The Law
Reform
Commission

Report No 43
Interim

THE COMMONWEALTH PRISONERS ACT

Australian Government
Publishing Service
Canberra 1988

Unless otherwise indicated this report reflects the law as at 1 December 1987

ISBN 0 644 06900 7

Commission Reference: ALRC 43

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

Printed in Australia by Finepress Offset Printing, Revesby.

Contents

Terms of reference

SENTENCING

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

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

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

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

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

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

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

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

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

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

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

IN ITS REVIEW AND REPORT the Commission —

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

(2) shall have particular regard to —

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

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

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

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

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

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

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

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

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

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

(3) shall —

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

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

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

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

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

DATED this eleventh day of August 1978

Peter Durack QC
Attorney-General

Participants

The Commission

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

President

The Honourable Justice Elizabeth Evatt AO, LLB (Syd), LLM (Harv) (from January 1988)
The Honourable Xavier Connor AO, QC, LLB (Melb) (1985 to December 1987)

Deputy President

Mr J Greenwell (from November 1987)

Commissioner-in-charge

Mr G Zdenkowski, BA, LLB (Syd)

Commissioners

Professor JR Crawford, D Phil (Oxon), BA, LLB (Adel)
Professor RW Harding, LLB (Lond), LLM (Columbia)
Dr RA Hayes, LLB (Melb), PhD (Monash)
The Honourable Justice DM Ryan, BA, LLB (Melb)

Officers of the Commission

Secretary and Director of Research

Stephen Mason, BA, LLB, MTCP (Syd)

Writing and research

Pauline Kearney, BA (Macq), LLB (NSW), Senior Law Reform Officer

Legislative drafting

Dorothy Kitching, LLB (Syd), Assistant Legislative Counsel
Stephen Mason, BA, LLB, MTCP (Syd)

Principal Executive Officer

Barry Hunt, BA (Syd)

Library

Joanna Longley, BA (Lib) (CCAE), Librarian
Susan Collins, BA (Lib)(R-MIHE), Library Officer

Word Processing/Secretarial

Rhonda Basford
Maureen Carter
Jennifer Clark
Jan McLellan

Typesetting

Maria Capitani

Consultants*

Mr K Anderson SM, former Deputy Chief Stipendiary Magistrate (NSW)
Dr AA Bartholomew, Consultant Psychiatrist, Department of Health (Vic)
Dr T Beed, Director, Sample Survey Research Centre, University of Sydney
Ms V Bell, Public Defender, former Director, Redfern Legal Centre
Mr P Byrne, Commissioner, New South Wales Law Reform Commission
Mr P Cashman, former Director, Public Interest Advocacy Centre
Mr W Clifford, former Director, Australian Institute of Criminology (now deceased)
Mr V Dalton, Chairman, Corrective Services Commission of New South Wales
Mr R Downes, former Chairman, Prison Officers Vocational Branch (NSW)
Mr R Fox, Reader in Law, Monash University
Mr A Freiberg, Senior Lecturer in Law, Monash University
Mr LB Gard, former Director, Department of Correctional Services (SA)
Mr AR Green, formerly of Prisoners' Action Group
Mr G Hawkins, former Director, Institute of Criminology, University of Sydney
Mr M Hogan, Research Consultant
Mr P Loof, Attorney-General's Department, Canberra
Mr JG Mackay, former Director, Probation and Parole Service, Attorney-General's Department, Hobart
Dr GM McGrath, Director, National Police Research Unit
Mr D Meure, Senior Lecturer in Law, University of New South Wales
Ms J Neil, Women Behind Bars (NSW)
Mr W Nicholl, Stipendiary Magistrate (ACT)
The Honourable Justice A Nicholson, Chief Judge of the Family Court of Australia and formerly of the Supreme Court of Victoria
Mr I Potas, Criminologist, Australian Institute of Criminology
Mr N Reaburn, Attorney-General's Department, Canberra
Mr F Rinaldi, Senior Lecturer in Law, Australian National University
The Honourable Justice Roden, Supreme Court of New South Wales
Professor P Sallmann, Executive Director, Australian Institute of Judicial Administration
Dr AJ Sutton, Director, New South Wales Bureau of Crime Statistics and Research

Mr S Tilmouth, former Director, Legal Services Commission of South Australia
Professor T Vinson, Department of Social Work, University of New South Wales
Chief Inspector R Walker, Australian Federal Police
Mr H Wallwork, QC, Barrister, Perth.

---

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

Summary of recommendations

General approach

1. *Law should deliver its policy.* Commonwealth legislation governing the release of federal offenders from prison before the end of their terms of imprisonment should be consistent with Commonwealth policy on the matter (para 15).

2. *Release should be according to law.* Decisions as to entitlement to release on parole, the earliest possible time of release, actual release, revocation of parole and the consequences of breach of parole should, as far as possible, be made according to law and not left to a general discretion (para 16).

3. *Law should be flexible.* In those areas where State or Territory law is to apply, Commonwealth law should be flexible enough to pick up the relevant law of all jurisdictions. It should be flexible enough to pick up existing and future State and Territory law (para 17).

4. *Administration should be simplified.* The administration of the early release regime of the Commonwealth should be simplified (para 18).

5. *Legislation should be simplified.* The substantive provisions of the Commonwealth Prisoners Act 1967 (Cth) should be redrafted and the release on licence scheme should be included in that Act, where it properly belongs (para 19).

Entitlement to parole

6. *Parole should be available to federal offenders in all jurisdictions.* The provisions of the Commonwealth Prisoners Act should operate in respect of federal offenders throughout Australia (para 28).

7. *State law should apply.* The law governing the entitlement to parole of a federal offender should, generally speaking, be the law of the State or Territory in which the offender is convicted. This general rule is subject to one proviso. Where the court has a discretion to decline to make an order that a person is eligible for parole when it is dealing with a State or Territory offender, it should not be able to exercise that discretion when dealing with a federal offender (para 29).

8. *Court must specify the minimum term.* A court that sentences a federal offender to imprisonment should have to specify a minimum term of imprisonment. The minimum term specified by the court should be the same, as nearly as possible, as that which would apply to a State or Territory offender.

In specifying the minimum term, the court should apply all relevant State and Territory law. In jurisdictions where the minimum term is prescribed by statute, the court should specify what the minimum term would be under the relevant legislation (para 31).

9. *Exceptions are limited.* A federal offender should not be eligible for parole if the sentence is of a kind which does not attract parole under State or Territory law. Thus, a federal offender should not be entitled to parole under the Act when

- in the case of fixed term of imprisonment — a minimum term may not be fixed or cannot be ascertained in respect of a sentence of that duration under State or Territory law
- in the case of an indeterminate sentence — a minimum term may not be fixed or cannot be ascertained in respect of such a sentence under State or Territory law (para 32).

Other provisions which impact upon release date

10. *Commencement date of sentence and minimum term.* The commencement date of the sentence and of the minimum term should be the date on which the sentence was imposed, except where the offender has been in custody in relation to the offence. In that case the offender should be deemed to have been serving the sentence and the minimum term during the period of custody (para 36).

11. *Remissions.* The law of the State or Territory in which a federal offender is imprisoned relating to the reduction or remission of sentences and minimum terms of imprisonment should continue to apply to federal offenders (para 37).

12. *Pre-release programs and temporary release.* The Act should allow for the provisions of a law of a State or Territory providing for release from prison before the end of the minimum term, if specified in the regulations under the Act, to apply to federal offenders, where appropriate (para 38, 39).

Release on parole

13. *Release should be automatic.* Where a minimum term has been specified by a court for a federal offender, the offender should be released automatically on the appropriate day, unless the offender is, for some other reason, not to be released (para 42).

14. *Release of life prisoners.* Federal offenders sentenced to life imprisonment in respect of whom a minimum term has not been specified should be able to be released on parole by order of the Minister. This should not occur before the offender has served 10 years imprisonment unless the Minister is satisfied that exceptional circumstances exist (para 44).

Conditions of parole

15. No condition, including supervision, should be mandatory. The power to set conditions for the release of parole of federal offenders should be vested in the Minister (para 49, 50).

Liability to serve remainder of term

16. *Circumstances in which person should be liable to serve balance of imprisonment.* A parolee should be liable to serve the remainder of the imprisonment to which the parole order relates if and only if

- the parole is revoked or
- the parolee is sentenced to a term of imprisonment for an offence committed while on parole (para 53).

17. *Revocation of parole.* A person's parole should be able to be revoked only for breach of a condition of parole. The power to revoke a person's parole should be vested in the Minister alone (para 54).

Service of remainder of imprisonment

18. *'Clean street time' should apply.* If a person becomes liable to serve the balance of the imprisonment to which the parole relates, the time spent on parole should be deducted from the time that is deemed to remain to be served (para 57).

19. *Minimum term of imprisonment should be specified for unserved period of imprisonment.* The Minister should be able to specify a period as the minimum term of imprisonment for the unserved period of imprisonment when revoking a person's parole. The court should be required to specify a period as the minimum term of imprisonment for the unserved period of imprisonment when it sentences a person to imprisonment for an offence committed by the person while on parole, unless the Minister has already done so (para 58).

20. *Order of service of sentences.* When a person is sentenced to imprisonment for an offence committed while on parole, the unserved balance of the term should be treated as another sentence imposed contemporaneously with the new sentence. The court should be able to order that the unserved period be served concurrently with, or cumulatively or partly cumulatively upon, the new sentence (para 59).

Release on licence

21. *Release on licence should be retained.* The Commonwealth should retain a discretionary power to release federal offenders on licence before they are

entitled to be released on parole. The power to release on licence should remain with the Governor-General (para 65).

22. *Eligibility for release on licence should be limited.* The circumstances in which a person may apply to be released on licence should be limited to 'exceptional circumstances' (para 66).

23. *Consequences of revocation of licence.* The consequences of revocation of a licence should be the same as the consequences of revocation of parole (para 67).

The Commonwealth Prisoners Act

Introduction

The Reference

1. *The Reference.* On 11 August 1978 the then Attorney-General, Senator Peter Durack, referred to the Commission 'the laws of the Commonwealth and the Australian Capital Territory relating to the imposition of punishment for offences and any related matters'. The Reference drew particular attention to the costs and other unsatisfactory characteristics of imprisonment and the adequacy of existing alternatives to imprisonment.

2. *Earlier publications.* An interim report was published in 1980. It reported, among other things, the results of a national survey of judges and magistrates, and of federal prosecutors and offenders, conducted by the Commission. The report made a number of recommendations on various aspects of the reference. A summary of those recommendations appears in the Commission's *Annual Report 1980.*[1] Later annual reports detail the extent to which those recommendations have been adopted.[2] Other aspects of the reference were not dealt with, or were the subject of only tentative recommendations. Those aspects were to be the subject of detailed consideration in the light of further public consultation. Following publication of the first interim report, a decision was made to suspend work on the Reference. Two factors led to this decision. First, it was clear that time was needed for the recommendations and suggestions in the interim report to be considered by the public and by correctional authorities, prosecutors, the legal profession and State and Territory administrations. Secondly, given the demands of other References then before it, the Commission did not have sufficient resources to enable it to produce a final report at that time. Work was resumed in 1984. In 1987, three discussion papers were published, summarising the work done in this 'second phase' of the Reference.[3] Release from custody is the subject of a chapter of one of these discussion papers.[4]

This report

3. *This report.* This report is an interim report, written to provide urgent advice to Government. It focusses on only one aspect of the punishment process: early release from prison. It concerns particularly the way in which federal

[1] ALRC 17 para 67–74.
[2] See eg ALRC 34 para 98.
[3] ALRC DP 29, 30, 31.
[4] ALRC DP 30, ch 4.

offenders, who have been sentenced to imprisonment, become eligible for parole and release on licence. Federal offenders are persons convicted of offences against Commonwealth, as distinct from State or Territory, laws. For these offenders, parole and release on licence matters are presently governed by the Commonwealth Prisoners Act 1967 (Cth) and the Crimes Act 1914 (Cth) s 19A. In the normal course, the reform of these provisions would not be reported on separately by the Commission. However, the Attorney-General has specifically asked the Commission to report in advance of its final report on the best way to overcome a number of anomalies and deficiencies that have come to light in the operation of those laws. In this report, each of the elements of a conditional release scheme are dealt with in turn. The present law is examined and its shortcomings identified. The Commission's recommendations for reform of the law are then made and explained.

4. *Relationship to later report.* This report accepts the present policy framework within which Commonwealth law on parole and related matters operates. The recommendations it makes are not put forward by the Commission as long-term solutions to all the problems raised by the operation of a comprehensive parole system for federal offenders. They are stop-gap solutions only. They do not represent the Commission's final views, but have been prepared in the light of the Commission's thinking on the issues raised. To a considerable extent, the reforms recommended in this report can be used as a basis for the reforms to be recommended in the final report. The broad outline of those reforms can be indicated. In brief, the Commission's final report will be based on the premise that the present approach to imprisonment as a whole should be reconsidered. At present, a court determines that a particular amount of imprisonment is the appropriate sentence to be imposed for a particular offence. At some later stage, a parole authority, in effect, reduces the amount of imprisonment that is to be served and substitutes a less intrusive form of punishment – parole. The Commission's final recommendations will call for those two processes to be treated as one single process. The punishment imposed is in reality, and should be seen to be, not simply imprisonment. It is that the offender is to be subject to the control of the State for a particular period. For a specified part of that period, fixed by law, the control is to be detention in prison. For the balance of the period, progressively more relaxed State control is to be exerted over the offender. Imprisonment and parole should be seen as one continuous process. Recommendations in this report correct the anomalies and difficulties which have arisen with the present Commonwealth Prisoners Act. They do so in a way that is consistent with, and is a step towards, the more fundamental reforms to be recommended in the later report.

