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The Law Reform Commission

Summary of
Discussion Papers No 29, 30, 31
October 1987

NCJRS

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ACQUISITIONS

SENTENCING

This is a short summary of three Discussion Papers, not a report. It sets out proposals for reform of the law of sentencing.

The proposals are not the Commission's final conclusions. Your submissions on them would be welcome. All submissions made to the Commission will be taken into account in preparing the Commission's report. Submissions should, if possible, be sent to the Commission by 31 December 1987.

If you want your submission to be treated as confidential, clearly mark it 'Confidential'. However, you should be aware that submissions may have to be released under the Freedom of Information Act 1982.

As far as possible submissions should be related to the paragraph numbers in the full Discussion Papers.

All enquiries and comments should be directed to:

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Commission Reference: ALRC Summary DP 29, 30, 31

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Introduction

1. *Nature of Reference.* The reference on sentencing was given to the Law Reform Commission by the federal Attorney-General in August 1978. In 1980 an Interim Report, *Sentencing of Federal Offenders* (ALRC 15) was tabled. The reference was revived in 1984. The Commission's Terms of Reference require it to report on the laws of the Commonwealth and Australian Capital Territory relating to the imposition of punishment for offences. In formulating its recommendations the Commission must have regard to

- uniformity in sentencing
- guidelines for imprisonment and non-custodial penalties
- grading offences and penalties
- structuring discretion
- establishment of a Sentencing Commission.

The Commission may only make recommendations for federal and ACT offenders.

2. *Contents of this Paper.* This paper summarises the Commission's principal proposals for reform of the sentencing process. Discussion Paper 29 deals with the establishment of statutory sentencing goals, methods of determining sentence, procedures for use during sentencing hearings and the establishment of Sentencing Commissions. Discussion Paper 30 deals with sentencing options, a new penalty structure, forms of release from custody and special offender groups. Discussion Paper 31 deals with prisons, particularly the question of constructing a prison system in the ACT, prison management and conditions, prison discipline, grievance mechanisms and civil disabilities of prisoners.

3. *Public comment sought.* The proposals set out in this summary are provisional only. Members of the public are invited to comment on the proposals, either by writing to the Commission or by making an oral submission to one of the public hearings which will be conducted in each of the capital cities later this year.

DP 29: Sentencing: Procedure

Reform of the sentencing process

4. *Constructing a just and consistent sentencing system.* While the criminal justice system attributes great importance to procedures for the determination of guilt or innocence, it neglects procedures for the determination of punishment. There is currently no statutory guidance and little common law in Australia on the goals of sentencing or how they are to be achieved. Judicial officers have a very broad discretion which can result in unjustified disparity in the treatment of similar offenders sentenced for similar conduct. A system to structure the exercise of discretion is therefore proposed (para 24–30).

5. *The goals of sentencing.* Because of the need to sentence according to a consistent policy a statutory statement of sentencing policy goals is proposed. Just deserts

should be the primary goal of sentencing. The goals of rehabilitation, incapacitation and deterrence should be given subsidiary weight. General deterrence should be eliminated as a goal of sentencing. Where possible the court should encourage reparation by the offender to the victim (para 31–8).

6. *Methods of determining sentence.* Detailed principles to guide the courts in the imposition of punishment should be incorporated in the proposed sentencing legislation. The penal value of an offence should be determined by its seriousness, having regard to the harm or risk which the conduct involved and the offender's degree of culpability for the offence. In addition, judicial discretion should be structured by the principles of consistency, proportionality and parsimony. The maximum punishment prescribed for an offence should not be imposed except in the most extreme case. No cruel or unusual punishment should be imposed. There should be no imprisonment solely for rehabilitation and no punishment should be increased by reason only that there has been an increase in the penalty prescribed for the offence since the time it was committed. The sentence imposed should be readily understood by the offender and those responsible for enforcing it and should be communicated in writing to those concerned (para 39).

Sentencing procedure

7. *The information base of sentencing.* At present the content and extent of information which may assist a court in determining sentence, and the way it is presented to the court, are largely unregulated. Unless the information base for sentencing is accurate, reliable and sufficiently detailed, the severity of the offence cannot be accurately assessed, nor an appropriate sentence chosen. A proper information base is thus critical to consistency in the treatment of offenders. It is suggested that appropriate procedures should include

- ensuring that sufficient information is available adequately to assess the nature of the criminal conduct, the characteristics of the offender and any other relevant matter
- ensuring, by applying appropriate standards of proof, that the information is reliable
- ensuring that information that is irrelevant, unfair or biased is excluded
- evaluating the information by giving it a priority consistent with the goals of sentencing (para 41–3).

8. *Factual basis of sentence.* The law does not place any limit on the matters which may be taken into account in sentencing. The Commission proposes a list of aggravating and mitigating factors to which judicial officers may have regard, if established by evidence, in formulating sentence. The aggravating factors relate to the circumstances of the offence. The mitigating factors relate to the circumstances of the offence and the offender, the response to the charge, circumstances of the proceedings and the effect of the sanction. Sentencers may step outside the list where the facts of the case clearly give rise to an aggravating or mitigating factor not listed, provided that the proposed goals of sentencing are adhered to. Failure to give written reasons justifying reliance on an extra factor should be a ground of appeal against sentence.

A plea of guilty entered for reasons other than remorse should not be regarded as a factor in mitigation but should still attract a discount in sentence. Safeguards should apply to such pleas. In addition it is proposed that the court should not be allowed to consider certain aggravating and mitigating factors currently in use: the prevalence of the offence; prior record (to the extent that it is relied upon to justify punishment beyond what is otherwise appropriate); providing information to the authorities; and the impact of sentence on third parties (para 43–60).

9. *Problems with determining facts of the offence.* Where, after presentation of prosecution and defence evidence relevant to the facts of the offence, any ambiguity or uncertainty exists concerning the circumstances of the offence, the court should invite the Crown to adduce such further relevant and admissible evidence as may be available and should invite the defence to do likewise, while acknowledging the defendant's right to silence. If necessary, the court may of its own motion compel the production of further written or oral evidence (other than by the defendant) to inform itself as to the facts of the offence. Such evidence should be on oath and cross-examination permitted. Where no further evidence is available, the sentencer should form a view of the facts on such evidence as is available to the court, but in so doing should not have regard to any of the facts listed below in paragraph 10. The rules of evidence to apply should be those proposed by the Commission in the draft Evidence Bill 1987 in its Report *Evidence* (ALRC 38) (para 66).

