesirable for the prosecution to go further and make submissions about either range or quantum of sentence.⁸²¹

10.56 The CDPP has developed administrative guidelines on the role of the CDPP at sentencing. These guidelines state the role of the prosecutor in the sentencing process is: to be fair; not to focus on ensuring that the maximum penalty is imposed; to ensure that the penalty imposed is appropriate in all the circumstances of the case; 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.⁸²² The guidelines provide guidance on:

- matters that may be relevant when a prosecutor is considering whether to address on sentence;
- addressing on sentence when a defendant is unrepresented;

Department, *Legal Services Directions: Directions on the Commonwealth's Obligations to Act as a Model Litigant* Attorney-General's Department <www.law.gov.au/olsc> at 13 October 2004.

816 *R v Tait and Bartley* (1979) 24 ALR 473, 476–477.

817 See *Ibid*; *R v Jermyn* (1985) 2 NSWLR 194; *R v Howlett, Myall and Holland* (1997) 97 A Crim R 153.

818 J Temby, 'The Role of the Prosecutor in the Sentencing Process' (1986) 10 *Criminal Law Journal* 199, 211.

819 *R v Jermyn* (1985) 2 NSWLR 194.

820 *R v Tait and Bartley* (1979) 24 ALR 473.

821 J Willis, 'Some Aspects of the Prosecutor's Role at Sentencing' (1996) 6 *Journal of Judicial Administration* 38, 47.

822 The only exception is in the case of major prosecutions.

- matters that may be addressed;
- charge bargaining; and
- failure to address on sentence.⁸²³

10.57 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.⁸²⁴ This raises the issue of the appropriate role of prosecuting authorities in promoting consistency in the sentencing of federal offenders. A further issue for consideration is whether this form of assistance should be formalised, perhaps in the Prosecution Policy of the Commonwealth,⁸²⁵ or in standards such as *Directions on the Commonwealth's Obligations to Act as a Model Litigant*.⁸²⁶

Question 10–6 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?

Sentencing information

10.58 ALRC 44 stated that judicial officers need reliable, accessible and up-to-date information, not only to impose appropriate penalties on individual offenders, but also to help ensure that sentences imposed are consistent.⁸²⁷ The ALRC expressed the view that meaningful comparisons between sentences can be made only if a relatively standardised description of offences and offenders concerned is collected and made available to judicial officers, the legal profession, and others involved in the criminal justice system.⁸²⁸

10.59 The ALRC concluded that for this purpose, an information system, with both quantitative and qualitative components, is needed to provide and disseminate

823 Office of the Commonwealth Director of Public Prosecutions, *Correspondence*, 29 October 2004.

824 Office of the Commonwealth Director of Public Prosecutions, *Consultation*, Sydney, 16 September 2004; New South Wales Bar Association, *Consultation*, Sydney, 2 September 2004.

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

826 Attorney-General's Department, *Legal Services Directions: Directions on the Commonwealth's Obligations to Act as a Model Litigant* Attorney-General's Department <www.law.gov.au/olsc> at 13 October 2004.

827 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [267].

828 *Ibid.*, [267].

comprehensive, up-to-date and accessible information on the offences for which sentences are imposed; the type and quantum of penalties imposed in respect of particular offences; and the relevant characteristics of the offence and the offender that were taken into account, and the weight given to them.⁸²⁹

10.60 Such an information system has never been established in relation to federal offences. However, the Judicial Commission of NSW has established the Judicial Information Research System (JIRS) in relation to NSW 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 case law, legislation, principles of sentencing, sentencing statistics and other information. The sentencing statistics component of the database provides information in the form of graphs and tables on the range and frequency of penalties imposed in cases of a similar nature. The judicial officer may enter details of the offence and a limited number of characteristics of the offender (for example, age, prior record, bail status, plea), and then display statistical information about various sentencing options, such as fines and prison terms. The judicial officer is then able to read from the screen information on the type of penalty imposed, and within any penalty type, the quantum of penalty imposed for a similar offence.

10.61 The object of the sentencing information in JIRS is not to limit the sentencing discretion, but to 'provide judicial officers with rapid and easy access to the collective wisdom of the courts in order to assist them with their sentencing decisions'.⁸³⁰ The NSW Court of Criminal Appeal has noted that statistics generally have a 'broad indicative value' only, and that they do not 'remove the need for sentencing Courts, primary or appellate, to look with discriminating care at the particular circumstances, objective and subjective, particular to each individual case'.⁸³¹

10.62 At present, JIRS contains limited data on sentences imposed in federal criminal matters. Moreover, the information that is included on federal matters is limited to decisions of NSW courts. This raises the issue of whether a comprehensive national database should be established to cover the sentences of federal offenders and, if so, what information should be included and how it should be organised. There are also practical considerations such as how such information should be collected and categorised on a national basis, and what sort of body should have responsibility for this. These issues are further discussed in Chapter 16 below.

829 Ibid, [268].

830 Judicial Commission of New South Wales, *Judicial Information Research System (JIRS) [Information Flyer]*.

831 *R v Shorten* (Unreported, New South Wales Court of Criminal Appeal, Sully J, 10 September 1997). See also *Wong v The Queen; Leung v The Queen* (2001) 207 CLR 584, [59].

Question 10–7 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?

Sentencing commissions and advisory councils

10.63 In recent years, governments have established a number of sentencing bodies in the form of sentencing commissions and advisory councils. Their objectives usually include consistency in sentencing, but their constitution and functions can vary greatly.

10.64 ALRC 44 recommended the establishment of a national sentencing council to provide judicial officers with detailed, comprehensive information to promote consistency in sentencing federal and ACT offenders. Other proposed functions included the provision of advice to government, monitoring sentencing practices, and a public information service. The sentencing council would have met regularly and monitored research projects and publications that concerned sentencing issues. The council would have been chaired by a judge of the Federal Court of Australia and the ACT Supreme Court. Its membership would have included judges of the Supreme Courts; judges of the County Court or District Court in at least one state; and magistrates from the states and the ACT. The interests of prosecutors, correctional authorities, legal and other academics, members of the legal profession, and the general community, would also have been represented.⁸³² This recommendation was not implemented at the federal level, but some states have established similar bodies.

10.65 The NSW Sentencing Council, established under the *Crimes (Sentencing Procedure) Act 1999* (NSW), comprises 10 members, including a retired judicial officer; persons with expertise or experience in criminal law or sentencing, law enforcement, and Aboriginal justice issues; and representatives of the general public.⁸³³ The main functions of the Council are to:

- advise and consult with the Minister in relation to offences suitable for standard non-parole periods and their proposed length, matters suitable for guideline judgments, and submissions to the NSW Court of Criminal Appeal to be made by the Minister in guideline proceedings; and
- monitor, and report annually to the Minister on, sentencing trends and practices, including the operation of standard non-parole periods and guideline judgments.⁸³⁴

832 See Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Recs 176–178.

833 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100I.

834 *Ibid* s 100J.

10.66 In July 2004, the Victorian Attorney-General announced the establishment of the Victorian Sentencing Advisory Council, which is similarly constituted to the NSW Sentencing Council.⁸³⁵ Its functions include: stating in writing to the Victorian Court of Appeal its views about giving or reviewing a guideline judgment; conducting research about sentencing matters and disseminating such information to judicial officers and other interested persons; and gauging public opinion on sentencing matters.⁸³⁶ The Tasmania Law Reform Institute is currently considering the establishment of a ‘modest’ sentencing advisory council.⁸³⁷

10.67 Although the two sentencing councils described above have advisory and research functions, other bodies such as the Sentencing Guidelines Council in England and the sentencing commissions in the United States, have a more direct impact on individual cases.

10.68 The English Sentencing Guidelines Council was set up under the *Criminal Justice Act 2003* (UK) to take over the Court of Appeal’s responsibility for issuing sentencing guidelines.⁸³⁸ The Council is responsible for producing guidelines that will apply to all courts for the full range of criminal offences.⁸³⁹ In every individual case, the judge or magistrate will continue to make his or her own decision as to sentence, but will be required to have regard to the Council’s guidelines.⁸⁴⁰

10.69 A number of jurisdictions in the United States have sentencing commissions that develop and administer sentencing guidelines. The United States Sentencing Commission, created by the Sentencing Reform Act provisions of the *Comprehensive Crime Control Act 1984* (US), is an independent rule-making agency in the judicial branch of government. Its principal purpose is to establish sentencing policies and practices for the federal courts, including guidelines prescribing the appropriate form and severity of punishment for offenders convicted of federal crimes. The Commission also conducts research and distributes a broad array of information on federal crime and sentencing issues.

10.70 The ALRC is interested in hearing views on the desirability of establishing a body to provide information or advice to the Australian Government or the courts in

835 R Hulls (Attorney-General), ‘Victoria’s First Sentencing Advisory Council Appointed’ (Press Release, 28 July 2004). See also N Ross, ‘Sentencing Plan Fails to Appeal’, *Herald Sun* (Melbourne), 18 August 2004, 27.

836 *Sentencing Act 1991* (Vic) s 108C.

837 K Warner, *Sentencing—Issues Paper No 2* (2002) Tasmania Law Reform Institute, 132.

838 The establishment of such a body was recommended in J Halliday, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* (2001) Home Office (UK). The Council held its first meeting on 5 March 2004.

839 The Parliament will have a role in scrutinising the draft guidelines drawn up by the Council: Home Office, ‘New Body to Improve Sentencing Practice’ (Press Release, 5 March 2004).

840 England also has a Sentencing Advisory Panel that is similar to the NSW and Victorian sentencing advisory councils. In the past, the Panel submitted advice to the Court of Appeal, but it is now required to submit its advice to the Sentencing Guidelines Council for consideration.

relation to the sentencing of federal offenders. If such a body were established, further issues arise in relation to its function, and how it should be constituted and structured.

Question 10–8 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?

Judicial specialisation

10.71 A lack of specialisation of state and territory courts in federal criminal matters may be one cause of real or perceived inconsistency in the sentencing of federal offenders. Repeated exposure to the Part IB regime may enable a judicial officer to gain a better understanding of its particular requirements, while infrequent exposure and unfamiliarity may be reflected in unevenness of decision making.

10.72 There are different ways in which specialisation might be achieved. In NSW, it was the past practice of one Local Court in Sydney to assign a particular magistrate to deal with federal criminal matters in that Court.⁸⁴¹ In Tasmania, the Launceston Magistrates Court spends one day a month dealing with federal criminal matters, although different magistrates deal with these matters from time to time.

10.73 The volume of federal criminal matters may dictate the degree of specialisation that is possible within a particular town or city. For example, there may be too many federal criminal matters in Sydney for them to be determined expeditiously by a single judicial officer. Conversely, there may insufficient matters in smaller cities to justify the specialisation of a judicial officer, or the grouping of all federal matters on a particular day. The ALRC is interested in hearing views on whether there is a role for greater specialisation of state and territory judicial officers in the sentencing of persons convicted of federal offences.

10.74 Judicial education may also assist in achieving greater consistency in the sentencing of federal offenders. Judicial education is considered in Chapter 16.

841 New South Wales Legal Aid Commission—Criminal Law Division, *Consultation*, Sydney, 22 September 2004.

Question 10-9 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?

11. Procedural and Evidential Issues

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Introduction

11.1 This chapter considers a number of procedural and evidential issues in relation to the sentencing hearing, including the information upon which a federal sentence should be based, the manner in which information should be presented, the process of fact-finding in sentencing, and the burden and standard of proof. This chapter also explores whether there should be an increased role for the jury in sentencing, and whether, prior to trial, federal offenders should be able to receive an indication of sentence if they were to plead guilty.

Information used in sentencing

11.2 As discussed in Chapter 8, s 16A of the *Crimes Act 1914* (Cth) sets out a non-exhaustive list of 13 matters that are to be taken into account in sentencing so far as they are relevant and known to the court. Those factors include the nature and circumstances of the offence; factors relevant to the offender (such as antecedents, cultural background, and physical or mental condition); other offences that are required or permitted to be taken into account; the personal circumstances of any victim of the offence; any injury, loss or damage resulting from the offence; the prospect of rehabilitation; and the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.

11.3 To a large degree, the factors specified in s 16A determine the type of information that should be available to the court before sentencing a federal offender: to the extent that it is relevant and known, information about all these factors should be placed before the court. It may also be relevant to provide the court with information about the prevalence of the offence, the availability of services and programs that could assist the offender, the time spent by an offender in custody in relation to the offence prior to sentencing,⁸⁴² sentences imposed on co-offenders, and sentencing statistics and authorities on how similar offences have been dealt with. The use of sentencing statistics to promote consistency in sentencing is discussed in Chapter 10.

11.4 Administrative guidelines on the role of the Commonwealth Director of Public Prosecutions (CDPP) at sentencing address the types of matters on which a prosecutor may address the court.⁸⁴³ These include: the facts; any circumstances of aggravation or mitigation; whether the offender has made reparation or has cooperated in the investigation or prosecution of other offences; and the prevalence of the relevant offence, and its effect upon the Commonwealth and the community.⁸⁴⁴

11.5 The question arises as to the manner in which information is to be obtained and presented to the court. If the information relates to a disputed fact, it may become necessary to present the information in a form that is admissible as evidence. This is discussed further in the section on fact-finding below.

11.6 Part IB does not make provision for victim impact statements, pre-sentence reports or how information on prior convictions is to be presented. As discussed in Chapter 3, ss 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. However, 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 s 68 picks up and applies

842 Pre-sentence custody is discussed in Ch 9.

843 These guidelines are discussed in Ch 10.

844 Office of the Commonwealth Director of Public Prosecutions, *Correspondence*, 29 October 2004.

particular state and territory provisions to the sentencing of federal offenders is often tested on a case-by-case basis.⁸⁴⁵ This raises the issue of whether there needs to be greater legislative clarity in this regard. Provisions in relation to victim impact statements and pre-sentence reports have been described as matters of sentencing procedure and are therefore picked up and applied in the sentencing of federal offenders.⁸⁴⁶ These matters are addressed separately below.

Victim impact statements

11.7 A victim impact statement is a statement made by or on behalf of a victim⁸⁴⁷ to inform the sentencing court of the harm, loss or injury suffered by a victim as a result of the offence that is the subject of the sentencing proceedings. In some American states, the statement can also include an expression of the victim's opinion about an appropriate sentence for the offender.⁸⁴⁸ However, 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.⁸⁴⁹

11.8 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.⁸⁵⁰ Problems with victim impact statements include that they can raise a victim's expectations about sentence, which are not subsequently fulfilled; that they can expose offenders to unfounded allegations by victims;⁸⁵¹ and that they can lead sentencers to give disproportionate weight to the impact of a crime on a victim, to the detriment of other relevant considerations.⁸⁵²

11.9 In the 1980s, the ALRC and the Victorian Parliament's Legal and Constitutional Committee recommended against legislative provision for victim impact statements,⁸⁵³ and the Victorian Sentencing Committee recommended against the adoption of victim impact statements.⁸⁵⁴ ALRC 44 stated that sentences are imposed on behalf of the

845 Office of the Commonwealth Director of Public Prosecutions, *Consultation*, Sydney, 16 September 2004.

846 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.406], [2.507].

847 For example, under *Sentencing Act 1991* (Vic) s 106B(1)(b) a person with a sufficiently close relationship to the victim can prepare the report where the victim is incapable of giving consent.

848 A Ashworth, 'Victim Impact Statements and Sentencing' (1993) *The Criminal Law Review* 498, 504.

849 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. Compare *Sentencing Act 1995* (NT) s 106B(5A).

850 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.501].

851 A Ashworth, 'Victim Impact Statements and Sentencing' (1993) *The Criminal Law Review* 498, 501, 507.

852 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.502].

853 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [192]; Victorian Parliament Legal and Constitutional Committee, *Report Upon Services for Victims of Crime* (1987), Rec 53.

854 Victorian Sentencing Committee, *Sentencing* (1988), Rec 13.4.3.

entire community, not just particular persons,⁸⁵⁵ and that the attitude of the victim to the particular sentence to be imposed was irrelevant. It said that the court will already have taken into account the impact of the offence on the victim and that there is no need for legislative change to make such statements mandatory either generally or in specific circumstances.⁸⁵⁶ It also recommended against victims being parties to the sentencing hearing.⁸⁵⁷ These observations raise the issue of the relevance of victim impact to federal sentencing, especially where the victim impact statement is from a secondary victim (for example, a family member of a person who has died due to a terrorist act).

11.10 The Victorian Sentencing Committee noted that if victim impact statements were introduced and were not made compulsory, disparity could arise in the sentencing process: more severe sentences might be imposed in cases in which victim impact statements were available than in cases in which they were not, even if the culpability of the offender were the same.⁸⁵⁸

11.11 In 1996, the NSW Law Reform Commission (NSWLRC) recommended that, except in death cases, victim impact statements should be admissible at sentencing hearings, at the discretion of the court and at the victim's option, as an indication of the seriousness of the offence.⁸⁵⁹ It also 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.⁸⁶⁰ The practice in South Australia of having police officers prepare victim impact statements which are not signed or acknowledged by the victim was criticised by the South Australian Court of Criminal Appeal.⁸⁶¹ More recently, the NSWLRC identified a number of arguments against extending the coverage of victim impact statements to include offences of the type more typically committed by corporations.⁸⁶²

11.12 A number of states and territories have legislative provisions governing the use of victim impact statements.⁸⁶³ However, there is disparity in relation to the definition

855 In *R v Qutami* (2001) 127 A Crim R 369, [75], [77] Spigelman CJ stated that the public interest in sentencing is broader than the particular community or the victims affected by the crime. That public interest is to ensure that crimes are dealt with by punishment at appropriate levels of severity.

856 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [191]–[192].

857 *Ibid*, Rec 106.

858 Victorian Sentencing Committee, *Sentencing* (1988), [13.3.26].

859 New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), Rec 3.

860 *Ibid*, Recs 6, 7, 9.

861 *Nicholls v The Queen* (1991) 53 A Crim R 455, 458.

862 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), [14.23]. See further Ch 15.

863 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 26–30A; *Sentencing Act 1991* (Vic) Pt 6 Div 1A; *Criminal Law (Sentencing) Act 1988* (SA) s 7A; *Sentencing Act 1995* (WA) Pt 3 Div 4; *Sentencing Act 1995* (NT) ss 106A–106B; *Crimes Act 1900* (ACT) s 343. Tasmania and Queensland do not have express provisions in relation to victim impact statements, but general provisions allow the court to receive any information it considers appropriate to enable it to impose a sentence: *Penalties and Sentences Act 1992* (Qld) s 15; *Sentencing Act 1997* (Tas) s 81.

of victim,⁸⁶⁴ the types of offences in respect of which a statement may be made,⁸⁶⁵ whether the victim has the option of giving the statement in written or oral form,⁸⁶⁶ and whether the victim can express an opinion in relation to the manner in which the offender ought to be sentenced.⁸⁶⁷ Some, but not all, of the state and territory legislation makes provision for the victim to be cross-examined in relation to the contents of a statement,⁸⁶⁸ or expressly grants the court the power to rule as inadmissible the whole or any part of a victim impact statement,⁸⁶⁹ or 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.⁸⁷⁰

Pre-sentence reports

11.13 A pre-sentence report is a document prepared for the court, usually at its request, in order to provide background information on an offender and to assist the court in determining the most appropriate manner of dealing with an offender.⁸⁷¹ Pre-sentence reports may have an important role in the sentencing of special categories of offenders (see Chapter 15). Pre-sentence reports can be discretionary or mandatory⁸⁷² but in either case the conclusions of such reports do not compel the sentencing court to impose a particular sentence.⁸⁷³

11.14 All states and territories make provision for pre-sentence or assessment reports.⁸⁷⁴ In NSW, assessment reports are prepared to determine the offender's suitability to undertake various forms of punishment.⁸⁷⁵ The person responsible for preparing a pre-sentence report depends on the particular jurisdiction. For example, in Victoria, reports on adult offenders are compiled by community corrections officers;⁸⁷⁶ in the ACT, they are prepared by a public servant who is authorised to do so;⁸⁷⁷ and in

864 Compare *Sentencing Act 1995* (NT) s 106A; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26; *Sentencing Act 1991* (Vic) s 3 (the latter provides that a 'body' as well as a 'person' can be a victim).

865 Offences in respect of which a victim impact statement can be made are restricted in NSW and the ACT: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27; *Crimes Act 1900* (ACT) s 343.

866 A victim impact statement must be in writing in NSW, but can be in written or oral form in Victoria, Western Australia and the Northern Territory.

867 Compare *Sentencing Act 1995* (WA) s 25(2) and *Sentencing Act 1995* (NT) s 106B(5A).

868 *Crimes Act 1900* (ACT) s 343(3); *Sentencing Act 1995* (NT) s 106B(9).

869 *Sentencing Act 1991* (Vic) s 95B(2); *Sentencing Act 1995* (WA) s 26(2).

870 *Crimes Act 1900* (ACT) s 343(1)(b); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 29(3).

871 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.401].

872 In Victoria, a pre-sentence report is mandatory prior to making a community based order: *Sentencing Act 1991* (Vic) s 96(2). In NSW, a pre-sentence report is mandatory for juveniles prior to the imposition of a custodial penalty: *Children (Criminal Proceedings) Act 1987* (NSW) s 25.

873 R Fox, *Victorian Criminal Procedure: State and Federal Law* (11th ed, 2002), [9.2.44].

874 *Sentencing Act 1995* (WA) ss 20–22; *Criminal Law (Sentencing) Act 1988* (SA) s 8; *Sentencing Act 1991* (Vic) Pt 6 Div 2; *Crimes Act 1900* (ACT) Div 15.2; *Sentencing Act 1995* (NT) Pt 6 Div 2; *Sentencing Act 1997* (Tas) ss 81–83, 87; *Corrective Services Act 2000* (Qld) s 245; *Crimes (Sentencing Procedure) Act 1999* (NSW) Pt 5 Div 3, Pt 6 Div 3, Pt 7 Div 3, s 95B.

875 I Potas, *Sentencing Manual: Law, Principles and Practice in New South Wales* (2001), 185.

876 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.401].

877 *Crimes Act 1900* (ACT) s 362.

Queensland they are prepared by corrective services officers.⁸⁷⁸ At a minimum, reports are based on an interview with the offender, although an offender cannot be forced to cooperate in the preparation of such a report.⁸⁷⁹

11.15 Pre-sentence reports may be self-serving and contain unsubstantiated allegations made by the offender.⁸⁸⁰ In this regard they must be treated with caution. They may also contain secondary recounted evidence, which would normally be subject to the hearsay rule. However, any conclusions of the report may be admissible as expert opinion.⁸⁸¹

11.16 There is disparity in the extent to which state and territory legislation specifies the contents of such reports. Some legislation sets out a number of common factors that 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.⁸⁸² Other legislation is more restrictive in describing the scope of a pre-sentence report,⁸⁸³ while some legislation broadly provides that a court may give instructions as to the issues to be addressed in the report, and that in the absence of instructions such reports are to address matters relevant to sentencing.⁸⁸⁴

11.17 Most jurisdictions make provision for the distribution of a pre-sentence report to the prosecution and the defence. However, 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,⁸⁸⁵ other legislation gives the court a discretion in this regard.⁸⁸⁶ There is also disparity in the manner in which the information in a pre-sentence report is to be treated. Some legislation is silent on this point.⁸⁸⁷ Other legislation provides a mechanism for the prosecution or the defence to dispute the contents of a pre-sentence report,⁸⁸⁸ or expressly provides for the cross-examination of the author of the report.⁸⁸⁹ 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.⁸⁹⁰

878 *Corrective Services Act 2000* (Qld) s 245(1).

879 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.407].

880 *Majors v The Queen* (1991) 54 A Crim R 334, 337.

881 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.407].

882 *Crimes Act 1900* (ACT) s 362; *Sentencing Act 1995* (NT) s 106; *Sentencing Act 1991* (Vic) s 97; *Sentencing Act 1997* (Tas) s 83.

883 See *Criminal Law (Sentencing) Act 1988* (SA) s 8(1).

884 *Sentencing Act 1995* (WA) s 21.

885 *Criminal Law (Sentencing) Act 1988* (SA) s 8(4); *Sentencing Act 1991* (Vic) s 98; *Crimes Act 1900* (ACT) s 365.

886 *Sentencing Act 1995* (WA) s 22(5).

887 See, eg, *Ibid* ss 20–22, which do not make provision for the challenge of a pre-sentence report.

888 *Sentencing Act 1991* (Vic) s 99.

889 *Crimes Act 1900* (ACT) s 366; *Criminal Law (Sentencing) Act 1988* (SA) s 8(5).

890 *Corrective Services Act 2000* (Qld) s 245(8).

11.18 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; that there should be no statutory specification of the contents of a report; and that both parties should be entitled to a copy of the report and to challenge the accuracy of any factual statement contained in the report.⁸⁹¹ In 1996, the NSWLRC recommended that pre-sentence reports should be given a legislative basis and that written reports ordered by the court should generally be made available to the parties at least the day before the sentencing hearing.⁸⁹²

Prior convictions

11.19 An accused and his or her legal representative is not obliged to reveal previous convictions or to rectify any information in relation to prior convictions that may be given to the court by the prosecution.⁸⁹³

11.20 Prior convictions are normally admitted by an offender but, if not, they need to be proved.⁸⁹⁴ In federal courts and in the ACT, NSW and Tasmania (where the uniform Evidence Acts apply),⁸⁹⁵ the prosecution may prove prior convictions by tendering a certificate signed by a judge, magistrate or a registrar or other proper officer of an Australian court or a foreign court showing the fact, time and place of conviction.⁸⁹⁶ Such a certificate is also evidence of the particular offence in respect of which the person was convicted.⁸⁹⁷ In jurisdictions where the uniform Evidence Acts do not apply, there are provisions in each of the state and territory Evidence Acts regulating the proof of prior convictions.⁸⁹⁸ The ALRC is interested in hearing whether there are any problems with the current arrangements relating to proof of prior convictions in the sentencing of federal offenders.

11.21 Where the prosecution is not put to proof, the question arises as to how information on prior convictions should be presented to the court. For example, is it sufficient for the prosecution to present to the court a list of prior convictions or a police antecedent report that contains the details of prior convictions?

891 See Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 106.

892 New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), Recs 1, 2.

893 R Fox, *Victorian Criminal Procedure: State and Federal Law* (11th ed, 2002), [8.10.1.1].

894 K Warner, *Sentencing in Tasmania* (2nd ed, 2002), [2.331].

895 The application of the laws of evidence to sentencing is discussed below.

896 *Evidence Act 1995* (Cth) s 178(1), (2); *Evidence Act 1995* (NSW) s 178(1), (2); *Evidence Act 1991* (Tas) s 178(1), (2).

897 *Evidence Act 1995* (Cth) s 178(3); *Evidence Act 1995* (NSW) s 178(3); *Evidence Act 1991* (Tas) s 178(3).

898 *Evidence Act 1958* (Vic) ss 87–89; *Evidence Act 1939* (NT) ss 32, 33, 33A; *Evidence Act 1929* (SA) ss 42, 43, 43A; *Evidence Act 1906* (WA) s 47; *Evidence Act 1977* (Qld) ss 53–54. See also *Crimes Act 1958* (Vic) s 395.

Question 11–1 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?