5. *Consultation.* The recommendations in this report have been the subject of consultation with interested parties. Proposals for reform, including a draft amendment Bill, were circulated to officers of the Attorney-General's

Department, the Director of Public Prosecutions, the Commission's consultants and others. The Commission has carefully considered all the comments and suggestions received.

Early release

6. *Parole.* Parole involves releasing the offender from prison before the end of the period of imprisonment imposed by the sentencing court. Each State and Territory has its own parole board, which decides whether a State or Territory offender should be released on parole. If the prisoner is to be released, the board fixes appropriate conditions. These will normally include a requirement that the parolee be supervised and counselled by officers of the State or Territory parole and probation service, who are in most cases trained social workers. The intended purpose of parole is to provide a supervised transition from the harsh and artificial prison environment back into the community, with a view to ensuring that the parolee can once more find a useful place in society.

7. *Parole of federal prisoners.* Each Australian jurisdiction has its own parole statute. They were enacted at different times and have been amended – in some cases substantially – since their enactment. As a result, there is no uniformity between jurisdictions in a number of the key aspects of the parole process. However, these State and Territory laws do not apply of their own force to federal prisoners. A person convicted of a federal offence is imprisoned by virtue of federal law. Therefore, the authority to release from prison must also be derived from a federal law. A State or Territory parole statute cannot authorise the release from prison – even from a State prison – of a federal prisoner. Accordingly, the Commonwealth Prisoners Act was enacted to give the benefits of parole to federal prisoners along with their State counterparts.[5]

8. *Release on licence.* A federal prisoner may also be released on licence before the end of the sentence under s 19A of the Crimes Act 1914 (Cth). This procedure is used in situations where the Commonwealth Prisoners Act does not, or may not, authorise release of the offender on parole.

9. *Dimensions of the problem.* The number of federal prisoners is small in comparison to the total Australian prison population,[6] but is increasing.[7] Most

---

[5] The Judiciary Act 1903 (Cth) s 68, which applies State and Territory laws 'respecting ... the custody of offenders' to federal prisoners, was held not to apply laws empowering the court to impose a minimum term: *R v Mirkovic* [1966] VR 371.

[6] In June 1986, there were 485 federal prisoners in Australian jails, that is, 4.2% of the total of 11 497 prisoners: Walker & Biles 1987, Table 13.

[7] The 1985 figures showed 463 federal prisoners: Walker & Biles 1986, Table 13. The 1984 figures showed 343 federal prisoners: Walker & Biles 1985, Table 13.

of them are in New South Wales.[8] There are, however, no published statistics indicating the numbers of federal prisoners on parole, or released on licence, at any one time. The Commission understands from the Attorney-General's Department that about 428 federal prisoners were in this category in November 1987. For the vast majority of these prisoners, no difficulty was experienced during their parole periods. Only 28 breaches of parole or licence conditions were reported to the Attorney-General's Department in 1986/87. Of these, only 4 resulted in automatic revocation of parole under the Commonwealth Prisoners Act s 5(7). Action was taken to revoke parole or a licence under other provisions in only 11 cases.

10. *Elements of an early release scheme.* The operation of a system of release from imprisonment on parole, or any other system of early release, requires that certain decisions be made in relation to the person to be released. The first is whether the person should, at some time before having finished serving the imprisonment, be considered for release and, if so, when. What impact, if any, remissions should have upon the time of release has to be determined. At the appropriate time, the decision must be taken as to actual release. If the person is released, a decision must be made as to any conditions to be imposed. The sanction, if any, attaching to a breach of these conditions must be considered. If revocation of parole is to be among the available sanctions, who can revoke, and in what circumstances, needs to be determined, as well as the consequences of revocation in the individual case. Finally, a decision may need to be made as to whether a person whose parole has been revoked should be released on parole again and, if so, when.

Law and policy

Existing policy

11. *Intra-jurisdictional parity with respect to entitlement to parole.* The policy underlying the Commonwealth Prisoners Act is that, in the matters of eligibility for, and release on, parole, federal prisoners should be treated in the same way as their State or Territory counterparts. The Act, and s 19A of the Crimes Act 1914 (Cth), are administered to give effect to that policy. The Commonwealth Prisoners Act was passed in the wake of the introduction of parole legislation in several States, and following a decision of the Victorian Court of Appeal that the State parole legislation did not apply to federal offenders.[9] The aim of the legislation was to extend to all federal prisoners the benefit of State or Territory parole legislation on the same terms as it was available to State or Territory prisoners. In his Second Reading Speech, the then Attorney-General, Mr Nigel Bowen MHR, said

---

[8] ie 269. Victoria was the next most populous, with 80 federal prisoners. There was only 1 federal prisoner in Tasmania and none in the Australian Capital Territory: Walker & Biles 1987.

[9] *R v Mirkovic* [1966] VR 371.

> a person who is being sentenced to imprisonment for an offence against a law of the Commonwealth should be treated in the same way as if he were being sentenced for an offence against the law of the State in which the trial takes place.[10]

Thus, the entitlement of a federal prisoner to parole is, by and large, the same as the entitlement of his or her State or Territory counterpart. The impact of remissions on non-parole periods is also the same.

12. *Certain decisions retained by the Commonwealth.* However, certain key decisions relating to release on parole are, under the Act, made by the Commonwealth. The decision to release once the minimum term of imprisonment has expired – a decision 'properly one not for the State authorities but for the Commonwealth itself'[11] – is vested in the Governor-General[12] acting on the advice of the Attorney-General,[13] as is the power to amend or revoke a parole order before the end of the parole period.[14] The conditions to which parole is subject are set by the Commonwealth[15] and the Act provides for the procedures to be followed in the event of breach of a condition of parole. The Act also provides for the order in which a sentence of imprisonment imposed for an offence committed by a person on parole and the balance of the sentence to which the parole relates are to be served. The power to release on parole is supplemented by the broad-ranging power vested in the Governor-General by s 19A of the Crimes Act 1914 (Cth) to release federal offenders on licence. This power is used to release offenders to whom the provisions of the Commonwealth Prisoners Act do not, or may not, apply.

13. *Supervision of parolees by State and Territory authorities.* As the Commonwealth does not have a parole service of its own, federal parolees are supervised by State and Territory parole officers pursuant to an agreement under the Act.[16] They are given the same supervision as their State or Territory counterparts.

Approach of this report

14. *Underlying policy is not subject to review.* The fundamental question arising out of the operation of the Commonwealth Prisoners Act is the extent to which Commonwealth policy on the release of federal offenders on parole should accord with the policies of the jurisdictions in which they are imprisoned. Present Commonwealth policy is popularly described as a policy of 'intra-jurisdictional parity'. In reality, it is only on the questions of eligibility for release and time of release on parole that intra-jurisdictional parity has been adopted as the guiding principle. Other elements of the policy, for exam-

---

[10] Commonwealth of Australia, *Hansard* (H of R) (20 April 1967) 1559.
[11] id, 1560.
[12] s 5(1).
[13] s 32.
[14] s 5(5).
[15] s 5(4).
[16] s 21(1)(b).

ple, those concerning the consequences of breach of parole conditions, do not rely on local State or Territory policy. In its interim report on Sentencing, the Commission favoured a system of national uniformity of treatment of federal offenders.

> Commonwealth laws should implement the principle that offenders against the laws of the Commonwealth should be treated as uniformly as possible throughout Australia. Commonwealth laws and procedures which hinder the achievement of uniformity should be changed to bring them into accord with this principle even if doing so results, for a time, in differences in the way in which Commonwealth and local offenders are treated within a State or Territory jurisdiction.[17]

The recommendation that Commonwealth laws should implement the principle of national uniformity of treatment provoked considerable criticism. In its final report, the Commission will review the desirability of retaining the current policy. In this interim report, however, recommendations for reform will be made on the basis of the current policy. Thus, recommendations for reform will be limited to those necessary for the purpose of turning the Commonwealth Prisoners Act into an adequate vehicle for delivery of the current policy.

15. *Law should deliver its policy.* The Commonwealth Prisoners Act was intended to ensure, and did at first ensure, that federal prisoners would be entitled to be considered for release on parole under similar circumstances, and at about the same time, as their State or Territory counterparts. The mechanism adopted to achieve this was to apply the provisions of the relevant State and Territory law. However, with the introduction of new models of parole legislation, the Act no longer applies the relevant laws of all States and Territories.[18] In fact, the Act precludes the operation of some of the relevant legislation in jurisdictions where it does operate.[19] Clearly, Commonwealth policy on these matters and the statute law governing them should coincide. To ensure that the policy objective of parity of treatment of federal offenders with their State and Territory counterparts, so far these matters are concerned, is, and will continue to be, achieved, the Commonwealth Prisoners Act needs to be substantially amended.

16. *Release should be according to law.* One of the consequences of the failure of the Commonwealth Prisoners Act to deliver this policy is that it has become more and more necessary to rely on the highly discretionary procedure in s 19A of the Crimes Act 1914 (Cth). Release on licence has become the surest and most convenient way to implement the policy where the Commonwealth Prisoners Act does not apply as was intended. Excessive reliance on discretionary powers to release offenders from prison is a clear demonstration of the inadequacy of the Commonwealth Prisoners Act and its failure to achieve its stated object. It is not in the interests of the offender or of the community

---

[17] ALRC 15, xxxiii, recommendation 16; see also para 151.

[18] eg Queensland and Tasmania.

[19] eg laws allowing the fixing of an aggregate minimum term of imprisonment for multiple sentences of imprisonment: see para 22.

that the operation of the parole regime of the Commonwealth should depend upon the exercise of an unfettered discretion. Under s 19A, the offender has no right to be considered for release and a decision not to release is not amenable to review.[20] From the point of view of the community, the routine release of offenders before the end of the period of imprisonment imposed by the court, as a matter of unfettered discretion, raises questions about the operation of the criminal justice system as a whole. Reliance on the release on licence provisions has also led to practical difficulties.[21] However, discretionary decision making is also a feature of the Commonwealth Prisoners Act. Under the Act, the Commonwealth retains the decision to release on parole. Like the power to release on licence, the power to release on parole is vested in the Governor-General, who also has a discretionary power to revoke. While it may be appropriate to retain a residual discretion for use in exceptional circumstances, decisions as to entitlement to release on parole, the earliest possible time of release, actual release, revocation of parole and the consequences of breach of parole should, as far as possible, be made according to law and not left to a general discretion.

17. *Law should be flexible.* A number of the inadequacies of the Commonwealth Prisoners Act arise out of its failure to apply State and Territory legislation as it was intended it should. For this reason, the Act cannot operate at all in Queensland and Tasmania, and there are serious gaps in its operation in the remaining jurisdictions. The Commonwealth Prisoners Act must be flexible enough to pick up the relevant law of all jurisdictions. It should be flexible enough to pick up not only existing State and Territory provisions, but future provisions as well.

18. *Simplifying the administration.* The administration of the early release regime of the Commonwealth is made unnecessarily complicated by the Commonwealth Prisoners Act. Release on parole under the Act is first dealt with by Departmental officers who, after considering detailed reports from the probation service and prison administrations, make a recommendation as to release. That recommendation, and the reports, are then carefully considered, under the present Ministerial arrangements, by the Minister for Justice. The final decision, however, is made by the Governor-General. Notwithstanding these three levels of decision making, only in the rarest case is parole refused. Additional administrative complications are caused by the breadth of the discretionary power conferred by s 19A of the Crimes Act. Because there are no pre-conditions on the exercise of the power to release, the provision generates a large number of applications, some of which, in the view of the Attorney-General's Department, clearly lack merit. A fair and rational system of early release should not depend on the co-existence of two parallel, but different, systems of release, each demanding individual consideration of every application at three separate levels of government at the appropriate time (or, in the case of some s 19A applications, at an inappropriate time). The early release regime

---

[20] *Steiner v Attorney General* (1983) 52 ALR 148.

[21] See para 18.

of the Commonwealth should be rationalised and its administration simplified in the interests, not only of the administrators, but the clients.

19. ***Simplifying the legislation.*** The Commission considered three alternative approaches to reform of the Commonwealth Prisoners Act:

- repeal of the existing Act and substitution of a new one
- piecemeal amendments to the Act to overcome its inadequacies
- repeal and replacement of the substantive provisions only.

Under the Act, certain functions are performed in relation to federal parolees by State and Territory officers by arrangement with the States and Territories. In particular, State and Territory officers act as prescribed authorities for, among other things, the purpose of issuing warrants for the removal of persons to prison in the event of revocation of parole. Arrangements under the Act also provide for the supervision of federal parolees by State and Territory parole authorities. Similar arrangements have been made under s 19A of the Crimes Act. Repeal of the provisions authorising these arrangements would necessitate re-making them with every State and Territory. For this reason, the Commission decided not to recommend repeal of the Act. The Commission then considered whether piecemeal amendments would be sufficient to overcome the inadequacies of the existing Act. But it decided that it is preferable to redraft the substantive provisions of the Act. This would allow much of the language of the Act to be made simpler and clearer and allow the release on licence scheme to be included in the Act, where it properly belongs. Consequently, the draft Bill in Appendix A provides for the repeal of the substantive sections of the Act and the substitution of new sections for them.

Availability of parole

Present law

20. ***Minimum term is 'fixed by court'.*** The circumstances under which a federal offender is entitled to parole under the Commonwealth Prisoners Act are limited by s 4, s 5 and the definition of 'minimum term of imprisonment' in s 3. Section 5 provides for the release on parole of federal offenders after the expiration of a 'minimum term of imprisonment'. This is defined as

> that part of a term of imprisonment to which a person has been sentenced by a court that is *fixed by the court* as the period during which the person is not eligible to be released on parole.[22]

Section 4 governs the circumstances in which a court may or must set such a minimum term of imprisonment. Thus, a federal prisoner is entitled to parole only when the sentencing court has *fixed* a minimum term of imprisonment.

---

[22] s 3(1), emphasis added.