10. *Matters and procedu,es not relevant to resolving uncertainties.* Facts to which, as a matter of law, courts may not have regard in sentencing include some conditional release policies, unproclaimed legislation, facts which conflict with a jury verdict and facts arising out of the same incident which would have supported a more serious offence than the one charged. In addition, the court should not have regard to matters inconsistent with the proposed goals of sentencing, the defendant's demeanour in court, the defendant's choice not to give evidence or to plead not guilty, facts about the offender (as far as findings about the offence are concerned), the fact that the defendent committed perjury in the course of the proceeding or any antecedent or subsequent offences either committed by the defendant or charged against him or her. The role of juries should not be extended to allow their use as fact-finders to resolve uncertainty or ambiguity in the factual basis of sentence (para 62–5).

11. *Proof of facts relevant to sentence.* It is proposed to require proof and the application of the rules of evidence to all factual material relevant to sentence and in particular to the aggravating and mitigating factors unless the requirement of proof is waived by both the prosecution and defence and the judicial officer is satisfied that proof is not required. Pre-sentence procedures designed to reduce the time likely to be taken in court by the requirement of proof are suggested. A transcript should be made of addresses upon sentence (para 79).

12. *Resolving conflicts in the factual basis of sentencing.* The suggested sentencing legislation should include standard procedures for resolving conflicts as to facts about the offence. The court should attempt to resolve any conflicts of fact regarding the offence, where such facts are relevant and material to sentence, by seeking the provision of evidence by the prosecution and/or the defence. Proof of such facts should be beyond reasonable doubt. Neither party should be compelled to call evidence. The court may, of its own motion, compel the production of further evidence (other

than by the defendant) to establish the factual basis of the offence. Such evidence should be on oath and cross-examination permitted. The rules of evidence as set out in the Commission's proposed Evidence Bill 1987 should apply to resolving facts about the offence. Where there is insufficient evidence to resolve any conflict as to the factual basis of sentence, the sentencer should, where possible, not have regard to the challenged material in forming a view of the factual basis of sentence. Where such challenged evidence is an inextricable part of the facts relevant to sentence, the sentencer should resolve the conflict in favour of the defendant. The above procedure should also apply to conflicting evidence about the offender where the evidence in question is amenable to formal proof (para 80–94).

13. *Proof of facts about the offender.* Not all facts about the offender will be of sufficient importance to warrant proof according to the procedure outlined for the resolution of conflicting facts. It is therefore proposed that proof only be required where the court is invited to act upon facts or circumstances about the offender which the prosecution and defence do not agree upon. Procedural reforms designed to restrict the admission of unreliable information about the offender should be introduced. Such reforms could include improving the quality of police antecedent reports and resolving any conflict in them prior to the sentencing hearing. It may also be desirable to eliminate the conflicting roles of probation and parole officers who currently act for both the state and the offender. Suggestions are made for improving pre-sentence reports (para 91–6).

14. *Proof of other matters.* The court should have a discretion as to the proof required for any material, other than facts of the offence, or facts about the offender, which may be taken into account in sentencing consistently with the proposed goals of sentencing (para 97).

15. *Involvement of victims.* The victim's interests should be represented by the prosecution. A victim impact statement may be tendered by the prosecution where the extent of impact is not otherwise readily ascertainable from the evidence and court ordered restitution is an available option. The statement should consist of a statutory declaration prepared by a victim liaison officer and containing particulars of a victim's injuries (if any), damage to property and financial loss. Any greater involvement of victims in the sentencing process is inappropriate (para 74 and 98–9).

16. *Address on sentence.* It is proposed that victims, if any, or their counsel should not be permitted to address on sentence. Prosecuting counsel, however, should take an active role in address on sentence in the light of the Crown's right of appeal against sentence. Suggestions are made as to matters prosecutors could deal with when addressing on sentence (para 100–9).

17. *Reasons for and explanation of sentence.* Sentencing courts should give reasons for sentence which indicate the facts relied upon in reaching sentence, the reasons for the inclusion or exclusion of particular considerations and the aggravating and/or mitigating factors relied upon. Such reasons should be recorded in writing. In summary courts the requirement should be limited to recording reasons for sentence and addresses upon sentence unless an appeal is lodged, in which event written reasons should be made available. The court should be required to explain to the offender the purpose and effect of the proposed order, the consequences that may follow in the

event of failure to comply and the circumstances in which the order may be varied or revoked (para 110–7).

18. *Appeals against sentence.* Submissions are sought as to whether appeals against sentence should be as of right or by leave and as to whether there should be a change in the avenue of appeals against sentence in federal cases from State and Territory Courts of Criminal Appeal to the Federal Court. If appeals are to the Federal Court, should it be empowered to hear appeals against sentence for a State offence where the offender is also appealing against a federal offence, and should it be empowered to transfer any appeal in a federal case to a State Supreme Court if it considers this more appropriate? Regardless of the avenue of appeal, legal aid should be available in appropriate cases and the costs of an appeal should not be awardable to either side. A time limit of 28 days should be imposed for the bringing of appeals against sentence and credit should always be given for any time served in custody pending the hearing of the appeal. The means of appellants should be taken into account in deciding whether or not to require entry into a recognizance or lodgment of a deposit to secure their intention to continue with an appeal. Submissions are invited as to the grounds of appeal against sentence — these might include misinterpreted facts, acting on a wrong principle and manifestly excessive or lenient sentence. Submissions are also invited on the desirability of imposing restrictions, beyond those established by law, on the right of the Crown to appeal against lenient sentences (para 118–41).

19. *Means of implementing these proposals.* The same procedures should be used in all Australian courts for sentencing federal and ACT offenders. Sentencing legislation, in like terms, should be enacted both federally and in the ACT (para 142).

