AUSTRALIAN STIPENDIARY MAGISTRATES' ASSOCIATION

SECOND BIENNIAL CONVENTION

15 JUNE 1980, 2 P.M.

SENTENCING REFORM

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

May 1980

AUSTRALIAN STIPENDIARY MAGISTRATES' ASSOCIATION

SECOND BIENNIAL CONVENTION

MELBOURNE 15 JUNE 1980 2 P.M.

SENTENCING REFORM

The Hon. Mr Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

FIRST NATIONAL REPORT ON SENTENCING

On 21 May 1980 the Commonwealth Attorney-General (Senator P.D. Durack, Q.C.) tabled in the Australian Parliament a manuscript copy of a report of the Australian Law Reform Commission Sentencing of Federal Offenders.[1] Printed copies of the report will be delivered in late June. They will therefore be available to the Australian participants in the Sixth United Nations Congress on the Prevention of Crime and Treatment of Offenders. That Congress was to have been held in Sydney. It will now gather in Caracas, Venezuela in late August 1980. Item (iv) on the provisional agenda of the Congress refers to 'deinstitutionalisation of corrections'. Item (v) refers to 'norms and guidelines in criminal justice: from standard-setting to implementation'.

The report of the Law Reform Commission is a major document, for it is the first national study of sentencing ever carried out in the Australian Commonwealth. The Commissioner in charge of the project was Professor Duncan Chappell, who now holds the chair of Criminology at Simon Fraser University in Canada. In its work, the Commission collaborated with the Australian Institute of Criminology, the New South Wales Law Foundation, a team of consultants drawn from all parts of the country and varying interests in the criminal justice process and large numbers of judges, magistrates and concerned citizens. The report is a major enterprise describing for the first time in any detail the Federal involvement in the criminal justice system in Australia. It contains a detailed study of the lack of uniformity in the punishment of convicted Federal offenders, the use of imprisonment, prison conditions and grievance mechanisms for Federal prisoners, Federal parole and alternatives to imprisonment. It includes discussion

of the means of guiding the discretion of judicial officers in the sentencing Federal offenders, so that greater uniformity can be achieved in their treatment. It concludes with a detailed analysis of compensation for the victims of Commonwealth and Territory crimes and an analysis of the many tasks that remain for the completion of the comprehensive reference received by the Law Reform Commission.

To the Commission's report are attached a number of appendixes. These include copy of a questionnaire survey which was sent to all Australian judges and magistrates engaged in sentencing[2]; copy of the preliminary report on the analysis of the returns of this survey[3]; copy of a questionnaire which was sent to Federal prosecutors[4]; copy of a questionnaire which was distributed to all Federal prisoners and to certain State prisoners in gaols throughout Australia[5]; and an analysis of inconsistencies in Commonwealth legislation providing for the punishment of offences.[6] Finally, the report attaches two draft Bills for Commonwealth Acts. The first proposes a Crimes Act Amendment Act 1980.[7] The basic purpose of this draft Bill is to provide guidance upon the use of imprisonment in the case of convicted Commonwealth offenders, to make provision for the enforcement of orders for imprisonment in default of payment of fines and to make available State punishments as alternatives to imprisonment, in the case of persons convicted of certain Commonwealth offences. The second piece of draft legislation is for a Federal Criminal Injuries Compensation Act to provide for the victims of Commonwealth and Territory crimes resulting in death or bodily harm.[8]

It is not possible in this paper to do more than to sketch the nature of the Commission's inquiry, the principal recommendations and the tasks that remain outstanding. The report was presented as an Interim Report for several reasons. In the first place, important aspects of the reference remain to be completed. Secondly, the Commission has established a detailed procedure of consultation and community discussion as a pre-requisite to final recommendations for law reform that will last. The severe deadline for report imposed by the Attorney-General with a view to having a document available for the United Nations Congress, prevented the completion of public hearings in all parts of Australia and other consultations on its tentative proposals. This will now be possible on the basis of the Interim Report. When the consultations are concluded and the remaining items for study are completed, a final report will be presented to Parliament attaching comprehensive legislation for a Federal sentencing statute. In the meantime, the legislation which is presented is put forward in a final form because it was included in the Commission's earlier discussion paper[9] and discussed in all parts of the country, meeting little or no opposition. The same unanimity cannot be expected in respect of the other matters dealt with in the report and full procedures of consultation must be exhausted before final proposals are advanced.

PREPARING THE REPORT: LEGAL AND EMPIRICAL RESEARCH

The reference on Sentencing of Federal Offenders was received by the Law Reform Commission in August 1978. It could scarcely have been couched in more ample terms. The Commission started its task facing the well known lack of readily available Australian data on the imposition of punishment on offenders, Federal and State alike.[10]

> In general there are no adequate, reliable and comprehensive and national criminal justice statistics in Australia. Those that do exist are not readily available on a uniform national basis. Further, there has been almost no empirical research conducted on sentencing in Australia. These two glaring omissions have made preparation of this report difficult.[11]

Within the short time fixed by the Attorney-General for the presentation of an Interim Report and the relatively small resources of the Commission, a comprehensive research program was nevertheless initiated designed to close the most important and critical of the data gaps. In terms of legal research, of the orthodox kind, a number of specific studies were initiated to examine sentencing in Australia. These studies addressed sentencing and punishment as explained in the decisions of the courts, in the practice of other criminal justice officials or as provided for in legislation. Eight sentencing research papers were produced and widely distributed for comment and criticism. These papers dealt with the following topics:

* Sentencing Disparities. 'An Analysis of Penalties Provided in Commonwealth and Australian Capital Territory Legislation'. (J. Gilchrist)