21. *State law applies.* The circumstances in which a court may or must fix a minimum term in relation to a federal offender are set out in s 4 of the Commonwealth Prisoners Act. Section 4(1)(a) provides that a court sentencing a federal offender to a term of imprisonment *shall* fix a minimum term if, under the law of the State or Territory where the offender is convicted, the court is required, when sentencing a State or Territory offender to a like term of imprisonment, to fix such a minimum term. Section 4(1)(b) provides that the court *may* fix a minimum term when sentencing a federal offender if, when sentencing a State or Territory offender, it is permitted to set such a minimum term. In fixing the minimum term, the court is required to have regard to the matters to which it would have had regard if the law of the State or Territory in which the offender was convicted were applicable.[23] Thus, whether or not a non-parole period is fixed in relation to a federal offender depends upon the terms of the relevant State or Territory legislation.

22. *Application of State law is limited.* Until a recent amendment to the Commonwealth Prisoners Act comes into effect,[24] s 4(4) provides that the provisions of a State or Territory law which apply to federal offenders are those applicable to a local offender

> who is before a court for sentence for only one offence and is not already serving a term of imprisonment for another offence.

Thus, a court sentencing a federal offender cannot apply State or Territory legislation empowering or requiring it to set a single non-parole period in respect of a number of terms of imprisonment. In Victoria, for example, where a person is to be sentenced for more than one offence, the court must not fix a minimum term for each offence but must fix a minimum in respect of the aggregate period of imprisonment liable to be served under all the sentences imposed.[25]

Haphazard operation of Commonwealth Prisoners Act

23. *Variation among jurisdictions.* The circumstances in which a non-parole period may or must be set vary from jurisdiction to jurisdiction. In Victoria, unless the court considers that the nature of the offence and the antecedents of the offender render the fixing of a minimum term inappropriate,[26] the court must, if it imposes a term of imprisonment of not less than two years, and may, if the term is less than two years but not less than 12 months, fix a non-parole period that is at least six months less than the head sentence.[27] In New South Wales, the court must fix a non-parole period in respect of sentences of imprisonment of more than three years duration,[28] unless it appears to the

---

[23] s 4(2).
[24] Statute Law (Miscellaneous Provisions) Act 1987 (Cth).
[25] Penalties and Sentences Act 1985 (Vic) s 17(3).
[26] Penalties and Sentences Act 1985 (Vic) s 17(2).
[27] s 17(1).
[28] Probation and Parole Act 1983 (NSW) s 19.

court that the specification of a non-parole period is undesirable.[29] A non-probation period (at the end of which the offender is automatically released) must be fixed in respect of sentences of more than six months but not more than three years.[30] In South Australia and in Victoria, but not elsewhere, a minimum term of imprisonment may be fixed in respect of a life sentence.

24. *Act may not operate throughout the Commonwealth.* The limitation of the application of the Commonwealth Prisoners Act to those persons for whom a minimum term of imprisonment has been 'fixed by a court' raises doubts about the operation of the Act throughout Australia. In Queensland and Tasmania, non-parole periods are fixed, not by the court, but by statute,[31] although Queensland courts are empowered to make a recommendation as to the release date.[32] Thus, while a State offender is eligible for release on parole at the end of the statutory non-parole period,[33] the prevailing view is that a federal offender may not be released on parole under the Commonwealth Prisoners Act. In order to overcome the apparent anomaly, officers of the Attorney-General's Department consider recommending prisoners for release on licence under s 19A of the Crimes Act 1914 (Cth) at the time that their State or Territory counterparts would be eligible for parole or, in cases where a Queensland court has made a recommendation as to release, at the time recommended. On the other hand, in the context of s 28(1) of the Prisoners (Interstate Transfer) Act 1982 (NSW), it has been held that the period during which an offender sentenced to a term of imprisonment by a Queensland court is not eligible to be released on parole pursuant to statute can properly be described as 'a minimum term of imprisonment' fixed by a court under a law of Queensland.[34]

25. *Joint offenders.* Particular problems may arise in relation to joint offenders. Section 4(5) provides that where a person is sentenced to a term of imprisonment for a Commonwealth offence and is at the time under sentence of imprisonment for a State or Territory offence, the court may direct that the Commonwealth term commence to be served at the end of the minimum term fixed in respect of the State or Territory term. On occasions, the court fails to do so. This failure may give rise to one of two consequences. If the offender is not released at the end of the minimum term fixed for the State or Territory offence, he or she may be seriously disadvantaged because the federal term will not begin to run until after the head sentence imposed for the State or Territory offence, less remissions, has expired. Alternatively, the offender may be released on parole in respect of the State or Territory offence before he or she has commenced to serve the federal term. This would necessitate the

---

[29] s 21(1).

[30] s 5.

[31] Offenders Probation and Parole Act 1980 (Qld) s 53; Parole Act 1975 (Tas) s 16.

[32] Offenders Probation and Parole Act 1980 (Qld) s 53(3).

[33] ie in Queensland, where the sentence is longer than 6 months, after one half of the sentence, and in Tasmania, after one third or 6 months, whichever is the greater.

[34] *Abdi v Release on Licence Board*, unreported, NSW Court of Appeal (30 July 1987).

federal offenders's being returned to prison to serve the federal term at the end of the State or Territory term.[35] When the court orders that a federal term be served cumulatively upon a State term, in jurisdictions where the Act does not operate, s 19A of the Crimes Act 1914 is used.to achieve the result that would have occurred had the court ordered that the federal sentence commence to be served at the end of the minimum term for the State or Territory offence. However, s 19A cannot be used to rectify the situation where a State term is ordered to be served cumulatively upon a federal term without giving rise to a hiatus between the release on licence and the commencement of the State term. This is because the State term does not commence to run until the full federal term less remissions available under State law has expired.[36]

26. *Act does not apply to all federal offenders.* Even in those jurisdictions where the Act does operate, it is not comprehensive in its coverage of federal offenders. It does not apply to federal offenders in respect of whom the court is empowered, but properly declines, to set a non-parole period in the particular case.[37] Nor does it apply to persons imprisoned for civil contempt[38] or to prisoners who will be or are likely to be deported on release.[39] The Act precludes the fixing of a non-parole period in respect of a life sentence, even in jurisdictions where this is permitted under local law.[40] Until the matter was settled in 1985,[41] there was doubt whether a non-probation period fixed by a court under s 5 of the Probation and Parole Act 1983 (NSW) was a minimum term of imprisonment within the meaning of the Commonwealth Prisoners Act. When it comes into effect, a recent amendment will put the matter beyond doubt: 'parole' is defined as including probation.[42]

27. *Act does not apply all relevant State law.* Until that amendment, the Act precluded the applicability to federal offenders of State or Territory law which empowers or requires a court to set an aggregate minimum term when imposing sentences for more than one offence.[43] Thus, the court was required to fix multiple minimum terms when it imposed multiple sentences.[44] Taken in conjunction with applicable State and Territory provisions limiting the fixing of non-parole periods in respect of short sentences, this gave rise to sentencing difficulties in some circumstances, in particular, when a court wished to impose a number of concurrent or cumulative sentences of short duration,[45] and led

---

[35] For judicial criticism of this situation, see *R v Kidd* [1972] VR 728.

[36] See *R v Hipworth*, unreported, Queensland Court of Criminal Appeal (24 October 1986).

[37] eg because it considers it inappropriate to do so; see further para 23.

[38] *G v G* (1981) FLC 91–042.

[39] This is because release is conditional upon supervision.

[40] eg in South Australia.

[41] See *R v Gavin* (1985) 4 NSWLR 363; *R v Brodie*, unreported, NSW Court of Criminal Appeal (27 June 1986).

[42] Statute Law (Miscellaneous Provisons) Act 1987 (Cth).

[43] See para 22.

[44] See eg *R v Thomas* (1986) 67 ALR 497.

[45] See *R v McGown*, unreported, Court of Criminal Appeal, Victoria (4 December 1985)

to the imposition of patently artificial sentences. Where a court purported to fix an aggregate non-parole period, the prisoner was considered for release on licence under s 19A of the Crimes Act 1914 (Cth) at the specified time in order to give effect to the court's wishes. Where the Commonwealth Prisoners Act does not or may not operate, federal offenders are considered for release on licence under s 19A of the Crimes Act at the time in which they would be eligible for parole under State or Territory law, if applicable.

Recommendations

28. *Parole should be available to federal offenders in all jurisdictions.* Federal offenders in all jurisdictions should be entitled to be released on parole in appropriate circumstances. The Commonwealth Prisoners Act should be amended in such a way that its provisions operate throughout the Commonwealth.

29. *State law should apply.* There are a number of ways in which the decision whether a person sentenced to imprisonment should be eligible to be released on parole at some time in the future, whether fixed in advance or not, may be made. It may be made by the legislature (where non-parole periods are fixed by statute or where the fixing of a non-parole period by the court is mandatory), by the sentencing court (where the fixing of a non-parole period is not mandatory) or by the executive (in cases, for example, of life imprisonment, where a non-parole period is not fixed by statute and cannot be, or has not been, fixed by the court). In relation to federal offenders, this decision, by whomsoever made, may be governed by a law which applies the law of the State or Territory where the offender is convicted or it may be governed by a law for federal offenders which applies throughout the Commonwealth. In its Discussion Paper, the Commission tentatively proposed that federal offenders sentenced to a fixed term of imprisonment should be automatically released on parole after serving a proportion of the head sentence fixed by statute.[46] The arguments in favour of this proposal in the context of the Commission's final recommendations relating to custody based sentences will be fully canvassed in the final report. However, so long as the current Commonwealth policy of intra-jurisdictional parity of treatment of offenders with respect to entitlement to parole applies, the law governing the entitlement to parole of a federal offender should, generally speaking, be the law of the State or Territory in which the offender is convicted. The effect of this recommendation will be that federal offenders will be entitled to be considered for parole on the same basis as offenders in the State or Territory in which they are convicted. On the other hand, the circumstances in which a federal offender is entitled to be considered for parole will vary from jurisdiction to jurisdiction.[47]

30. *A proviso.* The recommendation made in the preceding paragraph is subject to one proviso. In those jurisdictions where the court, when it is dealing with a State offender, has a discretion to decline to make an order that the

[46] ALRC DP 30, para 232.

[47] See para 23.

offender is eligible for parole, it should not be able to exercise that discretion when dealing with a federal offender. Ultimately, the offender will have to be considered for parole at some time. The sentencing court is better placed than the executive to decide this.

31. *Court must specify the minimum term.* In order to implement the recommendation made in paragraph 28, the proposed legislation provides that the court must specify a minimum term when it sentences a federal offender to imprisonment.[48] The word 'specify' was chosen to avoid the problems arising out of the use of the word 'fix' in the present Act. The purpose of requiring the court to specify a minimum term is to ensure that the Act will operate in all jurisdictions irrespective of the parole system in existence in a particular jurisdiction. It is intended, however, that the minimum term specified by the court will be the same, as nearly as possible, as that which would apply to a State or Territory offender.[49] In jurisdictions in which, under State or Territory law, the court fixes a minimum term for a State or Territory offender in the exercise of its discretion, it should be assumed, for a federal offender, that the discretion will be exercised favourably and that a like minimum term will apply to a federal offender. In jurisdictions where State or Territory law prescribes the minimum term for State or Territory offenders, the prescribed minimum term should apply to federal offenders. By requiring the court to *specify* what the effect of the local State or Territory law would be if it applied to a federal offender, one of the main problems with the present Act, that it applies only where a minimum term is 'fixed', will be avoided. All relevant State and Territory law, including laws which permit the court to set an aggregate minimum term for a number of offences, will be applied by the court. Further, offenders will know with certainty what the non-parole period is to be. Thus, the court which sentences a federal offender in Queensland should impose the sentence and then specify that the minimum term of imprisonment is one half of the sentence imposed or, alternatively, that it is the period which the court recommends, pursuant to its statutory power, as the period before which the offender should not be released. In jurisidictions where the minimum term is fixed by the court, the court will have to take into account the matters it would have taken into account if the offender were a State or Territory offender and the law of the State or the Territory in which the offender was convicted were applicable.[50] By the use of this device, federal offenders sentenced to imprisonment in Queensland and Tasmania will be brought within the ambit of the Commonwealth Prisoners Act without violating the policy of intra-jurisdictional parity of treatment. Similarly, in jurisdictions where the court is empowered under local law to fix a minimum term for life prisoners, for example, in South Australia, it will be able to do so for federal offenders. In other jurisdictions, it will not.

---

[48] Proposed s 5(1).

[49] See proposed s 5(3).

[50] This is one effect of proposed s 5(3).

32. *Exceptions are limited.* A federal offender should not, however, be eligible for parole if the sentence is of a kind which does not attract parole under State or Territory law, for example, a very short sentence or, in most jurisdictions, a life sentence. This is necessary to avoid disparity of treatment in the matter of eligibility for parole between federal and State or Territory offenders. Accordingly, a federal offender should not be entitled to parole under the Act when

- in the case of a fixed term of imprisonment — a minimum term may not be fixed or cannot be ascertained in respect of the sentence of that duration under State or Territory law
- in the case of an indeterminate sentence — a minimum term may not be fixed or cannot be ascertained in respect of such a sentence under State or Territory law.

The draft Bill therefore requires a court that sentences a federal prisoner to imprisonment to specify a minimum term of imprisonment in all cases other than the two mentioned above.[51]

Other provisions which impact upon release date

Present law

33. *Commencement of the sentence and minimum term.* Under s 68 of the Judiciary Act 1903 (Cth), the State and Territory law as to the commencement of sentence has effect for federal offenders. There is some doubt, however, whether all State and Territory law relating to the commencement date of the minimum term applies to federal offenders: in particular, provisions allowing the court to order that the minimum term begin earlier or later than the sentence.[52] Under the laws of some States and Territories, an offender may be given credit for the time spent in custody on remand. In Victoria, for example, the time spent in custody is deemed to be time already served under the sentence and is either deducted from the sentence or taken into account when imposing the sentence.[53] In New South Wales, if a person has been detained on remand, the non-parole period is deemed to have commenced from the time specified by the court as the time from which the offender has been in custody by reason of the offence.[54] In jurisdictions where there is no statutory requirement for credit to be given, pre-sentence detention is often taken into account informally in determining the sentence.