A Sentencing Commission?

20. Sentencing Commissions can play valuable roles in collecting and disseminating sentencing information, developing sentencing guidelines, educating judicial officers and advising Parliament and the courts on sentencing issues. The Commission suggests that a federal and an ACT Sentencing Commission should be established to perform these tasks. If there is not the money available to establish two Sentencing Commissions, it is suggested that one Sentencing Commission might be established in Canberra. It would be an independent body responsible for developing sentencing policy for both ACT and federal offenders. The Australian Institute of Criminology might be charged with servicing the Sentencing Commission with research staff and support services (para 143–85).

DP 30: Sentencing: Penalties

Sentencing options

21. *Unacceptable punishments.* Neither capital punishment nor corporal punishment should be reintroduced as a sentence against ACT or federal offenders (para 7–8).

22. *Imprisonment.* Imprisonment should be a punishment of last resort. The general approach in s 17A of the Crimes Act 1914 (Cth) is endorsed. It is proposed that additional guidelines be introduced in the proposed sentencing legislation in respect of the use of imprisonment (para 14).

23. *Fines.* The fine should continue to be used widely. The problem of the eroding effect of inflation on fines should be addressed by introducing a penalty unit system whereby a maximum fine of a specified amount for each offence is replaced by a maximum number of penalty units. To do away with the inequities of fines it is proposed that, when sentencing courts impose a fine on federal or ACT offenders, they should conduct a means inquiry to ascertain the defendant's income, assets, debts and dependants. The legislation governing such inquiries should reflect the approach in the Penalties and Sentences Act 1985 (Vic). In conducting such an inquiry the courts should not have any powers to compel the defendant or third parties to disclose the defendant's financial affairs. A failure to attempt to conduct an inquiry should be a ground of appeal against penalty. When a court is imposing a fine, restitution to the victim should have priority over a financial penalty (para 29–30).

24. *Fine default.* Fines should normally be paid at the time of sentencing, subject to a discretion in the court to allow payment by instalments. A defendant may opt to perform community service in lieu of payment of the fine. The court should have the power, at any time, to hear applications to review orders, grant further time to pay, vary the order allowing instalments or impose community service orders on the defendant instead of the originally ordered fine. Persons who default in payment of a fine through inability to pay should not be imprisoned. Default imprisonment should remain but only as the ultimate deterrent where the court is satisfied that the refusal to pay the fine is wilful. The default period of imprisonment should be fixed at the time of imposition of the fine and a maximum limit of 3 months should be placed on default periods of imprisonment. A formula should be set for converting a penalty into a term of default imprisonment or into a community service order. For example:

1 penalty unit = $100
1 penalty unit = two days imprisonment
1 penalty unit = four days community service (para 31).

25. *Absolute discharge and conditional release.* All courts responsible for sentencing federal and ACT offenders should have the power to order the absolute discharge of offenders without proceeding to conviction. They should also have the power to order conditional release and to impose such conditions on conditional release as they see fit. In the ACT the relevant legislation should be amended so that specific reference is made to reparation, restitution and payment of compensation. No period of conditional release should exceed three years. Where there is a breach of condition by the commission of another offence for which the offender is charged before a different court, the second court should have the power to determine both issues, except that where the second court is of inferior jurisdiction to the original court it should adjourn proceedings until the original court has determined the breach of condition issue (para 34, 35–41).

26. *Suspended, split and deferred sentences.* Suspended sentences should not be available for federal and ACT offenders. Existing provisions granting the courts power to suspend sentences should be repealed. Existing powers to impose so-called split sentences whereby the court partially suspends a sentence of imprisonment should also be removed. Courts sentencing ACT and federal offenders should have a specific power to defer passing sentence for a limited period in accordance with the procedure approved by the High Court in *Griffiths v R* [1977] 137 CLR 293 (para 36–41).

Supervised sanctions

27. *Probation.* Where a condition of supervised probation is made, the court should notify the probation service directly. The maximum period of supervision should be one year (para 41, 44, 174).

28. *Community service order.* Community service orders should only be made with the consent of the offender and a maximum number of hours which can be ordered (say 300) and a maximum number of hours which can be served each week (say 40) should be fixed (para 174).

29. *Home detention.* The Commission invites comment on the desirability of introducing home detention as a sentencing option and on the restrictions which should apply. If it is introduced it ought to be a genuine alternative to imprisonment, not merely an additional sentencing option which carries the risk of net-widening (para 77).

Implementation of sentencing options

30. *Federal offenders.* The Commission has considered and rejected the possibility of a federal system of non-custodial options due to the small numbers of federal offenders. State and Territory agencies should continue to be authorised to administer non-custodial options for federal offenders and the federal government should meet all costs incurred. Three possible approaches are considered. All State and Territory options could be available to federal offenders; all existing State and Territory options could be available but there could be uniform rules regulating their operation in relation to federal offenders. Alternatively, a range of authorised options, selected from available State and Territory options, could be legislated for. These would apply uniformly in relation to all federal offenders. The Commission tentatively prefers the last of these approaches. Such a list should be an exhaustive one, drawing only upon existing options considered acceptable. A clearly defined hierarchy of sentencing options should be set out in ascending order of severity. The following list is offered for consideration:

- absolute discharge
- conditional discharge
- fine
- deferment of sentence
- probation order
- community service order

- attendance centre order
- periodic detention
- imprisonment.

Not all options will be available in all jurisdictions, so courts sentencing federal offenders will need to inform themselves as to the availability of the relevant sentencing options. The sentencing tribunal should also be empowered to make any of the following ancillary orders in combination with any of the above sanctions: restitution, compensation, disqualification, forfeiture and costs (para 78–82).

31. *ACT offenders.* The range of sentencing options in the ACT should be expanded so that ACT courts have the same hierarchy of sanctions available to them as do courts sentencing federal offenders. There are two possible exceptions to this. Consideration should be given to establishing a pilot scheme based on the day fine system in the ACT, and to establishing home detention as a sentencing option in the ACT as opposed to an early release scheme. Any such scheme should not involve electronic surveillance (para 83–6).