* Offender Minimum Standards. 'Minimum Standards for Treatment of Federal Offenders' (M. Richardson)

* Fines. 'Alternatives to Imprisonment: The Fine as a Sentencing Measure' (J. Scutt)

* Community Work. 'Community Work Orders as an Option for Sentencing' (J. Scutt)

* Federal Jurisdiction. 'Sentencing the Federal Offender: Jurisdictional Problems' (R. Davies)

* Parole. 'Federal Parole Systems' (M. Richardson)

* Sentencing Discretion. 'Limiting Sentencing Discretion: Strategies for Reducing the Incidence of Unjustified Disparities' (I. Potas)

* Probation. 'Probation as an Option for Sentencing ' (J. Scutt)

In addition to legal research of this kind, five projects for the systematic gathering of relevant empirical data were completed by the Commission. These included:

* a National Survey of Judges and Magistrates;
* a Survey of Federal Prosecutors;
* a National Survey of Offenders;
* a Survey of Public Opinion;
* a Survey of Federal Police Files.

This is not the time to detail the methodology, contents, return, validity, outcome and implications of these projects. It is, however, important to make the point that the proposals of the Commission draw very heavily upon the information and opinions supplied by the critical actors in the criminal justice drama. The future of sentencing reform in Australia will almost certainly be influenced by this insight into the thinking and conduct of the chief dramatis personae. I believe that the time for considering sentencing reform as a matter to be studied in isolation from empirical data has passed. Anyone who approaches the reform of the practice of sentencing by an analysis only of what is said in legislation or in the decisions of the Courts of Criminal Appeal is almost certainly bound to proffer ineffective and ephemeral reforms which do not come to grips with the realities of sentencing practice, including in the Magistrates Courts where 90% of sentencing is done.

NATIONAL SURVEY OF JUDGES AND MAGISTRATES

Perhaps the most interesting and certainly the most controversial of the surveys completed by the Commission was the National Survey of Judges and Magistrates. Late in March 1979 a detailed questionnaire was distributed to 506 judicial officers throughout the country asking their views on a number of important topics. The project is believed to be unique, at least in common law countries. It was completed jointly with the Law Foundation of New South Wales. About 75% of the judicial officers of Australia (369) contacted by the Commission returned completed questionnaires. Many added useful and detailed comments about the problems of sentencing. Some who did not complete the questionnaire explained that by reason of special postings (e.g. to workers compensation or industrial functions) they were not involved in sentencing. The response rate of 75% is very high for a voluntary survey. It is certainly high enough to provide a statistically valid sample of the judicial officers of Australia. Only in one State, Victoria, were the

responses disappointing. Although the responses from magistrates in Victoria were the highest in any State in the country (88.6%), the responses from judges were the lowest in the country. Only 35% of the Supreme Court and 12.5% of the Country Court returned the survey form.[12] This low response followed a circular letter to the judges by the Chief Justice of Victoria expressing misgivings about the survey and its purposes. It may be of interest to record the participation of magistrates around Australia in this novel and important enterprise.

Table

Background and Response Rate National Sentencing Survey of Australian Judicial Officers 1979

Magistrates	Total	Number of Respondents	Percentage Return
New South Wales	86	68	79.0
Victoria	70	62	88.6
South Australia	27	19	70.3
Western Australia	26	23	88.5
Queensland	59	47	79.6
Tasmania	14	11	78.5
Northern Territory	7	5	71.4
Australian Capital Territory	5	5	100
Total	294	240	81.7

On behalf of the Commission I express appreciation to the magistrates of Australia for their support and assistance in completing the survey and, in so many cases, in adding detailed comments on sentencing reform. The Commission's Interim Report already draws on the preliminary results of the survey. The final report will contain a detailed analysis. The vast majority of respondents to the Judicial Officer Survey, judges and magistrates, indicated that they were of the view that there was a need for reform of sentencing in Australia. Only 2.3% of respondents were of the view that no aspect of sentencing was in need of reform.[13] The chief factors identified by respondents to the survey as being in need of reform were:

* the provision of more sentencing alternatives to judicial officers;
* provision for greater uniformity and consistency in sentencing;
* review of sentences and penalties currently provided for by law;
* probation and parole;
* clarification of the objectives of sentencing.[14]

I realise that there are some who are dubious about the value of opinion surveys and detailed analysis of sentencing practice and statistics. Though the human element in criminal punishment must never be overlooked, there is room for more science than exists at present. Inconsistency and disuniformity in the name of individual judicial discretion may be no more than lazy self-indulgence on the part of a legal profession resistant to change. The defence of the right of the judge or magistrate to have his personal idiosyncratic views, at the cost of the citizen coming before him for judicial punishment, is no longer tolerable. In a technological and sophisticated world, in the age of organ transplants, inter-planetary exploration and the microchip revolution, we in the law must be more open minded about the need for greater efficiency, consistency and modernity in what we are doing and how we do it. John Hogarth in his book Sentencing as a Human Process put it well:

> Until recently a student of the judicial process could roam freely through literature and only an occasional statistic would mar an otherwise serene landscape of rhetoric. He now faces a very different situation. Opening any recent book he may find himself confront chi squares t-tests and even regression equations and factor analysis. These disconcerting experiences inhibit adventure beyond the safe confines of law books, and they also tend to encourage a form of sectarianism where virtue is made out of ignorance and any researcher who uses anything but the most elementary research tools is seen as an invader who threatens to subvert theory to the interests of a strange and irrelevant methodological gamesmanship.[15]

It is encouraging to me, and I believe it should be encouraging to the citizens of Australia, that such an overwhelming majority of the Australian judiciary, judges and magistrates alike, took such an active and vigorous part in the Commission's judicial survey. Whilst we did not always follow the views of the judges and magistrates, any more than we blindly adopted the views of prisoners, prosecutors or the public (as revealed in a national public opinion poll) our recommendations are not made in ignorance of these views. Furthermore, the law makers will have these views before them when they consider the recommendations we have put forward. Where we have differed, the differences are explained and we seek to justify them. This is the proper role of a Law Reform Commission: to explain and clarify the current law and practice, to elaborate the problems therein as perceived by practitioner and non-practitioner, to isolate the policy issues for decision by the lawmaker and to put forward proposals which have been tested before the expert and the general community.