Fact-finding in sentencing

The decision maker

11.22 It is for the trial judge or magistrate to ascertain the facts upon which a sentence is based. The High Court has held that the procedure of allowing the trial judge to review evidence for the purpose of establishing facts to be used in sentencing does not involve any infringement of the right to a jury trial under s 80 of the *Australian Constitution*.⁸⁹⁹

11.23 In indictable matters—if the facts implied in the jury’s verdict are clear—the trial judge must accept the necessary implications and sentence the offender accordingly.⁹⁰⁰ The trial judge’s personal view of the facts cannot prevail over the jury’s verdict, even if the facts are known to be different.⁹⁰¹

11.24 Depending on their nature, aggravating circumstances are to be determined by either the jury or the judge. 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 factor bearing upon sentence, it is for the judge to determine its existence. Some circumstances of aggravation (for example, a breach of trust) may be either an element of the offence itself or a factor impacting only upon sentence.⁹⁰²

11.25 There is an additional category of aggravating circumstance, namely, those that affect the maximum sentence but are not an element of the offence. These circumstances must also be alleged in the indictment and ruled on by the jury. An example of this is s 233B of the *Customs Act 1901* (Cth), which creates a number of offences in relation to narcotic goods, including importation and possession. Section 235 of the *Customs Act* has the effect that the maximum penalty for an offence against s 233B varies according to whether the quantity of goods exceeds a commercial quantity or a trafficable quantity. In *Kingswell v The Queen*, the High Court held that the quantity of narcotics is not an element of the offence,⁹⁰³ but in *R v*

899 *Cheung v The Queen* (2001) 209 CLR 1.

900 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [9.2.3.2].

901 *R v Webb* [1971] VR 147.

902 R Fox, *Victorian Criminal Procedure: State and Federal Law* (11th ed, 2002), [9.2.3.1].

903 *Kingswell v The Queen* (1985) 159 CLR 264.

Meaton the High Court held that the quantity of narcotics, being a circumstance of aggravation, should be alleged in the indictment, and ruled on by the jury.⁹⁰⁴

11.26 A judge cannot take into account aggravating circumstances that could have been the subject of a separate charge or could have warranted a conviction for a more serious offence.⁹⁰⁵

Process of fact-finding

11.27 The process for determining facts relevant to sentencing differ according to whether the offender has been found guilty after a summary hearing or a jury trial, or has pleaded guilty. Where there has been a conviction either summarily or 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. In a summary hearing a magistrate determines the facts upon which a finding is based. In a trial, the facts that are clearly implied by the verdict must be accepted and acted upon by the sentencing court as proven beyond reasonable doubt. However, there are many matters relevant to sentencing that are not implied by a jury verdict. Whether a court should be able to clarify the factual basis of a verdict with the jury is considered below.

11.28 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. It negatives all defences to the offence, though it does not negative mitigating circumstances. However, a guilty plea 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.⁹⁰⁶

11.29 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. A court is not bound to accept an agreed statement of facts but is entitled to rely on such a statement if it is admitted by consent and the defence accepts that it accurately sets out the facts.⁹⁰⁷ A court is entitled to go beyond the agreed statement of facts tendered by the parties and—in the public interest—to seek further details about the conduct for which the offender is to be punished.⁹⁰⁸ Where a court proposes to rely on material that extends beyond the agreed statement of facts, it

904 *R v Meaton* (1986) 160 CLR 359, 364.

905 *R v De Simoni* (1981) 147 CLR 383. See also *R v JCW* (2000) 112 A Crim R 466.

906 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.315].

907 I Potas, *Sentencing Manual: Law, Principles and Practice in New South Wales* (2001), 251.

908 *Chow v Director of Public Prosecutions (NSW)* (1992) 28 NSWLR 593, 608, 613.

is under a duty to inform the parties and to ascertain whether such material is disputed.⁹⁰⁹

11.30 Judges have an independent duty to satisfy themselves of the factual basis for the sentence that they impose, but they do not have an inquisitorial role.⁹¹⁰ Nevertheless, a judge has a duty to make inquiries where facts relating to the essential elements of the offence are missing.⁹¹¹

11.31 Where facts are disputed following a plea of guilty, the court may seek to resolve them by relying on evidence already before it, such as evidence of admissions made by the accused, or evidence tendered or adduced at committal. In addition, the prosecution and defence can call evidence at the sentencing hearing to assist in the fact-finding process.⁹¹²

11.32 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. This often includes acceptance of uncontested medical or psychiatric reports, without the author being called.⁹¹³ An offender cannot be compelled to give evidence on oath at a sentencing hearing. However, when mitigating circumstances are disputed, they need to be established by admissible evidence. As discussed below, a court is not bound to accept circumstances of mitigation put forward by an offender, even if they have not been disputed. Administrative guidelines on the role of the CDPP at sentencing provide that untrue or unjustified matters put by the defence to the court must be disputed, and if necessary, the defence should be put to proof.⁹¹⁴

Laws of evidence

11.33 The procedures and protections about fact-finding at trial are well established, both at common law and pursuant to statute. But the same cannot be said in relation to fact-finding at the sentencing stage, where an accused is more immediately at risk of losing his or her liberty.

The adjudication of guilt in criminal matters is governed by elaborate procedural and evidentiary rules that narrowly confine the trial to evidence that is strictly relevant to determining whether the defendant is guilty of the criminal conduct of which he or she has been specifically accused. ... The same safeguards and limitations are not so clearly available at the dispositional or sentencing stage of the criminal process, though case law and statutory

909 *Mielicki v The Queen* (1994) 73 A Crim R 72, 79.

910 *R v Olbrich* (1999) 199 CLR 270, [15]–[17].

911 *Coulson v Chick* (Unreported, Supreme Court of Tasmania, Zeeman J, 16 August 1990).

912 *R v O'Neil* [1979] 1 A Crim R 59, 63.

913 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.319].

914 Office of the Commonwealth Director of Public Prosecutions, *Correspondence*, 29 October 2004.

rules based on the same standards are beginning to emerge as the law governing sentence evolves.⁹¹⁵

11.34 In *Weininger*, 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’.⁹¹⁶ 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 either 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.⁹¹⁷ A sentencing hearing is not an inquisition into all that may bear upon the personal circumstances of the offender or the circumstances of the offence.⁹¹⁸ 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.⁹¹⁹

11.35 In *Storey*, the Victorian Court of Appeal had stated:

Ordinarily, much of what is relied on in sentencing is not the subject of evidence given on the plea. Judges have always relied heavily on what is asserted from the bar table and we see no reason why that practice should not continue. ... There will, however, be cases, we venture to suggest relatively few cases, in which there will be significant disputes of fact that can be resolved only by the calling of appropriate evidence.⁹²⁰

11.36 The *Evidence Act 1995* (Cth) applies in all federal courts and in courts in the ACT.⁹²¹ NSW, Tasmania and Norfolk Island have passed mirror legislation, which is substantially the same as the Commonwealth Act, but is not identical.⁹²² 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.⁹²³ In those states and territories that have not adopted the uniform legislation, the law of evidence is a mixture of statute⁹²⁴ and common law, together with applicable rules of court.⁹²⁵

915 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.101].

916 Section 16A is discussed in Ch 8.

917 *Weininger v The Queen* (2003) 212 CLR 629, [21].

918 *Ibid.*, [23].

919 *Ibid.*, [24]; *R v Storey* [1998] 1 VR 359, 372.

920 *R v Storey* [1998] 1 VR 359, 371.

921 Some provisions have a wider reach: *Evidence Act 1995* (Cth) ss 5, 185–187.

922 *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas); *Evidence Act 2004* (NI). See also Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [2.1].

923 State Government of Victoria, *New Directions for the Victorian Justice System 2004-2014: Attorney-General's Justice Statement* (2004), 26.

924 Each jurisdiction has an Evidence Act and other relevant legislation.

925 Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004), [1.9].

11.37 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.⁹²⁶ 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 in relation to the proof of a fact and the court is of the view that proof of that fact is or will be significant in determining sentence.⁹²⁷ This position substantially reflects the recommendation made by ALRC 44 in relation to the application of the laws of evidence at sentencing hearings.⁹²⁸ If there is good reason to object to evidence in sentencing proceedings the objection, when taken, must be resolved by the laws of evidence, and in the absence of a direction pursuant to s 4(2) the law of evidence unaffected by the uniform Evidence Act applies.⁹²⁹

11.38 ALRC 44 expressed the view that to impose a requirement that relevant facts at sentencing be proved only by admissible evidence would transform the sentencing hearing into an adversarial process. Apart from increasing costs and delays,⁹³⁰ not all facts may be sufficiently important to warrant such a requirement. It would also tend to exclude some evidence that may be useful to the sentencing court, such as evidence that the offence was out of character or that the offender was remorseful.⁹³¹ The ALRC recommended that the court be empowered to apply the rules of evidence to the proof of facts that are, in the court's view, significant to sentencing. The ALRC emphasised that where the rules of evidence are not applied, courts will still have to make decisions as to evidence rationally and fairly, rather than capriciously.⁹³²

Question 11–2 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?

Burden and standard of proof

11.39 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

926 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.

927 See uniform Evidence Acts s 4(3), (4).

928 See Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 103.

929 *R v Bourchas* (2002) 133 A Crim R 413, [61].

930 It has been said that if every fact had to be formally proved, the sentencing process would grind to a halt: New South Wales Public Defenders Office, *Consultation*, Sydney, 22 September 2004.

931 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [186].

932 *Ibid.*, [186].

other party to respond.⁹³³ 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.

Criminal trial

11.40 The burden and standard of proof in a criminal trial are well settled. The prosecution bears the persuasive burden of proving the accused's guilt, and the standard of proof is 'beyond reasonable doubt'.⁹³⁴ This means that, subject to statutory reversals of the onus of proof, the prosecution must prove each *element* of an offence beyond reasonable doubt. However, the prosecution need not prove every *fact* alleged beyond reasonable doubt.

11.41 Although the persuasive burden may be on the prosecution, 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. For example, the *Criminal Code* (Cth) imposes an evidential burden on the accused in relation to certain defences including intoxication, mistake, duress and self-defence.⁹³⁵

Burden of proof in sentencing

11.42 The issue arises as to who, if anyone, should bear the burden of proof in sentencing. In *R v Storey*, the Victorian Court of Appeal said that there was no burden of proof in sentencing, and that it was for the judge to find the facts relevant to the exercise of the sentencing discretion.⁹³⁶

11.43 *R v Storey* was approved by the High Court in *R v Olbrich*.⁹³⁷ The High Court 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 in sentencing 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.⁹³⁸

933 D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (3rd ed, 2001), 412–416.

934 *Woolmington v Director of Public Prosecutions (UK)* [1935] AC 462.

935 *Criminal Code* (Cth) s 13.3(2), Pt 2.3.

936 *R v Storey* [1998] 1 VR 359, 368.

937 *R v Olbrich* (1999) 199 CLR 270.

938 *Ibid.*, [25].

11.44 It has also been pointed out that there may be cases in which a court regards a matter as relevant to sentencing, even though neither party has raised the matter. The court may then direct the parties' attention to the matter before making use of it. It will then become apparent whether the parties accept or reject it.⁹³⁹

Standard of proof in sentencing

11.45 Issues also arise as to what the standard of proof should be in resolving disputed facts at sentencing, and what circumstances, if any, might justify a variation of the standard. Standards of proof include the criminal standard of 'beyond reasonable doubt' and the less onerous civil standard of 'on the balance of probabilities'.

11.46 ALRC 44 recommended that no particular standard of proof should be imposed for facts relevant to sentencing. It said that:

The standard of proof will need to be related to the significance of the particular fact in the particular case. The standard which should have to be satisfied before making a finding on a more significant fact will be higher than for other, less significant facts. This should be a matter for the court to determine: accordingly, any legislation governing the standard of proof of facts relevant to sentencing should therefore do no more than require that the court be 'satisfied' of the relevant fact.⁹⁴⁰

11.47 Just as, in a criminal trial, the prosecution does not have to prove every *fact* upon which it relies beyond reasonable doubt, so too, in a sentencing hearing, it is the relevant *issue* that must be established to the requisite standard, not each of the separate facts that bear upon the issue.⁹⁴¹ However it is not clear what an 'issue' is in this context. Unlike the criminal trial, with its concept of 'elements of the offence', the sentencing process contains no clear concept that differentiates between issues and facts. For example, of good character, amenability to rehabilitation, and lack of prior convictions, which is a sentencing issue and which is a fact?

11.48 *R v Ali* suggested that a distinction should be made between the circumstances of the offence and those of the offender as a basis for regulating proof of facts relevant to sentencing.⁹⁴² It was said that the prosecution should bear the burden of establishing the circumstances of the offence beyond reasonable doubt and that—except for prior convictions—the offender should establish his or her circumstances on the balance of probabilities. The Victorian Court of Appeal rejected this proposition in *R v Storey*. It noted that there could be frequent overlap between the circumstances of the offence and those of the offender. For example, the holding of a position of trust could be both an aspect of the offence and evidence of good character.⁹⁴³ Further, not every matter

939 *R v Storey* [1998] 1 VR 359, 367.

940 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 104.

941 *R v Storey* [1998] 1 VR 359, 372.

942 *R v Ali* [1996] 2 VR 49.

943 *R v Storey* [1998] 1 VR 359, 365. See also R Fox, 'Case Note: The Burden of Proof at Sentencing: Storey's Case' (1998) 24 *Monash University Law Review* 194.

relevant to sentencing could be classified as either ‘the circumstances of the offence’ or ‘the circumstances of the offender’.⁹⁴⁴ Such matters include the prevalence of the offence; the hardship that a sentence may cause to the offender’s dependants; and the availability of particular facilities and services.⁹⁴⁵

Facts adverse or favourable to the offender

11.49 In *R v Olbrich*⁹⁴⁶ and *Weininger v The Queen*⁹⁴⁷ the High Court approved the formulation of the standard of proof in sentencing expressed by the Victorian Court of Appeal in *R v Storey*:

[T]he 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.⁹⁴⁸

11.50 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.⁹⁴⁹

11.51 The High Court stated that attention to questions of burden and standard may incorrectly suggest that all disputed facts of sentencing must be resolved for or against the offender. However, some disputed facts cannot be resolved in a way that goes either to increase or to decrease the sentence to be imposed:⁹⁵⁰ lack of persuasion about a mitigating factor is not to be treated as the equivalent of persuasion of the opposite fact in aggravation.⁹⁵¹

11.52 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.⁹⁵² The majority of the Court in *Storey* also expressed the view that the prosecution does not have to disprove, beyond reasonable doubt, matters that the judge proposes or is invited to take into account in favour of the offender.⁹⁵³

944 *R v Storey* [1998] 1 VR 359, 366.

945 R Fox, ‘Case Note: The Burden of Proof at Sentencing: Storey’s Case’ (1998) 24 *Monash University Law Review* 194, 195–196.

946 *R v Olbrich* (1999) 199 CLR 270, [27].

947 *Weininger v The Queen* (2003) 212 CLR 629, [18], [24].

948 *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.

949 *R v Olbrich* (1999) 199 CLR 270 (judge ignored issue of defendant’s role in the criminal enterprise involved in importing drugs).

950 *Weininger v The Queen* (2003) 212 CLR 629, [19].

951 *Ibid*, [24].

952 *R v Olbrich* (1999) 199 CLR 270, [24].

953 *R v Storey* [1998] 1 VR 359, [30]. Callaway J dissented in this regard.

Circumstances extraneous to the offence

11.53 What standard of proof should apply to circumstances extraneous to the offence? In *R v Storey*, Callaway J expressed the minority view that the judge must be satisfied beyond reasonable doubt in respect of all contested sentencing issues except circumstances of mitigation extraneous to the offence. He stated that the offender bore the evidentiary and legal burdens with respect to extraneous circumstances of mitigation, to be discharged on the balance of probabilities.⁹⁵⁴ Extraneous mitigating factors include matters arising *after* the commission of the offence, such as remorse, attempted restitution, and cooperation with the authorities.⁹⁵⁵

So far as principle is concerned ... the facts which justify the sanction are no less important than the facts which justify the conviction, and both should be subject to the same standard of proof. If that is so, the principle cannot be confined to circumstances of aggravation. It must extend to circumstances of mitigation [that are not extraneous to the offence] in respect of which the prisoner has the evidentiary onus.⁹⁵⁶

Question 11–3 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?

Role of the jury in sentencing

11.54 As discussed in Chapter 3, the role of a jury in a trial on indictment is to decide the facts of a case and to determine whether or not an accused is guilty of the offence beyond reasonable doubt. The jury has no direct role in the sentencing hearing. However, where the facts implied in a verdict are clear, the sentence passed must not conflict with the jury's verdict.⁹⁵⁷ 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.⁹⁵⁸ 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.⁹⁵⁹

11.55 The issue arises whether juries should have a greater role in sentencing federal offenders. An extreme means of doing so is to allow the jury to pass sentence. Another method is to allow juries to determine some or all of the facts upon which a sentence for a federal offence is based. To the extent that there is an overlap between facts

954 See *Ibid*, 376–380.

955 *Ibid*, 377, fn 70.

956 *Ibid*, 379. There has been some support for this view: see R Fox, 'Case Note: The Burden of Proof at Sentencing: Storey's Case' (1998) 24 *Monash University Law Review* 194, 209.

957 *R v Ford* (1994) 75 A Crim R 398 (guilty verdict); *R v Webb* [1971] VR 147 (verdict of acquittal).

958 *Whittaker v The King* (1928) 41 CLR 239, 240.

959 *R v Cheng* (2000) 203 CLR 246, [41]–[42].

relevant to conviction and facts relevant to sentence, juries already play a role in the determination of those facts. However, as discussed below, there is an issue about extending the role of the jury in instances where the factual basis of a verdict is unclear. A more controversial question is whether a jury should have any role in determining facts relevant to sentencing but not conviction, whether on a verdict of guilty or a plea of guilty.

Imposing sentences

11.56 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.⁹⁶⁰

11.57 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 both courses of action.⁹⁶¹ Other disadvantages identified by the Mitchell Committee were that juries are subject to greater community pressures than judges; that jury sentencing would lead to greater inconsistencies in sentencing than judicial sentencing, given that juries meet together as a body on limited occasions; that it would be unfair to the accused because no jury could be expected to make as informed a decision on sentencing as a judge; and that sentencing by jury would only occur in indictable matters because there are no juries in summary matters. The Mitchell Committee concluded:

Jury sentencing would mean therefore 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.⁹⁶²

Clarifying the factual basis of verdict

11.58 While a jury trial usually elicits adequate details of the conduct constituting the offence, a guilty verdict often fails to settle the exact circumstances of the accused's wrongdoing. For example, a finding of guilt in relation to a strict liability offence does not determine the accused's knowledge or intention, which is relevant to sentencing.⁹⁶³

960 Criminal Law and Penal Methods Reform Committee of South Australia, *First Report: Sentencing and Corrections* (1973), 25–26.

961 *Ibid.*, 26.

962 *Ibid.*, 26.

963 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.311].

11.59 Although a jury's functions generally cease after determining guilt or innocence, a jury might be invited to determine further facts after it has returned its verdict. A judge can then rely upon these facts in sentencing.⁹⁶⁴ In *Isaacs v The Queen* the NSWCCA said that a trial judge has the power to ask the jury the basis for its verdict. However, it said that the exercise of this power is to be discouraged, save in exceptional circumstances.⁹⁶⁵ Occasionally, a jury has been requested to address issues left unresolved by a verdict by being asked to give reasons for its verdict or to make further determinations about facts it has found proved. For example, in drug trafficking cases, a jury may be asked to specify the number of times that it found the offender had supplied drugs.⁹⁶⁶ However, the practice of sending a jury back to determine collateral sentencing issues is not widely used.⁹⁶⁷ Therefore it is largely for the judge alone to determine sentencing facts that are not implied by the verdict itself.

11.60 Different views have been expressed about whether it is appropriate for a trial judge to ask a jury questions to clarify findings of fact that will assist in sentencing.⁹⁶⁸ On the one hand, as the jury has the prime responsibility for determining facts in a criminal trial, being asked questions by the judge would merely be an extension of its role. On the other hand, there may be difficulties in disclosing the process by which the jury reached its verdict.⁹⁶⁹ For example, a foreman cannot supply the information sought where there has been no unanimity as to grounds for the verdict, or if individual jurors are not prepared to disclose their grounds.⁹⁷⁰

11.61 In DP 29, the ALRC stated that where there is a need to clarify the factual basis of a jury's verdict, alternative fact-finding mechanisms initiated by the judge should be used. The ALRC suggested that the jury's role should be confined to the determination of the verdict. It noted that there could be possible injustice to a convicted person if the jury's answers to the judge's questions were inaccurate or introduced facts inconsistent with the verdict.⁹⁷¹ In 1986, the NSWLRC expressed the view that there was some merit in the proposition that the jury's findings should be reflected in the determination of sentence, but the NSWLRC was not agreed upon the means by which the factual findings of the jury were to be ascertained.⁹⁷²

964 *R v Warner* [1967] 1 WLR 1209.

965 *Isaacs v The Queen* (1997) 90 A Crim R 587.

966 K Warner, *Sentencing in Tasmania* (2nd ed, 2002), [2.320].

967 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [2.314].

968 Australian Law Reform Commission, *Sentencing: Procedure*, DP 29 (1987), [62].

969 *Ibid.*, [62].

970 *Veen v The Queen [No 1]* (1979) 143 CLR 458, 466. This case illustrated the danger of using jury questions to resolve ambiguities in a verdict.

971 Australian Law Reform Commission, *Sentencing: Procedure*, DP 29 (1987), [62].

972 New South Wales Law Reform Commission, *The Jury in a Criminal Trial*, Report 48 (1986), [8.19].

Position in the United States

11.62 In the United States, juries have a greater role to play in sentencing. In *Blakely v Washington*,⁹⁷³ the United States Supreme Court affirmed the rule in *Apprendi v New Jersey*⁹⁷⁴ that, except for the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond reasonable doubt. An offender could, however, elect to waive his or her right to have a jury determine matters that increase a sentence beyond the prescribed statutory maximum, and opt for judicial determination of those factors.⁹⁷⁵

11.63 The United States Supreme Court has held that the right to trial by jury in the Sixth Amendment to the *US Constitution* requires that any aggravating facts necessary for the imposition of the death penalty must be found by a jury.⁹⁷⁶

11.64 The *United States Code* makes provision for separate sentencing hearings to determine whether a federal death sentence is justified.⁹⁷⁷ Such hearings are generally to be conducted before the jury that determined the defendant's guilt. If the defendant was convicted after a plea of guilty or at a trial before a court sitting without a jury, the hearing is to be conducted before a jury empanelled for the purpose of the hearing. However, the hearing can be conducted before a court alone, upon the motion of the defendant and with the approval of the attorney for the government. The role of the jury is to return special findings identifying particular aggravating factors. A finding with respect to any aggravating factor must be unanimous. If no specified aggravating factors are found to exist the court shall impose a sentence other than death. Where aggravating factors are found to exist in relation to specified offences, the jury by unanimous vote must recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release, or some other lesser sentence.

11.65 The *Texan Code of Criminal Procedure* also makes provision in certain cases for a jury to assess the punishment to be imposed.⁹⁷⁸ It specifically provides that in cases where the State seeks the death penalty on a finding that the defendant is guilty of a capital offence, a separate sentencing hearing is to be conducted before the trial jury as soon as practicable.⁹⁷⁹ Particular issues are referred to the jury for determination and, depending on the jury's response to those issues, the defendant is sentenced either to death or to imprisonment for life.⁹⁸⁰ Most states in the United States that have the death penalty have such a procedure.

973 *Blakely v Washington* 124 S Ct 2531 (2004).

974 *Apprendi v New Jersey* 530 US 466 (2000).

975 *Blakely v Washington* 124 S Ct 2531 (2004).

976 See *Ring v Arizona* 536 US 584 (2002), applying *Apprendi v New Jersey* 530 US 466 (2000).

977 18 USC s 3593. The federal death penalty is rarely invoked.

978 *Code of Criminal Procedure 1965* (Texas) art 37.07.

979 *Ibid* art 37.071.

980 See *Ibid* art 37.071(b), (e), (g).

Question 11–4 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?

Sentence indication schemes

11.66 The concept of a sentence indication scheme brings to mind the following dialogue from Lewis Carroll's *Alice's Adventures In Wonderland*:

King: Let the jury consider their verdict.

Queen: No, no! Sentence first—verdict afterwards.

Alice: Stuff and nonsense! The idea of having the sentence first.

11.67 A sentence indication entails a judicial officer, at some stage prior to the commencement of a trial, advising the accused either of the probable sentence, or the type or range of sentences, that the offender is likely to receive if he or she were to plead guilty. Sentence indications have taken place in Australia and overseas. There are different models of sentence indication, which are discussed below. 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.

11.68 Although a sentencing discount for a guilty plea is closely connected with sentence indication, it is conceptually distinct.⁹⁸¹ While some sentence indication models incorporate a discount for a guilty plea,⁹⁸² a sentence indication scheme could exist without any sentencing discounts.

11.69 Advantages of sentence indications have been said to include the speedy resolution of charges; minimising the trauma to victims of having to appear in court; savings in time and money as a result of reducing the number of trials; and lessening the anxiety of alleged offenders by reducing the time between charge and disposition.

11.70 Objections to sentence indication schemes include that they endorse bargained justice; have insufficient regard to the needs and concerns of victims; create significant and unjustified inducements to plead guilty; and cause ethical difficulties for accused

981 A Freiberg and J Willis, 'Sentence Indication' (2003) 27 *Criminal Law Journal* 246, 249. The issue of discounting sentences for pleading guilty is discussed in Ch 9.

982 The New Zealand Law Commission has recommended that the availability of an early guilty plea should be an explicit component of a sentence indication: New Zealand Law Commission, *Reforming Criminal Pre-trial Processes*, Preliminary Paper 55 (2004), [251]–[252].

persons and their lawyers.⁹⁸³ 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.⁹⁸⁴

11.71 Support has been expressed recently for sentence indication schemes. In 2000, the Standing Committee of Attorneys-General recommended that consideration be given to introducing a system of sentence indication,⁹⁸⁵ and in 2002 the UK Government stated its intention to introduce sentence indications to encourage early guilty pleas.⁹⁸⁶ In 2004, as discussed below, the New Zealand Law Commission (NZLC) supported sentence indication.⁹⁸⁷ Some judges and academics have also supported it.⁹⁸⁸

Pilot sentence indication scheme in NSW

11.72 A pilot sentence indication scheme commenced in NSW in the District Court in 1993.⁹⁸⁹ The aim of the scheme was to encourage guilty pleas, decrease the number of trials before the District Court, dispose of matters more quickly in the interests of justice, and therefore reduce trial costs and trial preparation time.⁹⁹⁰

11.73 The *Criminal Procedure (Sentence Indication) Amendment Act 1992* (NSW) provided that, on the application of an accused person, a District Court judge could, on or before the arraignment of that person, indicate at a sentence indication hearing what sentence the judge might impose if the person were to plead guilty.⁹⁹¹ The judge could consider such material as would be available to him or her if the accused person had pleaded guilty and the judge were passing sentence on that person.⁹⁹²

11.74 Sentence indication hearings were to be conducted in open court, subject to express powers given to the court to make suppression orders. The hearing effectively proceeded as a provisional guilty plea. The prosecution provided the judge with a draft

983 See 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, 220–221.

984 *R v Marshall* [1981] VR 725, 732.