A new penalty structure

32. *Introduction.* In a rational system of punishment it is desirable that penalties prescribed by law correspond to offence seriousness in a consistent fashion and different penalty types be applied in accordance with readily accessible and well understood rules. No such claim can be made about penalty structures in Australia which are inconsistent and in a state of chaos. A new penalty structure should be created in two stages: setting the framework and then setting individual penalties. The Commission should undertake the first task but the second should be left (as far as federal offences are concerned) to the Review of the Criminal Laws of the Commonwealth. The Sentencing Commission should undertake the second task for ACT offences (para 99).

Hierarchy of offences

33. *Considerations in ranking offences against persons and property.* A greater premium should be placed on personal physical security than the security of property. The sentencing process should reflect this in ranking offence seriousness. Offences against the person should be ranked according to harm and culpability. Offences against property should be ranked according to method of commission (para 109–21).

34. *Ranking offence seriousness.* Offences should be divided into specified categories according to seriousness. This ranking should take into account both public perception and sentencing practice. It is tentatively proposed that there be eight categories of offences. The proposed hierarchy is not comprehensive. *Category A* should only contain the offence of murder punishable by a maximum penalty of life imprisonment. *Category B* offences should have a maximum penalty of 15 years imprisonment. This category should only extend to offences regarded as extremely serious by the community, such as complicity in or conspiracy to murder, manslaughter and extremely serious forms of drug trafficking. *Category C* offences should carry a maximum of 10 years imprisonment. Offences in this category might include armed robbery, hijacking aircraft, aggravated sexual assault, assault intentionally occasioning grievous

bodily harm, kidnapping and other offences against the person involving acts endangering life. *Category D* offences should carry a maximum of five years imprisonment and include break, enter and steal, serious fraud or misappropriation, arson and driving causing death. *Category E* offences should have a maximum penalty of two years imprisonment. This category might include theft, receiving, unlawful possession of stolen goods and reckless driving. *Category F* offences should have a maximum of six months imprisonment and could include gaming and betting, theft under $1 000, escape from custody and indecent acts. For *Category G* offences imprisonment should not be available as a penalty. This category should cover all offences not specifically allocated to other categories. *Category H* offences should carry fixed monetary penalties dealt with on an infringement notice basis such as parking violations and minor tax and customs matters (para 122–30).

35. *Length of sentences.* Fixed maximum penalties have been favoured, the only exception being life imprisonment (discretionary) in respect of murder. There should be a general downgrading of maximum penalties and a particular downgrading of maximum penalties in respect of non-violent property-related offences. Such downgradings will result in the new levels being more consistent with existing sentencing practice (para 121, 189).

Hierarchy of sanctions

36. *Grading sanctions.* A sanction hierarchy should be adopted for federal and ACT penalties. The proposed hierarchy is set out in ascending order of severity in paragraph 30. The maximum sanction type will depend upon the location in the offence seriousness hierarchy of the offence in question. The court will be directed by legislation to consider the appropriateness of each sentencing option, commencing with the least punitive choice, and to select the least punitive sanction appropriate having regard to the circumstances of the offence and the characteristics of the offender (para 174).

37. *Enforcement.* The sanction for non-compliance with a particular penalty should be the sanction next in the ascending order in the proposed sanction hierarchy except for some forms of conditional discharge for which there should be no enforcement mechanism. Imprisonment should be the enforcement sanction for escape from custody (para 171–2).

38. *Proposed scale of monetary penalties.* There ought to be a consistent relationship between maximum terms of imprisonment and maximum monetary penalties in relation to the various offence categories. A proposed scale of monetary penalties which relates to the proposed custodial penalties is set out (para 170).

39. *Combining penalties.* There should be a general prohibition on combining penalties. However it should be possible to combine ancillary orders with any sanction and fines with any non-custodial, non-monetary penalties (para 166).

40. *Setting length of imprisonment in weeks.* Prison terms should be imposed in weeks to be served rather than years or months as is currently the case (para 175).

41. *Setting the terms of imprisonment.* Comments are invited on the desirability of the sentencing court having the power to order that a prison term be served according to a particular security level in a particular institution and the power to *recommend* a classification level. They are also sought on whether judicial review of classification decisions should be allowed (para 156).

Awarding sanctions to particular offences

42. *Choice of penalties and penalty levels.* Once an offence seriousness hierarchy has been determined and a classification of sanctions has been achieved, there still remains the question as to how these are to be related. What rules should govern the allocation of particular sanctions in the hierarchy to particular offence categories (para 178)?

43. *Mandatory penalties.* No mandatory custodial sentences should be imposed for any offence, summary or otherwise. If there are to be any fixed penalties at all for minor offences, such penalties should be restricted to fines. Fixed financial penalties ought not to be established at too high a level. Their proliferation is not favoured. There should be no mandatory minimum penalty for any federal or ACT offence subject to one qualification in respect of minor offences. Existing minor offences (such as parking or traffic offences) should be retained in the interest of efficiency. Any new proposals for fixed penalties should be scrutinised by the proposed Sentencing Commission. There should be no system of specific penalty types being allocated to specific offences (para 184).

44. *Maximum penalties.* The maximum penalty prescribed for any particular category envisages the penalty which might be applicable in the 'worst possible case'. Repeat offending should not inevitably result in progressively higher penalties. The sentencing court should not be permitted to increase the maximum penalty (para 121).

45. *Choice of penalties and penalty levels.* Although classification of offence seriousness and sanctions constitute important improvements in the penalty structure further guidance is required for the courts in relation to the choice of penalties and penalty levels. Guidelines should be incorporated in the sentencing legislation providing that offences in categories A, B and C should presumptively result in a custodial sentence, offences in categories D, E and F should presumptively result in a non-custodial sentence and offences in categories G and H can only result in a non-custodial sentence. If a non-custodial sentence is selected, the court should impose the least onerous form of non-custodial disposition warranted by the circumstances having regard to the severity scale referred to. Once a particular type of disposition has been determined, the court should fix the penalty level by reference to the aggravating and mitigating factors. Mitigating factors should operate to reduce the penalty type or amount of penalty otherwise appropriate. Aggravating factors should operate to increase the penalty type or amount otherwise appropriate (para 189).