A BRACE OF SENTENCING REPORTS

The Australia Commission's report was not produced in isolation. Throughout the common law world there is an expanding debate about the laws, practice and principles of punishment. In the United States especially, numerous proposals for the revision of sentencing laws have recently been considered. In many cases they have been implemented by legislation. The most important move for a comprehensive and national reform of sentencing is in the United States where a new Federal Criminal Code is proceeding through the Congress. The Code's stated aim is that of achieving greater certainty and consistency in the imposition of punishment. It proposed the establishment of a Federal Sentencing Commission without power to lay down guidelines to be observed by Federal judicial officers.[16]

In Canada, the Law Reform Commission of Canada in 1975 published a major report on sentencing. The most novel aspect of this report was the new emphasis it placed on the needs of victims of crime and of the public. The Australian Commission has picked up this theme and carried it forward to important proposals for victim compensation and restitution in the Commonwealth's sphere in Australia.[17]

In Britain a number of contemporary studies are directed at sentencing reform, particularly to reduce disparities in sentencing. In 1978 the Advisory Council on the Penal System released a report containing proposals for quite radical changes in the maximum statutory penalties available for serious offences. In the same year a Working Party established by the Lord Chancellor's Office published a series of recommendations for the formal training of judges and other sentencers. Since the publication of the Law Reform Commission's report a new study has been released by Roger Tarling of the Home Office Research Unit into Sentencing Practice in Magistrates' Courts.[18] The study involved the analysis of 30 English Magistrates' Courts. It acknowledged that in a local system of dispensing justice, involving some 23,000 magistrates organised in about 640 petty sessional divisions throughout England and Wales, there was bound to be variation in sentencing practice. In fact, Tarling's report does show that wide variation occurs between the 30 courts analysed.[19] Apart from the detailed scrutiny of statistical material, the author interviewed individual clerks about the organisation and working of their courts. Special problems attend the reform of sentencing in Magistrates' Courts in England. Although problems attend reform in Australia, principally because of the Federal nature of our Constitution, it is believed that our difficulties may be fewer than those of Britain with its substantial lay participation in the local judicial process.

In New Zealand too efforts have been made to reform sentencing. The court system of that country, as a result of a series of recommendations made in 1978, is presently in the process of significant change, including change affecting the Magistrates' Courts. I know that you will be examining some of these changes in your conference.[20] In November 1979 the New Zealand Minister for Justice indicated that a major review would be conducted concerning New Zealand's penal policy and institutions.[21]

Quite apart from these overseas efforts, we had before us a large number of reports of relevant Australian inquiries directed at various aspects of criminal justice and penal law reform. The most important and comprehensive of these is the 1973 Report of the South Australian Criminal Law and Penal Methods Reform Committee, chaired by Justice Roma Mitchell.[22] As a result of crises in the various Australian correctional systems during the 1970s a number of Royal Commissions and Committees of Inquiry reported on aspects of punishment, particularly imprisonment and parole. Thus, the Commission had before it the report of the Royal Commissions into New South Wales Prisons conducted by Mr Justice Nagle[23], the report into New South Wales Parole Release Procedures made by a Committee chaired by Judge Muir[24], a report on the Western Australian Parole System by Mr K.H. Parker, Q.C.,[25] and a report by the Nelson Committee in Victoria.[26] Numerous other inquiries are proceeding or have lately been completed which will be relevant for criminal law and punishment. At a Commonwealth level, the recent report of the Royal Commission on Drugs is obviously most relevant.[27]

Australia began its recorded history as a penal colony. It is therefore not surprising that it has seen the various philosophies of and attitudes to criminal punishment come and go. The philosophy of rehabilitation has come under close scrutiny recently as the general conclusion is increasingly drawn from the studies of the effectiveness of various kinds of treatment, that the prospects for reformation of criminals by means of available sentencing policy are all too frequently poor. This depressing discovery and the late emphasis upon greater consistency and equality in punishment has led to new attention to the view that the prime business of penal policy is to ensure that 'just deserts' and no more are visited upon the convicted criminal offender.[28] Prisons were once called 'reformatories'. But if they do not reform, and on the contrary all too frequently instil cumulating criminality, whilst costing the community dear, new effort must be made to find viable, effective and just alternatives. Those alternatives should be less expensive both in cost to the public and in their human toll on the convicted offender. Considerations such as these, drawn from the international debate on punishment, overseas and local reports on the subject, elaborated by the Commission's own legal and empirical research have led to important proposals for the reform of sentencing as it affects offenders convicted of Commonwealth crimes.

THREE MAJOR THEMES

In the course of the Report Sentencing of Federal Offenders, three major themes emerge:

* Consistency and Uniformity. The first is the need to ensure greater consistency and uniformity in sentences imposed on Federal offenders wherever they are convicted throughout Australia. The Report collects the evidence of present inconsistency. It proposes that greater consistency be introduced and it suggests that this should be done by taking a number of innovative steps -

  . The establishment of a national Sentencing Council comprising judges, magistrates and others for the consistent overall development of sentencing law.