985 Standing Committee of Attorneys-General, *Deliberative Forum on Criminal Trial Reform* (2000), Rec 22.

986 Lord Chancellor's Department, *Justice for All*, White Paper (2002), 12.

987 New Zealand Law Commission, *Reforming Criminal Pre-trial Processes*, Preliminary Paper 55 (2004), [251]–[252].

988 Justice Weinberg indicated support for sentence indication schemes at a conference in 2000, entitled 'Reform of Criminal Trial Procedure'. See A Freiberg and J Willis, 'Sentence Indication' (2003) 27 *Criminal Law Journal* 246, 250–251, 259.

989 J Willis, 'The Sentence Indication Hearing' (1997) 7 *Journal of Judicial Administration* 98, 99.

990 New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 November 1992, 9791 (G West).

991 Arraignment is the process by which a person committed for trial is read the indictment and asked to plead guilty or not guilty.

992 *Criminal Procedure (Sentence Indication) Amendment Act 1992* (NSW) Pt 12.

indictment, a statement of facts that were usually agreed with the defence, and relevant information such as witness statements and the accused's antecedents. The accused could then conduct a normal plea, calling any witnesses or tendering any evidence in mitigation, and making submissions on sentence. Following the plea, the judge would indicate the sentence that he or she would impose if the accused were to plead guilty. The accused could accept or reject the indicative sentence.

11.75 If the accused accepted the indicative sentence, he or she was arraigned and the indicative sentence was passed. Where a plea of guilty was entered following a sentence indication hearing, a judge was required to give full reasons for sentence in the same way as would have been appropriate if no sentence indication hearing had taken place.⁹⁹³ If the accused rejected the indicative sentence, the matter was set down for trial before another judge who was not told of the sentence indication hearing, unless the accused elected to do so.

11.76 Both the prosecution and the accused had the right to appeal against a sentence imposed after acceptance of an indicative sentence. 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 an accused to greater jeopardy than that normally associated with prosecution appeals.⁹⁹⁴

11.77 The scheme was terminated in January 1996. The NSW Bureau of Crime Statistics and Research concluded that the scheme was not achieving its objectives.⁹⁹⁵ 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,⁹⁹⁶ which was in conflict with principles laid down by the NSW Court of Criminal Appeal in *R v Warfield*.⁹⁹⁷

Other forms of sentence indication

11.78 Other forms of sentence indication exist in Victoria, Tasmania, the ACT, the United Kingdom and New Zealand. In addition, particular models for sentence indication have been canvassed by the NSWLRC, the Royal Commission on Criminal Justice, chaired by Viscount Runciman in the United Kingdom (the Runciman Royal Commission), and more recently by the NZLC.

11.79 In most schemes, sentence indications take place in open court. In contrast, the Runciman Royal Commission proposed that a 'sentence canvass' would normally take

993 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.

994 *R v Glass* (1994) 73 A Crim R 299, 304; *R v Warfield* (1994) 34 NSWLR 200, 210.

995 D Weatherburn, E Matka and B Lind, *Sentence Indication Scheme Evaluation* (1995) New South Wales Bureau of Crime Statistics and Research, iii, 29.

996 *Ibid.*, iii, 29.

997 *R v Warfield* (1994) 34 NSWLR 200, 14.

place in the judge's chambers with both sides represented by counsel. A shorthand writer was also to be present.⁹⁹⁸

11.80 In Victoria, Tasmania, the ACT, the United Kingdom and New Zealand, sentence indications are generally limited to an indication of the type of sentence, for example custodial or non-custodial.⁹⁹⁹ In 2004 the NZLC proposed that sentence indications should normally be limited to type of sentence rather than quantum.¹⁰⁰⁰ In contrast, the model proposed by the Runciman Royal Commission allowed the judge, on the accused's request, to indicate the highest sentence that the judge would impose on the facts as known.¹⁰⁰¹

11.81 Another common feature of sentence indication in Victoria, Tasmania, the ACT and New Zealand is that it forms only part of a wider hearing concerned with pre-trial issues.¹⁰⁰² The NZLC has proposed that sentence indications should be a feature of pre-trial review hearings.¹⁰⁰³ The Runciman Royal Commission proposed that a 'sentence canvass' could take place either at a preparatory hearing or a hearing called specially for this purpose or at the trial.¹⁰⁰⁴

11.82 Some models have addressed the issue of the type of information that should be available for a sentence indication. Under the model proposed by the Runciman Royal Commission, an indication was to be based on brief statements from the prosecution and defence, which were to include details of the accused's prior convictions and, if available, any pre-sentence report. However, the absence of a pre-sentence report would not normally rule out a sentence indication.¹⁰⁰⁵ In New Zealand, guidelines prepared by status-hearing judges provide that an indication is not to be given unless the judge has the police summary of facts, a list of previous convictions and, where appropriate, a victim impact statement.¹⁰⁰⁶ The NZLC has proposed that a sentence indication should not be given if the type of sentence is likely to be affected by

998 *Report of The Royal Commission on Criminal Justice* (1993), [7.51].

999 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]; *Criminal Justice Act 2003* (UK) sch 3 cl 6, amending the *Magistrates' Courts Act 1980* (UK).

1000 New Zealand Law Commission, *Reforming Criminal Pre-trial Processes*, Preliminary Paper 55 (2004), [251].

1001 *Report of The Royal Commission on Criminal Justice* (1993), [7.50].

1002 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.

1003 New Zealand Law Commission, *Reforming Criminal Pre-trial Processes*, Preliminary Paper 55 (2004), [251].

1004 *Report of The Royal Commission on Criminal Justice* (1993), [7.50].

1005 *Ibid.*, [7.52].

1006 New Zealand Law Commission, *Reforming Criminal Pre-trial Processes*, Preliminary Paper 55 (2004), [216].

material in a pre-sentence report or if there is otherwise insufficient information to give an indication.¹⁰⁰⁷

11.83 In 1987, the NSWLRC canvassed the concept 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 from the court 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.¹⁰⁰⁸ The suggestion that the sentence indication should be given only upon conviction after trial was to counter any notion that the indication itself should act as an inducement to plead guilty.¹⁰⁰⁹ In contrast, the NZLC has proposed that a court giving a sentence indication is not to make any reference to the likely penalty if the accused were to be convicted after a defended hearing or trial.¹⁰¹⁰

Question 11–5 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?

1007 Ibid, [251].

1008 New South Wales Law Reform Commission, *Procedure From Charge to Trial: Specific Problems and Proposals*, DP 14 (1987), 496.

1009 P Byrne, 'Sentence Indication Hearings in New South Wales' (1995) 19 *Criminal Law Journal* 209, 211. The pilot scheme introduced in NSW differed from the scheme tentatively suggested by the NSWLRC in that it provided for an indication of sentence in the event that the accused pleaded guilty.

1010 New Zealand Law Commission, *Reforming Criminal Pre-trial Processes*, Preliminary Paper 55 (2004), [251].

12. Administration of Federal Offenders

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Introduction

12.1 The Terms of Reference require the ALRC to examine whether the 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 discussed the issues of location of trial and punishment and transfer of federal offenders. This chapter examines the administrative arrangements in place at the federal level, and between the Australian Government and the states and territories, for dealing with federal offenders. Chapter 13 will look in more detail at the arrangements in relation to the release of federal offenders on parole or licence.

Role of the Australian Government

12.2 Chapter 3 set out the legal and institutional framework by which federal offences are investigated and adjudicated and by which federal offenders are sentenced and punished. 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.

12.3 The Australian Government plays an active role in particular aspects of the administration of federal offenders, including the following:

- grant and revocation of parole or release on licence;
- setting of parole and licence conditions;
- review of persons found unfit to be tried or found not guilty of federal offences on the grounds of mental illness or intellectual disability;
- approval of travel overseas by federal offenders released on parole or licence; and
- transfer of prisoners interstate and overseas.¹⁰¹¹

12.4 However, the Australian Government plays only a limited role in the day-to-day administration of sentences¹⁰¹² and does not, as a matter of course, monitor federal offenders or maintain a complete list of all federal offenders.¹⁰¹³ The lack of accurate information about federal offenders may hamper sound policy development in this area and in the federal criminal justice system generally. This issue is discussed further in Chapter 16.

12.5 There is a strong argument that the polity that proscribes certain conduct through the criminal law should maintain some level of oversight and control of the sentences imposed for breach of those laws. In addition, the Australian Government has obligations in international law, discussed in Chapter 3, in relation to the treatment of federal offenders. Although the states and territories may fulfil these obligations adequately on behalf of the Australian Government, there appears to be no monitoring mechanism in place to ensure that this is so.

12.6 In general, federal offenders are treated in the same way as state or territory offenders in the same institution or jurisdiction in relation to administrative issues such as security classification and access to rehabilitation schemes. The Australian Government has received complaints from federal offenders in relation to these issues, and about differences in conditions between institutions or jurisdictions where an offender has been transferred.¹⁰¹⁴ It is unclear to what extent the Australian Government liaises with state and territory corrective services agencies about these

1011 The transfer of prisoners is discussed in Ch 4; parole and release on licence in Ch 13; and mental illness and intellectual disability in Ch 14.

1012 Attorney-General's Department, *Consultation*, Canberra, 1 October 2004. The Department is not informed of the number of non-custodial orders imposed on federal offenders or, generally, when such orders are breached. Attorney-General's Department, *Correspondence*, 18 October 2004.

1013 Attorney-General's Department, *Consultation*, Sydney, 31 August 2004; Australian Institute of Criminology, *Consultation*, Canberra, 1 October 2004.

1014 Attorney-General's Department, *Consultation*, Sydney, 31 August 2004.

issues at a policy level, but the ALRC has been advised that the Attorney-General's Department (AGD) responds to individual complaints by providing information directly to the federal offender concerned or by liaising with the relevant state or territory correctional authority.¹⁰¹⁵

12.7 The Corrective Services Ministers' Conference (CSMC) meets once a year to consider problems relating to prison and community based correction issues. 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. The Australian Institute of Criminology is also invited to attend where appropriate. A meeting of the Corrective Services Administrators' Conference, 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.¹⁰¹⁶

Question 12–1 Should the Australian Government play a more active role in managing federal offenders? What role, if any, should the Attorney-General's Department perform?

Arrangements with the states and territories

12.8 As discussed above, the states and territories provide a range of corrective services and facilities in relation to federal offenders, including accommodating federal offenders sentenced to a term of imprisonment and federal prisoners held on remand. The states and territories also administer and supervise federal offenders sentenced to alternative custodial orders as well as federal offenders released on parole or licence subject to supervision orders. By and large, the states and territories bear the immediate cost of providing these services, but some account is made for the cost of providing corrective services for federal offenders through the Commonwealth Grants Commission process.

12.9 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

1015 Attorney-General's Department, *Correspondence*, 24 December 2004.

1016 Attorney-General's Department, *Attorney-General's Department Website* <<http://www.ag.gov.au/>> at 27 October 2004.

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 alternative sentencing options imposed on federal offenders;
- state and territory officers exercising powers and performing functions in order to carry out alternative 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 an intellectual disability accused of a federal offence.¹⁰¹⁷

12.10 Section 21F(1)(a) 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 magistrates to perform the functions of a ‘prescribed authority’ under Part IB. These functions are described in Chapter 13 and include remanding federal offenders in custody following revocation of parole orders. There are arrangements in place with all the states and territories under s 21F(1)(a).

12.11 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.

12.12 Section 16 of the *Crimes Act* provides that the term ‘parole officer’ in the Act means:

- (a) an officer of a State, the Australian Capital Territory, the Northern Territory or Norfolk Island in respect of whom there applies:
 - i. an arrangement in force under paragraph 21F(1)(b); or
 - ii. an arrangement having a substantially similar effect in force under section 3B; or
- (b) a person appointed or engaged under the *Public Service Act 1999* in respect of whom an appointment under subsection 21F(3) is in force.

¹⁰¹⁷ 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.

12.13 As noted above, there are arrangements in place under s 3B with all the states and territories allowing state and territory officers to exercise the powers and functions of ‘probation officers’ under the *Crimes Act*. The term ‘probation officer’ is used in the *Crimes Act* in relation to supervision of offenders who are discharged without conviction,¹⁰¹⁸ conditionally released following conviction,¹⁰¹⁹ or released under a recognizance release order.¹⁰²⁰ The term is also used in relation to supervision of persons with a mental illness or intellectual disability accused of a federal offence.¹⁰²¹ The term ‘parole’ is defined in the *Crimes Act* to include ‘probation’,¹⁰²² but the terms ‘probation’ and ‘probation officer’ are not defined.

12.14 The ALRC has been advised that it is unnecessary to have 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 (for example, under s 19B of the *Crimes Act*, which allows an offender to be discharged without proceeding to conviction). The s 3B arrangements ensure that the states and territories will provide probation services in these and other circumstances.¹⁰²³

12.15 The ALRC has been advised that this is also why the s 3B arrangements are limited to alternative sentencing orders and 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.¹⁰²⁴

Question 12–2 Are the arrangements between the Australian Government and the states and territories in relation to the administration of federal offenders satisfactory?

1018 *Crimes Act 1914* (Cth) s 19B.

1019 *Ibid* s 20.

1020 *Ibid* s 20AA.

1021 *Ibid* ss 20BV–20BY.

1022 *Ibid* s 16.

1023 Attorney-General’s Department, *Correspondence*, 22 December 2004.

1024 *Ibid*.

Joint offenders

12.16 The administration of federal offenders who are also serving sentences for state or territory offences is complex and requires close liaison between the Australian Government and the corrective services authorities of the states and territories.

12.17 A number of provisions in Part IB of the *Crimes Act* deal specifically with joint offenders. Section 19AJ provides that a court may not fix a single non-parole period or a recognizance release order in respect of both a federal sentence and a state or territory sentence of imprisonment.

12.18 Section 19AM addresses the various situations that can arise in relation to the grant of federal parole where the offender is also serving, or is about to serve, a state or territory sentence. The section is intended to ensure that an offender is not released on federal parole while still serving a state or territory sentence. For example, a federal parole order cannot be made where an offender is also serving a life sentence without a fixed non-parole period for a state or territory offence.¹⁰²⁵

12.19 In consultations, the NSW Department of Corrective Services noted that caution must be exercised in releasing joint offenders and that permission must be obtained from both federal and state authorities.¹⁰²⁶ The AGD noted that complications have arisen in a number of cases, for example, where a federal offender is released on parole and commits a state or territory offence during the parole period. The court dealing with the state or territory offence is not always made aware that, in committing the new offence, the offender is also in breach of a federal parole order.¹⁰²⁷ The issue of communication between jurisdictions in relation to individual offenders is discussed further in Chapter 16.

Question 12–3 What issues arise in relation to the ongoing administration of offenders who are serving sentences for both federal offences and state or territory offences?

Increased oversight of federal offenders

12.20 One way in which the Australian Government could achieve more comprehensive oversight of federal offenders across Australia would be to establish an inspectorate or office responsible for federal offenders. ALRC 15 recommended the establishment of a special officer to monitor the conditions under which federal

1025 *Crimes Act 1914* (Cth) s 19AM(4).

1026 New South Wales Department of Corrective Services, *Consultation*, Sydney, 15 September 2004.

1027 Attorney-General's Department, *Consultation*, Sydney, 31 August 2004.

prisoners are held.¹⁰²⁸ However, there are other functions that could be performed by such an office including: investigating and resolving complaints; maintaining up-to-date statistics and information on federal offenders; monitoring the sentences of federal offenders including expiry of non-parole periods; prison visits and the provision of information to federal offenders; liaison with state and territory corrective services agencies; and advising the Australian Government in relation to federal offenders.

12.21 Some of these functions are currently performed by various federal, state and territory agencies, but others (such as maintaining a central database of up-to-date information on all federal offenders) are not. This means that the flow of information to and from federal offenders can be difficult. The ALRC experienced this in the course of this Inquiry in its attempts to inform federal offenders about the Inquiry and invite their comments. Contacting federal offenders involves liaison with each state and territory corrective services or justice department and is dependent on the cooperation of those agencies.

12.22 In relation to complaint handling, the Commonwealth Ombudsman can investigate complaints from a federal offender held in custody by the Australian Federal Police or in relation to decisions and actions of the AGD, but does not have power to investigate complaints about state and territory agencies. Federal offenders may raise issues and make complaints in writing to the Commonwealth Attorney-General or Minister for Justice and Customs but this mechanism does not provide the independence or transparency of an ombudsman or independent inspector.

12.23 Federal offenders subject to the administration of state and territory agencies do have access to state and territory complaint and oversight mechanisms, where available in each jurisdiction. However, these agencies are limited to overseeing the actions of state and territory agencies. They are not in a position to investigate complaints or issues arising in relation to the federal aspects of a federal offender's sentence, for example, the fact that a federal offender may not have access to specific pre-release schemes that are available to state or territory offenders in the same jurisdiction.

12.24 The Office of the Inspector of Custodial Services in Western Australia was established in 1999 and is the only custodial inspectorate in Australia that possesses statutory autonomy and direct access to the state Parliament. The office provides independent external scrutiny of the standards and operational practices of custodial services in the state. The Office carries out comprehensive, 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. The Office, which falls within the portfolio responsibility of the Western Australian Minister for Justice, is answerable directly to the state Parliament. This

1028 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [238].

model is designed to ensure that the Inspector's activities remain independent and that custodial operations in Western Australia are transparent and accountable.¹⁰²⁹

12.25 The Victorian Corrections Inspectorate was established on 1 July 2003 to monitor the performance of both public and private correctional service providers in the state, conduct specific investigations, and manage the Official Prison Visitors Scheme. The Inspectorate provides advice—independent of Corrections Victoria—on correctional issues and developments across the system to the Secretary of the Victorian Department of Justice.¹⁰³⁰ The Victorian Ombudsman handles complaints from individual prisoners.

12.26 In NSW, the Office of the Inspector-General of Corrective Services, which was established by the *Crimes (Administration of Sentences) Act 1999*, was abolished in 2003. The NSW Ombudsman now handles complaints relating to the NSW Department of Corrective Services.

12.27 A number of states and territories have official visitors schemes. Volunteers in these schemes visit prisons in order to speak with prisoners and custodial service officers about their concerns. These schemes are intended to provide a safeguard for the wellbeing and rights of prisoners; to provide information to prisoners concerning access to prison services (such as prisoner grievance procedures) and information on prisoner and community support agencies; to speak on behalf of prisoners to senior corrective services officers; and to record complaints made by prisoners or corrective services officers. It would be possible for an inspectorate or office of federal offenders to play a similar role, liaising between federal prisoners and state and territory corrective services agencies.

12.28 Given the absence of federal correctional facilities and supporting bureaucracy, any new inspectorate or office of federal offenders would be required to work closely with, rather than oversee, state and territory corrective services agencies. This element of relationship building and interaction by the office would assist the Australian Government in monitoring federal offenders and maintaining some level of oversight in relation to conditions, facilities, programs and parity. As a consequence the Australian Government is likely to be better informed in making policy and better equipped to respond to issues and problems arising in relation to federal offenders.

12.29 However, the establishment of an office of federal offenders would require additional resources to allow the office to make direct contact with federal offenders across Australia on a regular basis. It would also be important to define the role of the office clearly to ensure that it did not duplicate functions already performed by state and territory corrective services agencies.

1029 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.

1030 Victorian Department of Justice, *Annual Report 2003–04* (2003), 52.

Question 12–4 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?

Failure to comply with sentence

Alternative sentencing options

12.30 As discussed in Chapter 7, a number of alternative sentencing options 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. These options include custodial orders (such as periodic detention and home detention orders) as well as some non-custodial options (such as community service or intensive supervision orders). Where such a sentence is imposed on a federal offender, the sentence is administered by state or territory corrective services agencies and officers under the arrangements discussed above.

12.31 Section 20AC of the *Crimes Act* sets out the consequences of an offender failing, without reasonable cause or excuse, to comply with an alternative sentencing order made under s 20AB. The court that passed the sentence or made the order may deal with the offender by imposing a fine, revoking the order and re-sentencing the offender, or taking no further action.¹⁰³¹ The sufficiency of these options is canvassed in Chapter 7.

12.32 In relation to federal offenders, the court that passed the sentence must deal with any breach of an alternative sentencing order, whether or not the court is constituted by the judge or magistrate who originally passed the sentence.¹⁰³² In relation to state offenders this is not always the case, and many breaches may be dealt with administratively. For example, in relation to home detention in NSW, the person appointed to supervise an offender's home detention order may issue a formal warning or impose more stringent conditions in response to a minor breach.¹⁰³³ The NSW Parole Board has power to revoke home detention orders where the breach is more serious.¹⁰³⁴ In Victoria, the Secretary to the Department of Justice has similar powers

1031 *Crimes Act 1914* (Cth) s 20AC(6), (7).

1032 *Ibid* s 20AC(6).

1033 *Crimes (Administration of Sentences) Regulation 2001* (NSW) reg 201.

1034 *Crimes (Administration of Sentences) Act 1999* (NSW) s 167.

to deal with minor breaches of a home detention order.¹⁰³⁵ For more serious breaches, the Victorian Adult Parole Board has the power to vary or revoke the order.¹⁰³⁶

12.33 In consultations, the NSW Department of Corrective Services expressed the view that the application of alternative sentencing options to federal offenders worked well until an offender failed to comply with the order. The Department noted that the need to take every breach before a judicial officer for resolution was complicated and time consuming. In some cases, resolution of the matter had taken years. The Department noted that particular difficulties arise in relation to federal offenders who breach periodic detention orders.¹⁰³⁷ As at 23 March 2004, there were 48 federal offenders serving a sentence of periodic detention in NSW and, of these, 12 were in breach of their orders.¹⁰³⁸

12.34 In NSW, where there is reason to suspect that a state offender has failed to comply with his or her obligations under a periodic detention order, the Parole Board may conduct an inquiry and may revoke the order if satisfied that the offender has breached the order. Once the order is revoked, a warrant may be issued for the offender's arrest.¹⁰³⁹ The NSW Parole Board does not, however, have these powers in relation to federal offenders.

12.35 The difficulties with the administration of periodic detention orders imposed on federal offenders received some publicity in 2004 in relation to an order imposed on Rene Rivkin, a federal offender convicted of insider trading and sentenced to imprisonment for a term of nine months to be served by way of periodic detention.¹⁰⁴⁰ The Rivkin case was complicated by the fact that the offender sought leave of absence from periodic detention on health grounds.

12.36 In NSW, the Commissioner of Corrective Services may grant an offender leave of absence on health, compassionate, or any other grounds that he or she thinks fit.¹⁰⁴¹ After presenting a series of medical certificates seeking leave of absence from detention periods, and after the Commissioner considered psychiatric advice, the Commissioner agreed to allow Rivkin to serve eight remaining weekends of his periodic detention in one 16-day block.¹⁰⁴²

1035 *Sentencing Act 1991* (Vic) s 18ZZH.

1036 *Ibid* s 18ZZK.

1037 New South Wales Department of Corrective Services, *Consultation*, Sydney, 15 September 2004.

1038 Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 2004, 28220 (Question No 2852).

1039 *Crimes (Administration of Sentences) Act 1999* (NSW) s 163.

1040 *R v Rivkin* (2003) 198 ALR 400.

1041 *Crimes (Administration of Sentences) Act 1999* (NSW) s 87(1).

1042 See, eg, A Mitchell, 'Offenders Who Never Set Foot Inside Jail', *Sun-Herald* (Sydney), 4 April 2004, 26; Rivkin to Serve 16 Days in Jail', *Herald Sun* (online), 22 September 2004, <www.heraldsun.news.com.au>; K McClymont, 'Rivkin Deal Means Sentence will be Served in a Fortnight', *The Sydney Morning Herald* (online), 23 September 2004, <newsstore.smh.com.au>.

12.37 It was apparently not possible to have the order amended or revoked by a court because s 20AC of the *Crimes Act* applies only where an offender does not have a reasonable cause or excuse for not complying with the order. Section 20AC does not enable the court to reconsider the appropriateness of a periodic detention order for a federal offender suffering from a medical condition that prevents the offender from attending periodic detention. Further, there is no procedure set out in Part IB allowing review of an alternative sentencing order such as periodic detention where it is no longer appropriate.¹⁰⁴³

12.38 In May 2004, the Commonwealth Attorney-General announced that the Australian Government was considering options for revising the administrative arrangements in relation to periodic detention.¹⁰⁴⁴ The AGD has informed the ALRC that, as a consequence, it is currently reviewing the operation of s 20AC of the *Crimes Act* with a view to enabling non-compliance by federal offenders to be dealt with in the same way as non-compliance by state and territory offenders, as far as possible; providing the courts with greater flexibility in dealing with breach or frustration of alternative sentencing orders; and streamlining the court process.¹⁰⁴⁵

12.39 Any review of s 20AC will have to take into account the constraints imposed by Chapter III of the *Australian Constitution*, which precludes a non-judicial body, such as the NSW Parole Board, from exercising federal judicial power. The sentencing or re-sentencing of a federal offender is an exercise of judicial power, although there are circumstances in which the exercise of this power may be delegated to persons who are not federal judges appointed in accordance with Chapter III of the *Constitution*.¹⁰⁴⁶

Fines

12.40 Like a number of other provisions discussed in this Issues Paper, s 15A of the *Crimes Act* in relation to the enforcement of fines falls outside Part IB of the *Crimes Act*. However, the provision is closely linked to those sections of Part IB that deal with the imposition of fines—such as s 16C—and with the more general issue of state and territory involvement in the administration and enforcement of penalties imposed on federal offenders. The ALRC is of the view that the provision is sufficiently connected with the subject matter of the Inquiry to warrant consideration.

12.41 Section 15A(1) of the *Crimes Act* provides that the law of a state or territory relating to the enforcement or recovery of a fine applies to a federal offender to the extent that it is not inconsistent with federal law or with certain modifications made by

1043 Attorney-General's Department, *Correspondence*, 18 October 2004.

1044 Commonwealth, *Parliamentary Debates*, House of Representatives, 11 May 2004, 28220 (Question No 2852).

1045 Attorney-General's Department, *Correspondence*, 18 October 2004.

1046 *Harris v Caladine* (1991) 172 CLR 84.

s 15A.¹⁰⁴⁷ One important modification made by s 15A(1AA) is that only a court is empowered to impose a penalty on a federal offender who fails to pay a fine, even where the relevant state or territory law allows an authority other than a court to impose a penalty on a state or territory offender who fails to pay a fine. This modification is necessary because of the constitutional issues discussed above.

12.42 In 1998 and 1999, s 15A was amended to allow the states and territories to employ some of the options used in the enforcement of fines against state or territory offenders in enforcing fines against federal offenders.¹⁰⁴⁸ In particular, the amendments made the suspension or cancellation of a vehicle registration or a driver's licence available in respect of fines imposed by a court for federal offences.