34. *Remissions.* Consistently with the policy of intra-jurisdictional parity of treatment of offenders so far as the time of release is concerned, s 19 of the

---

[51] Proposed s 5(1), (4), (5).

[52] *R v Ghadban*, unreported, NSW Court of Criminal Appeal (1 October 1982); cf *R v Turner*, unreported, NSW Court of Criminal Appeal (22 May 1981).

[53] Penalties and Sentences Act 1985 (Vic) s 16.

[54] Probation and Parole Act 1983 (NSW) s 24(1).

Commonwealth Prisoners Act provides that the provisions of State or Territory legislation 'relating to the reduction or remission of sentences or minimum terms of imprisonment' apply to federal offenders. It has been held that s 19 authorises the reduction of the minimum term by deducting remissions earned for good behaviour.[55] Remission rates vary from jurisdiction to jurisdiction. In some jurisdictions, remissions affect only the head sentence; in others, they are deducted from the non-parole period. In addition, special remissions may be earned in some jurisdictions. In South Australia, a court imposing a term of imprisonment or fixing a non-parole period must have regard to the fact that the prisoner may be credited with remission.[56] It has been held that New South Wales legislation providing for the reduction of the balance of a sentence to be served in the event of revocation of parole by the time the offender has been on parole without breaching the conditions of parole applies to federal offenders by virtue of s 19.[57]

Section 19 too limited

35. The applicability of a particular provision of State or Territory legislation will depend upon whether it can be characterised as one 'relating to the ***reduction or remission*** of sentences or minimum terms of imprisonment'.[58] It has been held that a provision allowing a prisoner to apply for release on parole before the end of the non-parole period does not fall within s 19.[59] Nor does s 19 authorise the conditional release of federal prisoners before the end of the minimum term, less remissions, for any reason. Thus, the pre-release program available to Victorian offenders under the Community Welfare Services (Pre-Release Program) Act 1983 (Vic) is not applicable to federal offenders. In order to allow federal prisoners to participate, they are released on licence.[60]

Recommendations

36. *Credit for pre-sentence detention.* The Commission is strongly of the view that any time spent in prison in relation to an offence for which the offender is ultimately sentenced to imprisonment should be deemed to be part of the service of that imprisonment. Under present law, whether or not this happens depends upon the provisions of the law of the State or Territory in which the offender is sentenced.[61] The Commission considered making no specific recommendation on the matter of credit for pre-sentence detention, confining itself to recommending only that State or Territory law by which the commencement

---

[55] *R v Tio and Lee* (1984) 35 SASR 146; see also *R v Thomas* (1986) 67 ALR 497.
[56] Criminal Law Consolidation Act 1935 (SA) s 302.
[57] *Attorney-General (Cth) v Burcher*, unreported, High Court of Australia (2 December 1986).
[58] s 19, emphasis added.
[59] *R v Martin* (1983) 78 FLR 133.
[60] Kelleher 1987, 425.
[61] See para 33.

date of a sentence and minimum term is ascertained should apply to federal offenders. This would have been consistent with the policy underlying this report and would have clarified the uncertainty surrounding the applicability to federal offenders of State and Territory law relating to the commencement of the minimum term.[62] However, it would have had the effect, in some jurisdictions, that no credit would be given. The Commission recommends that the commencement date of the sentence and of the minimum term should be the date on which the sentence was imposed, except where the offender has been in custody in relation to the offence. In that case the offender should be deemed to have been serving the sentence and the minimum term during the period of custody.[63] In making this recommendation, the Commission acknowledges that it may give rise to administrative difficulties in cases where joint offenders are sentenced to concurrent terms of the same length for both a federal and a State or Territory offence. If pre-sentence detention is credited to the federal, and not the State or Territory sentence, the offender will be entitled to be released on parole for the federal offence before he or she is eligible for parole for the State or Territory offence.

37. *Remissions.* The impact of remissions on both the head sentence and the minimum term varies markedly from jurisdiction to jurisdiction.[64] In its Discussion Paper,[65] the Commission provisionally proposed that a uniform system of remissions should apply to all federal offenders. General remission would be deducted from the head sentence and special remissions from the minimum term. If there were uniformity in sentences and minimum terms among the various jurisdictions, a uniform system of remissions would have much to commend it. However, there is not. The calculation of special remissions can be very complicated and, in the absence of a uniform system of remissions for all prisoners, State or Territory and federal, two different systems would have to be administered within the prison. In the case of joint State or Territory/federal offenders, they would have to be administered in relation to the one offender. Remissions which come off the head sentence affect the date when the sentence effectively comes to an end. Hence, a uniform federal remission system would make it very difficult to pursue the present goal of intra-jurisdictional parity of treatment: a sentence imposed on a State offender would end at a different time from the same sentence imposed on a federal offender. Therefore, the Commission recommends that the law of the State or Territory in which a federal offender is imprisoned relating to the reduction or remission of sentences and minimum terms of imprisonment should continue to apply to federal offenders. Section 19 of the Commonwealth Prisoners Act should remain unaffected in substance.[66]

---

[62] See para 33.

[63] Proposed s 4.

[64] See para 34.

[65] ALRC DP 30 para 271.

[66] Some drafting changes have, however, been made to it and it has been relocated as proposed s 6 of the Act.

38. *Pre-release programs.* In Victoria, State prisoners may, in certain circumstances, be released up to 12 months before the end of the minimum term to participate in a pre-release program introduced under the Community Welfare Services (Pre-Release Program) Act 1983 (Vic). It is consistent with Commonwealth policy that the program should be available to federal offenders but the Commonwealth Prisoners Act does not authorise their release for this purpose.[67] Consequently, they must be released under s 19A of the Crimes Act 1914 (Cth). If the Commission's recommendations are adopted, the power to release on licence will become a residual power to be exercised by the Governor-General only in exceptional circumstances.[68] The Commonwealth having decided that the Victorian program should be available to federal offenders, it is preferable that the offender be released on parole which, after successful completion of the program, will continue, albeit subject to different conditions. Therefore, federal offenders should be able to be released on parole to participate in the program. Clearly, however, the decision as to which pre-release programs should be available to federal prisoners should be retained by the Commonwealth. On the other hand, once approved, programs should be able to be made available without having to amend the Act. Therefore, the Act should provide for approved programs to be authorised by regulation. The Act should further provide for appropriate modifications to be made to programs approved for federal prisoners.[69]

39. *Temporary release.* Under State and Territory legislation, a prisoner may be allowed to be absent temporarily from the prison for a variety of reasons.[70] These include going to a relative's funeral, working or attending an educational institution. It appears that, in appropriate circumstances, federal prisoners are granted temporary leave of absence under provisions of this sort. It is not clear, however, that it is authorised by law: a federal law is needed. Accordingly, the draft Bill provides that the provisions of a law of a State or Territory relating to the release from prison of a person before the end of the minimum term of imprisonment may be applied to federal prisoners under the regulations.[71]

Release on parole

Decision to release is discretionary

40. Under the Commonwealth Prisoners Act, the decision to release a federal prisoner on parole is made by the Governor-General, acting on the advice of the Attorney-General.[72] The administrative processes involved were described

---

[67] See para 35.
[68] See para 65.
[69] Proposed s 6(2).
[70] See eg Prisons Act 1952 (NSW) s 29.
[71] Proposed s 6(2).
[72] s 5, s 3(2).

earlier in this report.[73] It has been the practice of successive Attorneys-General to recommend release on parole of federal offenders on completion of the minimum term where the prison and parole reports are satisfactory and there are adequate post-release plans.[74]

Administration too complicated

41. The effective operation of the conditional release scheme of the Commonwealth requires not only two statutory schemes, but three levels of decision-making in each case. Nevertheless, an offender is rarely refused parole at the end of the minimum term.[75] The procedure is unnecessarily complicated. It doubtless generates much needless anxiety on the part of the prisoner. Further, the Commission has been told by officers of the Attorney-General's Department that it is sometimes very difficult to process short-term prisoners quickly enough to release them on time. In any case, there may not be sufficient post-sentence information to make an informed decision.

Recommendations

42. *Release should be automatic.* If the recommendation made at paragraph 31 above is adopted, a minimum term will have been specified by the sentencing court for federal offenders except those sentenced to a term of imprisonment too short to attract a minimum term under local law and those sentenced to life imprisonment in jurisdictions where a minimum term may not be set for life sentences. Assuming the sentencing court has performed its task in deciding upon the sentence and the minimum term, there should be no relevant fact, for example, an extensive criminal record, that was known prior to sentencing that has not already been taken into account. Generally speaking, any offences outstanding at the time of sentence or committed subsequently will have been dealt with and, in appropriate cases, further terms of imprisonment will have been imposed. If an offence or offences remain still to be dealt with, the bail laws, not the parole laws, are the appropriate laws to govern the situation. For misconduct in prison which does not amount to a criminal offence, sufficient disciplinary powers, including loss of remissions, exist. Where a minimum term has been specified by a court for a federal offender, the offender should be released automatically on the appropriate day, unless the offender is, for some other reason, not to be released, for example, because he or she is on remand in custody awaiting trial for another offence or is serving another sentence of imprisonment.[76]

---

[73] See para 18; see also ALRC DP 30, para 206.
[74] Kelleher 1987, 416.
[75] See para 9.
[76] Proposed s 7(1).

43. *Discretion not to release rejected.* The Commission considered providing for a Ministerial discretion not to release an offender at the end of the minimum term. Automatic release could have been restricted to short-term prisoners or, alternatively, there could have been a *prima facie* entitlement to automatic release, but with the Minister retaining a discretion not to release in a particular case. The principal argument in favour of such a discretion is that it may not be appropriate for a person who has been sentenced to a long term of imprisonment for a serious crime to be automatically released. Under that argument, whether or not such a person is suitable for release at the time specified by the court should be considered closer to the time of the release. For the reasons outlined in the preceding paragraph, however, the Commission decided against providing for a discretion not to release.

44. *Release of life prisoners.* Under the Commission's recommendations, a minimum term will not be specified for persons sentenced to life imprisonment unless State or Territory law empowers the court to do so. Persons sentenced to life imprisonment are not presently covered by the Commonwealth Prisoners Act, but are released on licence. Persons are sentenced to life imprisonment only for the most serious of crimes, but in most cases, they will eventually be conditionally released. Within the range of crimes for which a person might be sentenced to life, there is a wide range of culpability, especially in jurisdictions which retain a mandatory life sentence for certain crimes, for example, murder. It is neither possible nor desirable to lay down a formula which will apply equally to all persons sentenced to life imprisonment. The decision to release must be made on a case by case basis. Australian Capital Territory offenders serving life sentences are considered for release on licence after 10 years, and annually thereafter.[77] In the Commission's view, this is, generally speaking, satisfactory, as long as there is a mechanism for release before 10 years in appropriate cases. Therefore, the Commission recommends that federal offenders sentenced to life imprisonment, in respect of whom a minimum term has not been set, should be able to be released by order of the Minister. Such an order should not be able to be made before the offender has served 10 years imprisonment unless the Minister is satisfied that exceptional circumstances exist.[78]

45. *Remaining discretionary powers to be exercised by the Minister.* The retention of a limited discretionary power to release persons on parole raises the question of who should exercise it. This power should be exercised, not by the Governor-General acting with the advice of the Attorney-General as at present, but by the appropriate Minister. This not only eliminates a level of decision-making but, more importantly, it locates the decision-making power at the level of government where responsibility for the decision actually lies. For this reason, the Commission recommends that all discretionary decisions relating to parole made under the Act should be made by the appropriate

---

[77] Kelleher 1987, 417.

[78] Proposed s 7(2), (3).

Minister.[79] Unlike the discretionary decisions made under the present Act by the Governor-General, decisions made by the Minister would be subject to review under the Administrative Decisions (Judicial Review) Act 1977 (Cth).

The parole period

Present law

46. *The parole period.* The parole period is defined in the present Act as commencing on the day on which the person is released from prison and ending

- in the case of a life sentence — on the day specified in the parole period as the day on which it ends or
- in any other case — on the day on which the term of imprisonment ends.

If the parole order is revoked or cancelled, the parole period ends on the date of revocation or cancellation.[80] The notion of the parole period is significant because it defines the period during which the parolee is subject to the conditions of parole and remains liable to serve the balance of the imprisonment. In a significant number of cases, the parole period is in excess of 10 years.[81]

47. *Conditions of parole.* Under the present Act, supervision is a mandatory condition of parole for federal offenders. Section 5(4) of the Commonwealth Prisoners Act provides that the parolee must, during the parole period, be subject to supervision of a parole officer and obey all reasonable directions of that officer. He or she must also comply with any other conditions specified in the order. Conditions other than supervision may be varied or revoked by the Governor-General.[82] As the Commonwealth does not have a parole service of its own, Commonwealth parolees are supervised by State and Territory parole officers pursuant to an agreement under the Act,[83] and receive the same supervision as their State or Territory counterparts.

Problems

48. The requirement that federal parolees be supervised for the whole of the parole period gives rise to a number of problems. First, offenders who will be, or are likely to be, deported cannot be released on parole so, if they are to be released at all, they must be released on licence. The release and repatriation of foreign nationals convicted of serious crimes has, on occasion, given rise to political controversy. Secondly, and more importantly, federal parolees may have to be supervised for inordinately long periods. The purpose of supervision is to facilitate the offender's transition from prison into the community and

---

[79] cf release on licence in proposed s 9(3).
[80] s 3(1).
[81] Kelleher 1987, 427.
[82] s 5(5).
[83] s 21(1)(b).

to reduce the likelihood of the offender's committing further offences. It is almost universally acknowledged that, if supervision is going to be effective, it will be effective sooner rather than later. In any case, the reality is that the resources of State and Territory parole authorities do not stretch to effective supervision for any length of time. There is doubt whether subjecting parolees to other types of conditions, some of which may seriously affect their lifestyles, for such a long period serves any useful purpose. In New South Wales, where 'clean street time' applies,[84] parole conditions continue to apply even beyond the time when there exists an effective sanction for breach.