  . The provision of sentencing guidelines, by that Council, for the prosecution and sentencing of Federal offenders, not as legally binding on the decision maker but for his guidance towards the fairer and more uniform exercise of his discretion.

  . The revision of penalties provided for in Commonwealth legislation, which penalties the report discloses in many cases to be inconsistent, outdated, anomalous and in some instances, unacceptable.

  . The channelling of appeals in Federal criminal cases, including sentencing appeals, to the Full Court of the Federal Court of Australia in place of the Courts of Criminal Appeal of the several States, as at present.

  . The standardisation of remissions for Federal prisoners throughout Australia, wherever they are held in custody.

  . The uniform improvement of conditions in prisons in Australia in which Federal prisoners are held, so that they meet national minimum standards for the treatment of prisoners. No longer should the Commonwealth surrender its own separate responsibility for its prisoners by simply handing them over to State custodial institutions.

  . The abolition of parole in the case of Federal offenders (with consequent alteration and general reduction of Federal sentences so that they are the actual sentence to be served). If this suggestion is delayed or not accepted, the Commission has proposed the reform of parole to make its procedures and outcome fairer and more consistent in the case of Federal prisoners.

* Victims of Crime. The second theme is the plain need to do more for the victims of crime, all too frequently the forgotten participants in the criminal justice drama. The report proposes the establishment of an adequate Commonwealth Victim Compensation Scheme. It also suggests ways in which a greater emphasis could be placed on compensation and restitution orders, so that more is done by the criminal justice system for those who suffer as a result of a Commonwealth or Territory crime.

* Alternatives to Imprisonment. The third theme, is the desirability of finding new alternatives to imprisonment given its proved cost both in human and financial terms and its tendency to contribute to continuing criminality. For this purpose, the report proposes a number of specific reforms. They include:

  . Enactment of a legislative direction from the Commonwealth Parliament that imprisonment should be used (unless otherwise specifically provided for by law) only where no other sanction would achieve the objectives contemplated by the law. A number of specific principles are proposed to guide the judicial officer in the imposition of imprisonment upon persons convicted of Commonwealth offences, so that he will know the facts which the Parliament considers as appropriate to have in mind in imposing such a sentence. Already, in Britain and New Zealand legislation has been enacted in an endeavour to reduce the use of imprisonment and to encourage the use of alternatives.

  . The provision of sentencing guidelines by the Sentencing Council will, it is expected, not only ensure greater consistency and uniformity in punishment but also a reduced use of imprisonment, so that imprisonment is preserved for cases where 'no other available sentence is appropriate'.[29]

  . Courts sentencing offenders against Commonwealth laws should have power to impose non-custodial sentences which are available in their jurisdiction but not currently available in the case of Commonwealth offences. Many of the Australian States and Territories have already adopted innovative punishments, short of orthodox imprisonment. The innovations include community service, periodic detention and work release. The draft legislation attached to the Commission's report would, if enacted, permit judicial officers to impose on Commonwealth offenders a like range of sentences as is available in the jurisdiction of conviction for persons convicted of State or Territory offences in that jurisdiction.

  . The report also suggests the development of new alternatives to imprisonment for use in Federal cases.

CONSISTENCY AND UNIFORMITY IN PUNISHMENT

A major concern of the Law Reform Commission's project was to identify the chief sources of inconsistency and disuniformity in punishment of persons convicted of Commonwealth offences. In our large country of scattered communities, it is not surprising that elements of inconsistency and disuniformity should emerge in the criminal justice system. In the Australian Federal system of government and particularly given the 'autochthonous expedient' (by which Federal offenders are usually bailed, charged, committed, tried and imprisoned and otherwise punished by State officers), disuniformity is almost institutionally guaranteed. Since the federation of the Australian colonies in 1901, the Commonwealth Parliament has enacted many laws containing criminal offences and punishment. It has lately provided policing and other Federal agencies to investigate those offences or many of them. Even more recently, it has established a new superior court, the Federal Court of Australia. But for all these moves towards a truly Commonwealth criminal justice system, the great bulk of the work of dealing with Federal crime remains today where it has always been, with State agencies. Persons accused of Federal offences are tried in State Courts. They are sentenced by State magistrates and judges. When sentenced, they are (except in some cases in the Northern Territory) held in State prisons pursuant to a constitutional obligation of the States to receive in its prisons persons accused or convicted of offences against the laws of the Commonwealth.[30] Although decisions to grant parole to Federal prisoners or to release them on licence are made by Commonwealth authorities, as a result of the language of the relevant Commonwealth Act, quite different parole provisions apply to Federal offenders according to where they are convicted in different parts of Australia. Parole supervision is provided by State parole and probation officers. Institutional factors such as these combine to incorporate the Commonwealth offender overwhelmingly into the criminal justice system of the particular State (or Territory) in which he was charged, prosecuted and sentenced.

Because there are important differences in practices amongst prosecutors and sentencers in different jurisdictions of Australia, established clearly in the Law Reform Commission's report, inevitably these differences result in disparities in the punishment of Commonwealth offenders in different parts of the country. Although the criminal justice data available to the Commission was poor (being a species of the generally lamentable Australian criminal and penological statistics) they convinced the Law Reform Commission that Federal offenders, convicted in different parts of the country, were being treated in significantly different ways.