12.43 The 1999 amendment also provided that an officer of a state or territory court could make an order imposing a penalty for failure to pay a fine for a federal offence where the law of the state or territory allowed the officer to exercise the court's powers. The reasons for allowing court officers to enforce federal fines were explained in Parliament as follows:

Firstly, the 'fine enforcement' burden imposed on busy magistrates will be eased. Secondly, many rural and regional areas have a court officer in permanent residence whereas a magistrate may only visit periodically on circuit. In these areas, federal fine enforcement will be easier and more timely if court officers can impose relevant penalties.

Finally, fine enforcement systems in a number of states and territories rely heavily on court officers to impose penalties for fine default. In these states and territories the ability to use court officers in federal cases will allow federal cases to be dealt with more efficiently within the state or territory fine enforcement system.¹⁰⁴⁹

12.44 Because of the constitutional limitations discussed above, a non-judicial court officer can only exercise federal judicial power where the court retains effective control and supervision of the exercise of jurisdiction. This means that the delegation of power to the court officer must be effected by, and revocable by, the court and the officer's decisions must be subject to review by the court. In addition, the court must continue to bear responsibility for the exercise of judicial power in relation to the more important aspects of contested matters.¹⁰⁵⁰

1047 Some fines are imposed and enforced under other federal Acts. For example, fines imposed under the *Trade Practices Act 1974* (Cth) are enforced through s 79A of that Act. Taxation legislation also contains its own enforcement provisions: see, eg, *Payroll Tax Assessment Act 1941* (Cth) s 61.

1048 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 June 1998, 5076 (D Williams—Attorney-General). Section 15A(1AA)–(1AD) was inserted by the *Crimes Amendment (Enforcement of Fines) Act 1998* (Cth) and the *Crimes Amendment (Fine Enforcement) Act 1999* (Cth).

1049 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 June 1999, 7865 (P Slipper).

1050 *Harris v Caladine* (1991) 172 CLR 84, 94–95.

12.45 Each state and territory has its own fine enforcement options.¹⁰⁵¹ Most schemes allow for a combination of civil recovery action such as the seizure and sale of land or property; the garnishee of debts, bank accounts or salary; and other methods of enforcement such as community service orders, work orders,¹⁰⁵² or imprisonment. Imprisonment may be imposed either directly in default of payment of the fine¹⁰⁵³ or in default of performance of a community service or other work order.¹⁰⁵⁴ The extent to which state and territory enforcement processes have been used to enforce fines for federal offences is unclear because published data do not distinguish between state and federal offences.¹⁰⁵⁵

Question 12–5 What concerns arise in relation to enforcing alternative sentencing orders or fines against federal offenders? How might these concerns be addressed? See also Questions 7–7 and 7–9.

1051 See *Magistrates Court Act 1930* (ACT) Pt 9, Div 9.2; *Fines Act 1996* (NSW) Pt 4; *Fines and Penalties (Recovery) Act 2002* (NT) Pt 5; *State Penalties Enforcement Act 1999* (Qld); *Criminal Law (Sentencing) Act 1988* (SA) Pt 9; *Sentencing Act 1991* (Vic); *Fines Penalties and Infringement Notices Enforcement Act 1994* (WA) Pt 4, Div 3.

1052 Except in the ACT, where this is not an option. In Queensland, community service is available only under a ‘fine option order’, which is an order made at the request of the person owing the fine. In Western Australia this is known as a ‘work and development order’.

1053 In the ACT, Queensland and Victoria.

1054 In NSW, the Northern Territory, South Australia, Victoria and Western Australia.

1055 For example, the annual report published by the New South Wales Treasury does not provide the level of detail necessary to distinguish between fines imposed for state and federal offences: New South Wales Treasury, *Office of Financial Management Annual Report 2002–03* (2003), 71.

13. Early Release from Custody

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Introduction

13.1 There are a number of ways in which federal offenders serving custodial sentences may be released into the community before their sentence is complete. A prisoner may be released on parole, on licence, pursuant to a recognizance release order 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 prerogative of mercy. In many cases conditions are attached to the early release of an offender from custody, including supervision orders. While the decision to grant a federal offender parole, release on licence or a pardon is made at the federal level, responsibility for pre-release schemes and supervision of offenders released into the community remains with the states and territories.

Parole and release on licence

Release on parole

13.2 Release on parole refers to the discretionary conditional release of an offender from custody before the offender's sentence of imprisonment is complete.¹⁰⁵⁶ Although released from custody, the offender is still considered to be serving a

1056 But see discussion of automatic parole below.

sentence under supervision in the community.¹⁰⁵⁷ The potential to be released on parole is intended to encourage better behaviour by offenders in custody, including more active involvement in rehabilitation programs to address the offending behaviour. In considering whether to release a prisoner on parole, the relevant authority generally considers such issues as the interests and safety of the community and the behaviour and needs of the offender.

13.3 The period of supervision following release is intended to assist the offender in reintegrating into the community and to reduce the risk of re-offending. During this period on parole, an offender is required to be of good behaviour, must not violate any law, and must comply with other conditions imposed by the Attorney-General, including supervision by a parole officer.¹⁰⁵⁸

13.4 Part IB of the *Crimes Act 1914* (Cth) includes detailed provisions in relation to the fixing of non-parole periods by the courts and the grant and revocation of parole. Fixing the non-parole period is discussed in Chapter 8. Where the sentencing court imposes a term of imprisonment of more than six months and less than three years, Part IB requires the court to make a recognizance release order rather than set a non-parole period. Recognizance release orders are discussed further in Chapters 7 and 9.

13.5 Except in relation to offenders sentenced to life imprisonment, the maximum length of the period to be served on parole is five years.¹⁰⁵⁹ If the balance of an offender's sentence at the end of the non-parole period is less than five years, then the remaining balance will be the length of the parole order. Where the balance of an offender's sentence at the end of the non-parole period is more than five years, the parole period may expire before the end of the offender's head sentence. In relation to offenders sentenced to life imprisonment and released on parole, the Attorney-General or departmental delegate decides the length of the parole period. This is normally at least five years and may be longer.¹⁰⁶⁰

Question 13–1 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?

Automatic parole

13.6 Where a federal offender has been sentenced to more than three years and less than 10 years imprisonment, s 19AL(1) of the *Crimes Act* provides that the Attorney-

1057 *Crimes Act 1914* (Cth) s 19AZC.

1058 *Ibid* s 19AN.

1059 *Ibid* s 16.

1060 Attorney-General's Department, *Information for Federal Offenders* [pamphlet].

General must grant parole at the end of the non-parole period. 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.¹⁰⁶¹ The vast majority of federal offenders are sentenced to less than 10 years and so are eligible for automatic parole.¹⁰⁶²

13.7 ALRC 44 recommended that parole should be granted automatically at the end of the non-parole period in relation to all sentences except life sentences.¹⁰⁶³ At the time of that Report, 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 sentence imposed and the sentence actually served. Given the limited use now made of remissions in all jurisdictions, the ALRC is of the view that it is timely to reconsider this issue in the context of the current Inquiry.¹⁰⁶⁴

13.8 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.¹⁰⁶⁵

Question 13–2 Under what circumstances, if any, should automatic parole be provided to federal offenders?

Release on licence

13.9 Release on licence is a form of discretionary conditional release of an offender from custody, which is used in exceptional circumstances. A release on licence may be granted whether or not a non-parole period has been fixed, or a recognizance release order made, and whether or not the non-parole period or the pre-release period has expired, but must only be granted in exceptional circumstances.¹⁰⁶⁶ The two usual grounds on which early release is considered are where the offender is sick and requires treatment that cannot be provided within the prison system, and where the offender has provided assistance to law enforcement authorities and this was not taken into account in sentencing.¹⁰⁶⁷

1061 *Crimes Act 1914* (Cth) s 19AM.

1062 Attorney-General's Department, *Consultation*, Canberra, 1 October 2004.

1063 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Recs 28–29.

1064 See discussion of remissions in Ch 5, 9.

1065 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 October 1989, 2078 (N Brown—Shadow Attorney-General).

1066 *Crimes Act 1914* (Cth) s 19AP(4).

1067 Attorney-General's Department, *Information for Federal Offenders* [pamphlet].

13.10 An offender, or someone acting on behalf of the offender, must apply to the Attorney-General in writing for a release on licence and must set out the exceptional circumstances that would justify the grant of the licence.¹⁰⁶⁸ As with parole, an offender released on licence is required to be of good behaviour and must not violate any law during the licence period. The Attorney-General may impose other conditions, including supervision. Although released from custody, the offender is still considered to be serving a sentence under supervision in the community.¹⁰⁶⁹

Discretionary release on parole or licence

13.11 While the sentencing court determines the length of sentence and also the portion of the sentence that is to make up the non-parole period, the decision as to whether and when an offender is actually released on parole is an administrative decision, except where parole is automatic.

Decision-making body

13.12 Section 19AL(2) of the *Crimes Act* provides that where a sentence of 10 years or more has been imposed on a federal offender and a non-parole period has been fixed, the Attorney-General must decide whether the offender is to be released at the end of the non-parole period. The authority to grant or refuse parole has been delegated to senior officers of the Attorney-General's Department (AGD).¹⁰⁷⁰ Where the Attorney-General or departmental delegate decides not to grant parole, the decision must include a statement of reasons and, if the Attorney-General or departmental delegate proposes to reconsider the matter, must indicate when this is to occur.

13.13 The decision to grant release on licence is also discretionary. The authority to grant or refuse release on licence has also been delegated to senior officers of the AGD.¹⁰⁷¹

13.14 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. The Panel is composed of two representatives from the Office of the Commonwealth Director of Public Prosecutions (CDPP) and three external consultants, 'independent of law enforcement and having administrative law expertise'.¹⁰⁷² In cases where the delegate consults the Panel, one member from the CDPP and one external consultant provide advice to the delegate. 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.

1068 *Crimes Act 1914* (Cth) s 19AP(3).

1069 *Ibid* s 19AZC.

1070 Delegation of 19 July 2004 made under the *Law Officers Act 1964* (Cth) s 17(2).

1071 *Ibid*.

1072 Attorney-General's Department, *Correspondence*, 24 September 2004.

13.15 In the states and territories, the authority to grant parole orders and set parole conditions lies with an independent parole board or equivalent body.¹⁰⁷³ In NSW and Victoria the boards include a number of judicial members as well as members drawn from government agencies and the community.¹⁰⁷⁴ In NSW, members include representatives from the police and the Probation and Parole Service of the Department of Corrective Services.¹⁰⁷⁵

13.16 State and territory parole boards are established as independent statutory authorities and are not subject to direction from the responsible minister, or the state or territory government, in relation to their decisions on the grant or refusal of parole. This helps to ensure that such decisions are made on the basis of legislative criteria, including the public interest, and are not subject to political or media pressure.

13.17 The structural arrangements are different at the federal level, where the authority to grant or refuse parole and release on licence lies with the Attorney-General and is exercised on his or her behalf by senior staff of the AGD.

13.18 If greater independence of decision making were considered desirable, two options would be available: 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 boards. Establishing an independent federal parole board would contribute to more consistent decision making in relation to parole and release on licence for federal offenders across Australia, but would require the establishment of a new institution and supporting administrative structure, with associated costs. Delegating authority to release federal offenders to state and territory parole boards may lead to less consistency in decision making across Australia but would take advantage of existing administrative structures, procedures and expertise.

13.19 The Attorney-General and the AGD have authority to make a range of other decisions in relation to the early release of federal offenders. For state and territory offenders, these decisions are typically made by the parole board in each jurisdiction. These decisions include revoking parole or release on licence, amending the conditions attached to parole or release on licence, and authorising travel overseas while on parole or release on licence. While these functions are considered separately below, the following question is phrased broadly on the basis that the question of the independence of the decision-making authority in relation to parole or release on licence of federal offenders also arises in relation to these other functions.

1073 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).

1074 *Crimes (Administration of Sentences) Act 1999* (NSW) s 183; *Corrections Act 1986* (Vic) s 61.

1075 The *Crimes (Administration of Sentences) Amendment (Parole) Act 2004* (NSW) received assent on 15 December 2004. The Act will make a number of amendments to the *Crimes (Administration of Sentences) Act 1999* (NSW), including renaming and reconstituting the NSW Parole Board.

Question 13–3 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?

Guidelines for decision makers

13.20 Part IB of the *Crimes Act* does not provide any guidance in relation to the decision to grant or refuse parole. In relation to the grant or refusal of a release on licence, the Act provides that a licence must not be granted unless exceptional circumstances exist which justify the grant.¹⁰⁷⁶ In consultation, 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.¹⁰⁷⁷

13.21 In a number of other jurisdictions the relevant legislation includes criteria and information that the parole board must take into account in making its decision.¹⁰⁷⁸ In other jurisdictions the board publishes a list of the criteria and information it considers in making its decisions.¹⁰⁷⁹ There is some divergence in these criteria between jurisdictions.

13.22 A number of elements underpin good administrative decision making, that is, decision making that is 'consistent and equitable as between individuals in similar situations'.¹⁰⁸⁰ These include clear guidelines for decision makers, which set out the criteria upon which the decision-making discretion is to be based. Publication of such guidelines assists individuals affected by such decisions, and the general community, to understand the basis upon which decisions are made and contributes to the transparency of the decision making process. The NSW 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.¹⁰⁸¹

1076 *Crimes Act 1914* (Cth) s 19AP(4).

1077 Attorney-General's Department, *Consultation*, Canberra, 1 October 2004.

1078 See, eg, *Crimes (Administration of Sentences) Act 1999* (NSW) s 135.

1079 See, eg, Department of Justice Victoria, *Adult Parole Board of Victoria Website* (2003) <<http://www.justice.vic.gov.au/>> at 10 November 2004.

1080 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report 39 (1995), x.

1081 New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), [11.51].

13.23 In addition, if authority to make decisions in relation to parole of federal offenders were delegated to state and territory parole boards, as discussed above, national guidelines would contribute to greater consistency in decision making.

Question 13–4 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?

Offender's right to be heard

13.24 The AGD makes its parole decisions solely on the basis of written reports and information.¹⁰⁸² While the written information and reports available to the Department are likely to be similar to those available to state and territory parole boards, there is no opportunity for the offender to appear before the Department at any stage.

13.25 The NSW Parole Board makes its initial decisions on the grant or refusal of parole at a private meeting on the basis of the written material before it. If the Board comes to a preliminary view that parole should be refused, it invites the offender to make further submissions and appear at a public hearing, typically by video link from a correctional facility. A lawyer may represent the offender at the review hearing.¹⁰⁸³ The Board may then either confirm its initial intention to refuse parole, or grant parole. In the ACT, when the Sentence Administration Board decides not to make a parole order, the offender is given an opportunity to appear before the Board to make further representations as to why he or she should be given parole. A lawyer may represent the offender at this hearing.¹⁰⁸⁴

13.26 In NSW, parole is ordered in about half the matters brought to review.¹⁰⁸⁵ 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.

1082 Attorney-General's Department, *Consultation*, Sydney, 31 August 2004.

1083 New South Wales Parole Board, *Annual Report 1 January 2003–31 December 2003*, 3. The review hearing procedure is not available in relation to decisions to grant or refuse parole in exceptional extenuating circumstances.

1084 ACT Corrective Services, *Sentence Administration Board of the ACT Website* <<http://www.cs.act.gov.au/sab/index.htm>> at 8 December 2004.

1085 New South Wales Parole Board, *Annual Report 1 January 2003–31 December 2003*, 3.

Question 13–5 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?

Merits review

13.27 Where the Attorney-General or departmental delegate makes an order that a federal offender is not to be released at the end of the non-parole period, the offender must be given a copy of the order within fourteen days. The order must include a statement of reasons why parole has been refused and indicate whether and when the decision will be reconsidered.¹⁰⁸⁶ It is not possible to challenge the merits of the decision except by applying to the delegate or the Attorney-General to reconsider the decision.

Judicial review

13.28 The decisions of parole authorities are decisions of an administrative character, which directly affect the liberty of individuals. For this reason it is important that the decision making processes are fair, and are seen to be fair. This idea is encapsulated in the legal doctrine of procedural fairness or natural justice.¹⁰⁸⁷

13.29 At the federal level, it is possible to seek judicial review, under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), of decisions such as whether to grant or refuse parole or release on licence and the setting of conditions of parole or release on licence. While parole is automatic for sentences of more than three years and less than 10 years where a non-parole period has been fixed, it is possible to seek review in relation to the conditions imposed in these orders. There have been very few such applications for review.

Question 13–6 What further provision, if any, should be made for review or appeal of decisions relating to parole and release on licence of federal offenders?

Conditions attached to parole or licence

13.30 Under Part IB of the *Crimes Act*, certain conditions are attached automatically to release on parole and release on licence. These are that the offender must be of good behaviour and not violate any law during the parole period or the period of release on

¹⁰⁸⁶ *Crimes Act 1914* (Cth) s 19AL.

¹⁰⁸⁷ *Park Oh Ho v Minister for Immigration & Ethnic Affairs* (1988) 81 ALR 288, 296–297.

licence.¹⁰⁸⁸ 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 the offender may be subject to supervision and that, if so, the offender must obey all reasonable directions from his or her supervisor.

13.31 The AGD has developed a list of parole conditions based on standard state and territory conditions.¹⁰⁸⁹ A pamphlet produced by the AGD for the information of federal offenders includes the following information:

Parole orders consist of standard and special conditions. The standard conditions apply to all offenders and involve your duties while under supervision eg to report to your parole officer, to keep your parole officer informed of any changes of address or job, to request permission of the relevant authorities if you wish to travel interstate or overseas.

Special conditions relate to any specific problems which may have been identified in your case. They may specify counselling for financial, emotional or marital problems or for drug addiction. The provisions for drug users may include urinalysis.¹⁰⁹⁰

13.32 An offender cannot be released on parole unless the offender agrees in writing to the conditions to which the parole order is subject.¹⁰⁹¹

13.33 In NSW, standard parole conditions are set out in the *Crimes (Administration of Sentences) Regulation 2001* (NSW). In addition, the NSW Parole Board has the power to impose any special conditions, so long as they are not inconsistent with the standard conditions set out in the regulations. In Victoria, an exhaustive list of parole conditions is set out in the *Corrections Regulations 1998* (Vic).

13.34 Except in relation to federal offenders sentenced to life imprisonment, the maximum length of the supervision period attached to parole or release on licence is three years.¹⁰⁹² If the balance of an offender's sentence at the end of the non-parole period is less than three years, then the remaining balance will be the maximum length of the supervision period. In relation to offenders sentenced to life imprisonment and released on parole under supervision, the Attorney-General or departmental delegate decides the length of the supervision period.¹⁰⁹³

13.35 Where the offender's parole period is less than three years, or where the offender is serving a life sentence, the offender can be supervised for the entire parole

1088 *Crimes Act 1914* (Cth) ss 19AN(1)(a), 19AP(7)(a).

1089 Attorney-General's Department, *Consultation*, Canberra, 1 October 2004.

1090 Attorney-General's Department, *Information for Federal Offenders [pamphlet]*.

1091 *Crimes Act 1914* (Cth) s 19AL(5).

1092 *Ibid* s 16.

1093 *Ibid* s 16.

period. However, in other cases the supervision period cannot extend the full length of the parole period.¹⁰⁹⁴

Question 13–7 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?

Question 13–8 Would it be desirable for the federal parole authority to have greater flexibility in setting the length of the supervision period?

Revocation of parole or licence

13.36 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.¹⁰⁹⁵ 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.¹⁰⁹⁶

Automatic revocation

13.37 Where a parole order or licence is revoked automatically, 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 subject to the operation of s 19AA(2) of the *Crimes Act*, which deals with ‘street time’.¹⁰⁹⁷ Section 19AA(2) 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. Not all states and territories recognise ‘street time’, but in those jurisdictions that have such laws the period of ‘street time’ is deducted from the sentence remaining to be served.¹⁰⁹⁸

13.38 A federal parole order or licence is automatically revoked when the offender is actually sentenced for the offence committed while on parole or licence. Because of this, ‘street time’ for federal offenders is calculated from the date of release on parole or licence to the date the offender is sentenced for the new offence. By contrast, for

1094 In NSW, the maximum period of supervision is three years. In Victoria and the ACT an offender can be supervised for the entire parole period.

1095 *Crimes Act 1914* (Cth) s 19AQ.

1096 *Ibid* s 19AU.

1097 *Ibid* s 19AQ(5).

1098 For example, while NSW does recognise ‘street time’, the ACT does not: *Crimes (Administration of Sentences) Act 1999* (NSW) s 171; *Rehabilitation of Offenders (Interim) Act 2001* (ACT) s 43.

NSW state offenders 'street time' is calculated from the date of release on parole to the date on which it appears to the NSW 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.

13.39 For a state offender in NSW, the balance of the sentence to be served is calculated from the date the offender failed to comply, to the end of the original sentence. For a federal offender in NSW, 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 of sentence that a federal offender will be required to serve in NSW will be shorter than the balance of sentence that a state offender in NSW 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 serve.

Question 13–9 Is the law and practice in relation to automatic revocation of federal parole or licence satisfactory? 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?

Discretionary revocation

13.40 Apart from automatic revocation of parole or licence, the Attorney-General has a discretion to revoke a parole order or licence if a federal offender fails to comply with attached conditions, or if there are reasonable grounds for suspecting that the offender has failed to comply.¹⁰⁹⁹ The Attorney-General has delegated authority to make these decisions to senior officers of the AGD.¹¹⁰⁰ Where possible and practicable, the Attorney-General or departmental delegate must notify the offender of the alleged breach and the fact that the parole order or licence is to be revoked in fourteen days. The offender then has the opportunity to provide reasons why the parole order or licence should not be revoked.

13.41 The authority of the Attorney-General to *revoke* a parole order or licence in this way is discretionary.¹¹⁰¹ But the legislation does not specify what other action the Attorney-General may take in response to a breach of conditions by an offender on parole or licence, for example, where the breach is of a minor nature and would not justify returning the offender to prison.

1099 *Crimes Act 1914* (Cth) s 19AU.

1100 Delegation of 19 July 2004 made under the *Law Officers Act 1964* (Cth) s 17(2).

1101 *Crimes Act 1914* (Cth) s 19AQ(1).

13.42 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. The only discretion the magistrate has in these circumstances is whether to fix a non-parole period in relation to the unserved portion of the sentence. The magistrate is not required to do so if the unserved portion of the sentence is three months or less or the magistrate considers it inappropriate because of the nature of the breach of conditions.¹¹⁰² The magistrate does not have the flexibility to impose alternative custodial orders, such as periodic detention, or non-custodial orders, such as community service orders, even where these are available under the relevant state or territory law.

13.43 By contrast, where a state offender in NSW fails to comply with his or her obligations under a parole order, the Parole Board may revoke the order, impose further conditions on the order, or vary any of the existing conditions.¹¹⁰³ In the ACT, legislation provides a list of options available to the ACT Sentence Administration Board in relation to an ACT offender who has failed to comply with his or her obligations under a parole order, including taking no further action; issuing a warning; imposing additional or varied conditions; or revoking the parole order.¹¹⁰⁴

13.44 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 responses to a breach of conditions.

13.45 Authority to revoke parole orders and licences currently resides with the Attorney-General and the departmental delegate. In the states and territories, these matters are dealt with by parole boards. If an independent federal parole authority were established, as discussed above, it might also be invested with authority in relation to revocation. The ALRC would be interested in the views of stakeholders in relation to this issue.

Question 13–10 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?

1102 Ibid ss 19AW, 19AX.

1103 *Crimes (Administration of Sentences) Act 1999* (NSW) s 170(4).

1104 *Rehabilitation of Offenders (Interim) Act 2001* (ACT) s 58.

Travel while on parole or release on licence

13.46 The AGD's list of standard parole conditions includes a number of conditions related to travel while on parole or licence. These include: (a) 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 (b) that the offender will not leave Australia without the written permission of the Attorney-General or the departmental delegate.¹¹⁰⁵

International travel

13.47 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. While 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 also committed a further criminal offence.

13.48 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. This approach has been adopted in the *Crimes Act* in relation to serious narcotics offenders, and may be extended to other offences by regulation.¹¹⁰⁶ The provision only applies to Australian passports.

13.49 Authorised officers of the Department of Foreign Affairs and Trade are responsible for approving the issue and cancellation of Australian passports. The *Passports Act 1938* (Cth) provides that these officers must not issue a passport where they have reason to believe that the person applying for the passport is required to remain in Australia or to refrain from applying for, or obtaining, an Australian passport due to a court order or because the person has been released on parole or licence.¹¹⁰⁷ The *Passports Act* does not, however, expressly prohibit the issue of a passport to an offender who is still serving his or her prison sentence.

1105 Attorney-General's Department, *Commonwealth of Australia Crimes Act 1914—Standard Parole Order* (2004).

1106 *Crimes Act 1914* (Cth) s 22.

1107 *Passports Act 1938* (Cth) s 7B. The Australian Passports Bill 2004 (Cth) was introduced into the House of Representatives on 2 December 2004. The Bill, if passed, will repeal and replace the *Passports Act*. The Bill includes new administrative arrangements in relation to the cancellation or refusal of a passport on law enforcement grounds.

Question 13–11 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?

Deportation

13.50 As a matter of practice, offenders who are non-citizens and subject to a deportation order are deported by the Department of Immigration and Multicultural and Indigenous Affairs when they are released from custody.¹¹⁰⁸ It has been suggested that this is unsatisfactory because the period of release on parole is part of the sentence imposed on the offender and, if the offender is 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.¹¹⁰⁹

13.51 It was argued in the High Court case of *Shrestha* that offenders who were 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.¹¹¹⁰

13.52 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.

Question 13–12 Is the law and practice in relation to federal offenders who are subject to deportation upon release from custody satisfactory?

Pre-release schemes

13.53 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

1108 *R v Shrestha* (1991) 173 CLR 48, [10].

1109 New South Wales Parole Board, *Consultation*, Sydney, 4 November 2004.

1110 *R v Shrestha* (1991) 173 CLR 48, [15].

or education, or to complete a custodial sentence by way of home detention. Federal legislation does not expressly provide for specific pre-release schemes, instead relying on those available under state and territory law. Section 19AZD(3) of the *Crimes Act* 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).¹¹¹¹

13.54 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 Queensland, South Australia, Victoria and Western Australia. In Western Australia, for example, offenders may be released up to six months early for employment or vocational training purposes and, in some cases, to undertake counselling, education or personal development training to assist them to re-enter the community.¹¹¹² There are no pre-release schemes available to federal offenders in NSW, Tasmania, the ACT or the Northern Territory.

13.55 A number of the schemes listed in regulation 5 have been repealed or replaced in the relevant jurisdiction, for example, the pre-release permits granted under Division 6 of Part 8 of the *Corrections Act 1986* (Vic); pre-release permits granted under Division 5 of Part 8 of the *Corrections Regulations 1988* (Vic); and pre-release permits granted under s 19 of the *Penalties and Sentences Act 1985* (Vic).

13.56 The number of repealed and replaced pre-release schemes listed in the *Crimes Regulations* indicates one of the difficulties of relying on state and territory law in this way. States and territories are at liberty to change the nature and availability of pre-release schemes without consulting the Australian Government. It is unclear whether the Australian Government is given notice of these changes so as to enable it to amend the regulations in a timely fashion.

Question 13–13 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?

Leave of absence

13.57 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

1111 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.

1112 *Sentence Administration Act 2003* (WA) Pt 4.

prison, such leave may also be granted to federal offenders serving a sentence in the state or territory.