46. *The starting point or 'the tariff'.* An issue which remains is how to determine the starting point, the penalty level at which a sentencing court commences when confronted with a specific offence and from which adjustments are made according to the circumstances of the case. Traditionally there has been a 'going rate' or informal tariff from which the court starts. The existing system is unsatisfactory. However,

a carefully developed tariff system, soundly based on proper information as to sentencing practice could be of considerable assistance to sentencing courts. This would involve the systematic collection of information about sentencing, publication of such information, development of case examples and the development of legislative criteria as to the point at which a court should commence consideration of the appropriate penalty. These tasks should be undertaken by the proposed Sentencing Commission (para 190–2).

47. *Concurrent and cumulative sentences.* Leigslation should provide that, where a court imposes more than one sentence of the same kind on an offender in respect of a series of offences arising out of the same incident, there should be a presumption that the sentences operate concurrently. In exceptional circumstances the court may order that the sentences be cumulative. In doing so the court shall have regard to the totality principle (para 198).

48. *Commencement of custodial sentences.* Custodial sentences should commence from the time when a person is first remanded in custody by the court, whether or not the person is subsequently released on bail (para 199).

Release from custody

49. *Introduction.* A sentence does not end when an offender is conditionally released from custody. Rather, it continues to be served in the community under appropriate supervision and conditions.

50. *Reform of parole not abolition.* Numerous criticisms can be made of the parole system for federal and ACT offenders. In ALRC 15 the Commission recommended that parole be abolished. It is now of the view, however, that parole should be reformed to achieve a just and principled system of conditional release (para 220).

51. *Automatic parole.* The decision to release on parole prisoners sentenced to fixed terms should be removed from the Parole Board (in the case of ACT offenders) and the Governor-General (in the case of federal offenders). Prisoners sentenced to fixed terms should be automatically released on appropriate conditions to be specified by the parole board after serving the proportion of their head sentence fixed by statute. It is suggested that automatic release on conditions should take place after one-third of the sentence has been served. The notion of automatic release will be easily understood by all and taken into account by the sentencing court. Life sentence offenders will not be covered by the scheme. Submissions are sought as to whether certain other categories of offenders, such as those with sentences of less than 12 months, should be excluded from the proposed scheme (para 231–6).

52. *Revocation hearings.* The parole board should be empowered to impose more stringent conditions in the event of breach of conditions and to revoke parole only where the breach involves the commission of a fresh criminal offence. Credit for 'clean street time' should be given where parole is revoked (para 237).

53. *Procedures for use at parole hearings and appeals.* Prisoners should be informed about the parole system and their rights in respect of it. Full written reasons should be given for determinations as to supervision, conditions and revocation. Subject to

certain exceptions, prisoners should have access to documents about themselves that were considered in relation to parole board decisions. Prisoners should have the right to be present and to be legally represented at hearings affecting them and should be entitled to make submissions in writing to the board's hearings whether or not they are present. Appeals should be allowed from ACT parole hearings to the ACT Supreme Court. Appeals by federal offenders could go either to the Federal Court or to the Supreme Court of the relevant State or Territories. Written reasons for the appeal court decision should be given (para 239).

54. *Parole volunteers.* Parolees should be provided with assistance in relation to housing, employment and medical care. Consideration should be given to the establishment of a parole volunteers service (para 240–1).

55. *Implementing reforms for ACT offenders.* Until a prison system is created in the ACT, prisoners from the ACT should be subject to the same conditional release policies as NSW prisoners. However, the Parole Ordinance should be amended so that the procedures for use at parole hearings and appeals, outlined in paragraph 53, apply in the ACT. The scheme outlined above should apply once an ACT prison system is established (para 242).

56. *Implementing reforms for federal offenders.* The policy of treating federal prisoners in the same way as their State counterparts in relation to parole should be abandoned. Federal offenders should all be subject to the same parole scheme. The small number of Commonwealth parolees compared with State parolees would not at present justify the establishment of a federal parole board or service. If the proposals for a federal parole system are implemented, State and Territory parole boards would be required to administer two systems of parole — one for federal offenders and one for offenders within their own jurisdiction. This should not cause great administrative difficulties. The work load for parole officers will in fact be decreased as the maximum period of supervision for federal parolees will be two years. If there is any additional burden on State or Territory authorities the Commonwealth should provide additional funding. Further reforms to the Commonwealth Prisoners Act 1967 (Cth) are currently being investigated by the Commission (para 243–4).

57. *Life sentence prisoners.* Federal and ACT prisoners sentenced to life imprisonment should be released on parole by the ACT Parole Board (in the case of ACT prisoners) and the relevant State or Territory authorities (in the case of federal prisoners). Legislation should provide that a life sentence prisoner's case must be considered no longer than 10 years after the commencement of sentence and at least annually after the date of first consideration. Parole boards should consider on their merits applications made at any time. The procedures set out in paragraph 53 should apply to parole hearings for life sentence prisoners (para 250).

58. *Release on licence.* Legislation enabling release on licence redresses injustices produced as a result of the inadequacy of parole legislation relating to federal and ACT offenders. If the proposed parole reforms are introduced then there will be no justification for continuing with release on licence for either federal or ACT offenders (para 249).

59. *Governor-General's prerogative of mercy.* The Governor-General's power to exercise the royal prerogative of mercy should be retained for use in exceptional circumstances. Legislation should provide that the Governor-General can fully pardon a prisoner (including removal of the original conviction) as well as conditionally or unconditionally release offenders (para 253).

60. *Pre-release.* Legislation should provide that pre-release may be granted up to 30 days prior to the prescribed release date where the release of the prisoner at the prescribed time would unduly prejudice employment opportunity, education programs, medical treatment or family circumstances. Pre-release should not be used to relieve prison over-crowding (para 256).

61. *Temporary leave.* The provisions of the Corrections Act 1986 (Vic) in relation to temporary leave of absence should be adopted for ACT and federal prisoners (para 257).