Quite apart from the institutional considerations which lead to an interjurisdictional disuniformity and disparity, there are very large elements of personal discretion which, even within one jurisdiction, lead to differences of punishment which are significant. The elements of inconsistency begin at the very earliest stage of the criminal justice process. The prosecutor has the responsibility to decide whether or not to charge an offender and, if a charge is laid, which of several usually available he will choose as appropriate to the circumstances. If no charge is laid, no official punishment will follow. Punishment is then left to the vagaries of the conscience of the offender. If a lesser charge is laid, that decision inevitably affects the maximum punishment that may subsequently be imposed by a magistrate or judge. After conviction, the range of punishment that may be imposed on the offender is usually expressed in ample terms, the legislature doing virtually nothing to guide the sentencer: simply stating the maximum he may impose. Even where there is an appeal, appeal courts, including the Courts of Criminal Appeal, will usually uphold the legitimate exercise of the wide personal discretion proposed in the judicial officer, not interfering simply because the punishment imposed was atypically high or atypically low. Except in the most general terms, there is no endeavour by the court system to rationalise and systematise the business of getting consistency in punishment, giving due weight to factors relevant to the offence and considerations personal to the offender. The High Court of Australia has shown a marked disinclination to become involved in effective sentencing review.

Faced with these considerations, the Commission was obliged to make a threshold decision. Is it better to ensure that convicted Federal offenders are treated as uniformly as possible throughout Australia? Or should the emphasis of the Commonwealth's criminal justice system remain that of integrating Federal offenders into the local State or Territory machinery of criminal justice, notwithstanding that such a policy will inevitably result in disparity in the treatment of like Federal offenders, depending upon where they are charged and tried in Australia. Until now, the Commonwealth's law and policy have chosen the course of integration into the local State or Territory system. The proliferation and likely future growth of Federal crime, the availability and desirability of remedial machinery and the importance attached to equality of punishment as an attribute of justice, has led the Law Reform Commission to the view that the time has come for a change in the Commonwealth's policy.

One member of the Commission (Professor Duncan Chappell) was inclined to proposed the establishment of an entirely separate Federal criminal justice system, such as already exists in the United States and to some extent in Canada. The majority of the Commissioners were of the view that present disparities and injustices from jurisdiction to jurisdiction could be substantially removed by the adoption of a somewhat less radical

reform. This would, at the one time preserve the unique role of State agencies in handling Commonwealth offenders and remove the more unacceptable sources of disparity (institutional and personal) in the punishment of Commonwealth offenders in different parts of Australia. Put shortly, the Commission's unanimous view is that it is unacceptable that an offender against the same Commonwealth law should be treated significantly differently in different parts of Australia, whether in the decision to prosecute, the nature of the prosecution brought, the sentence imposed or the manner in which it is served. To promote nationwide uniformity and consistency in the punishment of convicted Commonwealth offenders a number of proposals are advanced. They include:

* Provision of openly stated and uniformly enforced guidelines for Federal prosecutors.

* A major review of the Commonwealth's statute book to remove the many internal disparities and inconsistencies which presently exist in penalties provided for by current Commonwealth law.

* The provision of a new line of appeal in Federal criminal cases to the Full Court of the Federal Court of Australia, so that a single national court will lay down principles of punishment for Federal offenders, wherever they may be convicted in Australia.

* The abolition of parole in the case of Federal offenders and its substitution by a more determinate procedure for the post-sentence release of Federal prisoners. Alternatively, if parole abolition is not accepted or is delayed, significant reform of the Federal parole system is proposed to make it more principled, consistent and fair.

* The establishment of a national Sentencing Council, one of the major functions of which is to develop guidelines for the consistent exercise of sentencing discretions when judges and magistrates proceed to impose criminal punishment on convicted Federal offenders.

* The improvement of conditions in prisons where Federal prisoners are housed, so that they accord with international and nationally recognised minimum standards for the treatment of prisoners.

* The provision of an accessible and confidential grievance mechanism so that Federal prisoners having complaints about prison administration (normally State administration) can have such complaints fairly determined according to law.

THE AUSTRALIAN SENTENCING COUNCIL

Undoubtedly, the most far-reaching recommendation in the Law Reform Commission's Report is that the Commonwealth should establish an Australian Sentencing Council. The aim of this move is to ensure that generally uniformity and consistency of criminal justice punishment is made a matter of good management rather than good fortune. It is proposed that the Council should comprise the majority of judicial officers, including at least one magistrate. It should include other people with relevant expertise and community interest. It should have appropriate administrative and research support. All members should serve part-time. The report of the Law Reform Commission reflects the judicial survey in rejecting legislatively determined and highly specific mandatory statutory punishments. This is one course that has developed in the United States as a direct reaction to the perceived unfair disparities in judicial sentencing. The Law Reform Commission's report urges a different course. Although there is undoubtedly a need to cure manifest inconsistencies, injustices and omissions in Federal laws, the mandatory sentence is not recommended. On the contrary, it is suggested that the mandatory statutory sentence is too susceptible to ephemeral political pressure towards the ineffective increase in levels of punishment. Furthermore, it excludes due consideration being given to the particular circumstances of the offence and the personal characteristics of the offender.

> What is needed is a system which at once preserves the humanising element of discretion in sentencing but submits it to clearer, more specific and principled guidance.31

The report proposes that the Sentencing Council should prepare detailed and publicly available guidelines which spell out the general and particular criteria which the sentencing judge or magistrate should keep in mind in the exercise of his discretion in punishing persons convicted of Commonwealth offences. The guidelines are not to be coercive, substituting one form of oppression for another. Instead, they should provide judicial officers with publicly available guidance (grounded in proper statistical analysis) as a supplement to court decisions. The latter too often depend upon haphazard, chance factors of appeals. They are too frequently subject to the understandable reluctance of appeal courts to interfere after the event with the trial judge's determination. Publicly available sentencing guidelines should replace informal 'tariffs', 'tariff books', hurried conversations in the corridor between judges and magistrates and the idiosyncratic considerations which at present affect the practices of sentencing and criminal punishment.