Recommendations

49. *No mandatory conditions.* In most cases, it will be appropriate that release on parole should be conditional upon the parolee's being supervised by the relevant authorities for a period. However, in order to overcome the problems identified in the preceding paragraph, the Commission recommends tnat no condition, including supervision, should be mandatory. The length of supervision, if any, should be determined for each offender. The Commission considered including a provision that supervision should not exceed two years. This would have taken account of the argument that supervision is unlikely to be effective after two years, and of arguments based on the premise that supervision of any kind is intrusive. However, bearing in mind its recommendation that offenders should be automatically released at the end of the minimum term, the Commission decided that it would be preferable to allow for the maximum flexibility possible in the setting of conditions. Two years is an arbitrary period which may be appropriate in some cases, but not others. Depending on the degree of supervision, it is not necessarily intrusive; nor is it likely to be after two years. For some offenders, some contact, albeit limited, with parole authorities, may be useful beyond that time.

50. *Minister to set conditions.* The question arises as to who should set the conditions of parole. Subject to the requirement that supervision be one of the conditions, the conditions applicable to federal prisoners are set by a Commonwealth authority, presently the Governor-General acting with the advice of the Attorney-General. They may include the requirement to be of good behaviour, restrictions on where the parolee can live and work and travel restrictions. The present policy demands that the power to set conditions be retained by the Commonwealth and, in the absence of a federal parole board, the Commission is of the view that the appropriate person to exercise that power is the Minister. It therefore recommends that the power to set conditions for the release on parole of federal prisoners should be vested in the Minister.[85] In the light of the need to simplify the administration of parole for federal offenders, the Commission considered a suggestion by officers of the Attorney-General's De-

---

[84] See para 34.

[85] Proposed s 8(1); see para 45 for the reasons for recommending that this and other discretionary powers under the Act be vested in the Minister.

partment that standard conditions could be prescribed under the regulations. These could be applied to short-term prisoners, for example, persons sentenced to a term of five years or less, whose cases would only need to be considered if the offender applied for the standard conditions to be varied. Individually tailored conditions would be set by the Minister for longer term prisoners. The Commission seriously doubts, however, that it is possible to devise a model that would remove the need to consider each case individually. Accordingly, it does not recommend that a standard set of conditions should be prescribed for a particular class of offenders. This will not preclude devising a set of conditions for classes of offenders which could be used in a standardised way.

Liability to serve remainder of term

Present law

51. A person is liable to serve the remainder of the term of imprisonment to which a parole order relates when the parole order is revoked or cancelled.[86] A parole order may be revoked at any time by the Governor-General.[87] It is deemed to be revoked if a parolee is sentenced to a term of imprisonment for an offence committed during the parole period.[88] Further, if a parolee fails to comply with a condition of the order, or there are reasonable grounds for suspecting it, the parolee may be arrested without warrant[89] and the parole order may be cancelled by a magistrate.[90] There is a right of appeal against cancellation of the parole order to the Supreme Court of the relevant State or Territory.[91]

Law is irrational

52. These provisions can best be described as a hotchpotch. There is an unnecessary overlap of functions between the Governor-General, prescribed authorities in the States and Territories and the courts. In fact, parole is rarely revoked under any of the provisions.[92] Nevertheless, the Governor-General's discretion to revoke is unfettered and is not amenable to review. A parolee's security is limited.

Recommendations

53. *Circumstances in which person should be liable to serve balance of term.* Underlying the power to revoke or cancel parole is the need to have a sanction for breach of a condition of parole. Liability to serve the remainder of the term

---

[86] s 7.
[87] s 5(5)(b).
[88] s 5(7).
[89] s 5(8)(b).
[90] s 5(10).
[91] s 11.
[92] See para 9.

of imprisonment to which the parole order relates should therefore arise if the parolee fails to comply with a condition of the parole. If a person is released unconditionally, the existence of an arbitrary power to return the person to prison is clearly inappropriate. On the other hand, it is not inappropriate to return a person to prison if his or her release is subject to conditions and the conditions are not complied with. A person should also be liable to serve the balance of the term if he or she is sentenced to imprisonment for an offence committed while on parole. In such a case, the person's release on parole has effectively come to an end, whether or not it has formally been revoked as it can be for a breach of a condition of parole. However, the Commission recommends that these should be the only circumstances in which a person should be liable to serve the balance of the imprisonment.[93]

54. *Power to revoke parole should be limited.* The Commission recommends that a person should be liable to have his or her parole revoked for breach of a condition. However, this should be the only circumstance in which a person's parole should be liable to be revoked. Consistently with the recommendation in paragraph 45, the power to revoke a person's parole should be vested in the Minister alone.[94] It follows that the provisions empowering prescribed authorities to cancel parole should be repealed.

Service of remainder of term

Present law

55. Under present law, a person on parole is deemed

> not to have served the part of the term of imprisonment that remained to be served at the commencement of the parole period, until the parole period expires without the parole order being revoked or cancelled or until he is otherwise discharged from that imprisonment.[95]

So, in all jurisdictions except New South Wales where 'clean street time' is credited to the balance, a person whose parole is revoked or cancelled may be required to serve the whole of the remainder of the term from the date of release on parole. A new parole order may be made in relation to a person notwithstanding that a previous parole order has been revoked or cancelled.[96] There are, however, no statutory guidelines for the determination of the appropriate balance of the original term to be served in the event of revocation or cancellation. Each case is treated on an individual basis having regard to such matters as the nature of the breach, the balance of the term to be served and whether there have been other breaches.[97] When an offender is sentenced to a further

---

[93] Proposed s 10.
[94] Proposed s 11(1).
[95] s 17(1).
[96] s 16.
[97] Kelleher 1987, 427.

term of imprisonment for an offence committed while on parole, he or she is not deemed to have commenced to serve the balance of the original term until after at least the minimum term of the new sentence has been served. The Act specifically provides for the order of service of sentences in the event of revocation of parole by virtue of the imposition of a further term of imprisonment:

- first, the minimum term of imprisonment fixed in respect of the offence constituting the breach of parole or, if no minimum term was fixed, the full term
- second, the remainder of the sentence in respect of which the parole order is made, and
- third, where the new offence is an offence against the law of the Commonwealth and the minimum term has been fixed, the term of imprisonment for the new offence that exceeds the minimum term.[98]

Potentially harsh consequences

56. Although a person whose parole has been revoked or cancelled may be released on parole again at the discretion of the Governor-General, the potential consequences of revocation are very harsh. In practice, the offender is informed by officers of the Attorney-General's Department how much of the balance of the sentence is required to be served, but there is no statutory requirement to do so. No credit is given for the time during which the person fully complied with the conditions of parole ('clean street time') except in jurisdictions where it applies by virtue of the application of local law. The effect of s 15(4) and (5) is to exclude the provisions of s 19 of the Crimes Act 1914 (Cth), which provides that the court may order that multiple sentences be served cumulatively, part cumulatively or concurrently.[99] These provisions seriously inhibit the court's flexibility in sentencing as they preclude the court from ordering that the remainder of the sentence to which the parole order relates be served concurrently with the sentence for the new offence. The practical effect of this in individual cases can be extremely harsh. There are no equivalent provisions in s 19A of the Crimes Act 1914 (Cth).

Recommendations

57. ***'Clean street time' should apply.*** While on parole, a person is deemed to be serving the sentence imposed. Under the Commission's recommendations, the person becomes liable to serve the remainder of the term only if the parole is revoked for breach of a condition or if the person is sentenced to imprisonment for an offence committed while on parole. The liability arises by virtue of the breach or of the offence. The period spent on parole before this should be

---

[98] s 15(4), (5).

[99] Section 19 applies when a person is convicted of multiple offences by the same court at the same sitting and when a person is, at the time of conviction for a Commonwealth offence, already serving a term of imprisonment.

regarded as time served. Accordingly, in the event of a person's becoming liable to serve the balance of the term, the time spent on parole should be deducted from the time that is deemed to be left to be served. In other words, 'clean street time' should be available to federal offenders in all jurisdictions. This is the effect of the definition of 'unserved period of imprisonment' in proposed s 3(3).

58. *Minimum term should be specified for unserved balance.* When a person becomes liable to serve the unserved balance, the question arises as to how much of it he or she should be required to serve before being released again on parole. This question is not addressed by the present Act. In some cases, there will be so little of the unserved balance left that it will be appropriate that the offender be required to serve all of it. However, where a lengthy period remains, a decision as to how much of it should be served has to be made. Where the liability has arisen because the parole has been revoked by the Minister, the appropriate person to make this decision is the Minister. Accordingly, the Minister should be empowered to specify a period as the minimum term of imprisonment for the unserved period of imprisonment when the Minister revokes a person's parole.[100] Where the liability has arisen because the person has been sentenced to imprisonment for an offence committed while on parole, the appropriate body to set the new minimum term is the sentencing court. However, because in this case the court is already sentencing the person to imprisonment, it should be required to specify a minimum term for the unserved period of imprisonment.[101] In order to avoid the possibility that two minimum terms may be specified for the unserved period, the court should not be able to specify a minimum term if the Minister has already done so at the time of revoking the parole.[102] At the end of the minimum term thus specified, the person should be automatically released from prison.

59. *Order of service of sentences.* Under the present Act, a person who has been sentenced to imprisonment for an offence committed while on parole does not begin to serve the unserved period until he or she has served at least the minimum term of the new sentence. This provision is unnecessarily rigid. The balance of the sentence should be treated as another sentence imposed contemporanously with the new sentence. Accordingly, proposed s 14(3) empowers the court to order that the unserved period be served concurrently with, or cumulatively or partly cumulatively upon, the new sentence.

---

[100] Proposed s 12(2).
[101] Proposed s 14(5).
[102] Proposed s 14(6).

Miscellaneous

Other provisions not affected in substance

60. The approach to reform of the Commonwealth Prisoners Act recommended in this report has been to redraft all the substantive provisions of the Act.[103] Hence, the draft Bill in Appendix A provides for the repeal of the substantive sections and the substitution of new sections for them. However, not every provision has been affected in substance. The sections which have been substantially amended by the draft Bill have been identified and discussed in the preceding paragraphs. The remaining sections have been redrafted to take account of the substantive amendments proposed and to clarify and simplify them, but they have not been affected in substance. Some of the provisions have been relocated. In addition, the draft Bill provides for the repeal of s 19A of the Crimes Act 1914 (Cth) and the incorporation of the provisions governing release on licence into the Commonwealth Prisoners Act.

Transitional arrangements

61. The draft Bill provides that a minimum term of imprisonment fixed in relation to a person before the amending Act commences shall be taken to be a minimum term of imprisonment specified under s 5 of the Act as amended. Hence, all prisoners for whom a minimum term had been fixed would be automatically released under proposed s 7(1) at the end of that minimum term. Prisoners for whom a minimum term had not been fixed would be released by the Minister at the appropriate time under proposed s 7(2). Once an offender is released, the Act as amended would apply. Similarly, the Act as amended would apply to persons released on licence.

Release on licence

Release under the Crimes Act

62. Section 19A of the Crimes Act provides for the release of federal prisoners on licence. The licence is granted by the Governor-General[104] acting with the advice of the Attorney-General.[105] The licence may be subject to conditions.[106] A licence may be revoked by the Governor-General.[107] It may be cancelled by a prescribed authority if it is satisfied that the licensee has, without lawful excuse, failed to comply with the conditions of the licence.[108] In the event of revocation or cancellation, the licensee is liable to be imprisoned for that

---

[103] See para 19.
[104] s 19A(2).
[105] s 19A(14).
[106] s 19A(4); cf the requirement that a parole order must include supervision as a condition.
[107] s 19A(5)(b).
[108] s 19A(8).

part of the term of imprisonment that he or she had not served at the time of release on licence.[109] There is a right of appeal to a State or Territory Supreme Court against cancellation.[110] Section 19A does not specify how much of the remainder of the sentence should be served in the event of revocation or cancellation. Nor does it provide for the consequences of the imposition of another sentence of imprisonment, in particular, the order in which the new sentence of imprisonment and the old should be served.

Problems

63. ***Role of s 19A in conditional release regime is unsatisfactory.*** The discretionary power to release on licence provided for by s 19A is used to implement the policy which the Commonwealth Prisoners Act does not deliver. It is used for the conditional release of federal offenders in Queensland and Tasmania at the end of the statutory non-parole period which applies in the case of State prisoners or, in Queensland, at the release date recommended by the sentencing court. It is also used to give effect to the sentencing court's intention where the minimum term purportedly fixed is not valid under the Act, for example, when a court purports to set an aggregate non-parole period in respect of the number of terms of imprisonment. Increasingly, s 19A has been the means by which intra-jurisdictional parity of treatment is maintained in the face of innovative State and Territory legislation which is not, or may not be, picked up by the Commonwealth Prisoners Act.[111]

64. ***Discretionary power of release is too broad.*** Section 19A has been able to be used to overcome the inadequacies of the Commonwealth Prisoners Act because the discretionary power it vests in the Governor-General is very broad. The Governor-General may release a person 'if he thinks it proper so to do in the circumstances'.[112] This encourages a large number of applications from prisoners, and from other persons on behalf of prisoners, many of which, according to the Attorney-General's Department, have little or no merit. This causes unnecessary administrative complications.