62. *Remissions.* There should be a uniform and standard period of general remission for all federal and ACT prisoners sentenced to fixed terms. This period of general remission should be one-third of the head sentence. Federal and ACT prisoners should also be able to earn extra remissions, at a maximum rate of 15 days per calendar month served, for good behaviour or industry, and should remain liable to lose such remissions for breaches of prison discipline. Earned special remission should be deductible from the prisoner's conditional release date. General remissions come off the head sentence. They should not be available for life sentence prisoners, who should, however, be eligible for earned remission. Any earned remissions should be taken into account in deciding the conditional release date for life sentence prisoners. Sentencing courts should be entitled to take account of any automatic remissions when fixing the sentence but not of earned remissions (para 271–2).

Special categories of offenders

Aborigines

63. Submissions are sought as to whether Aboriginality should be included in the legislative statement of mitigating factors. They are also sought on the issue whether there should be special sentencing options available for Aboriginal offenders and whether there should be special rules regulating the operation of sentencing options for Aboriginal offenders. The Commission notes with concern that the 1987 draft of the Minimum Standard Guidelines for Australian Prisons specifically excluded police lock-ups from its coverage (para 275–81).

Corporate offenders

64. A sentencing court should have available to it a wide range of sanctions which are sufficiently flexible to cope with relatively minor crime as well as extremely serious corporate offences which have a major social impact. The cash fine should continue to play a useful role as a sanction against corporate offenders. The levels of maximum penalties should be raised in appropriate cases and reforms proposed in relation to cash fines for individual offenders should be introduced, suitably modified, for corporate offenders. In addition, submissions are invited as to the desirability of adopting

any or all of the following options: dissolution; disqualification from government contracts; equity fines; internal discipline orders; organisational reform orders; punitive injunctions; community service orders and publicity orders (para 307).

Female offenders

65. Gender should not of itself form the basis for differential treatment as far as sentencing is concerned. This does not mean, however, that problems and issues of particular relevance to women should be ignored (para 310).

Mentally disordered offenders

66. *Mentally disordered offenders found guilty.* The Commission invites submissions as to the desirability of any of the following options being implemented for the benefit of ACT and federal mentally disordered offenders who are fit to plead and not legally insane: hospital orders; treatment orders; guardianship orders; program orders (para 313, 320–4).

67. *Hospital orders.* If hospital orders are introduced it is suggested that they should be governed by special rules to protect against their misuse. Restricted hospital orders should not be available. Submissions are sought on the issue of whether or not time limits should be placed on the duration of hospital orders and also whether interim hospital orders should be available. The ACT should have its own secure psychiatric facility (para 314–9).

68. *The prison system.* The Commission invites submissions as to whether mentally disordered offenders within the prison system should be segregated from the rest of the prison population or integrated into it. If an ACT prison system is established, appropriate programs and guiding principles for mentally ill and intellectually disabled offenders should be developed. The official visitors scheme should be developed to fill a citizen's advocacy role within prisons. Mental illness and intellectual disability should not affect an offender's eligibility for remissions or parole (para 325–9).

69. *Fitness to plead.* The scheme recently introduced in NSW at the Supreme and District court levels to deal with offenders found unfit to plead should, with minor amendments, be introduced for the benefit of ACT and federal offenders. Separate procedures should apply to summary courts dealing with the issue of fitness to plead. The separate procedures found in the Crimes Act 1900 (NSW) s 428W and 428X provide, with minor amendments, a suitable model for adoption in the ACT and for summary courts dealing with federal offenders. Procedures for committal hearings will need to be devised (para 330–9).

70. *Not guilty on the ground of insanity.* The trial court, not the Governer-General, should be given the power to determine the most appropriate disposition for offenders found not guilty by reason of insanity. The trial court should have the power to make the following orders in respect of such offenders: an order discharging the offender either unconditionally or with conditions attached; hospital orders; treatment orders; program orders; forfeiture orders and disqualification orders. Submissions are sought as to whether there should be a maximum allowable length for such court imposed orders. Submissions are also sought as to the desirability of adopting the New Zealand procedure whereby the court, before making an order, may remand the person to a

hospital for a period not exceeding seven days for the purpose of making enquiries to determine the most suitable method of dealing with the case. It is proposed that courts of summary jurisdiction should have the same powers as superior courts to deal with and dispose of insanity pleas (para 340–5).

71. *Court obtained pre-sentence and psychiatric reports.* The Commission has not recommended any system of mandatory pre-sentence reports but notes that courts should avail themselves of such reports in all cases where there is a reasonable ground to expect it would assist in the sentencing process. Such reasonable grounds are particularly likely to exist where it appears that an offender is suffering from an intellectual disability or a mental illness. Submissions are sought as to whether the Magistrates' Court should have the power to order psychiatric examinations of accused already remanded in custody, as well as whether the court should be given the power to order an offender to undergo a psychiatric assessment on an outpatient basis following conviction (para 346–7).

Other special categories of offenders

72. *Young offenders.* The Commission is currently engaged in a research project on the sentencing of young offenders in co-operation with the Office of Youth Affairs. Submissions are invited on this topic (para 348–9).

73. *Habitual offenders.* Habitual offender legislation is outmoded and amounts to an unfair means of preventive detention. Section 17 of the Crimes Act 1914 (Cth) should be repealed (para 351).

74. *Defence force offenders.* The Commission has not yet consulted about sentencing under s 68 of the Defence Force Discipline Act 1982. However, it invites comment on the operation of the provisions (para 352).

DP 31: Sentencing: Prisons

A federal prison system

75. This is not the time to build a separate federal prison system. However, if the numbers of federal prisoners continue to increase, this position will need to be reviewed (para 4).

An ACT prison system

76. *ACT prison system.* An ACT prison system should be established. This should happen in two stages. Stage one should see the establishment of an open (minimum security) prison, a new remand centre and a periodic detention/work release centre (provided that the residential work release option is preferred to the non-residential option). Stage two would be the construction of a closed (maximum/medium) prison. The Commission does not favour the establishment of a bail hostel in the ACT. All ACT facilities should be co-correctional and should be staffed on an integrated basis. There will need to be substantial community involvement in planning for these

institutions and in particular in deciding upon their location. Belconnen Remand Centre could be used to accommodate a work-release/periodic detention centre. New facilities should be constructed for all other proposed institutions. It may be desirable to build all the facilities in close proximity to each other in order to maximise the use of staff and physical resources (para 18–34, 36, 39, 40).