13.58 For example, in Victoria, the Secretary of the Department of Justice may issue a custodial community permit to an offender for a number of listed purposes including employment, health, fitness or education; to visit a person with whom the offender has had a long standing personal relationship if that person is seriously ill or in acute personal need; to attend the funeral of such a person; or to assist in the administration of justice.¹¹¹³ In NSW, the Commissioner for Corrective Services may issue a local leave permit to an offender for any purpose the Commissioner considers appropriate including to visit a family member who is seriously ill, to attend the funeral of a family member, to attend a job interview, or to assist in the administration of justice.¹¹¹⁴

Question 13–14 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?

The prerogative of mercy

13.59 The Governor-General may exercise the prerogative of mercy, on the advice of the 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.

13.60 At common law a pardon is not the same as an acquittal or quashing of the conviction and the conviction itself is not reversed.¹¹¹⁵ However, the position in relation to the exercise of the prerogative to pardon federal offenders has been modified by statute. Section 85ZR of the *Crimes Act* provides that where a person has been granted a free and absolute pardon for a federal offence because the person was wrongly convicted, the person is to be regarded throughout Australia (and by federal and state authorities overseas) for all purposes as never having been convicted of the offence. Section 85ZS sets out some of the consequences of this, for example, the person is not required to disclose the fact that he or she was charged or convicted of the offence and the person is relieved of any legal duty or disability that accompanies conviction.

1113 *Corrections Act 1986* (Vic) s 57.

1114 *Crimes (Administration of Sentences) Act 1999* (NSW) s 26.

1115 R Fox, *Victorian Criminal Procedure: State and Federal Law* (11th ed, 2002), 385.

13.61 Section 85ZM of the *Crimes Act* provides that where a person has been granted a pardon for a federal offence for a reason other than that the person was wrongly convicted, the conviction is 'spent.' The person is not required to disclose the fact that he or she was charged or convicted of the offence, although the conviction stands.

13.62 A remission of sentence by prerogative means that a federal offender does not serve the whole of his or her sentence, but the conviction remains on the record.

13.63 A recommendation to grant a pardon is generally only put to the Governor-General where the Minister for Justice and Customs is satisfied that the offender is both morally and technically innocent of the offence and that the offender has no remaining avenue of appeal against the conviction; or the Minister is satisfied that the offender is morally or technically innocent of the offence, and there are exceptional circumstances justifying the grant of a pardon. For example, a pardon may be considered on the second ground where the Minister is satisfied that the offender is morally and technically innocent, but is unlikely to survive until the completion of an appeal process; or the offender is technically innocent, and there is no scope to refer the conviction to an appeal court for review.¹¹¹⁶

13.64 A recommendation to remit all or part of a sentence may be put to the Governor-General by the Minister where there are circumstances that did not exist or were unknown to the court at the time the matter was dealt with and which warrant some mitigation of sentence. A recommendation to remit all or part of a sentence may be put to the Governor-General on compassionate grounds, as a reward for post-sentence cooperation, to correct a sentencing error that has given rise to injustice, or where new evidence throws sufficient doubt on the conviction as a justifiable basis for continued detention.¹¹¹⁷

Question 13–15 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?

1116 Attorney-General's Department, *Correspondence*, 20 October 2004.

1117 Full or partial remission of a fine would normally be considered only where enforcement of the fine would cause 'undue hardship' or where there has been an administrative or procedural error in the conviction.

14. Mental Illness and Intellectual Disability

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Introduction

14.1 This chapter considers the prosecution and disposition of persons with a mental illness or intellectual disability, which accounts for a significant proportion of Part IB of the *Crimes Act 1914* (Cth).

14.2 Mentally ill and intellectually disabled persons are disproportionately represented within Australian criminal justice systems. For example, in 2003 the NSW Corrections Health Service reported that almost half of reception inmates and more than one third of sentenced inmates in that jurisdiction had suffered a mental disorder in the previous 12 months.¹¹¹⁸ It is not known how many federal offenders have a mental illness or an intellectual disability.

¹¹¹⁸ Reception prisoners were those remanded into custody pending further judicial process. Sentenced prisoners were those who had been sentenced by a judicial officer and were already serving a custodial sentence at the time of the study: T Butler and S Allnut, *Mental Illness Among New South Wales Prisoners* (2003) NSW Corrections Health Service, 2. The NSW Corrections Health Service defined a 'mental disorder' as a psychosis, affective disorder or anxiety disorder.

Criminal justice system or mental health system?

14.3 Commonwealth laws provide for funding, and set certain parameters, for the provision of intellectual disability and mental health services throughout Australia.¹¹¹⁹ State and territory laws regulate the infrastructure of intellectual disability and mental health services. The state and territory mental health and intellectual disability systems differ from each other, and many have been the subject of criticism and review.¹¹²⁰

14.4 The mental health system in each state and territory provides for the care, treatment and control of persons who are mentally ill through hospitals and community care facilities. Admission to a hospital or other care facility can be on a voluntary or involuntary basis. Some state mental health systems incorporate a specialist body, such as a Mental Health Review Tribunal, which reviews the involuntary detention and treatment of patients.

14.5 State and territory governments provide a range of services both directly and indirectly to help those with intellectual disabilities. Government services include programs designed for skills development; community access, participation and integration; and respite care.

14.6 The mental health and intellectual disability systems in each state and territory include a guardianship function. This usually involves investing a guardianship body with the power to make orders that involve supervising or making decisions on behalf of a person with a mental illness or intellectual disability.

14.7 Mental health and intellectual disability systems and the criminal justice system often intersect when a person with a mental illness or intellectual disability is accused of committing a crime. A number of important issues arise at this point. These include: whether such people should be dealt with by the criminal justice system in the same way as other offenders; whether criminal procedures (including sentencing procedures) should be modified because of the disadvantage experienced by such persons; and whether intellectual disability and mental health services should be used to provide support, protection and diversion from the criminal justice system.

14.8 Further issues are whether judicial officers, prosecutors and other lawyers are adequately skilled to deal with mental health and intellectual disability issues in the criminal justice system,¹¹²¹ and whether specialist diversion programs should be

1119 See, eg, *Disability Services Act 1986* (Cth); *Disability Discrimination Act 1992* (Cth); *Aged Care Act 1997* (Cth); *National Health Act 1953* (Cth); *Home and Community Care Act 1985* (Cth); *Health Insurance Act 1973* (Cth); *Social Security Act 1991* (Cth).

1120 For example, the *Mental Health Act 1990* (NSW) is currently being reviewed by the NSW Department of Health.

1121 Advisory Committee members, *Advisory Committee meeting*, 21 September 2004.

available to a person with a mental illness who is accused of committing a federal offence.¹¹²²

14.9 These complex issues extend beyond the issues raised by Part IB of the *Crimes Act*. ALRC 44 concluded that the interaction of mentally ill and intellectually disabled offenders with the criminal justice system as a whole, not with just one component of it, needed to be considered and a comprehensive scheme developed. The ALRC recommended that it should be given a separate reference covering all issues concerning the mentally ill and intellectually disabled within the criminal justice system.¹¹²³ This recommendation has not been implemented.

Scope of Part IB

14.10 Divisions 6 to 9 of Part IB of the *Crimes Act* deal with the prosecution and disposition of persons with a mental illness or condition, or an 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.

14.11 One threshold issue is the location of these provisions in Part IB of the *Crimes Act*, which deals primarily with the sentencing and imprisonment of federal offenders. The provisions that deal with those stages of the criminal justice process that precede sentencing may be more appropriately located in another Part of the *Crimes Act*.¹¹²⁴

14.12 Part IB often does not distinguish between mental illness and intellectual disability.¹¹²⁵ A widely accepted psychiatric classification system is the *Diagnostic and Statistical Manual of Mental Disorders*, which defines a mental disorder as:

a clinically significant behavioural or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (eg, a painful symptom) or disability (ie, impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom. In addition, this syndrome or pattern must not be merely an expected and culturally sanctioned response to a particular event, for example, the death of a loved one.¹¹²⁶

1122 The Magistrates' Court Diversion Program was established in South Australia in 1999.

1123 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 114, [200].

1124 See further Ch 6.

1125 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [201].

1126 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-TR* (2000), xxxi, cited in New South Wales Law Reform Commission, *Minors' Consent to Medical Treatment*, IP 24 (2004), [6.3].

14.13 People with an intellectual disability have significantly lower than average intellectual ability and deficits in social and adaptive functioning. Their capacity to learn and communicate may be impaired. They may have difficulty in grasping abstract concepts, handling complex tasks, and absorbing and assessing information at a 'normal' rate.¹¹²⁷ However, the majority of people with an intellectual disability have only a mild disability and can learn skills of reading, writing, numeracy, and daily living sufficient to enable them to live independently in the community.¹¹²⁸

14.14 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. A person with a mental illness may, at some stages of his or her life, be fit to plead and be dealt with under the criminal justice system. However, a person with a severe intellectual disability may never have the capacity to be tried. This raises the issue of whether Part IB should distinguish more clearly between persons with mental illness and those with an intellectual disability.

14.15 Some provisions in Part IB require a court to find that the person charged 'is suffering from a mental illness within the meaning of the civil law of the State or Territory' before the special procedures in Divisions 6 to 9 of Part IB will apply.¹¹²⁹ For example, in NSW a person with a mental illness accused of a federal offence will need to satisfy the civil law test set out in Schedule 1 of the *Mental Health Act 1990* (NSW). The civil law test is generally applied in determining whether a person can or must be admitted for treatment of a mental illness. Each state and territory has a different test that applies in criminal matters for determining whether an accused has a mental illness and should be dealt with under special criminal law procedures. In NSW, the criminal law test is less restrictive than the civil law test, allowing a greater number of people to be dealt with under the special procedures.¹¹³⁰

14.16 The ALRC has heard that the application of the state and territory civil law test may cause confusion in the courts, and may also unfairly preclude many people with mental illness from the benefit of Divisions 6 to 9 of Part IB. It is arguable that the criminal law test of mental illness under some state and territory legislation is more appropriate.

Fitness to be tried

14.17 In order to be tried for an offence, an accused must understand the nature of the offence for which he or she has been charged, and be able to enter a plea, exercise the right to challenge jurors, follow the court proceedings, mount a defence, and instruct

1127 New South Wales Law Reform Commission, *Minors' Consent to Medical Treatment*, IP 24 (2004), [6.6].

1128 *Ibid.*, [6.8].

1129 See, eg, *Crimes Act 1914* (Cth) ss 20BQ(1)(a), 20BS(1)(a), 20BV(1)(a).

1130 *Mental Health (Criminal Procedure) Act 1990* (NSW) s 32.

his or her legal representative.¹¹³¹ A person charged with an offence may be unfit to be tried due to mental illness, intellectual disability or other reasons. The fitness of an accused to be tried for a federal criminal offence is a matter of state and territory law.

14.18 The procedure for determining fitness to be tried varies across jurisdictions. This raises the issue of equality of treatment of persons with a mental illness or intellectual disability accused of a federal offence. In NSW, the procedures relating to fitness to be tried are contained in Part 2 of the *Mental Health (Criminal Procedure) Act 1990* (NSW). Under those provisions, if any party raises the issue of fitness, the court conducts an inquiry into the defendant's fitness. If the court determines that the person is fit to be tried, the proceedings in respect of the offence recommence. If the person is found unfit, the court refers the matter to the Mental Health Review Tribunal, which determines whether the person is likely to become fit to be tried within 12 months.

14.19 Part IB of the *Crimes Act* deals with the consequences of such a determination in relation to a person charged with a federal offence.¹¹³² Generally, where a court has found the accused unfit to be tried for a federal offence on indictment, and there is a prima facie case that he or she committed the offence, the court may order that the accused be detained in a prison or hospital for a specified period. The detention period must not exceed the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence. Alternatively, the court may order the person's release from custody absolutely, or subject to conditions that may apply for a period of up to three years.¹¹³³

14.20 The court has several options if it considers that the person will become fit to be tried within 12 months. If the person has a mental illness or condition for which hospital treatment is available, and the person does not object, the court must order that the person be detained in a hospital until he or she becomes fit to be tried. Otherwise, the person must be detained in a place other than a hospital (including a prison), or granted bail.¹¹³⁴ At least every six months, the Attorney-General must consider whether a person detained under these provisions should be released from detention. In considering this matter, the Attorney-General must obtain and consider a report from a qualified psychiatrist or psychologist.¹¹³⁵ The Attorney-General can order that the person be released from detention,¹¹³⁶ and may revoke this order.¹¹³⁷ The power to

1131 See *Kesavarajah v The Queen* (1994) 181 CLR 230; Butterworths, *Federal Criminal Law: Looseleaf Service*, [6A-165].

1132 The term 'unfit to be tried' includes unfit to plead: *Crimes Act 1914* (Cth) s 16(1).

1133 *Ibid* s 20BC(5).

1134 *Ibid* s 20BB(2)(b). If the person does not become fit to be tried within 12 months, the provisions below apply as though the court had originally determined that the person would not become fit to be tried: *Crimes Act 1914* (Cth) s 20BB(4).

1135 *Crimes Act 1914* (Cth) s 20BD(1), (2).

1136 *Ibid* s 20BE.

review a person's detention, order release, and revoke that order has been delegated to officers of the Commonwealth Attorney-General's Department (AGD).¹¹³⁸

14.21 Several cases have demonstrated a degree of confusion in applying these provisions. Some judges appear to have been uncertain about the interaction between the state and territory provisions for determining fitness to be tried and the Part IB provisions regarding the consequences of such a determination.¹¹³⁹ In *Kesavarajah v The Queen*, the High Court concluded that, as the determination of fitness to be tried is made in accordance with state and territory law, these provisions determine whether a judge or jury must make the determination.¹¹⁴⁰

14.22 An important issue is whether persons who have been found unfit to be tried should be detained in prison. The Human Rights and Equal Opportunity Commission (HREOC) has recommended that anyone ordered to be detained in custody after being found unfit to plead should be detained in a health facility, not a prison.¹¹⁴¹

14.23 Where a person has been found unfit to be tried the court may order the person's release from custody absolutely, or subject to conditions that may apply for a period of up to three years. The New South Wales Law Reform Commission (NSWLRC) has expressed the view that it is inappropriate to impose conditions after a defendant has been released where there has been no hearing or finding of guilt against them.¹¹⁴²

14.24 Another issue is the capacity of mentally ill or intellectually disabled persons to consent to detention under Division 6 of Part IB. The Division provides that a person found unfit to be tried due to a mental illness or condition may not be detained in a hospital for treatment if the person objects to being detained in this way. In practice, a person with a mental illness may not have the capacity to make an informed decision about detention. If the person does object, the court cannot order hospital detention and would have to consider the alternative options, including prison.¹¹⁴³

1137 Ibid s 20BF.

1138 *Delegation made under s 17(2) of the Law Officers Act 1964* (Cth) 19 July 2004.

1139 See, eg, *Kesavarajah v The Queen* (1994) 181 CLR 230, 243; *R v Burns (No 2)* (1999) 169 ALR 149; *R v Sexton* (2000) 76 SASR 534.

1140 *Kesavarajah v The Queen* (1994) 181 CLR 230, 243.

1141 Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993), Ch 25, 31.

1142 New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996), [5.80]. The recommendation was directed to the exercise of the Minister of Health's discretion to release persons found unfit to be tried under s 84 of the *Mental Health Act 1990* (NSW) where there has been no hearing.

1143 Transcript of Proceedings, *R v Batori*, (County Court of Victoria, Gullaci J, 17 May 2004), 4, 8–9. These concerns may also apply to the provisions dealing with psychiatric and program probation orders (discussed below), as the court must not make such orders if the person, or the person's guardian, objects to the proposed treatment: see *Fabriczy v Director of Public Prosecutions* (Unreported, South Australian Supreme Court, Lander J, 13 February 1998).

14.25 A related issue is the inability to treat patients who do not or cannot consent to treatment. A recent Victorian case, *R v Robinson*, raised the concern that mental health officials in that state may not have authority to treat a person who has been acquitted of a federal offence because of mental illness under s 20BJ of the *Crimes Act* and detained in custody.¹¹⁴⁴ Victorian legislation was subsequently amended to ensure that federal offenders in Victoria who are acquitted by reason of mental illness can be treated, as far as possible, in the same way as other forensic patients.¹¹⁴⁵ However, these amendments apply only to federal offenders detained under s 20BJ. Where a person is charged with a federal offence but detained under other federal mental health provisions (such as s 20BC, discussed below) similar problems may arise.¹¹⁴⁶

14.26 Section 20BC of the *Crimes Act* provides that a person who is found unfit to be tried must not be detained for a period longer than the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence. However, this can mean that a person dealt with under s 20BC may spend more time in detention than if they had been found guilty and sentenced because he or she does not get the benefit of non-custodial options, a non-parole period less than the head sentence, or a guilty plea sentence discount.

14.27 A further issue is whether the requirement for a review of detention every six months lacks sufficient flexibility. The Model Mental Impairment and Unfitness to be Tried (Criminal Procedure) Bill 1995 developed by the Model Criminal Code Officers Committee recommended that such a review should take place every 12 months.¹¹⁴⁷ If reviews were undertaken too regularly they may prove administratively onerous and may cause distress to the accused with a mental illness or intellectual disability. However, as noted above, the mental state of people with mental illness can change unpredictably. This raises the issue of how regularly reviews should be undertaken.

14.28 Another issue is the role of the AGD in conducting reviews of persons detained under s 20BC. A number of inquiries have considered the role of executive discretion in the detention of persons with a mental illness or intellectual disability. In 1993, HREOC recommended that an expert body such as a Mental Health Review Tribunal should have the power to order the release of mentally ill offenders who are subject to detention.¹¹⁴⁸ In some states and territories, such as NSW, a specialist tribunal reviews

1144 *R v Robinson* [2004] VSC 505. Section 20BJ is discussed below.

1145 *Mental Health Legislation (Commonwealth Detainees) Act 2004* (Vic).

1146 See, eg, Transcript of Proceedings, *R v Batori*, (County Court of Victoria, Gullaci J, 17 May 2004). The problem arises because the definition of 'forensic patient' in s 3 of the *Mental Health Act 1986* (Vic) does not extend to a person admitted in the circumstances covered by s 20BC.

1147 Model Mental Impairment and Unfitness to be Tried (Criminal Procedure) Bill 1995 cl 8.

1148 Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993), 802.

cases of persons found unfit to be tried.¹¹⁴⁹ This raises the issue of whether the AGD is the appropriate body to make such decisions.

14.29 One option is to adopt the procedures set out in the Model Mental Impairment and Unfitness to be Tried (Criminal Procedure) Bill 1995.¹¹⁵⁰ The Bill provided for fitness inquiries and special hearings by a court, not the executive or a tribunal; that the same procedures in relation to fitness would apply to all courts, including Local Courts; and a statutory definition of fitness.

Acquittal due to mental illness

14.30 If a person has been found fit to plead, he or she may nevertheless be acquitted of the offence by reason of mental illness. Conviction for a crime generally requires proof of both the criminal act and an intention to commit that act at the time of the offence. If an accused has committed the criminal act, he or she may nevertheless be acquitted if he or she lacked the relevant intention at the relevant time, by reason of mental illness.

14.31 Section 7.3 of the *Criminal Code* (Cth) contains a general defence of 'mental impairment'. The section provides that a person is not criminally responsible for an offence if, at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that: the person did not know the nature and quality of the conduct; or the person did not know that the conduct was wrong; or the person was unable to control the conduct. The defence applies to persons with a mental illness or intellectual disability.

14.32 Under Division 7 of Part IB of the *Crimes Act*, where a person has been acquitted of a federal offence on the grounds of mental illness at the time of the offence, the court may order that the person be detained in safe custody in a prison or hospital for a specified period. This period must not exceed the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence.¹¹⁵¹ Alternatively, the court may order the person's release from custody unconditionally, or subject to conditions for a period not exceeding three years.¹¹⁵² The ALRC is interested in hearing views about whether it is appropriate to impose conditions after a defendant has been acquitted due to mental illness.

1149 *Mental Health Act 1990* (NSW) s 80.

1150 The Model Mental Impairment and Unfitness to be Tried (Criminal Procedure) Bill 1995 was substantially implemented in South Australia. It has been said that Health Ministers in other jurisdictions objected to a court-based, rather than a health tribunal-based, scheme: Australian Government, *Australia's Fourth Report under the International Covenant on Civil and Political Rights January 1996–December 1996* (1998).

1151 *Crimes Act 1914* (Cth) s 20BJ(2).

1152 *Ibid* s 20BJ(4). See also *Crimes Act 1914* (Cth) s 20BL.

14.33 In many Australian jurisdictions, it is common for persons acquitted by reason of mental illness to be detained in psychiatric hospitals in the community. By contrast, in NSW it appears that the majority of persons within this category are detained—at least initially—in the prison system. The Long Bay Prison Hospital is classified as a prison, and forensic patients detained in the hospital are classified as prisoners.

14.34 As with persons found unfit to be tried, a fundamental issue is whether persons who have been acquitted on the grounds of mental illness should ever be detained in prison. HREOC has recommended that anyone who is ordered to be detained in custody after being found not guilty on the grounds of mental illness should be detained in a health facility, not a prison.¹¹⁵³

14.35 It is not known if persons with an intellectual disability accused of a federal offence are excluded from the operation of Division 7 of Part IB. One issue for consideration is whether federal legislation should provide for the consequences that flow from an acquittal because of ‘mental impairment’, as opposed to ‘mental illness’. This would be consistent with the defence under s 7.3 of the *Criminal Code*, and expressly includes persons with an intellectual disability.

Summary disposition

14.36 Division 8 of Part IB deals with the summary disposition of a federal offence involving an accused with a mental illness or intellectual disability. Where a court of summary jurisdiction considers that a person charged with a federal offence has a mental illness (within the meaning of the civil law of the state or territory) or an intellectual disability, and it would be more appropriate to deal with the matter under Division 8 than otherwise, the court may:

- dismiss the charge and discharge the person into the care of a responsible person for a specified period of up to three years—with or without conditions;
- adjourn the proceedings;
- remand the person on bail; or
- make any other order that the court considers appropriate.¹¹⁵⁴

1153 Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993), Ch 25, 31. See also D Brown and others, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (3rd ed, 2001), 626; Legislative Council Select Committee on Mental Health—Parliament of New South Wales, *Mental Health Services in New South Wales* (2002), 250.

1154 *Crimes Act 1914* (Cth) s 20BQ(1).

14.37 These provisions raise the issue of the relevance of the distinction between summary and indictable offences to the disposition of persons with a mental illness or intellectual disability.¹¹⁵⁵ In the interests of consistency and ease of operation, it may be desirable to have one set of procedures applying to the disposition of such persons across all courts hearing these matters under Part IB.

Sentencing alternatives

14.38 Division 9 of Part IB deals with sentencing alternatives where a person with a mental illness or intellectual disability has been convicted of a federal offence.

- *Hospital orders.* Where a person has been convicted of an indictable federal offence the court may—without passing sentence—order that the person be detained in a hospital for a specified period for the purpose of receiving certain treatment.¹¹⁵⁶
- *Psychiatric probation orders.* The court may—without passing sentence—order that the person reside at, or attend at, a specified hospital or other place for the purpose of receiving psychiatric treatment.¹¹⁵⁷
- *Program probation orders.* The court may—without passing sentence—order that the person be released on condition that he or she undertake the program or treatment specified in the order.¹¹⁵⁸

14.39 It has been noted that judicial officers are often forced to send people with a mental illness or intellectual disability to prison because these offenders are often considered unsuitable for non-custodial options.¹¹⁵⁹ The issue arises whether there are more appropriate sentencing options that should be available to federal offenders with a mental illness or intellectual disability.

Considerations relevant to sentencing

14.40 Once a person has been convicted of a federal offence, his or her ‘physical or mental condition’, if relevant, must be taken into account when passing sentence.¹¹⁶⁰

1155 The NSWLRC recommended that the same procedures should apply for all offences heard in the Local Court, whether summary or indictable: New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996), [5.74]. The Model Mental Impairment and Unfitness to be Tried (Criminal Procedure) Bill 1995 cl 5 provided for the same fitness procedures for all courts and offences.

1156 *Crimes Act 1914* (Cth) ss 20BS–20BU. A court may also make a hospital order in relation to a person who is already serving a federal sentence.

1157 *Ibid* ss 20BV–20BX.

1158 *Ibid* s 20BY.

1159 New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996), [5.67].

1160 *Crimes Act 1914* (Cth) s 16A(2)(m).

One method of informing the court about a person's intellectual disability or mental illness is through a pre-sentence report, which is used more generally to gather background information about an offender for the purpose of sentencing. ALRC 44 recommended that where there were reasonable grounds to expect that it would assist in sentencing, courts should avail themselves of pre-sentence reports.¹¹⁶¹ The ALRC commented that reasonable grounds are particularly likely to exist where it appears that a person may have an intellectual disability or mental illness.¹¹⁶² Pre-sentence reports are often requested in sentencing matters. However, it is not known how often pre-sentence reports are provided in relation to federal offenders. There is no process formalising the provision of pre-sentence reports at the federal level. Pre-sentence reports are discussed further in Chapters 11 and 15.

Commencement of sentence

14.41 Another issue that arises is whether, on the disposition of persons suffering from a mental illness or intellectual disability, credit should be given for any time already served under detention orders made under Divisions 6 and 7 of Part 1B. As noted above, a person may be detained in prison or in hospital where a court finds that a person accused of a federal offence is unfit to be tried or will become fit to be tried within 12 months, or if the court acquits a person due to a mental illness.

14.42 It has been stated that credit should be given for any time already spent in detention.¹¹⁶³ Section 16E of the *Crimes Act* provides that any period that a person has spent in custody in relation to a federal offence must be taken into account when sentencing a federal offender for that offence. However, it is not clear whether s 16E applies to detention under Divisions 6 and 7 of Part 1B.

14.43 In *R v Batori*, Gullaci J did not seek to determine the issue of how a period of time already spent in detention is to be treated. However, his Honour noted that in determining an appropriate period of detention the court should take into account the history of the defendant since being charged and the circumstances in which the court was asked to fix a period of detention. Consequently, Gullaci J took into account the time already spent by the defendant in detention.¹¹⁶⁴

Rehabilitation programs and parole

14.44 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 to

1161 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [203].

1162 *Ibid.*, [203].

1163 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [10.220].

1164 See *R v Batori* (Unreported, County Court of Victoria, Gullaci J, 16 July 2004), 59–60. See also *R v Renzella* [1997] 2 VR 88, 98.

encourage offenders' motivation and cooperation, participation in these programs should be on the basis of the offenders' consent.¹¹⁶⁵ ALRC 44 also recommended that intrusive treatment programs—such as those involving behaviour modification—and experimental programs should be offered to offenders only after full explanation and discussion of their nature and effect.¹¹⁶⁶

14.45 Persons with mental illness or intellectual disability are often segregated from the rest of the prison population or are under protection, and may therefore have restricted access to programs and services.¹¹⁶⁷ The parole authority may be disinclined to release people with an intellectual disability because they have not participated in appropriate prison programs. The ALRC is interested in hearing if any issues arise in relation to the availability of rehabilitation programs for mentally ill or intellectually disabled federal offenders during their sentences.¹¹⁶⁸

14.46 It has been said that parole authorities often will not release offenders unless they are convinced that the person is not a threat to the community.¹¹⁶⁹ This issue has also been identified as a problem with respect to persons with a mental illness. HREOC has suggested that when an offender with a mental illness is due for parole, the absence of secure accommodation can be a reason for being kept in prison.¹¹⁷⁰ The ALRC is interested in hearing if these issues arise in relation to federal offenders.