The idea of a Sentencing Council and of sentencing guidelines is not new. Similar developments are proposed nationally for the United States and have already been implemented in a number of State jurisdictions in that country. They preserve the appropriate element of judicial discretion. They preserve judicial pre-eminence in sentencing. They do not oppressively bind and coerce the judiciary. On the contrary they supply a measure of order and clear thinking in a vital but often unsystematic activity of the judiciary. Furthermore, they do so in the open and thereby submit the process to a proper and much needed public review. In practice, in many States of the United States, where guidelines operate the judicial officer is supplied with a 'grid' which shows in each case the mean sentence applicable having regard to the statutory maximum, the nature of the offence and the background and personal characteristics of the offender. Representatives and the offender himself may address the bench on the particular weight given to the 'prime' factors. If the bench disagrees with the 'mean' as calculated for the case, he may do so but must provide the reasons for doing so. The guidelines themselves are regularly reviewed by the judiciary. Such a review is proposed here by the Australian Sentencing Council. The thinking of the Law Reform Commission is put thus:

> Sentencing is too important a matter to be left in its current unco-ordinated state. A greater measure of order and consistency must be brought into the process. This is particularly needed in a Federal country such as Australia, where geographical distance and institutional arrangements exacerbate the opportunities for disparity and unfairness in the punishment of persons convicted of offences against Federal laws.[32]

PAROLE ABOLITION OR REFORM

The second major proposal of the Law Reform Commission's report is that parole should be abolished in the case of Federal prisoners. There seems little doubt that parole originated in a humane endeavour to modify the harsher aspects of punishment, to encourage good conduct in prison and to afford the prisoner a hope of early restoration to normal life. Unfortunately, apart from perceived disparities in initial sentencing there is no aspect of criminal justice which creates such feelings of injustice (in many cases justified) than the disparities of parole, as currently administered in Australia. Parole has many failings, dealt with at length in the Law Reform Commission's report. They include:

* It promotes indeterminacy and uncertainty in punishment.

* It assumes that conduct in society can be predicted at all on the basis of conduct 'in a cage'.[33]

* It is presently conducted largely in secrecy and most parole decisions are simply not reviewable in an open court forum.

* It is to a large extent a charade. A long initial sentence is imposed. But judicial officers, the prisoners themselves and now the community at generally, all know that the 'long sentence' will not generally be served. Rather a much shorter sentence will be served, the exact length of time depending upon unreviewable administrative discretions made in secret on the basis of material which is untested and frequently unknown to the subject whose liberty is at stake.

But if these are general objections to parole, particular objections can be directed at the parole of Commonwealth offenders in Australia. Of all the defective systems of parole in Australia that involving Commonwealth prisoners is the most unacceptably defective. The administrative procedures are too complicated. The system operates differently in different parts of Australia. Decisions have to be made by the Commonwealth Attorney-General and the Governor-General, both busy officers of State, attending to these duties amidst other pressing responsibilities.

The Law Reform Commission's report points to the difficulties of abolishing parole only in the case of Federal offenders. However, it is believed that a start should be made. We should return to more determinate sentencing, standard and uniform remissions for good behaviour and industry and the abolition of the parole system. It is pointed out that a consequence of this decision would be the necessity of shorter sentences for Federal prisoners. The role of the guidelines of the Sentencing Council is stressed in this connection. If the proposal to abolish parole is not accepted or is delayed for a time, the report urges immediate steps radically to reform the system of parole as it affects Commonwealth prisoners in Australia. Among the reforms urged:

* amendments to the language of the Commonwealth Prisoners Act so it applies in terms uniformly throughout Australia;
* introduction of standard non-parole periods and remissions for all Federal prisoners;
* the obligation to give reasons in the case of refusal of parole to a Federal prisoner;
* access by Federal prisoners to records considered by parole authorities, save in certain exceptional and defined circumstances;
* prisoner participation and representation in parole hearings affecting his liberty;
* the nomination of an identified Commonwealth officer responsible for providing parole information to prisoners and their families;

* the publication of parole guidelines for release decisions; and
* the creation of a Commonwealth Parole Board, in substitution for the Governor-General advised by the Attorney-General.

APPEAL TO THE FEDERAL COURT OF AUSTRALIA

The third major suggestion to bring greater consistency in punishment of Federal offenders is that appeals in Federal criminal cases (including in respect of sentence) should lie not to State Courts of Criminal Appeal as at present but uniformly to the Full Court of the Federal Court of Australia. This is a further illustration of the importance attached by the Law Reform Commission to securing greater uniformity in the punishment of Federal offenders wherever they are convicted in Australia. If appeals lie (short of the exceptional case of special leave to appeal to the High Court) to State Courts, differences will inevitably persist. The most orthodox and time-honoured method of encouraging consistency in criminal punishment within a given jurisdiction is by review of an ultimate appeal court. In the case of convicted Federal offenders, the jurisdiction is the whole of the Commonwealth of Australia. The Federal Court of Australia is a superior court with jurisdiction for the whole of the Commonwealth. In Territorial matters it already hears and determines appeals, including criminal appeals. In certain commercial matters, traditionally not as important as the liberty of the subject, the Federal Court already hears appeals from State Courts. Directing criminal and sentencing appeals in Commonwealth criminal matters to the Federal Court of Australia is a regular, sensible and thoroughly appropriate way to contribute to greater consistency and uniformity in the application of Commonwealth criminal law and sentencing principles. The Commonwealth has its own special responsibilities for the criminal law made by the Federal Parliament. Utilising the Federal Court is a desirable way of establishing and upholding a single national standard throughout the country.