Recommendations

65. ***Power to release on licence should be retained by the Commonwealth.*** If the recommendations made in this report are adopted, the discretionary power to release offenders from prison on licence under s 19A of the Crimes Act should no longer need to be used routinely as an alternative to the release on parole procedure provided for by the Commonwealth Prisoners Act. All federal prisoners will be covered by the provisions of the Commonwealth Prisoners Act as amended. There will always remain circumstances, however, in which the

---

[109] s 19A(19).

[110] s 19A(12).

[111] eg the Victorian pre-release program and the release on probation of prisoners in New South Wales.

[112] s 19A(2).

Commonwealth may wish to release an offender before he or she is eligible to be released under the Commownealth Prisoners Act. These might relate, for example, to the health or welfare of the offender or his or her family. The Commonwealth should retain a discretionary power to release federal offenders before the date on which they are entitled to be released on parole. Because release under this provision is in the nature of a special exception, it is appropriate that it remain with the Governor-General.[113]

66. *Eligibility for release on licence should be limited.* As it will no longer be necessary to release a person on licence except in very special cases, the circumstances in which a person should be able to apply to be released on licence should be limited to 'exceptional circumstances'. Applications for release on licence should have to specify the exceptional circumstances relied on to justify the grant of the licence. Although the Governor-General should be able to grant a licence at any time if the Governor-General thinks it is proper to do so in the circumstances,[114] licences should not be granted on application unless the Governor-General is satisfied that the exceptional circumstances exist and justify the grant of the licence.[115]

67. *Consequences of revocation of licence.* A licence granted under s 19A may be revoked by the Governor-General and, given that release is authorised by the Governor-General, this should continue to be the case. However, the provision does not currently provide for the consequences of revocation. There is no reason to distinguish between parolees and licensees in this matter; the proposed Bill therefore makes no such distinction. Thus, for example, the 'unserved period of imprisonment' in relation to licensees is defined to include credit for 'clean street time'.[116] Under proposed s 12, the Governor-General may, when revoking a licence, specify a period as the unserved period of imprisonment. Proposed s 13, dealing with arrest, will apply both to licensees and to parolees.

---

[113] Proposed s 9(3).
[114] Proposed s 9(3); cf Crimes Act 1914 (Cth) s 19A(2).
[115] Proposed s 9(1), (2), (4).
[116] Proposed s 3(4).

Appendix A
Draft legislation

COMMONWEALTH PRISONERS AMENDMENT BILL 1988

TABLE OF PROVISIONS

PART 1 — PRELIMINARY

PART 3 — AMENDMENT OF THE CRIMES ACT 1914

A BILL

FOR

An Act to amend the *Commonwealth Prisoners Act 1967* and the *Crimes Act 1914*

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

PART 1 — PRELIMINARY

Short title

1. This Act may be cited as the *Commonwealth Prisoners Amendment Act 1988*.

Commencement

2. This Act comes into operation on a day fixed by Proclamation.

PART 2 — AMENDMENTS OF THE COMMONWEALTH PRISONERS ACT 1967

Principal Act

3. The *Commonwealth Prisoners Act 1967* is in this Part referred to as the Principal Act.

4. Sections 3 to 20, inclusive, of the Principal Act are repealed and the following sections substituted:

Interpretation

"3. (1) In this Act, unless the contrary intention appears:

'federal court' does not include a court of a Territory;

'federal offence' means an offence against a law of the Commonwealth;

'federal offender' means a person convicted of a federal offence;

'minimum term of imprisonment', in relation to a person sentenced to imprisonment, means a period of that imprisonment during which the person may not be released on parole;

'offence' includes a federal offence, a State offence, a Territory offence, an offence at common law and an offence against an Imperial Act or order;

'parole' includes probation;

'parole officer' means:

(a) an officer of a State or of the Northern Territory in respect of whom an arrangement in force under paragraph 21(1)(b) applies; or

(b) an officer of the Australian Public Service in respect of whom an appointment under subsection 21(2) is in force;

'parole period', in relation to a person released on parole, means the period that:

(a) commences on the day on which the person is so released; and

(b) ends:

(i) in the case of a person released under an order mentioned in subsection 7(2) — on the day specified in the order as the day on which the parole period ends; or

(ii) in any other case — on the day on which, if the person had not been so released, the person would have been discharged from the imprisonment, or, if the parole is sooner revoked or the person commits an offence for which the person is sentenced to imprisonment — the day of revocation or of the offence;

'period of the licence' in relation to a person released on licence, means the period that:

(a) commences on the day on which the person is so released; and

(b) ends on whichever is the earlier of the following:

(i) the day on which, if the person had not been so released, the person would have been discharged from the imprisonment;

(ii) if the licence is revoked or the person commits an offence for which the person is sentenced to imprisonment — the day of revocation or of the offence;

'police officer' means:

(a) a member or special member of the Australian Federal Police; or

(b) a member of the police force of a State or Territory;

'prescribed authority' means:

(a) a person who holds office as a Chief, Police, Stipendiary, Resident or Special Magistrate of a State or of the Northern Territory and in respect of whom an arrangement in force under paragraph 21(1)(a) is applicable; or

(b) a person who holds office as a Chief, Police, Stipendiary, Resident or Special Magistrate of a Territory other than the Northern Territory;

'prison' includes any place where a person who has been sentenced to imprisonment may be detained to undergo that imprisonment and includes a lock-up or other place of custody;

'State offence' means an offence against a law of a State;

'State offender' means a person convicted of a State offence;

'Territory' means an internal Territory;

'Territory offence' means an offence against a law of a Territory;

'Territory offender' means a person convicted of a Territory offence.

"(2) A reference in this Act to:

(a) a person released on parole — is a reference to a person released from prison under section 7;

(b) a person released on licence — is a reference to a person released from prison under section 9.

"(3) Where a person released on parole becomes liable to serve the unserved period of the imprisonment, that period is the period of the sentence of imprisonment that the person had not served when the person was so released reduced by:

(a) a period equal to the parole period; and

(b) a period equal to any period or periods during which the person is in prison under this Act in connection with that parole.

"(4) Where a person released on licence becomes liable to serve the unserved period of the imprisonment, that period is the period of the sentence of imprisonment that the person had not served when the person was so released reduced by:

(a) a period equal to the period of the licence; and

(b) a period equal to any period or periods during which the person is in prison under this Act in connection with that licence.

Time of commencement of sentence and minimum term

"4. (1) A sentence of imprisonment imposed on, and a minimum term of imprisonment specified under section 5 for, a federal offender shall be taken to have commenced on the day on which the sentence was imposed.

"(2) Where, before the sentence was imposed, the offender was in custody in relation to the offence concerned, the offender shall be taken to have been serving the sentence of imprisonment, and the minimum term of imprisonment, during any period during which the offender was in that custody.

Specifying minimum term of imprisonment

"5. (1) A court that imposes a sentence or sentences of imprisonment on a person for a federal offence or offences shall, by order, specify a period as the minimum term of imprisonment.

"(2) Subsection (1) does not authorise a court to specify a single minimum term of imprisonment for a federal offence or offences and a State or Territory offence or offences.

"(3) The period shall be the same, as nearly as possible, as the period that would have been the minimum term of imprisonment if the provisions of the following laws of the State or Territory in which the person is sentenced had applied, namely:

(a) those laws that authorise or require a court to fix a minimum term of imprisonment for a State offender or a Territory offender who had been sentenced to the like imprisonment;

(b) those laws by reference to which a minimum term of imprisonment for a State offender or a Territory offender who had been sentenced to the like imprisonment is to be ascertained,

as the case may be.

"(4) Subsection (1) does not apply where the sentence, or one of the sentences, is:

(a) a sentence of life imprisonment; or

(b) a sentence of imprisonment for an unspecified period,

if, under the law of the State or Territory where the offender is convicted, a minimum term of imprisonment may not be fixed, or cannot be ascertained, for sentences of that kind.

"(5) Subsection (1) does not apply where the sentence is a sentence of imprisonment for a particular period or periods, if, under the law of the State or Territory where the offender is convicted, a minimum term of imprisonment may not be fixed or cannot be ascertained for a sentence of imprisonment for that period.

"(6) If more than one sentence of imprisonment is imposed, subsection (5) does not apply unless all the sentences imposed are sentences to which that subsection applies.

"(7) Where a court of the State or Territory concerned fails to make an order under subsection (1), that court or another court of the State or Territory that has jurisdiction in relation to proceedings for federal offences may, on application by the Attorney-General, the Director of Public Prosecutions or the informant or complainant, make the order.

"(8) If an order under subsection (1) was wrongly made or, in the circumstances, is not appropriate:

(a) the court that made the order; or

(b) if the order was made by a court of a State or Territory — another court of the State or Territory that has jurisdiction in relation to proceedings for federal offences,

may, on application by the Attorney-General, the Director of Public Prosecutions or the informant or complainant, vary the order.

"(9) Notwithstanding subsections 19(1) and (4) of the *Crimes Act 1914*, where:

(a) a court sentences a federal offender to imprisonment;

(b) at the time of the sentence, the offender is under sentence of imprisonment for a State offence or a Territory offence; and

(c) under a law of the State or Territory concerned, a minimum term of imprisonment was fixed or may be ascertained for the earlier sentence of imprisonment,

the court shall direct that the sentence imposed by the court shall commence to be served at the end of that minimum term of imprisonment.

"(10) Where:

(a) a person is sentenced to imprisonment for a federal offence in respect of which a minimum term of imprisonment is specified; and

(b) before that minimum term of imprisonment has ended, the person is sentenced to imprisonment for another federal offence in respect of which a minimum term of imprisonment is specified,

the later minimum term is cumulative upon, or concurrent with, the earlier minimum term according as the later sentence is cumulative upon, or concurrent with, the earlier sentence.

"(11) The order in which a person is to serve 2 or more sentences of imprisonment for federal offences is:

(a) first, sentences of imprisonment in respect of which no minimum terms of imprisonment have been specified and so much of any minimum term of imprisonment as is to be served concurrently with any of those sentences;

(b) second, any minimum terms of imprisonment, other than any minimum term, or part of a minimum term, referred to in paragraph (a).

"(12) Where, during the service of a sentence referred to in subsection (11), a further sentence of imprisonment is imposed on the person for a federal offence, service of the first-mentioned sentence shall, if necessary, be suspended in order that the sentences may thereafter be served in accordance with the order referred to in that subsection.

Reduction and remissions of sentences etc. for federal offenders

"6. (1) The provisions of a law of a State or Territory relating to the reduction or remission of sentences or minimum terms of imprisonment apply in relation to a federal offender who is serving a sentence of imprisonment in a prison in that State or Territory as they apply in relation to a State offender or a Territory offender serving a sentence of imprisonment in that prison.

"(2) The regulations may provide that the provisions of any other specified law of a State or Territory relating to the release from prison of a person before the end of the minimum term of imprisonment, modified as specified in the regulations, apply in relation to a federal offender in the State or Territory as they apply in relation to a State offender or a Territory offender.

Release of offenders on parole

"7. (1) Where a minimum term of imprisonment has been specified for a federal offender, the offender shall be released from prison on parole at the end of that term unless the offender is, for some other reason, not to be released.

"(2) Where a minimum term of imprisonment has not been specified for a federal offender, the Minister may order in writing that the offender be released on parole, specifying in the order a day as the day on which the parole period ends.

"(3) In the case of an offender whose sentence, or one of whose sentences, is a sentence of life imprisonment, the Minister may not make such an order before the offender has served 10 years imprisonment unless the Minister is satisfied that exceptional circumstances exist.

"(4) Unless the offender is, for some other reason, not to be released, the order is sufficient authority for the release of the offender from prison.

Conditions of parole

"8. (1) A person released on parole must comply with the conditions, if any, specified by the Minister by order in writing given to the person before the person was released from prison.

"(2) The Minister may, by instrument in writing, vary or revoke the order but the instrument is not effective until a copy of it is given to the person.

Release on licence

"9. (1) A person who is a federal offender, or who is being detained in prison by virtue of an order under section 17 of the *Crimes Act 1914*, may apply to the Minister for a licence to be released under this section.

"(2) The application must:

(a) be in writing;

(b) be signed by the person; and

(c) specify any exceptional circumstances relied on to justify the grant of the licence.

"(3) The Governor-General may, if the Governor-General thinks it proper to do so in the circumstances, grant a licence under this section to a person who is a federal offender, or who is being detained in prison by virtue of an order under section 17 of the *Crimes Act 1914*.

"(4) A licence shall not be granted on an application from, or made on behalf of, the person unless the Governor-General is satisfied that the exceptional circumstances exist and justify the grant of the licence.

"(5) A person released on licence must comply with the conditions, if any, specified in the licence and given to the person before the person was released from prison.

"(6) The Governor-General may, by instrument in writing, vary or revoke the conditions to which a licence is subject, but the instrument is not effective until a copy of it is given to the person released on licence.

"(7) Unless the person is, for some other reason, not to be released, a licence is sufficient authority for the release of the person from prison.

"(8) In this section, 'Governor-General' means the Governor-General acting with the advice of the Minister.

When balance of imprisonment must be served

"10. A person released on parole or on licence becomes liable to serve the unserved period of the imprisonment if:

(a) the parole or licence is revoked; or

(b) the person is sentenced to imprisonment for an offence committed while released on parole or while released on licence.

Revocation of parole or licence

"11. (1) The Minister may, by instrument in writing, revoke a person's parole if the person breaches a condition of the parole.

"(2) The Governor-General may, by instrument in writing, revoke a licence.

"(3) An instrument under this section takes effect from the day on which it was made.

"(4) In this section, 'Governor-General' means the Governor-General acting with the advice of the Minister.

Where parole or licence revoked

"12. (1) The instrument of revocation of parole:

(a) must specify the breach relied on and and the reason for revocation; and

(b) may specify a period as the minimum term of imprisonment in respect of the unserved period of the imprisonment.

"(2) The instrument of revocation of a licence may specify a period as the minimum term of imprisonment in respect of the unserved period of the imprisonment.