14.47 A further issue is that Part IB of the *Crimes Act* does not deal with circumstances where a federal offender develops a mental illness after he or she has been sentenced. Where this occurs, the offender is likely to be treated in accordance with the procedures operating in the state or territory in which he or she is imprisoned or serving the sentence.¹¹⁷¹ Given that Part IB deals in detail with aspects of the prosecution, disposition and sentencing of mentally ill and intellectually disabled persons, it may be desirable to expand its operation to cover this circumstance.

Operational issues

14.48 The AGD has expressed a number of concerns with the mental health and intellectual disability provisions in Part IB of the *Crimes Act*.¹¹⁷² The AGD has noted that difficulties have been experienced in obtaining psychiatric reports from state and

1165 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [217].

1166 *Ibid.*, [217].

1167 See Ch 15 for discussion of protection and segregation.

1168 On pre-release schemes, see further Ch 13.

1169 Discussed at 'Gaol as Community Housing: A Forum on Intellectual Disability and Criminal Justice', Sydney, 10 November 2004. Parole is discussed in Ch 13.

1170 Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993), 759.

1171 HREOC recommended that police and corrective services departments should ensure that individuals detained in custody are appropriately assessed by mental health professional for mental illness or disorder: *Ibid.*, Ch 25, 31.

1172 Attorney-General's Department, *Consultation*, Sydney, 31 August 2004.

territory authorities to enable cases to be considered under these provisions. In addition, the AGD has received inquiries from several states about the interaction between the Commonwealth and state systems, as well as between the criminal justice and mental health systems within these jurisdictions.

14.49 Another issue is the need for greater communication and coordination between government agencies, particularly between prison administration and Centrelink. This may be an issue for federal offenders with a mental illness or intellectual disability who, prior to incarceration, received a disability support or other pension.

A comprehensive federal scheme?

14.50 Each state and territory has comprehensive laws in relation to the prosecution and disposition of persons with a mental illness or intellectual disability.¹¹⁷³ At present, certain aspects of these regimes are applied to a person with a mental illness or intellectual disability accused of a federal offence.¹¹⁷⁴ This raises the issue of whether reliance on state and territory laws results in unequal treatment of persons accused of a federal offence, and creates problems in the administration of their sentences.

14.51 One option for consideration is whether the prosecution, disposition and administration of persons with a mental illness or intellectual disability accused of a federal offence should be dealt with wholly under state and territory legislation. However, because each jurisdiction has a different scheme for dealing with these persons,¹¹⁷⁵ further problems of unequal treatment may arise.

14.52 It may be more appropriate to deal with these matters under comprehensive federal legislation. One option for consideration would be to adopt the procedures set out in the Model Mental Impairment and Unfitness to be Tried (Criminal Procedure) Bill 1995, discussed above. However, other rules in relation to acquittal and sentencing options for mentally ill and intellectually disabled persons would also need to be developed.

1173 See, eg, *Mental Health (Criminal Procedure) Act 1990* (NSW).

1174 *Kesavarajah v The Queen* (1994) 181 CLR 230, 243.

1175 See, eg, *Mental Health (Criminal Procedure) Act 1990* (NSW); *Mental Health Act 1986* (Vic); *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic); *Mental Health Act 2000* (Qld).

Question 14–1 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?

15. Special Categories of Offenders

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15.1 This chapter examines categories of federal offenders that may raise special issues in relation to the sentencing and administration. These categories include young offenders, women, Aboriginal and Torres Strait Islander (ATSI) offenders, and corporations. As noted in Chapter 2, there is a general lack of data about federal offenders.¹¹⁷⁶ The ALRC is therefore unaware of how many federal offenders fall into these special categories.

15.2 Nevertheless, the issues surrounding special categories of offenders merit consideration for a number of reasons. Many of these categories have been raised as warranting special attention in international law, past sentencing reviews, and consultations with the ALRC. Moreover, offenders within many of these categories receive special treatment under state and territory schemes, which raises the issue of equality of treatment between federal offenders and state and territory offenders, and between federal offenders across the states and territories.

Young offenders

Data on young federal offenders

15.3 The ALRC does not have current data on the number of federal offenders who are under the age of 18 years (young federal offenders). As part of its earlier sentencing inquiry, the ALRC, together with the Commonwealth Office of Youth Affairs, commissioned a research paper on the sentencing of young offenders, which indicated that in 1986–87 there were 74 federal offences prosecuted by the Commonwealth Director of Public Prosecutions (CDPP) against young federal offenders.¹¹⁷⁷ As part of the joint inquiry into children and the legal process, the ALRC and the Human Rights and Equal Opportunity Commission (HREOC) were told that, in 1994–95, 21 young federal offenders were prosecuted in children’s courts by the CDPP on 45 separate charges.¹¹⁷⁸ The limitations on the collection of data in both of these inquiries suggest that the number of young federal offenders is generally underestimated. There are no data on the sentencing outcomes for young federal offenders.

1176 See Ch 2, 16.

1177 A Freiberg, R Fox and M Hogan, *Sentencing Young Offenders—Research Paper No 11* (1988) Australian Law Reform Commission and Commonwealth Youth Bureau, [155]. This figure does not include prosecutions in South Australia, Tasmania or the Northern Territory.

1178 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [2.88]. This figure does not include prosecutions in the Northern Territory or Tasmania.

Section 20C of the Crimes Act

15.4 The approach to juvenile justice has differed from the approach to adult criminal justice since the beginning of the twentieth century when separate laws, courts and corrections were first established for young offenders. Philosophies underpinning juvenile justice have shifted over the years, and every state and territory has introduced new juvenile justice legislation in the last 20 years. While this new legislation is primarily based on a justice/due process model, rehabilitation remains a key factor in sentencing, as can be seen from the existence of a variety of diversionary programs, including juvenile conferencing. Restorative justice has become very influential in the state and territory juvenile justice systems.

15.5 Section 20C(1) of the *Crimes Act 1914* (Cth) provides that a child or young person may be tried and punished in accordance with state and territory laws, thus enabling young federal offenders to be dealt with by the specialist juvenile justice systems established in the states and territories. In accordance with state or territory law, most young offenders are tried in the children's courts, although all jurisdictions provide for the trial and sentencing of young people as adults in specified circumstances. Although there is no clear statement as to whether s 20C(1) excludes the option of using the Part IB provisions for sentencing young federal offenders, the CDPP is of the view that judicial officers can draw on both the applicable state and territory laws and the federal provisions, as appropriate.¹¹⁷⁹

15.6 Section 20C(2) states that where a person under the age of 18 years is 'convicted of an offence against a law of the Commonwealth that is punishable by death', an alternative to a death sentence must be applied. The *Death Penalty Abolition Act 1973* (Cth) abolished the death penalty in relation to all federal offences.

15.7 Section 20C was the subject of criticism in the first ALRC sentencing inquiry,¹¹⁸⁰ and in the joint ALRC and HREOC inquiry into children and the legal process.¹¹⁸¹ The Gibbs Committee recommended that the retention or modification of s 20C should be the subject of a special review by government, which would need to examine all relevant state or territory legislation applied by the section in relation to the trial and punishment of young federal offenders.¹¹⁸² There has been no substantive amendment or clarification of s 20C since its introduction in 1960.

1179 Commonwealth Director of Public Prosecutions, *Submission to Children and the Legal Process Inquiry 110*, 2 November 1995.

1180 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [225].

1181 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [19.8]–[19.15]. See also H Bonney, 'Young Offenders: Some Sentencing Considerations' (1995) 69 *Law Institute Journal* 896.

1182 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991) Attorney-General's Department, [12.50], [12.59].

Definition of ‘child or young person’

15.8 There is no definition of ‘child or young person’ in the *Crimes Act* or the *Acts Interpretation Act 1901* (Cth). For the purposes of the criminal justice system, the definition varies between the states and territories. This has an impact upon whether the trial will take place in an adult or children’s court, and on the sentencing principles and options that will apply. There have been various approaches in practice: while the CDPP has preferred to adopt the definitions of the relevant state or territory, in some circumstances magistrates have assumed that s 20C applies only to people under the age of 18 years.¹¹⁸³ Adoption of the state and territory definitions adds to disparity of treatment of young federal offenders across the jurisdictions.

Severity of sentence

15.9 An issue of concern is whether, due to the application of state or territory provisions, a young federal offender may be subjected to more severe punishment than an adult federal offender would receive for the same offence. Some, but not all, state juvenile justice legislation include a specific provision clarifying 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.¹¹⁸⁴

Access to diversionary options

15.10 Diversionary options are now a key element of the juvenile justice system, keeping significant numbers of young people from entering the formal court system.¹¹⁸⁵ Police cautioning has always been part of the system, but the process has been gradually formalised and in most cases is now set out in legislation. Each jurisdiction differs slightly in operation.

15.11 Juvenile conferencing became a popular option in the 1990s and has now been adopted in some form in all Australian jurisdictions. Juvenile conferencing has been described as a process

in which victim restoration is highly valued, and where the offender’s actions are denounced through reintegrative shaming. Affected community members are encouraged to participate (including especially the friends and family of the victims and offenders). The purpose of the meeting is to discuss how the crime has affected the various parties, and to decide as a group how the offender may repair harm.¹¹⁸⁶

15.12 There are jurisdictional differences in terms of the legislative framework, the kinds of offences that are conferenced, the extent of the conferencing process, the

1183 Commonwealth Director of Public Prosecutions, *Submission to Children and the Legal Process Inquiry 110*, 2 November 1995.

1184 See, eg, *Children (Criminal Proceedings) Act 1987* (NSW) s 6(e); *Youth Justice Act 1997* (Tas) s 5(b).

1185 J Wundersitz, ‘Pre-Court Diversion: The Australian Experience’ in A Borowski and I O’Connor (eds), *Juvenile Crime, Justice & Corrections* (1997) 270, 275–276.

1186 C Cuneen and R White, *Juvenile Justice: Youth and Crime in Australia* (2002), 368.

upper limit on conference outcomes, and the organisational placement or administration of the conferencing process.¹¹⁸⁷

15.13 Section 20C refers to a child or young person being ‘tried, punished or otherwise dealt with’. This might be interpreted to be broad enough to encompass pre-court diversionary options. However, it only applies to a child or young person who has been ‘charged with or convicted of’ a federal offence. Most pre-court diversionary options are considered and applied prior to laying a charge. It is therefore questionable whether a young person accused of, but not yet charged with, a federal offence can be subjected to a police caution or referred to a juvenile conference under state or territory provisions.

15.14 In addition to pre-court diversion, in some jurisdictions the court has the power to refer a young person to one of these diversionary procedures rather than deal with the charge in court.¹¹⁸⁸ While s 20C would allow these state or territory provisions to be applied, there are questions as to whether a diversionary process can be used to exercise federal jurisdiction. State and territory children’s courts have jurisdiction to hear and determine federal offences, but there is no power to refer a matter to a non-judicial body that is not constituted as required by the *Judiciary Act 1903* (Cth).¹¹⁸⁹ These constitutional problems do not arise where the court refers the young person to a conference process in order to assist the court in determining sentence; for example, when a finding of guilt has been made in court and the case is to be returned to the court for a sentencing decision.¹¹⁹⁰

Enforcement of orders

15.15 Another concern arising from the operation of s 20C is the enforcement of orders made by state or territory courts.¹¹⁹¹ There is some doubt as to whether s 20C gives state and territory courts the power to apply state or territory enforcement provisions if a young person convicted of a federal offence defaults. The CDPP has argued that it is therefore preferable for a court to impose a penalty based on provisions of Part IB of the *Crimes Act*, rather than relying on the relevant state or

1187 Ibid, 374.

1188 See, eg, *Young Offenders Act 1994* (WA) s 28, which allows a court to refer a young person to a juvenile justice team for a form of juvenile conferencing.

1189 *Judiciary Act 1903* (Cth) ss 39(2)(d), 68(3). See, eg, *Newman v A (A Child)* (1992) 67 A Crim R 342 which considered a Children’s Panel constituted under the *Child Welfare Act 1947* (WA). See also Commonwealth Director of Public Prosecutions, *Submission to Children and the Legal Process Inquiry 110*, 2 November 1995.

1190 See, eg, *Juvenile Justice Act 1992* (Qld) s 165; Commonwealth Director of Public Prosecutions, *Submission to Children and the Legal Process Inquiry 110*, 2 November 1995. However, there may be concerns if legislation limits the court’s discretion by forcing adoption of the outcome of the diversionary process.

1191 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [19.14]–[19.15].

territory provision.¹¹⁹² In the joint inquiry into children and the legal process, the ALRC and HREOC considered that, consistent with the intention of s 20C, the words ‘or otherwise dealt with’ in that section could be interpreted to include enforcement procedures. However, the ALRC and HREOC recommended that s 20C be amended to clarify the issue.

Disparity between the jurisdictions

15.16 In accordance with s 20C, most young federal offenders are sentenced under the juvenile justice legislation of the relevant state or territory.¹¹⁹³ The juvenile justice field has traditionally included more statutory and judge-made sentencing principles and procedural rules than those applied to adult offenders.¹¹⁹⁴ These do, however, differ from one jurisdiction to the next, and reflect changing philosophies of juvenile justice. For example, some but not all jurisdictions have introduced legislative principles reflecting a restorative justice policy.¹¹⁹⁵

15.17 There are also disparities between jurisdictions in relation to certain matters of sentencing procedure. For example, while pre-sentence reports are traditionally a feature of children’s courts, there are different statutory requirements for use of and access to the reports.¹¹⁹⁶ Other procedural issues that differ across jurisdictions include the requirement to give reasons for decisions, the extent of participation of the young person, and the participation of government bodies.

15.18 As with adults, sentencing options for young federal offenders are limited by the options available at the state or territory level. Legislative options are not always reflected in the range of programs that are available in practice.¹¹⁹⁷ There are particular differences between jurisdictions in the availability of appropriate sentencing options for vulnerable young people—such as those with a mental illness or an intellectual disability, Aboriginal and Torres Strait Islanders, young women, young people with an addiction, and young people with a first language other than English. In addition, the availability and operation of parole for young offenders varies between the states and territories, and this can greatly affect the outcome of a custodial sentence for young federal offenders.

1192 Commonwealth Director of Public Prosecutions, *Submission to Children and the Legal Process Inquiry 110*, 2 November 1995.

1193 But see discussion above, which suggests that s 20C is not mutually exclusive, so that Part IB provisions could be applied to young federal offenders.

1194 K Warner, ‘Sentencing Juvenile Offenders’ in A Borowski and I O’Connor (eds), *Juvenile Crime, Justice & Corrections* (1997) 307, 307.

1195 *Young Offenders Act 1993* (SA) s 3(3)(a); *Youth Justice Act 1997* (Tas) s 5(1)(d), (2)(a).

1196 K Warner, ‘Sentencing Juvenile Offenders’ in A Borowski and I O’Connor (eds), *Juvenile Crime, Justice & Corrections* (1997) 307, 309. Disparity in the requirements of pre-sentence reports may also exist for adult federal offenders: see Ch 11.

1197 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [19.65].

15.19 As part of the joint inquiry into children and the legal process, the ALRC and HREOC recommended that national standards for juvenile justice should be developed in order to ensure that juvenile justice systems in all Australian jurisdictions reflect Australia's international obligations, and to develop some uniformity across the jurisdictions. It was recommended that the standards 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.¹¹⁹⁸ The national standards were to include principles for sentencing of young offenders, the provision of 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.¹¹⁹⁹ Development of national standards such as these would eliminate many of the disparities across jurisdictions, while still allowing for developments based on local needs. These recommendations have not been implemented.

15.20 ALRC 44 recommended that a new approach be adopted for young federal offenders.¹²⁰⁰ Rather than using s 20C to rely on the state and territory systems, the ALRC recommended that young federal offenders be afforded the protections generally set out for adult federal offenders in the *Crimes Act*, and that an approved list of sentencing options be set out in Commonwealth legislation. Neither the legislation nor the practice in relation to young federal offenders has changed as a result of that recommendation.

Question 15–1 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?

Women offenders

15.21 One of the few available statistics on federal offenders is the number of female federal prisoners. At 1 October 2004, there were 87 female federal prisoners incarcerated in state and territory institutions, representing approximately 13% of the total federal prisoner population. This is nearly double the national average female prison population. For example, of the average daily number of full-time prisoners in Australia for the June 2004 quarter, 7% were women.¹²⁰¹

1198 Ibid, Rec 192. The proposed federal Office for Children has not been established.

1199 Ibid, Recs 239, 240, 244, 246.

1200 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [225].

1201 Australian Bureau of Statistics, *Corrective Services: June Quarter*, 4512.0 (2004).

15.22 According to many commentators, women prisoners are likely to be poor, under-educated and lacking in vocational skills; and to have experienced physical and sexual abuse. A large proportion of female inmates are Aboriginal women; or have a first language other than English, a mental illness or intellectual disability, or a drug or alcohol problem.¹²⁰² Many women prisoners are also mothers.

15.23 A survey of NSW court statistics for 1995–1999 revealed that social security fraud under the *Social Security Act 1991* (Cth) accounted for 15.6% of all offences committed by women coming before those courts.¹²⁰³ It is not known how many female federal offenders receive non-custodial sentences. Although not distinguishing between federal and state offenders, a 2002–03 Australian Bureau of Statistics survey revealed that 37% of females found guilty of an offence received a non-custodial sentence (such as monetary orders, community supervision orders or work orders).¹²⁰⁴

Matters relevant to sentencing

15.24 The sex of an offender should not, in itself, be a matter relevant to sentencing. However, ALRC 44 found that female offenders may experience special problems, and therefore recommended that the statutory list of factors to be taken into account in sentencing should ensure that factors such as poverty, unemployment and child-rearing responsibilities are appropriately taken into account.¹²⁰⁵ The factors set out in s 16A(m) and (p) of the *Crimes Act* now require a court to consider such matters when sentencing a federal offender.

15.25 It has been suggested that—due to their social and economic disadvantage—it is mostly women who come before the courts charged with having illegally obtained social security benefits or other pensions, and that judges tend to be harsher on social security fraud than on similar offences such as tax fraud.¹²⁰⁶ This raises the issue of whether the disadvantage of many female federal offenders is being adequately considered, and whether the matters a court is required to consider when sentencing a federal offender are adequate. Another option would be for federal legislation to provide for pre-sentence reports; a matter discussed further in Chapter 11.

1202 See, eg, C Quadrelli, 'Women in Prison: Where are We Going?' (1997) 2(2) *Themis* 15; J Martin, 'Mental Health Needs of Women Prisoners: Policy Implications' (2000) 18 *Just Policy* 32, 34; Sisters Inside, *Submission of Sisters Inside to the Anti Discrimination Commissioner for the Inquiry into the Discrimination on the Basis of Sex, Race and Disability by Women Prisoners in Queensland* (2004).

1203 P Poletti, *Sentencing Female Offenders in New South Wales—Sentencing Trends No 20* (2000) Judicial Commission of New South Wales, 2.

1204 Australian Bureau of Statistics, *Criminal Courts*, 4513.0 (2002–03), 3–4, 22.

1205 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [228].

1206 A Thacker, 'Department of Social Security Prosecutions and Sentencing of Women Offenders' in A Thacker (ed) *Women & The Law* (1998) 139, 139.

Sentencing options

15.26 A number of arguments have been raised against imposing certain sentencing options on women offenders. For example, it has been stated that because women's crimes are overwhelmingly economic in nature, and few female offenders pose a risk to society, imprisonment is inappropriate, costly and inefficient.¹²⁰⁷ Others argue that fines will not always be appropriate, particularly in social security matters where a restitution order or pecuniary penalty order has been made;¹²⁰⁸ and that community service and attendance centre orders are not feasible sentencing options for offenders with primary childcare responsibility unless alternative childcare arrangements are available.¹²⁰⁹ Other commentators have suggested that periodic detention, other than weekend detention, may be appropriate in the case of female offenders who are mothers.¹²¹⁰ Courts may require greater guidance as to appropriate sentencing options for female federal offenders.

Rehabilitation programs

15.27 ALRC 44 found that the criminal justice system has developed along paths designed predominantly for male offenders, and that few programs and facilities are available for female offenders.¹²¹¹ Commentators have observed that, as the majority of crime committed by women is economic crime, it is important that women can access programs focused on self-sufficiency.¹²¹² Others have noted that it is unclear whether drug abuse treatment and employment and education programs for women are effective. In addition, it is said that women are provided with far fewer opportunities for release into low security prisons, or for parole, work release or home detention.¹²¹³ This raises the issue of whether the Commonwealth should have any responsibility for the range and quality of rehabilitative programs and release programs available to female federal offenders.

Offenders with family and dependants

Matters relevant to sentencing

15.28 ALRC 44 recommended that one factor that should carry considerable weight in the sentencing decision is being the mother of a young child. The ALRC recommended that only in exceptional circumstances, which constitute a real concern for the safety of

1207 G Brand, 'Alternatives to Imprisonment for Female Offenders' (1993) 5(2) *Criminology* 25, 26.

1208 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [12.1009].

1209 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [228].

1210 G Brand, 'Alternatives to Imprisonment for Female Offenders' (1993) 5(2) *Criminology* 25, 28.

1211 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [228]. See also *Sisters Inside, Submission of Sisters Inside to the Anti Discrimination Commissioner for the Inquiry into the Discrimination on the Basis of Sex, Race and Disability by Women Prisoners in Queensland* (2004), 34.

1212 C Quadrelli, 'Women in Prison: Where are We Going?' (1997) 2(2) *Themis* 15, 21.

1213 M Cameron, 'Women Prisoners and Correctional Programs' (2001) 194 *Trends and Issues in Criminal Justice* 1.

others, should a mother be imprisoned.¹²¹⁴ Section 16A(2)(p) of the *Crimes Act* now requires a sentencing court to take into account the probable effect that any sentence or order would have on an offender's family or dependants. However, the section may require some clarification. Some courts have been unclear as to how this provision relates to the common law, and in particular, if the provision applies generally or only in exceptional circumstances.¹²¹⁵

15.29 Another issue is the provision of information to judicial officers about a federal offender's access to mother and child programs.¹²¹⁶ Cooperation between state, territory and federal authorities in relation to the provision of information to the courts about the availability of such programs may also be an issue.

Sentencing options

15.30 Offenders with family responsibilities may experience difficulties complying with community service and attendance centre orders. ALRC 44 recommended that childcare facilities should be part of attendance centre and community service schemes to ensure that federal offenders, and women in particular, do not miss out on community sentencing options.¹²¹⁷ It is not known to what extent this recommendation has been implemented. The location of family and dependants will often affect where an offender will serve a term of imprisonment. This issue is discussed in Chapter 4.

Mother and child programs

15.31 The adequacy of existing mother and child programs has also been questioned. One commentator has observed that while there are some programs in some prisons allowing children to stay with their mothers, the majority of programs are for infants.¹²¹⁸ It has also been suggested that mother and child programs should be available for remand, periodic detention and home detention.¹²¹⁹ A further issue is whether these programs should be available to male federal offenders who have primary responsibility for the care of a child.

Aboriginal or Torres Strait Islander offenders

15.32 The over-representation of ATSI people in the criminal justice system is well documented.¹²²⁰ Over-representation has been attributed to a number of factors,

1214 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), Rec 152.

1215 See *R v Sinclair* (1990) 51 A Crim R 418, 430; *R v Ceissman* (2001) 119 A Crim R 535, [36]; *R v Oancea* (1990) 51 A Crim R 141, 155.

1216 *R v Toggias* [2002] NSWCCA 363, [50]. See also *R v Hinton* [2002] NSWCCA 405.

1217 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [228].

1218 C Quadrelli, 'Women in Prison: Where are We Going?' (1997) 2(2) *Themis* 15, 17.

1219 M Loy, 'A Study of the Mothers and Children's Program in the NSW Department of Corrective Services' (Paper presented at Women in Corrections: Staff and Clients, Australian Institute of Criminology, Adelaide, 31 October 2000), 12.

1220 In 2003, Indigenous offenders were 15 times more likely to be in prison than non-Indigenous persons: Australian Bureau of Statistics, *Year Book Australia 2003: Crime and Justice—Indigenous Prisoners*,

including social, economic and cultural disadvantage; a history of colonisation; and discrimination. It is not known how many federal offenders are Aboriginal or Torres Strait Islanders, although the Attorney-General's Department (AGD) has advised that there are few ATSI federal prisoners.¹²²¹ Social security fraud has been identified as one of the fundamental factors that bring ATSI women into contact with the criminal justice system.¹²²²

Matters relevant to sentencing

15.33 Section 16A(2)(m) of the *Crimes Act* requires the court to take into account, if relevant, a person's 'cultural background'. However, the section does not list specific considerations applicable to the sentencing of ATSI offenders.¹²²³ This raises the issue of whether certain matters that are particular to the sentencing of ATSI offenders should be set out in federal legislation. In 2000, the NSW Law Reform Commission (NSWLRC) considered this issue in relation to state offenders, but concluded that it was unnecessary to do so.¹²²⁴

15.34 Another issue is whether the *Crimes Act* should be amended to allow consideration of Aboriginal customary law when sentencing an ATSI offender. The ALRC's final report on the recognition of Aboriginal customary law (ALRC 31) recommended a general legislative endorsement of the practice of taking Aboriginal customary laws into account in sentencing.¹²²⁵ This recommendation has not been implemented.

Sentencing options

15.35 The principle that imprisonment should be a punishment of last resort, enshrined in s 17A of the *Crimes Act*, is 'acknowledged to be of great importance for the sentencing of Aboriginal and Torres Strait Islander offenders whose rate of imprisonment shows a significant degree of over-representation'.¹²²⁶ It has also been

Australia Now Australian Bureau of Statistics <www.abs.gov.au> at 4 November 2004. See also E Johnston, *National Report of the Royal Commission into Aboriginal Deaths in Custody* (1991); National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, *Bringing Them Home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997); New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders*, Report 96 (2000); Australian Law Reform Commission, *The Recognition of Aboriginal Customary Law*, ALRC 31 (1986).

1221 Attorney-General's Department, *Consultation*, Sydney, 31 August 2004.

1222 C Quayle, 'Prevention in Indigenous Communities' (Paper presented at Practice and Prevention: Contemporary Issues in Adult Sexual Assault in NSW Conference, 12-14 February 2003).

1223 Some courts have set out factors that are given weight when sentencing ATSI offenders: see New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders*, Report 96 (2000), Ch 2.

1224 *Ibid*, [2.47].

1225 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Law*, ALRC 31 (1986), [517]. For a similar conclusion, see New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders*, Report 96 (2000), [3.89].