IMPRISONMENT AND ALTERNATIVES

The primary thrust of the proposals outlined above has been towards securing greater uniformity and consistency in the punishment of Federal offenders in Australia. The Sentencing Council, with its guidelines for prosecutors and sentencers and its provision of statistical and other services should help to overcome the institutional and personal disparities that inevitably arise out of the present way of doing things. The abolition of parole (or even its major overhaul) would help to remove a very important contributor to the present disparities in actual punishment undergone. The provision of a line of appeal to a single national superior court would tackle consistency in an orthodox and routine way.

The report also concentrates on other considerations relevant to equality of punishment. To promote greater equality in the punishment of those sentenced to imprisonment, machinery is proposed for implementing the national and internationally recognised minimum standards for prisoners, at least in the case of Federal prisoners. Suggestions are made for fair grievance mechanisms.

The report also proposes legislative guidelines for the use of imprisonment and the facility of alternatives to imprisonment being available for convicted Commonwealth offenders. Now, it must frankly be acknowledged that the introduction of this last mentioned facility will produce a result that runs counter to the major thrust of the report, which is to promote general uniformity and consistency of punishment. The alternatives to imprisonment available throughout Australia differ from State to State. If we do no more than to pick the available State alternatives, rendering them applicable for the sentences of Federal offenders, this will infuse a further element of disuniformity and institutional inconsistency. Having acknowledged this problem, the Commission points out that the immediate and urgent necessity is to provide alternatives to imprisonment for convicted Federal offenders. Unless the Commonwealth is in a position to provide a whole range of non-custodial punishments available across the length and breadth of this country, it must face up to the need to use available State alternatives. In due course, the Commonwealth may move towards the provision of a wide range of alternatives, at least in the main centres of Australia. For the present, the urgency of deinstitutionalisation of punishment persuaded the Commission that statutory provision should be drawn to permit State judges and magistrates (and those of the Territories) to impose non-custodial punishments upon Commonwealth as well as local offenders. Numerous other reforms of a specific kind are proposed. The report calls attention to the cost both in human terms and financial burden upon the community, involved in punishment by imprisonment. The special need at a time of high unemployment, to ensure that fine defaulters are not imprisoned by reason of poverty receives attention in the report and the draft legislation attached.

VICTIM COMPENSATION AND REPARATION

Finally, a major theme of the report, as of the earlier Canadian report, is the need to do more for the victims of Commonwealth and Territory crime. In the past, the provision of such compensation has been hindered by attitudes of parsimony and indifference. The Commonwealth and the Australian Capital Territory are now the only jurisdictions in Australia which do not have a legislation for publicly funded compensation to the victims of violent crime. A Bill is attached to the Law Reform Commission's report

to remedy this defect. It draws on the experience of the other jurisdictions in Australia and overseas where such laws have been enacted. It rejects the assessment of victim compensation 'on the run' by the trial judge at the end of a criminal trial (as is done in most Australian States). It also rejects the fixing of a statutory maximum for victim compensation (as is provided in all of the Australian States). Drawing on the Victorian legislation, it proposes a separate tribunal to assess victim compensation. Drawing on the United Kingdom experience it is suggested that there should be no statutory maximum. It is proposed that the tribunal should award compensation for the loss and injury suffered by persons who are the victims of bodily injury or the dependents of such victims. Specific proposals are made (and more are foreshadowed) in relation to reparation by the offender himself in cases both of violent and non-violent crime.

THE FUTURE

In the last chapter of the report, the Law Reform Commission outlines the work that remains to be done to complete the Attorney-General's reference. Amongst the projects foreshadowed are the following:

* a final recommendation on whether correctional institutions should be recommended for the Capital Territory[34];
* comprehensive proposals for a variety of non-custodial sentences to be available in the Capital Territory;
* review of the 'day fine' system to redress for present inequalities in the imposition of fines upon people of different means;
* review of deportation, in its effect as a punishment;
* consideration of restitution and compensation orders and their relationship to the publicly funded victim compensation program;
* consideration of criminal bankruptcy and pecuniary penalties, to deprive convicted offenders of the 'fruits' of financial gains resulting from crime;
* consideration of new non-custodial sentences for Federal and Territory offenders including work release; provision of day training centres; disqualification, confiscation and forfeiture; periodic detention; half-way houses and the use of publicity as a punishment;
* review of pardon procedures in the case of Federal offenders.

A number of special offender groups have been singled out to be considered specifically in the second stage of the Commission's project. These will include:

* migrant offenders;
* white collar offenders;
* mentally ill offenders;

* women offenders;
* Aboriginal offenders;
* children and young persons offenders[35];
* military, drug and dangerous offenders;
* other special groups (e.g. persons convicted of contempt of Federal Courts).

Additionally, the Commission will be looking at a number of court procedures in connection with the sentencing of Federal offenders to consider what minimum standards, if any, should be required by law. This study will require the consideration of such matters as:

* the prosecutor's right to address on sentencing;
* the necessity and design of pre-sentence reports in the case of Federal offenders;
* the resolution of factual disputes relevant only to sentencing.

It seems likely that the final report of the Commission will include a general Commonwealth sentencing statute which will collect together the matters dealt with in the Interim Report, the matters reserved for the future as set out above and any special provisions relevant to the Commonwealth's Territories, particularly the Australian Capital Territory.

HELP FOR THE 'MOST PAINFUL' OF JUDICIAL TASKS

Obviously the reform of sentencing is a controversial task. The last word will never be spoken on sentencing and criminal punishment. Partly in recognition of this, the Commission has proposed the establishment of a national Sentencing Council. It would be hoped that State colleagues could take part in such a Council, in recognition of the vital place they play, and will continue to play in the punishment of Commonwealth offenders. Through the Commission's proposals run three simple themes, upon which it would probably be possible to get general unanimity. The first is the importance of ensuring as far as possible consistency and equality in criminal punishment of like cases. The second is the need to do more for the victims of crime. The third is the need for us all to be more resourceful and innovative in designing and using punishments which are less personally harmful and which cost the community less, both in the immediate short-run and in the long-run too.