"(3) If a minimum term is specified under this section, this Act applies as if that period had been specified under section 5 and so applies notwithstanding that part of the sentence of imprisonment for the offence in respect of which the person was on parole remains to be served.

Arrest etc. of person where parole or licence revoked

"13. (1) A police officer may, without warrant, arrest a person whose parole or whose licence has been revoked.

"(2) The police officer shall, as soon as practicable, take the person before a prescribed authority in the State or Territory in which the person is arrested for a hearing under this section.

"(3) The prescribed authority may defer or adjourn the hearing and may:

(a) by warrant from time to time remand the person to a prison until the time appointed for continuing the hearing; or

(b) if the person agrees — order the release of the person upon specified conditions,

but if the person breaches such a condition, a police officer may, without warrant, arrest the person and bring him or her before a prescribed authority who shall then issue a warrant under paragraph (a).

"(4) For the purposes of the hearing, the prescribed authority may:

(a) take evidence on oath or affirmation and, for that purpose, administer an oath or affirmation; and

(b) summon a person to appear before the prescribed authority to give evidence and to produce such documents and articles, if any, as are referred to in the summons.

"(5) A summons shall be served in the same manner as a summons to a witness to appear before a court of summary jurisdiction in the State or Territory where the summons was issued.

"(6) A person who has been duly served with such a summons shall not, without reasonable excuse, fail or refuse to comply with it.

Penalty:

"(7) A person who appears before a prescribed authority shall not, without reasonable excuse, fail or refuse to be sworn or make an affirmation or fail or refuse to produce documents or articles, or to answer questions, that the person is required by the prescribed authority to produce or answer.

Penalty:

"(8) If the prescribed authority is satisfied that the person's parole or licence has been revoked, the prescribed authority shall issue a warrant:

(a) authorising any police officer:

(i) to take the person to a specified prison in the State or Territory; and

(ii) if the person was, immediately before being released on parole or on licence, in prison in some other State or Territory, then to take the person to the prison from which the person was so released; and

(b) directing that the person be detained in prison in that State or Territory to undergo imprisonment for the unserved period of the imprisonment.

"(9) Subparagraph (8)(a)(ii) does not apply if there is produced to the prescribed authority an instrument signed by the Minister, or by a person authorised in writing by the Minister for that purpose, asking that the person be imprisoned in the State or Territory in which the person was arrested.

Where parolee or licensee sentenced to further imprisonment

"14. (1) A person sentenced to imprisonment for an offence committed while released on parole or while released on licence (in this section called an offence committed while released) shall be detained in prison to undergo imprisonment for the unserved period of the imprisonment in the State or Territory in which the person was so sentenced.

"(2) A prescribed authority in that State or Territory shall, if there is produced to the prescribed authority an instrument signed by the Minister, or by a person authorised in writing by the Minister for that purpose, asking for a warrant under this subsection, issue a warrant:

(a) authorising the person to be detained as required by subsection (1); or

(b) if, immediately before the person was released on parole or on licence, the person was in prison in some other State or Territory:

(i) authorising any police officer to convey the person to a specified prison in the other State or Territory; and

(ii) directing that the person be detained in prison in the other State or Territory to undergo imprisonment for the unserved period of imprisonment.

"(3) The unserved period of imprisonment shall be served concurrently with, or cumulatively or partly cumulatively upon, the term of imprisonment imposed for the offence committed while released, as is ordered by the court.

"(4) Where:

(a) the unserved period of imprisonment is to be served cumulatively, or partly cumulatively, upon the imprisonment imposed for the offence committed while released; and

(b) a minimum term of imprisonment is specified, fixed or can be ascertained for the sentence of imprisonment for the offence,

that minimum term of imprisonment shall commence to be served first.

"(5) A court that sentences a person for an offence committed while released shall specify a minimum term of imprisonment in respect of the unserved period of the imprisonment and this Act thereupon applies as if that period had been specified under section 5 and so applies notwithstanding that part of the sentence of imprisonment for the offence in respect of which the person was released on parole or on licence remains to be served.

"(6) Subsection (5) does not apply if, by instrument under paragraph 12(1)(b) or subsection 12(2), a period has been specified as the minimum term of imprisonment.

Detention in State or Territory prisons

"15. A person who, under this Act or a warrant issued under this Act, is to be detained in prison in a State or Territory may be detained in any prison in that State or Territory, and may be moved from one prison to another prison in that State or Territory, as if the person were a State offender or a Territory offender.

Jurisdiction of State and Territory courts

"16. (1) The several courts of the States are invested with federal jurisdiction, and jurisdiction is conferred on the several courts of the Territories, in respect of matters arising under this Act.

"(2) The jurisdiction with which courts of a State are so invested is invested subject to the conditions and restrictions specified in paragraphs 39(2)(a) and (c) of the *Judiciary Act 1903*.

Delegation

"17. (1) The Minister may, either generally or as otherwise provided by the instrument of delegation, by instrument in writing, delegate to a person all or any of the Minister's powers and functions under this Act, other than:

(a) the powers under subsection 11(1);

(b) the powers under paragraph 12(1)(b); and

(c) this power of delegation.

"(2) A power or function so delegated, when exercised or performed by the delegate, shall, for the purposes of this Act, be deemed to have been exercised or performed by the Minister.

"(3) A delegation does not prevent the exercise of a power or performance of a function by the Minister.".

Prescribed authorities and parole officers

5. Section 21 of the Principal Act is amended by omitting "of this section" from subsection (3).

Transitional

6. A minimum term of imprisonment fixed under the Principal Act in relation to a person shall be taken to be a minimum term of imprisonment specified in respect of the person under section 5 of the Principal Act as amended by this Act.

PART 3 — AMENDMENT OF THE CRIMES ACT 1914

Principal Act

7. The *Crimes Act 1914* is in this Part referred to as the Principal Act.

Repeal of section 19A

8. Section 19A of the Principal Act is repealed.

Transitional

9. The *Commonwealth Prisoners Act 1967* as amended by this Act applies to a person who has been released from prison on licence as if the person had been released from prison under that Act as so amended.

Explanatory Memorandum

COMMONWEALTH PRISONERS AMENDMENT BILL 1988

OUTLINE

1. This Bill amends the Commonwealth Prisoners Act 1967 and the release on licence provisions of the Crimes Act 1914. It implements the recommendations in a report from the Australian Law Reform Commission titled 'The Commonwealth Prisoners Act' published in 1988 (ALRC 43). The objectives of the Bill are

- to extend the right to release on parole under the Commonwealth Prisoners Act 1967 to federal prisoners throughout the Commonwealth
- to modernise, and simplify the administration of, the law authorising the release of federal offenders from prison on parole or on licence.

NOTES ON CLAUSES

PART 1 — PRELIMINARY

Clauses 1 and 2 — Short title and Commencement

2. These clauses are formal clauses providing for the citation and the commencement of the Bill. The Bill will come into operation on a day to be fixed by Proclamation.

PART 2 — AMENDMENTS OF THE COMMONWEALTH PRISONERS ACT 1967

Clause 3 — Principal Act

3. *Clause 3* provides that the Commonwealth Prisoners Act 1967 is the Principal Act referred to in the other clauses in this Part.

Clause 4 — Repeal of sections 3-20, inclusive, and substitution of new sections

4. *Clause 4* repeals most of the operative sections of the Commonwealth Prisoners Act and replaces them with new provisions. The provisions of the Commonwealth Prisoners Act not affected by the amendments made by this Bill are:

section 1 — short title
section 2 — commencement
section 21 — which authorises the Governor-General to enter into arrangements with State and Northern Territory administrations for State and Northern Territory officers to exercise power under the Act
section 22 — which preserves the Royal perogative of mercy and certain other Commonwealth and Territory laws
section 23 — which provides for the making of regulations.

Proposed section 3 — Interpretation

5. This proposed section replaces existing section 3 (interpretation).

6. *Proposed section* 3(1) defines a number of expressions used in the Act:

federal court: this definition reproduces the effect of the definition in existing section 3(1), with drafting amendments to make use of the definition of the expression 'federal court' in the Acts Interpretation Act 1902 s 26(b).

federal offence: this is a new definition introduced for convenience of drafting. It defines a federal offence as an offence against a law of the Commonwealth.

federal offender: this reproduces the definition in existing section 3(1), with drafting changes only.

minimum term of imprisonment: this reproduces the effect of the definition in existing section 3(1) with drafting changes consequent upon substantive changes made in the operative provisions of the Act.

offence, *parole* and *parole officer*: these definitions reproduce the equivalent definitions in existing section 3(1).

parole period: this defines the times that mark the beginning and end of the period during which a person is on parole. So far as the beginning of the parole period is concerned, no change, other than a minor drafting change, is made to the definition in existing section 3(1): parole commences on release from prison. Paragraph (b) of the definition provides a number of alternative finishing dates for the parole period. Where the Minister orders the release of a person on parole under proposed section 7(2) (that is where, in most cases, a person sentenced to life imprisonment is released), the parole period ends on the day specified by the Minister when the prisoner is released. In other cases, it ends at the end of the head sentence less whatever remissions would be applicable (remissions are applied to head sentences by proposed section 6(1)). However, if parole is revoked or the person is imprisoned for an offence committed while on parole, the parole period ends on revocation or when the offence was committed.

period of the licence: this is an equivalent definition to the definition of 'parole period' for the case of persons released on licence. However, there is no equivalent in this definition to the power of the Minister, in the case of parole of a person sentenced to life imprisonment, to specify a day as the day on which the parole period ends (see subparagraph (b)(i) of the definition of 'parole period').

police officer: this reproduces the definition of 'constable' in existing section 3(1).

prescribed authority: this definition reproduces the equivalent definition in existing section 3(1).

prison: this reproduces, with a consequential drafting change, the definition in existing section 3(1).

State offence and *Territory offence*: these are new definitions, parallel to the new definition of 'federal offence'.

State offender, *Territory* and *Territory offender*: these reproduce the equivalent definitions in existing section 3(1) with minor drafting changes.

7. *Proposed section 3(2)* defines the expressions *person released on parole* and *person released on licence* for drafting convenience.

8. *Proposed section 3(3)-(4)* define the expression *'the unserved period of imprisonment'* for persons released on parole and licence respectively. These definitions are relevant when the person becomes liable to serve the unserved period of imprisonment: that is, when the parole or licence is revoked, or when the person commits a further offence (see proposed section 10). To calculate the unserved period of imprisonment in each case, the starting point is the balance of the head sentence. 'Clean street time' (that is, the period during which the person was on parole or released on licence without breaching the parole or licence conditions, or committing a further offence) is deducted from the balance of the head sentence. If the person breaches parole or a licence condition and spends time in custody before being returned to prison to serve out the balance of the head sentence, the time spent in custody is also deducted. So far as parolees are concerned, this reproduces the effect of existing section 14. There is no equivalent provision, at present, for persons released on licence under section 19A of the Crimes Act 1914. Under proposed section 6(1) (reproducing existing section 19), remissions are also to be deducted from the unexpired portion of the head sentence.

Proposed section 4 — Time of commencement of sentence and minimum term

9. *Proposed section 4* specifies the time when sentence of imprisonment, and non-parole periods, are to be taken to have commenced. This will provide a common point of commencement for the calculation of the date of release on parole. *Proposed section 4(1)* provides the general rule that these periods commence on the day on which sentence is imposed. In the case of offenders who have previously been in custody for the offence (for example, on remand), *proposed section 4(2)* requires that time spent in custody be taken into account in calculating the time to be served.

Proposed section 5 — Specifying minimum term of imprisonment

10. This proposed section replaces existing section 4.

11. *Proposed section 5(1)* requires a court, when sentencing a federal offender to imprisonment, to specify a non-parole period. If the offender is being sentenced for more than one federal offence, an aggregate non-parole period must be specified. Under *proposed section 5(2)*, an aggregate non-parole period may not be fixed for an offender sentenced at the same time for a federal and for a State or Territory offence: separate non-parole periods must be specified for each. This reproduces existing section 4(4A).

12. *Proposed section 5(3)* requires the court specifying a non-parole period to ensure that the period is, as nearly as possible, the same as it would be if the local State or Territory law were to apply. However, if, under the local State or Territory law, the

court is given a discretion to fix a non-parole period, the effect of proposed section 5(1) is to require it to specify a non-parole period: no discretion is involved.

13. *Proposed section 5(4)* provides two exceptions to the requirement to specify a non-parole period: persons sentenced to life imprisonment or to imprisonment for an unspecified period. These exceptions only apply if, under the local State or Territory law, State or Territory offenders sentenced to life imprisonment or to imprisonment for an unspecified period cannot be eligible for parole.

14. *Proposed section 5(5)* provides a further exception to the requirement for the court to specify a non-parole period. In some jurisdictions, short sentences of imprisonment do not attract parole entitlements. In those jurisdictions, short terms of imprisonment for federal offences will not attract parole entitlement.

15. *Proposed section 5(6)* covers the case where some but not all of the sentences would, under proposed section 5(5), attract parole entitlements. It requires the court to specify a non-parole period for those sentences for which a non-parole period can be specified, even though it cannot do so for all the sentences. Compare the situation under proposed section 5(4): if a federal life sentence does not attract a parole entitlement, no other federal sentence imposed at the same time will.

16. *Proposed section 5(7)* covers the case where a State or Territory court fails to specify a non-parole period when required to do so. It allows the Attorney-General, the Director of Public Prosecutions or the prosecutor to apply to the court or to another State or Territory Court, to specify a non-parole period. This reproduces, with drafting changes, existing section 4(3).

17. *Proposed section 5(8)* covers the case where a non-parole period has been wrongly specified or, in the light of a further sentence of imprisonment, an earlier non-parole period is no longer appropriate. It allows the Attorney-General, the Director of Public Prosecutions or the prosecutor to apply to the court to vary the non-parole period. If the non-parole period was specified by a State or Territory court, another State or Territory court may also vary the non-parole period. This reproduces, with drafting changes, existing section 4(3).