1226 New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders*, Report 96 (2000), [2.6].

noted that ATSI offenders can experience problems accessing parole and regional post-release support programs.¹²²⁷

15.36 The suitability and availability of various alternatives to full-time custody also raise issues. For example, home detention—while generally considered to be an appropriate option for ATSI offenders because it helps keep families intact—can also be intolerable for some ATSI people.¹²²⁸ ATSI offenders in remote areas may be precluded from periodic detention if they live too far from periodic detention centres. One sentencing option that has been raised in relation to ATSI offenders is having a third party manage an offender's income, if the offender has been convicted of alcohol, drug or gambling related offences.¹²²⁹

15.37 These matters raise a number of issues concerning whether the Commonwealth should assume greater responsibility for the administration of federal offenders in relation to parole arrangements and non-custodial sentencing options.¹²³⁰ A further issue is whether courts require greater guidance about appropriate sentencing options for ATSI offenders. This information could also be provided in a pre-sentence report.¹²³¹

Community participation in sentencing

15.38 There has been widespread support for the principle of involving ATSI communities in the sentencing of ATSI offenders. The aim of this involvement has been to make court processes more culturally appropriate, to engender greater trust between ATSI communities and judicial officers, and to permit a more informal and open exchange of information about defendants and their cases.

15.39 Methods of ATSI community involvement in sentencing include Koori Courts in Victoria, circle sentencing in NSW and Western Australia, and justice groups in Queensland.¹²³² While these methods vary greatly, they generally involve the community providing information to judicial officers at sentencing. Although it is too early to make an assessment, community participation may help to address the over-representation of ATSI people in the criminal justice system. For example, to overcome the cycle of Indigenous imprisonment for unpaid fines, some courts

1227 Ibid, [5.16]–[5.29].

1228 Ibid, [5.30]–[5.46].

1229 The Minister for Family and Community Services, Senator the Hon Kay Patterson, raised this issue in the early stages of the Inquiry.

1230 See discussion in Ch 13.

1231 Pre-sentence reports are further discussed in Ch 11.

1232 The Victorian Government has recently established a Koori Court (Criminal Division) of the Children's Court: *Children and Young Persons (Koori Court) Act 2004* (Vic).

prioritise alternative penalties such as community service or adopt graduated methods of paying fines.¹²³³

15.40 It is not known to what extent ATSI federal offenders access these programs, and whether they are relevant to federal offenders. The ALRC is interested in hearing whether federal legislation should provide for ATSI community participation in the sentencing of federal offenders.

Communication issues

15.41 The NSWLRC identified that many Aboriginal people experience difficulties in communicating effectively as witnesses in the courtroom and as defendants in the sentencing process. Some of the difficulties experienced by Aboriginal people in this regard are shared with other minority groups in the community. However, other difficulties originate in distinctive features of Aboriginal language and culture.¹²³⁴ The ALRC is interested in hearing whether these issues also arise in relation to the sentencing of ATSI federal offenders, and what should be done to address them.

Offenders with a first language other than English

15.42 It is not known how many federal offenders are persons whose first language is not English. However, the ALRC has heard that a significant proportion of federal prisoners who have committed federal drug offences fall into this category.¹²³⁵

Matters relevant to sentencing

15.43 In its final report on multiculturalism and the law (ALRC 57), the ALRC examined the relevance of cultural background to sentencing. The ALRC recommended that an offender's cultural background should be specified as a factor to be taken into account when the court is passing sentence, and when the court is considering whether it is appropriate to proceed to a conviction.¹²³⁶ These recommendations were implemented by the introduction of 'cultural background' as a factor under s 16A(2)(m) of the *Crimes Act*.¹²³⁷ Further, an offender's isolation in prison, due partly to the fact that he or she cannot speak English, has been held to be a relevant consideration when making a reduction of sentence based on the

1233 E Marchetti and K Daly, 'Indigenous Courts and Justice Practices in Australia' (2004) 277 *Trends and Issues in Crime and Criminal Justice* 1, 5.

1234 New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders*, Report 96 (2000), [7.1].

1235 Attorney-General's Department, *Consultation*, Sydney, 31 August 2004. At 1 October 2004, 456 federal prisoners (69%) had committed a federal drug offence.

1236 Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC 57 (1992), [8.14]–[8.15].

1237 See *Crimes and Other Legislation Amendment Act 1994* (Cth).

circumstances of the confinement under s 16A(3).¹²³⁸ This provision is discussed in Chapter 8.

Communication issues

15.44 Many federal drug offenders whose first language is not English have stated that they do not understand the judicial process.¹²³⁹ The ALRC examined these issues in ALRC 57, recommending that a person accused of a federal offence who does not understand English well enough to comprehend what is said in the court should be entitled to an interpreter to interpret the whole of his or her trial.¹²⁴⁰ Various provisions of the *Crimes Act* require the court to explain a sentence to a federal offender 'in language likely to be readily understood by the person'.¹²⁴¹ The ALRC is interested in hearing whether federal offenders with a first language other than English continue to experience difficulties understanding the sentencing process and their sentence.

Rehabilitation programs

15.45 There is little information available about prison programs for federal offenders with a first language other than English. Although not distinguishing between state and federal offenders, a recent submission by 'Sisters Inside' to the Queensland Anti-Discrimination Commission noted that culturally and linguistically diverse women experience difficulties accessing the programs provided by the Queensland Department of Corrective Services because of language difficulties.¹²⁴² The ALRC is interested in comments about whether federal offenders with a first language other than English have adequate access to rehabilitative programs as part of, or in addition to, custodial or non-custodial sentencing options.

Offenders with drug addiction

15.46 Drug addiction (which is used in this chapter to include alcohol addiction) is commonly regarded as a significant factor in offending behaviour.¹²⁴³ Crimes commonly associated with drug use are property crimes (which are generally state and

1238 *R v Ng Yun Choi* (Unreported, Supreme Court of New South Wales, Sully J, 4 September 1990), 6. However, on its face, s 16A(3) appears to apply to sentencing options other than imprisonment.

1239 Attorney-General's Department, *Consultation*, Sydney, 31 August 2004.

1240 See Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC 57 (1992), [3.32]–[3.36], [10.47].

1241 See *Crimes Act 1914* (Cth) ss 16F(2), 19B(2), 20(2), 20AB(2).

1242 Sisters Inside, *Submission of Sisters Inside to the Anti Discrimination Commissioner for the Inquiry into the Discrimination on the Basis of Sex, Race and Disability by Women Prisoners in Queensland* (2004), 39.

1243 G Taylor, 'Should Addiction to Drugs be a Mitigating Factor in Sentencing?' (2002) 26 *Criminal Law Journal* 324, 324.

territory crimes) and fraud.¹²⁴⁴ It is not known what proportion of federal offenders has a drug addiction.

Matters relevant to sentencing

15.47 Courts regularly consider drug addiction to be a circumstance relevant to the sentencing of offenders. The issue arises whether federal legislation should expressly list drug addiction as a matter to be considered when sentencing federal offenders. Another option would be the provision of a pre-sentence report on the drug addiction of a federal offender.¹²⁴⁵

15.48 A further issue for consideration is whether federal legislation should provide that, in certain circumstances, drug addiction is a mitigating factor in sentencing a federal offender. Drug addiction is generally not considered to be a mitigating factor or an excuse.¹²⁴⁶ However, some commentators argue that there are circumstances in which drug addiction should be a mitigating factor.¹²⁴⁷

Sentencing options

15.49 In recent years treatment-oriented courts for offenders with a drug addiction have been established in NSW, South Australia, Western Australia, Queensland and Victoria. These specialist courts differ from each other. However, they generally include the prosecution and defence working together, early identification and placement on treatment programs, frequent drug testing, and ongoing involvement of the magistrate or judge with the offender.¹²⁴⁸

15.50 It is too early to make definite statements about the effectiveness of Australian drug courts. Recent evaluations have identified a number of positive outcomes from drug courts, including reductions in drug use and criminal recidivism both during and after program completion; improvements in participants' health and well-being; and social benefits such as increases in employment, education and reunification of families.¹²⁴⁹

1244 See K Willis and C Rushforth, 'The Female Criminal: An Overview of Women's Drug Use and Offending Behaviour' (2003) 264 *Trends and Issues in Crime and Criminal Justice* 1, 5; T Makkai and J Payne, *Drugs and Crime: A Study of Incarcerated Male Offenders* (2003) Australian Institute of Criminology, xv.

1245 Pre-sentence reports are discussed in Ch 11.

1246 See, eg, *R v Henry* (1999) 46 NSWLR 346, [268]–[270], [273].

1247 These circumstances include when the facts show that an addiction has spiralled out of control and that the accused is a person whose weakness of character is that of a drug addict rather than a hardened offender with contempt for the law and society: G Taylor, 'Should Addiction to Drugs be a Mitigating Factor in Sentencing?' (2002) 26 *Criminal Law Journal* 324, 342.

1248 D Indermaur and L Roberts, 'Drug Courts in Australia: The First Generation' (2003) 15 *Current Issues in Criminal Justice* 136, 145.

1249 Crime Research Centre–University of Western Australia, *Evaluation of the Perth Drug Court Pilot Project* (2003) Department of Justice (WA); T Eardley and others, *Evaluation of the New South Wales Youth Drug Court Pilot Program: Final Report* (2004) Social Policy Research Centre. See also *Drug*

15.51 Drug courts are currently not available to federal offenders, but one option would be for federal legislation to provide for federal offenders to have access to state or territory drug courts. If this course were taken, the availability of these courts in some states and territories but not others might raise issues of equality of treatment—a drug addicted federal offender in one state may have the benefit of a drug program and avoid incarceration, whereas a similar federal offender in another state may not. Sentencing options are further discussed in Chapter 7.

Rehabilitation programs

15.52 Little is known about the effectiveness of drug programs in Australian prisons, which can range from drug and alcohol counselling to methadone programs. Methadone programs are not available at all prisons. The availability of drug programs in some prisons and not others may raise issues of equality of treatment of federal offenders. Another issue is whether the Commonwealth should assume greater responsibility, or whether federal legislation should provide, for the availability of drug programs for federal offenders either as part of, or in addition to, custodial or non-custodial sentencing options.

Offenders with problem gambling

15.53 Problem gambling has been defined as ‘a situation when a person’s gambling activity gives rise to harm to the individual, and/or his or her family and may extend to the community’.¹²⁵⁰ Research points to a causal relationship between problem gambling and the commission of crime, which is usually non-violent property crime.¹²⁵¹ It is not known how many federal offenders are problem gamblers. However, the issue of problem gambling has arisen in matters involving social security fraud and defrauding the Commonwealth.¹²⁵²

Matters relevant to sentencing

15.54 A number of cases have held that problem gambling is not a mitigating factor when sentencing.¹²⁵³ However, in some cases the court has held that problem gambling is relevant to fixing a longer parole period,¹²⁵⁴ and when assessing an offender’s moral culpability and the extent to which the sentence should incorporate an element of

Courts: Reduced Drug Related Crime—AICrime Reduction Matters No 24 (2004) Australian Institute of Criminology.

1250 This definition was cited with approval in Productivity Commission, *Australia’s Gambling Industries*, Report 10 (1990), [6.3].

1251 Y Sakurai and R Smith, *Gambling as a Motivation for the Commission of Financial Crime* (2003) Australian Institute of Criminology, 3.

1252 See *R v Chapman* [2001] NSWCCA 457; *R v Perkins* [2000] VSCA 132; *Eva v Director of Public Prosecutions (Cth)* (1999) 76 SASR 1; *R v Molesworth* [1999] NSWCCA 43.

1253 See, eg, *R v Henry* (1999) 46 NSWLR 346; *Director of Public Prosecutions (Cth) v Hammond* (1994) 116 FLR 98; *Eva v Director of Public Prosecutions (Cth)* (1999) 76 SASR 1.

1254 *R v Molesworth* [1999] NSWCCA 43.

general deterrence.¹²⁵⁵ In rare cases, pathological gambling will go to mitigation of penalty.¹²⁵⁶ One commentator has argued that because gambling is state sanctioned, and gambling addicts generally do not commit crimes because of greed, problem gambling should be considered as a mitigating factor by a court when sentencing.¹²⁵⁷ This raises the question of whether a court should be required to consider problem gambling when sentencing a federal offender, and whether it should be a mitigating factor.

Sentencing options

15.55 A study that examined 2,779 cases heard by local and district courts in NSW between 1995 and 1999 found that almost two-thirds of the offenders with gambling problems received custodial sentences, and only a few were ordered to undergo counselling or treatment for their gambling problems after completing custodial sentences.¹²⁵⁸ The Australian Institute of Criminology has suggested that non-custodial orders with strict conditions that the offenders undergo counselling and treatment for their addiction may be more effective than the imposition of full-time custodial orders, even in serious cases.¹²⁵⁹ One option that has been raised in relation to ATSI offenders is having a third party manage the income of a person who has been convicted of a gambling-related offence. This also raises the issue of whether courts require greater guidance as to appropriate sentencing options for offenders with problem gambling.

Rehabilitation programs

15.56 Research has indicated that the rehabilitation of offenders who commit gambling-related crimes is vital in preventing offending in the future.¹²⁶⁰ However, the adequacy of facilities available for the treatment of problem gambling in prison has been questioned.¹²⁶¹ Another issue is whether the Commonwealth should assume greater responsibility, or federal legislation should provide, for the availability of remedial gambling programs for federal offenders as part of, or in addition to, custodial or non-custodial sentencing options.

Corporations

15.57 A corporation is an artificial entity that the law treats as having its own legal personality, separate from and independent of the persons who make up the

1255 *R v Novak* (1993) 69 A Crim R 145.

1256 *R v Petrovic* [1998] VSCA 95, [8].

1257 G Taylor, 'Is Addiction to Gambling Relevant in Sentencing?' (2004) 28 *Criminal Law Journal* 141, 159.

1258 P Crofts, *Gambling and Criminal Behaviour: An Analysis of Local and District Court Files* (2002) Institute of Criminology, Ch 10.

1259 Y Sakurai and R Smith, *Gambling as a Motivation for the Commission of Financial Crime* (2003) Australian Institute of Criminology, 5.

1260 P Crofts, *Gambling and Criminal Behaviour: An Analysis of Local and District Court Files* (2002) Institute of Criminology, 68.

1261 *Ibid*, 136.

corporation.¹²⁶² A corporation can commit a federal offence. For example, the *Corporations Act 2001* (Cth), the *Trade Practices Act 1974* (Cth) and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) include federal offences that attract penalties for corporations. However, because corporations are not natural persons and cannot be subject to imprisonment, they require special consideration in relation to sentencing law.¹²⁶³ The ALRC did not consider corporations in detail in its last inquiry.¹²⁶⁴

Matters relevant to sentencing

15.58 Section 16A of the *Crimes Act* contains a number of factors that are relevant to the sentencing of a corporation, and other factors that are not. This raises the issue of whether federal legislation should set out factors that are relevant specifically to corporate offenders. In its final report on the sentencing of corporate offenders, the NSWLRC concluded that, in addition to the general sentencing factors, NSW sentencing legislation should set out factors that are particularly relevant to corporate offenders. 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, effect of the penalty on services to the public).¹²⁶⁵

15.59 A related issue is whether courts would benefit from pre-sentence reports or victim impact statements in sentencing a corporation. Both issues were considered by the NSWLRC, which recommended the use of pre-sentence reports for corporations¹²⁶⁶ but rejected the use of victim impact statements.¹²⁶⁷

Sentencing options

15.60 The difficulties in devising appropriate penalties for corporations have been discussed by many commentators and review bodies, including the ALRC and the NSWLRC.¹²⁶⁸ These difficulties relate both to the particular characteristics of the

1262 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), [1.4].

1263 *Ibid.*, [1.4].

1264 ALRC 44 recommended that the question of controlling corporate behaviour through the criminal justice system be referred to it for inquiry and report: Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [198]. The ALRC has not received terms of reference for such an inquiry.

1265 New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), Rec 3.

1266 *Ibid.*, [14.7], Rec 22.

1267 *Ibid.*, [14.23].

1268 See, eg, B Fisse, 'Recent Developments In Corporate Criminal Law and Corporate Liability to Monetary Penalties' (1990) 13(1) *University of New South Wales Law Journal* 1; Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), Ch 28; Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, ALRC 68 (1994), [10.2]–[10.29]; New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003).

corporation as a legal person (in particular, that corporations cannot be imprisoned) and to the varied nature of corporations (in size, purpose and financial viability).

15.61 As corporations cannot be imprisoned, fines are the most common form of sanction imposed for corporate offences.¹²⁶⁹ Reliance on fines as penalties for corporations has been the subject of much criticism including that fines do not guarantee behavioural change in a corporation, and can be viewed as just another business expense.¹²⁷⁰ Recent reviews have concluded that corporate offenders should be treated as a special category of federal offender with tailored penalties that differ from those imposed on individual offenders.¹²⁷¹ These sentencing options could include:

- *Equity fines.* An equity fine involves three stages: transfer of shares from the corporation to the state criminal compensation fund, disposal of the shares by the fund, and distribution of the assets to persons affected by the conduct of the corporation.
- *Turnover fines.* A similar type of fine to the equity fine, but based on the annual turnover of the corporation.
- *Dissolution or deregistration of the corporation.* Sometimes referred to as ‘corporate capital punishment’.¹²⁷²
- *Disqualification.* Disqualification orders are designed to restrain the activities of corporations, for example, orders to cease certain commercial activities for a particular period, to refrain from trading in a specific geographic region, revoking or suspending licences for particular activities, disqualifying the corporation from particular contracts (for example, government contracts), or freezing the corporation’s profits.
- *Internal discipline orders.* These orders can involve the appointment by the corporation of a compliance director who is required to report periodically to the relevant regulator on the compliance strategies implemented by the corporation.

1269 The differential treatment of individuals and corporations in relation to the quantum of fines is provided for in the primary legislation or otherwise in s 4B of the *Crimes Act 1914* (Cth).

1270 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [28.8].

1271 See *Ibid*, Ch 28; New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), [6.20].

1272 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.

- *Organisational reform orders.* Organisational reform orders take the form of ‘a court order that requires a company’s organisation and methods to be reviewed, under court scrutiny, in order to avoid a repetition of the offence in issue’.¹²⁷³ This type of sanction implies that development and implementation of a compliance program is desirable.¹²⁷⁴
- *Corporate probation.* Probation orders are orders made for the purpose of ensuring that a corporation does not engage in the contravening conduct, similar conduct or related conduct during the period of the order. Examples of these orders include the establishment of a compliance program or education and training program, or the revision of the internal operations of the business.
- *Punitive injunctions.* Punitive injunctions are a form of corporate probation order. The punitive element might be that the reforms need to be undertaken within a short period of time or a requirement that particular members of senior management be actively involved.
- *Community service orders.* Community service orders involve a corporate offender undertaking or contributing to work or projects that benefit the community or a part of the community in some way.
- *Disclosure orders.* An order requiring a corporation that has contravened the law to disclose information in relation to the contravention.
- *Corrective advertising.* Corrective advertising orders are aimed at protecting the public by ‘correcting’ the harm caused by the offending conduct.
- *Adverse publicity orders.* Adverse publicity orders are aimed at ‘shaming’ the offending corporation by requiring a public confession of wrongdoing.
- *Attendance orders.* This type of order allows a sentencing court to require the presence of directors, the company secretary or the executive officer at a corporation’s sentencing hearing.¹²⁷⁵

15.62 These sentencing options raise several questions in relation to federal offenders:

- what type of sentencing options should be available in relation to corporate federal offenders;

1273 Australian Law Reform Commission, *Sentencing: Penalties*, DP 30 (1987), [297].

1274 Compliance programs are internal monitoring systems employed by corporations to assess the corporation’s level of compliance with legal and other requirements.

1275 See New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 102 (2003), [14.39], Rec 23.

- should these options be set out in legislation; and
- if so, should they be set out in the legislation creating the federal offence, or in an Act of general application, such as the *Crimes Act* or a dedicated federal sentencing statute?

Summary

15.63 As mentioned at the beginning of this chapter, there is little information about the characteristics of federal offenders or the number of federal offenders who may fall into categories calling for special consideration.

15.64 One overarching question is whether different categories of offenders are dealt with adequately under the existing principles of Part IB of the *Crimes Act*, as supplemented by relevant state and territory law; or whether special provision should be made for them. There appears to be a consensus that at least some categories of offender (such as young offenders) may call for special consideration in sentencing.

15.65 If special consideration is called for, a further question arises as to whether this should occur at the federal level (for example, through amendment to Part IB of the *Crimes Act*), or at the state and territory level. One relevant consideration is the impact of different legal regimes on the equal treatment of federal offenders, regardless of the state or territory in which they are sentenced.

15.66 If special treatment is warranted, there are several ways in which this could be achieved. It may be reflected in different sentencing processes, such as circle sentencing for ATSI offenders, or pre-sentence reports that provide the court with information on the social background of the offender. Additionally, special treatment might be reflected in the factors that a court is required to take into account in sentencing a federal offender. This is already recognised in s 16A of the *Crimes Act* in so far as a court must have regard to the age or cultural background of an offender, or the effect of the sentence on the offender's family or dependants. Alternatively, the particular characteristics of an offender might be accommodated through the programs made available to offenders by state and territory correctional facilities.

15.67 The ALRC invites comments on the categories of federal offender that may require special consideration in relation to sentencing, and on the nature of special consideration required.

Question 15–2 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; offenders with problem gambling; and corporations and their directors?

16. Information, Education and Cooperation

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Introduction

16.1 This chapter considers information, education and cooperation issues that arise in relation to the sentencing and administration of federal offenders. The first section is concerned with the collection and dissemination of information about federal offences and federal offenders. The following section considers whether the federal criminal justice system should be subject to reporting requirements in relation to federal offenders. The chapter then considers education issues, including judicial education, legal practitioner training and university legal education. The final section considers cooperation within and between the Commonwealth, states and territories in relation to federal offenders.

Information

16.2 Information on federal offences and federal offenders is crucial when evaluating the sentencing process and developing policies in relation to the sentencing and administration of federal offenders. This information may also facilitate consistency in

sentencing;¹²⁷⁶ assist defence lawyers in advising their clients; help offenders and victims to understand how the sentencing process affects them; and enhance community awareness of sentencing matters by presenting accurate and comprehensive information to the media and the public.¹²⁷⁷

Information on federal offences and federal offenders

16.3 While there is a large amount of information on the state and territory criminal justice systems, there is very little statistical information on federal offences and federal offenders. Information that is presented on a national basis rarely distinguishes between federal offences and offenders, on the one hand, and state and territory offences and offenders, on the other. The majority of available data on the federal criminal justice system relates to federal prisoners. As discussed in Chapter 2, there is very little information on the number of federal offenders who receive non-custodial sentences.

16.4 A number of organisations collect information on federal offences and federal offenders, including the Commonwealth Director of Public Prosecutions (CDPP), the Australian Bureau of Statistics, and the Commonwealth Attorney-General's Department (AGD). The Judicial Commission of New South Wales (JCNSW) and state and territory departments of corrective services also collect some information on federal offences and federal offenders. The Australian Institute of Criminology (AIC) conducts research and publishes material on crime in Australia.

Commonwealth Director of Public Prosecutions

16.5 The CDPP collects a significant amount of information about federal offences and 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.¹²⁷⁸

16.6 A summary of the CDPP's data is published in its annual reports.¹²⁷⁹ These data give some indication of the number of federal offenders dealt with by the CDPP each year. However, it is not a comprehensive account of federal prosecutions because other federal agencies have the power to prosecute federal offences.¹²⁸⁰ Further, although these statistics show what kind of offences are being prosecuted by the CDPP by

1276 See further Ch 10.

1277 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [269].

1278 Commonwealth Director of Public Prosecutions, *Correspondence*, 20 December 2004.

1279 See further Ch 2.

1280 These agencies include the Australian Taxation Office and the Australian Securities and Investments Commission.

categorising the information in terms of legislation and referring agency, the offences are grouped in broad categories. Apart from data on the charges dealt with under the *Crimes Act 1914* (Cth) and the *Criminal Code* (Cth), no information is given on the number of defendants dealt with under specific federal offence provisions. In particular, information about the number of charges dealt with does not assist in determining the number of persons convicted of a federal offence because one person may be the subject of multiple charges. Additionally, there are no data on federal offender characteristics such as age, sex or nationality.

Australian Bureau of Statistics

16.7 The National Centre for Crime and Justice Statistics (NCCJS) of the Australian Bureau of Statistics produces a number of publications, including the *Criminal Courts* publication and the *Corrective Services* publication.¹²⁸¹ The *Criminal Courts* publication provides statistics on the administration of criminal justice across Australia. Information is provided on the age and sex of defendants, and the outcomes of cases finalised. The publication also includes information on the principal sentence type imposed on defendants who have been proven guilty.¹²⁸² However, the information does not differentiate between federal, state and territory offenders. The *Corrective Services* publication is published quarterly and presents monthly and quarterly information on persons in custody or serving community based sentences. However, apart from providing the number of federal prisoners each quarter, none of the data distinguishes between federal, state and territory offenders.

16.8 Until 2001, the NCCJS also published a *Prisoner Census* on an annual basis, which presented information on all prisoners who were in custody on 30 June each year. This information did not differentiate between federal, state and territory offenders.

Commonwealth Attorney-General's Department

16.9 The AGD maintains a federal prisoner database, which contains data about current federal prisoners. There is no historical data on individual prisoners because their details are deleted from the system when they have completed their sentences.¹²⁸³ The AGD produces monthly statistics on the federal prisoner population. The information is categorised in terms of 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).

1281 Australian Bureau of Statistics, *Themes—National Centre for Crime and Justice Statistics* <www.abs.gov.au> at 16 December 2004.

1282 'Proven guilty' refers to an outcome of criminal proceedings in which a court accepts a guilty plea entered by a defendant or arrives at a guilty verdict following a trial: Australian Bureau of Statistics, *Criminal Courts*, 4513.0 (2002–03), 81.

1283 Australian Institute of Criminology, *Consultation*, Canberra, 1 October 2004.

16.10 The AGD also collects information on the number of federal prisoners at the end of each month, according to whether they are full-time, periodic detention or home detention prisoners; 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.

Judicial Commission of New South Wales

16.11 The JCNSW has established the Judicial Information Research System (JIRS) in relation to NSW criminal cases. JIRS includes data on some federal criminal matters dealt with in NSW courts. The system is comprised of a collection of nine computerised databases, including a sentencing statistics database, a judgments database (containing full text sentencing decisions), commentary and sentencing principles, and electronic versions of all NSW and Commonwealth legislation. Hypertext links connect the various databases within the system. The sentencing statistics database provides statistical information in the form of graphs and tables on the range and frequency of penalties imposed in the Supreme Court, District Court, Local Court and Children's Court. On entering specific details of the offence and the offender (such as age, prior record, bail status and plea) information is displayed on the 'going rate' or 'tariff' for the offence.

Sentencing databases in other states and territories

16.12 The Victorian Department of Justice is currently developing a sentencing information system for Victoria, similar to JIRS in NSW. The Judicial Officers' Information Network (JOIN) is expected to be in operation by March 2005. The ACT Supreme Court has also developed a sentencing database to allow accurate cross-referencing of data and provision of statistics on categories of offences. NiuMedia Pacific (tasInLaw) publishes a Tasmanian Sentencing Database, which contains more than 3,000 Comments on Passing Sentence (COPS) as well as details of sentences handed down by the Supreme Court of Tasmania from 1989 onwards. A number of states and territories (including South Australia, Queensland and the Australian Capital Territory) publish sentencing remarks on the Internet.