77. *Potential accommodation for federal and regional prisoners.* Submissions are sought as to the desirability of expanding the size of the proposed closed institution so that it could also accommodate some federal and regional prisoners (para 35).

78. *Community based half-way house.* In this, the International Year of the Homeless, a community based half-way house should be established in the ACT to assist just released offenders (para 38).

Prison management and conditions

Options for the ACT

79. *Delayed commencement of sentence scheme.* Consideration should be given to introducing a delayed commencement of sentence scheme in the ACT (para 59–60).

80. *Guiding principles.* ACT prisons legislation should contain a list of guiding principles. These principles should provide a clear framework for policy development and the making of discretionary decisions (para 57, 61–3).

81. *Programs for prisoners.* In planning and budgeting for the ACT prison system considerable attention and resources should be devoted to ensuring that adequate vocational, educational, welfare and recreational programs are provided. In providing these programs every effort should be made to take advantage of existing community facilities such as TAFE colleges and staff (para 64).

82. *Rights for prisoners.* The proposed ACT Prisons Ordinance should contain a list of prisoners' rights and these should be enforceable (para 65–6 and Appendix B).

83. *Monitoring conditions and treatment.* The proposed ACT Sentencing Commission should research and report to ACT sentencers on the physical conditions of ACT institutions, the programs and facilities provided for prisoners and the overall treatment received by prisoners. These factors may be taken into account when determining sentence and evidence may be led on them (para 67).

84. *Official prison visits.* ACT judicial officers should regularly visit all institutions in the ACT so that they have first hand knowledge of them. The proposed ACT Prisons Ordinance should include provision for such visits and for visits by the Ombudsman, representatives of the Sentencing Commission and Official Visitors (para 68).

85. *Conditions of employment for staff.* Staff should have access to continuous support, training programs, good working conditions and should be well remunerated (para 69).

Options for federal prisoners

86. *Intra-State parity.* In ALRC 15 it was recommended that there should be national uniformity in the treatment of federal prisoners. While still believing that inter-State parity is an ideal to be aimed for, the Commission accepts that the continuation of intra-State parity of treatment for federal prisoners is the only practical approach currently available. Acceptance of intra-State uniformity does not relieve the federal government of its responsibility for federal prisoners. Certain changes which would not cause management difficulties for State and Territory prison administrators should be implemented for the benefit of federal prisoners. In addition the federal government has an obligation to ensure that the treatment of all prisoners complies with its obligations under international law (para 43).

87. *Keeping sentencers informed about prison conditions.* Prison conditions may be relevant in determining sentence. The Sentencing Commission could conduct research into conditions and relay this information to sentencers. This task could also be undertaken by the national standards body proposed in the Minimum Standard Guidelines for Australian Prisons. The federal government should assist with the funding of this latter body to ensure that it is established and operating in the near future (para 71).

88. *Federal funding.* The federal government should assist the States financially in the area of corrections so that the Minimum Standard Guidelines for Australian Prisons can be complied with. This could be done through a series of tied grants and by existing federal government departments which are charged with functions relevant to the administration of prisons, funding specific projects (para 72).

89. *Certain guarantees for federal prisoners.* The proposed federal sentencing legislation should contain certain guarantees/protections for federal prisoners where these will not create great management difficulties for State or Northern Territory authorities (para 73).

90. *Ratification of the Convention against Torture.* The Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment should be ratified as soon as possible (para 74).

91. *Change to the operation of the Health Insurance Act.* The Minister should issue a directive to alter the effect of s 19(2) of the Health Insurance Act 1973 (Cth). The directive should ensure that all prisoners are covered by Medicare, to the same extent as members of the community, for medical costs incurred for treatment provided other than by prison medical officers (para 75).

92. *The media and public opinion.* The reporting of issues concerning prisons and prisoners is a continuing problem. To avoid this problem it is important that the media have access to up to date information on a sustained basis about programs and objectives. Short guidelines on criminal justice issues and a list of contact people for the media should be developed (para 76).

Prison discipline scheme for the ACT

93. *Offences.* The number of prison discipline offences should be kept to a minimum. They should all contain a *mens rea* element and trivial or catch-all offences should be avoided as should an excessive overlap with the criminal law. All offences should be set out in the Ordinance or regulations. All staff and prisoners should be provided with a written description of the disciplinary system and a list of all prison offences. Appropriate arrangements should be made for those prisoners who cannot read English (para 91–2).

94. *Forums.* There should be three forums for hearing prison discipline offences. If the prisoner admits guilt in writing, or gives written consent to a charge being dealt with by the superintendent, it should be dealt with internally by the superintendent unless he or she otherwise directs because the charge is trivial and should not be proceeded with or because it is sufficiently serious to be heard either by the visiting magistrate or the normal criminal courts. If the prisoner does not admit guilt or consent to charges being dealt with internally, or, if the superintendent considers that the charge is too serious to be dealt with internally but not serious enough to be referred to the general criminal courts, it should be dealt with by a visiting magistrate. Where an offence is covered by the criminal law and not by prison discipline offences it should be dealt with by the regular criminal courts. Where there is an unavoidable overlap between prison offences and the criminal law, the superintendent should have a discretion whether the matter should be dealt with as a breach of prison discipline or a breach of criminal law (para 93–6).

95. *Natural justice and representation.* The rules of natural justice should be complied with in hearings before both the superintendent and the visiting magistrate. A prisoner should be given written notice of the time, date and place of hearing and the charge and facts alleged against him or her not less than 48 hours before a superintendent's hearing and 72 hours before a visiting magistrate's hearing. A prisoner must not be confined to his or her cell between the charge and the hearing. In hearings before the superintendent the prisoner may be assisted by another prisoner or a member of staff and should be entitled to seek telephone advice, in private, from a lawyer. In hearings before a visiting magistrate the prisoner should have a right to legal representation and legal aid should be available for this purpose (para 97–100).