The Australian Law Reform Commission's Interim Report was concluded with miniscule resources. Nonetheless, the result is both the first general review of the Federal criminal justice system that has ever been written in Australia and the most comprehensive review of sentencing reform so far produced in this country.

The report could not have been written without the assistance the Commission had from the Australian Institute of Criminology, the New South Wales Law Foundation, our team of consultants and hundreds of judges and magistrates throughout Australia. Judicial officers are daily engaged in the business of sentencing offenders. With grossly inadequate statistical and other information, frequently with little preparation for the task and often with little assistance from those before them or from the legislature, they get on with the business of administering the nation's criminal justice laws. The time has come for the community concerned about crime to do more to help its judicial officers in the most 'painful' and 'unrewarding' of judicial tasks.[36] It is my hope that the debate on the Interim Sentencing Report will focus the attention of concerned Australians upon the undoubted defects in our criminal justice system and the specific and practical proposals of the Law Reform Commission, in Federal jurisdiction, to cure those defects.

FOOTNOTES

1. ALRC 15 (Interim Report) AGPS, Canberra 1980.

2. ALRC 15, Appendix A.

3. ibid., Appendix B. See also P. Cashman, 'Judicial Attitudes Towards Sentencing: A National Survey', mimeo, a paper presented to the Criminology and Forensic Science Section of Australian and New Zealand Association for the Advancement of Science Congress, Adelaide, 15 May 1980. The paper describes the methodology of the Judicial Survey. There is also a description of the methodology and a discussion of objections to the survey technique in Appendix B of ALRC 15.

4. ALRC 15, Appendix C.

5. ibid., Appendix D.

6. ibid., Appendix E.

7. ibid., Appendix F.

8. ibid., Appendix F. Draft Criminal Injuries Compenation Bill 1980, cl.8.

9. The Law Reform Commission, Discussion Paper No. 10, 'Sentencing: Reform Options' (ALRC DP 10), 1979.

10. ALRC 15, para.15.

11. Loc cit.

12. ALRC 15, Appendix B, Table A1.

13. ibid., Table 1.

14. ibid., para.1.2.

15. J. Hogarth, 'Sentencing as a Human Process', Uni. Toronto Press, 1971, 29-30.

16. See Report of the Committee of the Judiciary of the United States Senate to Accomany S.1437. See also Tonry and Morris 'Sentencing Reform in American', in Glazebrook (ed.) 'Reshaping the Criminal Law', (1978) 434, 441-444. The legislation has been passed by both Houses of Congress but in different form. Discussion is now proceeding to produce a draft acceptable to each Chamber.

17. ALRC 15, Chapter 12 (Victim Compensation). See also ibid., Chapter 10, para.387 (Restitution Orders).

18. R. Tarling, 'Sentencing Practice in Magistrates' Courts' Home Office Research Study No. 56, HMSO, London, Review (1980) 6 Commonwealth Law Bulletin 722. See also P. Softley, 'Sentencing Practice in Magistrates' Courts [1980] Crim LR 161.

19. See review (1980) 6 Commonwealth Law Bulletin, 722.

20. This refers to the paper to the Conference by D. Sullivan, Chief Judge of the District Court of New Zealand, 'What Was and Will Be in New Zealand'.

21. The Minister of Justice of New Zealand (Mr J.K. McLay) announced the review during the course of an address to the Birkenhead Jaycees, 12 November 1979. See [1980] Reform 21.

22. Criminal Law and Penal Methods Reform Committee of South Australia, First Report, Sentencing and Corrections (1973)i.

23. Report of the Royal Commission into New South Wales Prisons, 1978.

24. Report of the Committee Appointed to Review the Parole of Prisoners Act 1966 (NSW), 1979.

25. A Report on Parole, Prison Accommodation and Leave from Prison in Western Australia, 1979.

26. Report of the Sentencing Alternatives Committee, Victoria, Sentencing Alternatives Involving Community Service, 1979.

27. Report of the Australian Royal Commission on Drugs, 1980 (Mr Justice E. S. Williams, Royal Commissioner).

28. See in general Tonry and Morris, n.16 above.

29. ALRC 15, Appendix F, Draft Crimes Act Amendment Bill, cl.4

30. Australian Constitution, s.120. In the case of the Territories an Executive Agreement, supported by legislation, is relied on.

31. ALRC 15, Summary.

32. ibid.

33. N. Morris, 'Sentencing Convicted Criminals' (1953) 27 ALJ 186, 198 and N. Morris, 'Sentencing and Parole' (1977) 51 ALJ 523, 527.

34. See ALRC DP 10, para.25f. Where preliminary views are stated in favour of a range of such institutions. At present persons are sent to N.S.W. prisons.

35. The Law Reform Commission, Child Welfare: Children in Trouble, Discussion Paper No. 9 (ALRC DP 9), 1979; ibid, 'Child Welfare: Child Abuse and Day Care', Discussion paper No. 12 (ALRC DP 12), 1980. The Law Reform Commission has a comprehensive reference on the reform of child welfare laws in the Australian Capital Territory, including as they affect child offenders.

36. Lord Kilbrandon, 'Children in Trouble' (1966) British Journal of Criminology, 112, 122. See generally B. McKenna, 'A Plea for Shorter Prison Sentences' in Glazebrook, op cit, supra n.16, 429.