State and territory corrective services

16.13 State and territory departments of corrective services also hold information on federal prisoners. For example, the Western Australian Department of Corrective Services has a database that includes information on federal prisoners such as the name of the prison where the offender is housed, the federal offence committed by the prisoner, the estimated date of release, and the prisoner's security rating.

Australian Institute of Criminology

16.14 The AIC conducts research and publishes material on the extent, nature and prevention of crime in Australia to provide advice to the Australian Government and other key clients. The AIC has not conducted a study specifically on federal offenders.

However, many of the AIC's studies and publications relate to topics relevant to federal offences and federal offenders. For example, the AIC has conducted a study on serious fraud, which included consideration of federal offenders.¹²⁸⁴ The AIC has advised the ALRC that it could collect and analyse information about federal prisoners and other federal offenders on an ongoing basis.¹²⁸⁵

A national database on federal offenders?

16.15 Chapter 10 discusses whether a comprehensive national database should be established in relation to federal offenders. The establishment of such a database raises a number of important issues such as: what information should be collected; who should collect it; how should it be classified consistently; and how should it be disseminated.

What information should be collected?

16.16 A major issue for consideration is what information should be collected on federal offences and federal offenders. Chapter 10 noted the need for information on the federal offences for which sentences are imposed; the type and quantum of penalties imposed for particular offences; and the relevant characteristics of the offence and the offender that were taken into account, and the weight given to them.

16.17 Chapter 2 noted that, although information is available on the federal prisoner population at points in time, information is not available on the number of federal arrivals and departures over a period of time. Further, current data on federal prisoners categorise the prison population in broad offence categories. It would be valuable to have more specific information on the offences committed by federal prisoners.

16.18 Chapter 7 noted that there is no information on the number of federal offenders receiving non-custodial sentences each year. There are also no data on the number of federal offenders failing to comply with the conditions of custodial and non-custodial sentences. Chapter 14 stated that there is no information on the number of federal offenders with a mental illness or an intellectual disability, or on how many persons are dealt with each year under Divisions 6 to 9 of Part IB of the *Crimes Act*.

16.19 Chapter 15 noted the lack of data on special categories of federal offenders. For example, there are no data on whether federal offenders are children or young persons, women, or Aboriginal or Torres Strait Islander peoples. It is also not known how many federal offenders are corporations. The ALRC is interested in hearing whether further information about federal offences or federal offenders should be collected.

1284 Australian Institute of Criminology and PricewaterhouseCoopers, *Serious Fraud in Australia and New Zealand—Research and Public Policy Series No 48* (2003).

1285 Australian Institute of Criminology, *Consultation*, Canberra, 1 October 2004.

Who should collect it?

16.20 Comprehensive data on federal offences and federal offenders would require information to be collected from every state and territory to enable comparisons to be made between jurisdictions. The collection of information relating to federal offences and federal offenders would also require coordination between the Commonwealth, state and territory institutions involved in the federal criminal justice system. This raises the issue of what organisation or organisations should be responsible for collecting this information.

16.21 As noted above, a number of organisations already collect some information about federal offences and federal offenders. Organisations such as the AIC have experience in the analysis of data on criminal justice at a national level. It may be preferable to have a single body coordinating the collection and distribution of this information. One option for consideration is the establishment of a national sentencing council or an inspectorate or office of federal offenders, which could collect, organise and publish such information.¹²⁸⁶

How should it be classified consistently?

16.22 The involvement of different institutions across a number of jurisdictions raises issues about consistency in the collection and classification of information. For example, not all state and territory departments of corrective services currently collect the same information on federal prisoners. In some jurisdictions a sentencing option may be classified as custodial, and in others, non-custodial, and descriptions of offences and offender characteristics may differ. Further, in some cases information is collected for administrative rather than research purposes, which may impact on the quality of the data.

16.23 The collection of information about federal offences and federal offenders from various sources may require a standardised classification system. The National Criminal Justice Statistical Framework (NCJSF) and the Australian Standard Offence Classification (ASOC) developed by the Australian Bureau of Statistics may assist in promoting uniformity in the classification and organisation of information about federal offences and federal offenders.¹²⁸⁷

How should it be disseminated?

16.24 The ALRC is interested in the views of stakeholders about how information regarding federal offences and federal offenders should be shared among judicial

1286 The establishment of a national sentencing council is discussed in Ch 10; an inspectorate or office of federal offenders is discussed in Ch 12.

1287 The NCJSF provides a structure for organising, collecting and reporting data about crime and the criminal justice system. The ASOC has been developed for use within Australia for the production and analysis of crime and justice statistics. The objective of the classification is to provide a uniform national statistical framework for classifying offences for use by justice agencies and other persons and agencies with an interest in crime.

officers, policy makers, and others involved in the federal criminal justice system. JIRS, the various publications of the NCCJS, and the prosecution tables in CDPP annual reports are all examples of how this information may be presented and distributed.

16.25 In June 2004, the AGD made a grant to the National Judicial College of Australia (NJCA) to fund a scoping project for a national sentencing database relating to federal offences. The NJCA, the CDPP and the JCNSW are currently discussing a proposal for a joint project under which the NJCA would fund a Commonwealth sentencing database to be established using CDPP data and JCNSW technology.

Question 16–1 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?

Key performance indicators

16.26 Chapter 12 noted that there appears to be no monitoring mechanism in place to ensure that states and territories fulfil their obligations in relation to federal offenders on behalf of the Australian Government. In that chapter, the ALRC raised the issue of whether a body, such as an inspectorate or office of federal offenders, should be established to oversee the management of sentences being served by federal offenders. Another method of encouraging accountability in relation to the sentencing, imprisonment, administration and release of federal offenders is to require the various agencies with responsibility for federal offenders (including the Australian Government) to report on their performance against key performance indicators.

16.27 Performance measurement can: 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.¹²⁸⁸

16.28 All Commonwealth agencies are required to publish performance information in key accountability documents such as Portfolio Budget Statements and annual reports.¹²⁸⁹ Performance information is published in relation to outcomes and outputs.

¹²⁸⁸ Productivity Commission, *Report on Government Services 2004* (2004), Introduction, 1.4.

¹²⁸⁹ Performance management principles have been developed to guide Commonwealth departments and agencies on performance reporting and its uses for external and internal purposes: Department of Finance and Administration, *Performance Management Principles* <www.finance.gov.au> at 21 December 2004.

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.¹²⁹⁰ Key performance indicators help illustrate how an organisation has performed in terms of outcomes and outputs.

Commonwealth Attorney-General's Department

16.29 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.

16.30 One relevant performance indicator in relation to Output 2.1 is the 'successful implementation of new or enhanced programs/projects within available budget'. Another performance indicator is 'Applications for assistance or decisions under domestic and international arrangements for mutual assistance, extradition, federal prisoners, firearms importation and criminal laws, proactively managed and properly determined'.¹²⁹¹

16.31 The AGD is only required to report on its own obligations in relation to federal offenders. Therefore, the key performance indicators outlined above do not include activity undertaken by state and territory agencies in relation to federal offenders. Further, the key performance indicators do not require the AGD to report in detail on federal offenders. For example, information on the decisions made in relation to federal offenders reported under Output 2.1 is not disaggregated in terms of decisions on parole, release on licence, interstate transfers, permission to travel overseas, or applications for exercise of the prerogative of mercy.¹²⁹²

State and territory corrective services departments

16.32 Various state and territory corrective services departments have developed key performance indicators. For example, the NSW Department of Corrective Services *Annual Report 2003-04* includes a list of strategic objectives and performance indicators in relation to offender management in custody and offender management in the community. In relation to offender management in custody, key performance measures include deaths in custody; fights, assaults and occasions of force; escapes

1290 Department of Finance and Administration, *Performance Reporting Under Outcomes and Outputs* <www.finance.gov.au> at 21 December 2004.

1291 See Attorney-General's Department, *Annual Report 2003-04* (2004), 88, 90.

1292 *Ibid.*, 90.

from custody and commercial performance.¹²⁹³ The performance measures developed by state and territory corrective services departments do not distinguish between federal offenders and state and territory offenders.

Steering Committee for the Review of Government Service Provision

16.33 The Steering Committee for the Review of Government Service Provision, which is supported by the Productivity Commission, produces a *Report on Government Services* each year. The report is a tool for government to assist strategic budget and policy planning, and policy evaluation.¹²⁹⁴ Importantly, the *Report on Government Services* provides comparative reporting across the states and territories. This allows agencies to identify peer agencies that are delivering better or more cost effective services from which they can learn; and generates additional incentives for agencies to address substandard performance.¹²⁹⁵

16.34 The report includes a section on corrective services,¹²⁹⁶ but does not distinguish between federal, state and territory offenders. However, it may provide a model for the development of key performance indicators in relation to federal offenders. The report sets out a number of objectives of corrective services in relation to custody, community corrections, reparation to the community, prisoner/offender programs, and advice to releasing authorities. For example, the objective in relation to custody is 'to protect the community by the sound management of prisoners commensurate with the risks they pose to the community, and to ensure the environment in which prisoners are managed enables them to achieve an acceptable quality of life consistent with community norms'. The objective in relation to prisoner/offender programs is 'to provide programs and opportunities that address the causes of offending, maximise the chances of successful reintegration into the community and reduce the risk of re-offending'.¹²⁹⁷

16.35 The Steering Committee is in the process of developing further performance indicators. At present, the indicators include: custody (number of assaults, apparent unnatural deaths, escapes/absconds, and out-of-cell hours); community corrections (completion of community orders); reparation to the community (the proportion of eligible prisoners employed, and community work by community corrections offenders); and prisoner/offender programs (proportion of prisoners enrolled in education and training, personal development courses, and offence related programs).

1293 See New South Wales Department of Corrective Services, *Annual Report 2003–04* (2004), 14–46.

1294 Productivity Commission, *Report on Government Services 2004* (2004), Introduction, 1.1.

1295 Ibid, Introduction, 1.4.

1296 Ibid, Ch 7.

1297 Ibid, 7.11.

16.36 Other efficiency indicators relate to resource management and include cost per prisoner, costs per offender (community corrections), costs per movement (transporting and escorting prisoners under supervision), cost per report prepared for sentencing and releasing authorities, offender registration-to-staff ratio (a count of offender registrations across a period of time), offender-to-staff ratio (the daily average number of offenders), and prison utilisation.

Question 16–2 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?

Education

16.37 This section considers education needs that may arise in relation to the federal criminal justice system, including judicial education, legal practitioner training, and university legal education.

Judicial education

16.38 Various chapters in this Issues Paper detail difficulties faced by judges and magistrates in applying the provisions of Part IB of the *Crimes Act*. Judicial officers have sometimes misapplied the provisions of Part IB; at other times they have failed to apply relevant provisions at all. To the extent that Part IB 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. This raises the issue of judicial education in relation to federal sentencing law, and sentencing laws generally.

16.39 ALRC 44 found that there was little structured or formal sentencing education for judicial officers in Australia.¹²⁹⁸ The ALRC recommended that a federal sentencing council be established, and that its functions should include sentencing education for judicial officers.¹²⁹⁹ This recommendation has not been implemented. A number of Australian jurisdictions have bodies that provide education to judges on sentencing, but it is not known to what extent this education incorporates considerations of federal sentencing law.

Courts

16.40 Until recently, most professional development programs for judicial officers in Australia were developed and delivered by committees of judges or magistrates in

¹²⁹⁸ Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [282].

¹²⁹⁹ *Ibid.*, Rec 179.

Australian courts. Many courts hold annual conferences or more regular meetings of judicial officers, which include elements of professional development. The focus of these programs is often on updating judicial officers on developments in the law or topics of particular relevance to the work of the court in question.¹³⁰⁰ It is not known to what extent courts offer education on federal sentencing law.

National Judicial College of Australia

16.41 The NJCA was established in 2002,¹³⁰¹ and provides programs and professional development resources to judicial officers in Australia. The NJCA provides a number of residential programs, including the Phoenix Magistrates Program; the National Judicial Orientation Program (a program aimed at newly appointed superior and intermediate court judges from around Australia); and the Travelling Judicial Education Program (this program offers judicial officers the opportunity to revisit key areas of their work while benefiting from exchanges with judicial officers from other Australian jurisdictions).¹³⁰² Each of these programs includes a unit on sentencing.

16.42 Judicial officers participating in NJCA professional development programs have commented adversely on the lack of consistency between courts in the imposition of sentences for federal offences.¹³⁰³ One advantage of a national organisation providing judicial education is that judges from several jurisdictions can be grouped together in the one location for training. A national approach to sentencing education for judicial officers could facilitate greater consistency in sentencing federal offenders.

Judicial Commission of New South Wales

16.43 One of the principal functions of the JCNSW is to organise continuing education and training of judicial officers in NSW. In 2003–04, the JCNSW offered a number of programs on sentencing.¹³⁰⁴ The JCNSW also has an extensive publication program on sentencing, including *Sentencing Trends & Issues* (short empirical studies of sentencing practice) and a number of online facilities (see the discussion of JIRS above). The JCNSW also organises an annual conference for each of the NSW courts, which includes a session on developments in criminal law. The JCNSW does not regularly offer courses on the sentencing of federal offenders but has offered units dealing with such issues from time to time in its continuing legal education program.

1300 National Judicial College of Australia, *Judicial Education in Australia* (2004) <www.njca.anu.edu.au> at 22 December 2004, 2.

1301 The ALRC recommended the establishment of a National Judicial College in its report on the federal civil justice system: Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (2000), Rec 8.

1302 National Judicial College of Australia, *Annual Report 2003-04* (2004).

1303 National Judicial College of Australia, *Correspondence*, 22 December 2004.

1304 Including 'Circle sentencing', 'Recent developments in sentencing', 'Sentencing principles', and 'Sentencing today from a defence perspective': Judicial Commission of New South Wales, *Annual Report 2003-04* (2004), App 4.

Judicial College of Victoria

16.44 The Judicial College of Victoria is an independent statutory authority established to assist the professional development and continuing education of Victorian judicial officers by developing and conducting judicial education programs; producing publications; and providing professional development services, continuing judicial education and training services. The College has not offered any programs specifically on the sentencing of federal offenders. However, in 2004 the College ran a number of programs relevant to the sentencing of federal offenders, including cultural awareness programs, a seminar on mental health issues, and an induction for magistrates.

Other judicial education bodies

16.45 A number of other bodies provide opportunities for judicial education. However, it is not known if any of these organisations offer training in relation to the sentencing of federal offenders.

16.46 The Australian Institute of Judicial Administration (AIJA) is a research and educational institute associated with Monash University. The principal objectives of the AIJA include research into judicial administration and the development and conduct of educational programs for judicial officers, court administrators and members of the legal profession.

16.47 The objects of the Judicial Conference of Australia relate to the public interest in maintaining a strong and independent judiciary within a democratic society that adheres to the rule of law. The Conference's Governing Council consists of judges and magistrates drawn from all jurisdictions and levels of the Australian court system. Although the Judicial Conference does not provide formal judicial education programs, it does host an annual colloquium. In the past, these colloquia have included sessions on sentencing, including the sentencing of Indigenous offenders and mandatory sentencing.

Legal practitioners

16.48 Another issue is whether legal practitioners need additional training in relation to the sentencing of federal offenders. Some sentencing errors made by judicial officers might be avoided if the parties appearing before the court were better informed about federal sentencing law. ALRC 44 noted that, although the primary focus of sentencing education must be on judicial officers, education programs for other groups that have an impact on sentencing is desirable. These groups include prosecution and defence lawyers; correction, probation and parole officers; and police and media organisations.¹³⁰⁵

1305 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [281].

16.49 Practical legal training and continuing legal education have become competitive fields. Service providers now include legal professional associations, university law schools, practical legal training institutions, private companies and law firms. Most practical legal training courses include a unit on criminal law, which includes a component on sentencing. Assessment for these courses often requires students to conduct a mock plea in mitigation. It is not known to what extent these courses include consideration of the federal criminal justice system and the provisions of Part IB of the *Crimes Act*.

16.50 It is difficult to conduct a comprehensive survey of continuing legal education courses due to the large number of organisations offering these services. However, the ALRC is aware of a number of continuing legal education courses in NSW that have included a component on the federal criminal justice system and federal sentencing law. The ALRC is interested in hearing if 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, and how this may be provided.

Question 16–3 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?

Universities

16.51 A brief survey of university law school curricula reveals that very few law schools offer subjects on the federal criminal justice system or on sentencing law more generally.

16.52 All undergraduate law degrees offer at least one unit in criminal law, which is a core subject in the curriculum. However, the primary emphasis of undergraduate criminal law courses is on the principles of criminal responsibility in the context of state and territory offences. Some course outlines note that the criminal law course includes consideration of sentencing, but it is not known what proportion of this coursework is dedicated to the federal criminal justice system, or to federal sentencing law in particular.

16.53 A large number of university law schools offer advanced criminal law and criminology as elective subjects in an undergraduate degree. Many of these courses have a greater emphasis on sentencing. One law school offers a course on federal criminal law, and another offers a course in advanced criminal law, which includes consideration of federal criminal law.

16.54 Only a few universities offer Masters of Laws degrees by coursework that include units relevant to federal criminal law or federal sentencing. Four university law schools offer postgraduate subjects on sentencing. The course outlines for most of these subjects note that the courses include consideration of federal legislation and federal sentencing law. One Masters course also includes a subject on federal criminal law, including federal sentencing law.

16.55 The issue arises whether university law schools should place greater emphasis in their courses on the federal criminal justice system and sentencing law, including federal sentencing law, particularly in the undergraduate curriculum.

Question 16–4 Should university law schools place greater emphasis in their programs on the federal criminal justice system and sentencing law, including federal sentencing law?

Cooperation and information sharing

16.56 As outlined in Chapter 12, the Commonwealth, states and territories share responsibility for federal offenders, requiring cooperation and communication both within jurisdictions and between jurisdictions. The need for cooperation and information sharing can arise at various stages of the federal criminal justice process including the prosecution, imprisonment, administration and release of federal offenders. The need for cooperation extends to investigatory bodies, prosecution authorities, courts, corrective services, government departments, prison administrations, and parole boards.

Cooperation within jurisdictions

Australian Government

16.57 A number of departments and agencies of the Australian Government are directly or indirectly involved in the sentencing and administration of federal offenders. These include investigatory bodies such as the Australian Federal Police and the Australian Crime Commission; federal agencies exercising investigatory powers in regard to particular areas of federal responsibility; the CDPP; and the AGD.

16.58 The CDPP is the principal Australian Government agency responsible for conducting prosecutions of federal matters. However, other agencies such as the Australian Securities and Investments Commission and the Australian Taxation Office undertake some federal prosecutions. These prosecutions are generally in relation to high volume matters of minimal complexity.¹³⁰⁶ More complex matters are referred to

1306 See further Ch 2, 3.

the CDPP. At present, various arrangements, including memoranda of understanding, exist between the CDPP and other Commonwealth agencies that prosecute federal offences.

16.59 The ALRC is interested in hearing whether any practical difficulties arise between Commonwealth agencies in relation to the sentencing, imprisonment, administration and release of federal offenders.

Cooperation within the states and territories

16.60 Federal offenders are sentenced in state and territory courts, and the Australian Government relies exclusively on the states and territories to accommodate federal offenders sentenced to a term of imprisonment, as well as those who are held on remand. In addition, the states and territories administer and supervise federal offenders sentenced to alternative custodial sentences, 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.

16.61 The ALRC is interested in hearing whether any issues of coordination and communication arise between organisations within a particular state or territory in relation to the sentencing, imprisonment, administration and release of federal offenders. For example, Chapter 15 highlighted the issue of the provision of information to judicial officers about a federal offender's access to mother and child programs. Issues may also arise in relation to the interaction between state and territory mental health and criminal justice systems.¹³⁰⁷

Cooperation between jurisdictions

16.62 The federal criminal justice system requires cooperation between Commonwealth, state and territory authorities in a variety of circumstances. The need for cooperation is particularly acute in relation to joint offenders, namely, those who face both federal charges and state or territory charges.

16.63 Cooperation between jurisdictions may be necessary at different stages of the criminal justice process.

- *Prosecution.* Although federal crimes are generally investigated and prosecuted by federal agencies, from time to time state or territory agencies may have the carriage of these matters. Federal agencies are not always made aware of the existence of state or territory investigations or proceedings with respect to federal offences.¹³⁰⁸

1307 See further Ch 14.

1308 Office of the Commonwealth Director of Public Prosecutions, *Consultation*, Sydney, 16 September 2004.

In relation to joint offenders, there are administrative arrangements to determine whether the offender is prosecuted by the state or territory authorities or by the CDPP.¹³⁰⁹

- *Sentencing.* The AGD has noted that complications may arise, for example, where a federal offender is released on parole in one jurisdiction and commits a state or territory offence during the parole period in another jurisdiction. The court dealing with a subsequent state or territory offence is not always made aware that, in committing the new offence, the offender is also in breach of a federal parole order.¹³¹⁰
- *Administration.* Chapter 14 noted the need for greater communication and coordination between government agencies, particularly between state and territory prison administrations and federal agencies such as Centrelink. This may be a particular issue for federal offenders with a mental illness or intellectual disability who, prior to incarceration, received a disability support or other pension. The AGD has noted that difficulties may be experienced in obtaining psychiatric reports from state and territory authorities to enable the AGD to consider cases under the mental health and intellectual disability provisions of Part IB of the *Crimes Act*.
- *Release.* The AGD makes parole decisions on the basis of written reports and information.¹³¹¹ In this regard the AGD is dependent on the provision of parole reports by state and territory corrections services. The ALRC is interested in hearing whether this arrangement raises any problems in relation to cooperation between the AGD and state and territory corrections services. Cooperation and information sharing issues may also arise in relation to the release of federal offenders who are deportees. As a matter of practice, offenders who are non-citizens and subject to a deportation order are deported by the Department of Immigration and Multicultural and Indigenous Affairs when they are released on parole. It has been suggested that this is unsatisfactory because the period of parole is part of the sentence imposed on the offender and, if the offender is 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.¹³¹²

16.64 The ALRC is interested in hearing whether any other cooperation issues arise between jurisdictions in relation to the prosecution, sentencing, administration and release of federal offenders.

1309 See further Ch 12.

1310 Attorney-General's Department, *Consultation*, Sydney, 31 August 2004.

1311 *Ibid.*

1312 New South Wales Parole Board, *Consultation*, Sydney, 4 November 2004.

Methods of cooperation

16.65 The sentencing, imprisonment, administration and release of federal offenders creates particular challenges for the Commonwealth, state and territory organisations that have responsibility for them. A variety of methods are already in place to ensure that cooperation, coordination and information sharing is maintained between these organisations. These methods range from cooperative legislative schemes, through to executive arrangements and informal cooperation.

16.66 Legislation may provide for cooperation between the Commonwealth, states and territories in relation to federal offenders. For example, complementary federal, state and territory legislation provides for the transfer between jurisdictions of offenders serving a term of imprisonment.¹³¹³

16.67 Formal executive arrangements are also in place to facilitate cooperation between Commonwealth, state and territory jurisdictions. For example, s 3B 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 administer sentences imposed on federal offenders, and for state and territory correctional facilities and procedures to be made available. Section 21F(1)(a) 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 magistrates to perform the functions of a 'prescribed authority' under Part IB. These functions are described in Chapter 13 and include remanding federal offenders in custody following revocation of parole orders.

16.68 Arrangements are also in place to decide whether the prosecution of a joint offender is handled by state or territory authorities or by the CDPP.¹³¹⁴ There are also memoranda of understanding between the CDPP and a number of Commonwealth investigatory agencies in relation to the prosecution of federal offences.

16.69 Some cooperation occurs as a result of repeated interactions between jurisdictions. For example, the Corrective Services Ministers' Conference (CSMC) meets each year to consider problems relating to prison and community based corrections. The Conference comprises all state and territory ministers responsible for corrections, together with the relevant ministers from New Zealand. The Australian Government is not a member of the Conference but the Minister for Justice and Customs is invited to attend. A meeting of heads of corrective service agencies in each jurisdiction (Corrective Services Administrators' Conference (CSAC)) and officers in

1313 See, eg, *Transfer of Prisoners Act 1983* (Cth); *Prisoners (Interstate Transfer) Act 1993* (ACT); *Prisoners (Interstate Transfer) Act 1982* (NSW); *Prisoners (Interstate Transfer) Act 1983* (WA).

1314 See further Ch 12.

charge of community based corrective services is also held once a year. The AGD attends these meetings as an observer.¹³¹⁵

16.70 Informal cooperation also occurs between organisations involved in the federal criminal justice system. For example, the CDPP has taken an active role in providing state and territory courts with guidance on the interpretation and application of the federal sentencing regime set out in Part IB of the *Crimes Act*.¹³¹⁶

16.71 The issue arises whether there is a need for greater cooperation, coordination and information sharing between the various federal, state and territory bodies with responsibility for federal offenders. In other chapters of this Issues Paper, the ALRC has raised for consideration the establishment of a national sentencing council, a national database of federal offenders, and an inspectorate or office responsible for federal offenders. These possible institutional reforms may further facilitate cooperation and information sharing between relevant federal, state and territory bodies.¹³¹⁷

Question 16–5 Does the sentencing of federal offenders raise particular issues in relation to information sharing and cooperation between various federal, state and territory bodies, including: investigatory bodies; Directors of Public Prosecutions; courts; corrective services; government departments; prison administrations; and parole boards?

1315 Attorney-General's Department, *Attorney-General's Department Website* <<http://www.ag.gov.au/>> at 27 October 2004. See further Ch 12.

1316 See further Ch 10.

1317 See further Ch 10, 12.

Appendix 1. Abbreviations

The entities listed below are Australian entities unless otherwise stated.

ACC	Australian Crime Commission
ACCC	Australian Competition and Consumer Commission
ACSO	Authorised Corrective Services Officer
ACT	Australian Capital Territory
AFP	Australian Federal Police
AGD	Commonwealth 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 44	Australian Law Reform Commission, <i>Sentencing</i> , ALRC 44 (1988)
ASIC	Australian Securities and Investments Commission
ASOC	Australian Standard Offence Classification
ATO	Australian Taxation Office
ATSI	Aboriginal and Torres Strait Islander
AUSTRAC	Australian Transaction Reports and Analysis Centre
CBO	Community based order
CCO	Community Corrections Officer
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
DP 29	Australian Law Reform Commission, <i>Sentencing: Procedure</i> , DP 29 (1987)
DP 30	Australian Law Reform Commission, <i>Sentencing: Penalties</i> , DP 30 (1987)
HREOC	Human Rights and Equal Opportunity Commission
ICCPR	<i>International Covenant on Civil and Political Rights 1966</i>
ISO	Intensive supervision order
JCNSW	Judicial Commission of New South Wales
JIRS	Judicial Information Research System
JOIN	Judicial Officers' Information Network

NCCJS	National Centre for Crime and Justice Statistics
NCJSF	National Criminal Justice Statistical Framework
NJCA	National Judicial College of Australia
NSW	New South Wales
NSWCCA	New South Wales Court of Criminal Appeal
NSWLRC	New South Wales Law Reform Commission
NZLC	New Zealand Law Commission
SCAG	Standing Committee of Attorneys-General