96. *Punishments.* The only punishments a superintendent should be able to impose are a reprimand, or a restitution order or withdrawal of one or more of a prisoner's privileges for up to 14 days for each offence committed, but not exceeding in total 28 days. The visiting magistrate should also be able to impose these punishments and in addition should be able to order that the prisoner is to lose, for each offence committed, up to 10 days off the period of remission to which the prisoner is entitled, but no more than 28 days for all prison offences dealt with at the hearing. No more than one offence should be able to be charged in respect of a single incident. Matters listed as rights in the proposed ordinance will not be privileges and should not be affected as a result of disciplinary hearings. Submissions are sought as to the desirability of including fines amongst the permissible punishments (para 101–5).

97. *Appeals.* A prisoner should be able to appeal against a decision of the superintendent to the visiting magistrate. There should be a right to appeal from a

decision of a visiting magistrate acting at first instance to a Magistrates' Court with two magistrates sitting. After an initial appeal the only appeal should be to the Supreme Court by way of review on a question of law. Submissions are sought as to the desirable appeal scheme to adopt (para 106–8).

98. *Protections against informal disciplinary practices.* To ensure that decisions in respect of transfers, administrative segregation and classification are never used as *de facto* disciplinary machinery, the bodies charged with making decisions on each of these points must interview the prisoner before making their final decision and provide written reasons explaining their decision in each instance. A copy of these reasons should be given to the prisoner (para 109).

Grievance mechanisms for the ACT

99. *Internal grievance mechanisms.* Internal grievance mechanisms should be devised by staff and prisoners. Schemes should comply with minimum standards that should be set out in the ordinance (para 114).

100. *External grievance mechanisms.* The existing official visitors scheme should be extended to all new institutions in the ACT. The reporting powers of the official visitors should be expanded. All ACT prisons will fall within the jurisdiction of the Commonwealth Ombudsman. As well as dealing with individual complaints, officers from the Ombudsman's Office should visit all institutions on a regular basis and where these visits, or other investigations, reveal to them problems of a general nature the Ombudsman should exercise his or her power of own motion to investigate. The Ombudsman should also speak to all training courses for ACT prison staff, explaining the functions of the office and how it operates (para 115–20).

101. *The Commonwealth administrative review scheme.* The Commonwealth administrative review scheme should apply to all ACT correctional facilities. The latter will automatically come within the jurisdiction of the Commonwealth Ombudsman and the Federal Court acting under the Administrative Decisions (Judicial Review) Act 1977 (Cth). In addition appropriate appeal rights to the Administrative Appeals Tribunal should be made available (para 121).

Civil disabilities

102. *Voting rights.* Section 93(8)(b)–(c) of the Commonwealth Electoral Act 1918 (Cth) should be repealed so that a conviction does not act as a bar to voting in federal elections. Prisoners incarcerated for over a set period of time (say two years) should be entitled to list the prison as their residence for electoral purposes if they so choose (para 129–31).

103. *Access to the courts.* Legislation should be introduced to remove restrictions on access to the courts for federal and ACT prisoners. The legislation should provide that conviction for a federal or Territory offence (other than a Northern Territory offence) shall not of itself create an incapacity to sue in any court and that conviction for any offence shall not create an incapacity to sue in federal courts or a court of a Territory other than the Northern Territory (para 138, Appendix D).

THE AUSTRALIAN LAW REFORM COMMISSION

Invitation to Public Hearings on Sentencing of Federal and A.C.T. Offenders

The Australian Law Reform Commission is to report to the federal Government on proposals dealing with reform of the sentencing process. At present sentencing courts have wide discretionary powers which often result in offenders being given very different punishments for similar offences. Court procedures also vary from State to State, leading to inconsistencies in the sentencing of federal offenders. The Commission is examining whether

- the sentencing hearing should be regulated by more formal procedures
- the law of evidence should apply to the sentencing hearing
- the same procedures should be used in all Australian courts for sentencing federal offenders
- a sentencing commission should be established to develop sentencing guidelines, educate judicial officers and advise Parliament and the courts on sentencing issues
- a new penalty structure should be devised to relate the type of penalty imposed to the seriousness of the offence
- special rules should apply to offenders in special categories eg corporations, Aborigines and mentally disordered offenders

Other matters of concern to the Commission include whether:

- there is a need for a prison in the Australian Capital Territory
- A C T prisoners should be provided with certain basic rights
- legislation should guarantee that no federal or A C T offenders are punished by corporal punishment, solitary confinement or dietary restrictions
- there should be greater emphasis on reparation to victims.

The Commission has published Discussion Papers No 29, *Sentencing: Procedure;* No 30 *Sentencing: Penalties;* No 31 *Sentencing: Prisoners* and a separate summary of these papers. They explain the present law and set out the Commission's tentative proposals for change. Copies may be obtained free of charge from the Commission.

Informal public hearings are being held to discuss the Commission's proposals. You are invited to attend and express your views orally or in writing. If you wish to nominate a particular time for making submissions, please advise Mr Hunt (see below) and we will try to reserve the time for you.

Hearing details:

Tasmania	Tuesday 3 November Town Hall Conference Room Macquarie Street Hobart	11am to 6pm
Victoria	Wednesday 4 November The Gala Room (opposite Town Hall) City Square Cnr Collins and Swanston Sts Melbourne	11am to 6pm
South Australia	Tuesday 10 November Law Society 1st Floor 33 Gilbert Place Adelaide	11am to 6pm
Western Australia	Wednesday 11 November Perth Ambassador Hotel 196 Adelaide Terrace (1st Flr) Perth	12.30pm to 6pm
New South Wales	Monday 16 November Australian Law Reform Commission 10th Floor 99 Elizabeth Street Sydney	10am to 6pm
Northern Territory	Wednesday 18 November The Function Room Darwin Travelodge The Esplanade Darwin	11am to 6pm
Queensland	Monday 23 November Commonwealth Centre Lower Ground Level 295 Anne Street Brisbane	11am to 6pm
Australian Capital Territory	Friday 27 November University House (A.N.U) Common Room Balmain Crescent Acton	10.30am to 5pm

For further information please contact
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