18. *Proposed section 5(9)* covers the case of a federal offender who, at the time of being sentenced, is under sentence of imprisonment for a State offence or a Territory offence. If there is a non-parole period fixed or ascertainable for the State or Territory offence, the sentencing court can direct that the federal sentence of imprisonment be served after the non-parole period for the State or Territory has ended. This reproduces, with drafting changes, existing section 4(5).

19. *Proposed section 5(10)* covers the case of a federal offender with a non-parole period who is, during the non-parole period, sentenced for another federal offence for which a non-parole period is specified. It provides that the non-parole periods are cumulative or concurrent depending on whether the sentences are cumulative or concurrent. It reproduces, with drafting simplifications, existing section 4(6).

20. *Proposed section 5(11)* specifies the order in which sentences of imprisonment for federal offences are to be served. It reproduces the order provided for in existing section 4(7).

21. *Proposed 5(12)* ensures that the order of service of sentence as specified in proposed section 5(11) is not disturbed by further sentences for federal offences. It reproduces existing section 4(8).

Proposed section 6 — Reduction and remissions of sentences etc. for federal offenders

22. *Proposed section 6(1)* applies to federal offenders the benefits of local State and Territory law granting remissions or reductions of head sentences and non-parole periods in the same way as applies to State or Territory offenders. It reproduces existing section 19.

23. In a number of jurisdictions, pre-release or temporary leave schemes are available to prisoners. Not all of these schemes are covered by the existing section 19 or by the proposed section 6(1). Nor are State and Territory prison administrators, strictly, able to grant federal prisoners day leave and the like. *Proposed section 6(2)* allows regulations to be made to apply those schemes and powers to federal offenders in the same way they are applied to local State or Territory offenders, or with modifications specified in the regulations. The modifications may include, for example, substitution of Commonwealth agencies for State agencies in decision-making roles if this is appropriate.

Proposed section 7 — Release of offenders on parole

24. *Proposed section 7(1)* provides for the automatic release of federal offenders at the expiration of the specified non-parole period. It replaces existing section 5(1), which confers on the Governor-General a discretion to order release on parole.

25. *Proposed section 7(2)* covers the case where a non-parole period has not been specified for a federal offender (that is, federal offenders who fall within the exceptions listed in proposed section 5(4)–(5)). The Minister may order the release of these offenders on parole, specifying a day as the day on which the parole period ends.

26. *Proposed section 7(3)* provides that prisoners sentenced to life imprisonment for whom a non-parole period has not been specified may not be released on parole before they have served 10 years imprisonment unless exceptional circumstances exist.

27. *Proposed section 7(4)* confirms that a Ministerial order under proposed section 7(2) is sufficient authority to release the offender from prison. It reflects existing section 5(2).

28. Both automatic release and a Ministerial order under proposed section 7(2) are subject to the operation of other laws requiring that the offender not be released, for example, offenders who are still imprisoned for State or Territory offences.

Proposed section 8 — Conditions of parole

29. *Proposed section 8(1)* requires that offenders released on parole must comply with whatever parole conditions the Minister notifies them of before they are released. Under existing section 5(4), a condition — that the parolee be supervised by a parole officer — is imposed. In a number of cases, particularly cases of offenders released before being deported, such a condition is inappropriate. Accordingly, no mandatory conditions are applied.

30. *Proposed section 8(2)* allows the Minister to vary or revoke the order setting the parole conditions. Variations of the order are not effective until a copy of the variation is given to the offender. This reproduces the effect of existing section 5(5)–(6).

Proposed section 9 — Release on licence

31. *Proposed section 9* reproduces, with alterations, the scheme in existing section 19A of the Crimes Act 1914 for the release from prison of offenders on licence, rather than on parole.

32. *Proposed section 9(1)–(2)* are new provisions that allow federal offenders, or persons imprisoned as habitual criminals under the Crimes Act 1914, to apply for release on licence. Any such application must specify exceptional circumstances relied on to justify the grant of the licence.

33. *Proposed section 9(3)* authorises the Governor-General, in his or her discretion, to grant a licence. The licence need not be granted in pursuance of an application. This reproduces existing section 19A(2) of the Crimes Act 1914.

34. *Proposed section 9(4)* is a new provision that requires the Governor-General not to issue such a licence on an application unless the Governor-General is satisfied that there are exceptional circumstances to justify the licence. This provision is designed to ensure that release on licence is treated very much as the exception rather than, as at present, the rule.

35. Under *proposed section 9(5)* conditions may be imposed on a person released on licence. *Proposed section 9(6)* authorises the Governor-General to vary licence conditions, but variations are not to come into effect until the licensee is notified.

36. *Proposed section 9(7)* reproduces existing section 19A(3) of the Crimes Act 1914.

37. *Proposed section 9(8)* provides that the expression 'Governor-General' in this proposed section means the Governor-General acting with the advice of the Minister. This reproduces existing section 19A(14) of the Crimes Act 1914.

Proposed section 10 — When balance of imprisonment must be served

38. Proposed section 10 sets out the effect of revocation of parole or licence (provided for in proposed section 11) on a parolee or licensee being sentenced to imprisonment for a further offence. In each case, the parolee or licensee thereupon becomes liable to

serve the unserved portion of the original imprisonment. Proposed sections 3(3)–(4) and 6 provide for the calculation of the unserved period.

Proposed section 11 — Revocation of parole or licence

39. *Proposed section 11(1)* authorises the Minister to revoke a person's parole for a breach of a parole condition.

40. *Proposed section 11(2)* authorises the Governor-General to revoke licences.

41. *Proposed section 11(3)* provides that revocation becomes effective when the instrument of revocation is signed.

42. *Proposed section 11(4)* provides that the expression 'Governor-General' in this proposed section means the Governor-General acting with the advice of the Minister. This reproduces existing section 19A(14) of the Crimes Act 1914.

Proposed section 12 — Where parole or licence revoked

43. *Proposed section 12(1)* requires the Minister, in revoking parole, to specify the breach relied on and the reason revocation action was taken. It also authorises the Minister to specify a further non-parole period for the balance of the unserved period of imprisonment.

44. *Proposed section 12(2)* provides that the Governor-General, in the instrument revoking a licence, may specify a non-parole period in respect of the unserved period of imprisonment.

45. *Proposed section 12(3)* gives the same effect to a non-parole period specified under section 12(1)(b) or 12 (2) as is given to non-parole periods specified by a court.

Proposed section 13 — Arrest etc. of person where parole or licence revoked

46. *Proposed section 13* reproduces, with considerable drafting amendments and simplifications, existing sections 5(8)–(9), 7, 8, 9, 12 and 13.

47. *Proposed section 13(1)* authorises police officers to arrest, without warrant, persons whose parole or licence has been revoked. *Proposed section 13(2)* requires arrested parolees or licensees to be taken before a prescribed authority as soon as practicable for a hearing (for the definition of prescribed authority, see proposed section 3(1)). *Proposed section 13(3)* authorises the prescribed authority to defer or adjourn the hearing under this section and for that purpose to remand the parolee or licensee in custody or to release the parolee or licensee conditionally. If, however, the parolee or licensee breaches those conditions, the prescribed authority must remand the parolee or licensee in custody.

48. *Proposed section 13(4)* authorises the prescribed authority to take evidence on oath or affimation, administer oaths and affirmations and issue summonses. *Proposed section 13(5)* provides for the service of summonses. *Proposed section 13(6)–(7)* create

offences of failing to comply with summonses duly served, and failing to be sworn or affirmed, produce documents or articles, or answer questions as required.

49. *Proposed section 13(8)* requires the prescribed authority to issue a warrant for the imprisonment of the parolee or licensee whose parole or licence has been revoked. If the parolee or licensee was released from prison in another State or Territory, the warrant is to require the parolee or licensee to be taken back to that other State or Territory. However, if the Minister, or a person authorised in writing by the Minister for that purpose, asks that the parolee or licensee remain in prison in the State or Territory in which he or she was arrested, the warrant is not to authorise the parolee or licensee to be transferred back to the original State or Territory (*proposed section 13(9)*).

Proposed section 14 — Where parolee or licensee sentenced to further imprisonment

50. This proposed section deals with the case where a federal parolee or licensee commits an offence for which he or she is sentenced to imprisonment. Under proposed section 10, the person thereupon becomes liable to serve the unserved period of imprisonment. This proposed section makes necessary consequential and mechanical provisions and provides for the order in which the sentences of imprisonment are to be served.

51. *Proposed section 14(1)* provides the general rule that the parolee is to serve out the unserved period of imprisonment in prison in the State or Territory in which he or she is sentenced for the second offence. This reproduces existing section 15(2).

52. *Proposed section 14(2)* requires a prescribed authority in the State or Territory in which the parolee or licensee is sentenced to the further imprisonment, if so requested by the Minister or by a person authorised in writing by the Minister for that purpose, to issue a warrant authorising the detention required by proposed section 14(1) (*proposed section 14(2)(a)*). This is to ensure that appropriate records are available to prison administrators.

53. Proposed section 14(2) also covers the case where the parolee or licensee is sentenced to further imprisonment in a State or Territory other than the one from which he or she was paroled or licensed. In that case, if the Minister or a person authorised in writing by the Minister so requests, by way of exception to the general rule in proposed section 14(1), the prescribed authority must issue a warrant authorising the parolee or licensee to be taken back to the other State or Territory, there to serve out the unserved period of imprisonment. This aspect of proposed section 14(2) reproduces existing section 15(3)-(3A).

54. *Proposed section 14(3)* requires a court sentencing the person for an offence committed while on parole or while released on licence to determine whether the unserved period of imprisonment is to be served concurrently with or cumulatively upon the imprisonment to which the person is sentenced. This reflects existing section 15(4).

55. *Proposed section 14(4)* provides that, if the unserved period of imprisonment is ordered to be served cumulatively or partly cumulatively upon the imprisonment imposed, the unserved period is to be served after any non-parole period for the fresh sentence of imprisonment. This reproduces existing section 15(5).

56. *Proposed section 14(5)* requires the court to fix a further non-parole period for the unserved period of imprisonment in the same way as it is required to do for sentences imposed ordinarily. But *proposed section 14(6)* does not allow the court to do this if the parole or licence has already been revoked and the Minister or the Governor-General has already, under proposed section 12, specified a further non-parole period.

Proposed section 15 — Detention in State or Territory prisons

57. *Proposed section 15* reproduces existing section 20 with drafting changes to modernise it. It authorises federal offenders to be detained in State and Territory prisons, and to be moved from prison to prison, in the same way as State or Territory offenders.

Proposed section 16 — Jurisdiction of State and Territory courts

58. *Proposed section 16* reproduces, with small drafting amendments to modernise cross-references, existing section 18, conferring the necessary jurisdiction in respect of matters under the Act on State and Territory courts.

Proposed section 17 — Delegation

59. *Proposed section 17* is a new provision authorising the Minister to delegate his or her powers and functions under the Act. Revocation powers, however, may not be delegated.

Clause 5 — Prescribed authorities and parole officers

60. *Clause 5* makes a minor drafting amendment to existing section 21.

Clause 6 — Transitional

61. *Clause 6* makes transitional provision regarding parole. Its effect is that, where a minimum term of imprisonment has been fixed under the Act as it presently stands in respect of a federal offender, the offender will be entitled to the benefit of the amendments made by this Bill: he or she will be automatically released on parole at the end of the minimum term. Offenders for whom no minimum term was fixed can be released on parole in the discretion of the Minister under proposed section 7(2) and (3). Upon release, the Act as amended will apply. Persons already released on parole at the commencement of the Bill will be governed by the Act as amended.

PART 3 — AMENDMENT OF THE CRIMES ACT 1914

Clause 7 — Principal Act

62. *Clause 7* identifies the Crimes Act 1914 as the Principal Act in this Part.

Clause 8 — Repeal of section 19A

63. *Clause 8* repeals existing section 19A. The amendments to the Commonwealth Prisoners Act 1967 re-enact the scheme of release on licence presently provided for by section 19A.

Clause 9 — Transitional

64. *Clause 9* provides that persons released on licence before the commencement of this Bill are taken to have been released on licence under the Commonwealth Prisoners Act 1967 in its amended form.

Table of cases

References are to paragraphs in this report

Table of legislation

Bibliography

ALRC, see Australia, Law Reform Commission.

AUSTRALIA, LAW REFORM COMMISSION, Report No 15, *Sentencing of Federal Offenders (Interim)*, Australian Government Publishing Service, Canberra, 1980 (ALRC 15).

———, Report No 17, *Annual Report 1980*, Australian Government Publishing Service, Canberra, 1980 (ALRC 17).

———, Report No 34, *Annual Report 1986*, Australian Government Publishing Service, Canberra, 1986 (ALRC 34).

———, Discussion Paper No 29, *Sentencing: Procedure*, Australian Law Reform Commission, Sydney, 1987 (ALRC DP 29).

———, Discussion Paper No 30, *Sentencing: Penalties*, Australian Law Reform Commission, Sydney, 1987 (ALRC DP 30).

———, Discussion Paper No 31, *Sentencing: Prisons*, Australian Law Reform Commission, Sydney, 1987 (ALRC DP 31).

KELLEHER M, 'Federal and Australian Capital Territory Offenders: the Future of the Current Laws and Practice' in Potas (ed) *Sentencing in Australia*, Australian Institute of Criminology and Australian Law Reform Commission, Canberra, 1987 (Kelleher 1987).

WALKER J & BILES D, *Australian Prisoners 1984; Results of the National Prison Census — June 1984*, Australian Institute of Criminology, Canberra, 1985 (Walker & Biles 1985).

———, *Australian Prisoners 1985; Results of the National Prison Census — June 1985*, Australian Institute of Criminology, Canberra, 1986 (Walker & Biles 1986).

———, *Australian Prisoners 1986; Results of the National Prison Census — June 1986*, Australian Institute of Criminology, Canberra, 1987 (Walker & Biles 1987).