

AUSTRALIAN CRIME PREVENTION COUNCIL

FORUM, 10 DECEMBER 1980

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NEW APPROACHES TO PUNISHMENT OF FEDERAL OFFENDERS *

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

October 1980

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DRUGS, PUNISHMENT AND SENTENCING

This is not an article about drugs and drug use. Nor is it specific to the punishment of those who, contrary to the criminal law, possess, traffic, cultivate or otherwise deal in illegal drugs. But it is obvious from recent Australian reports that our criminal justice system is not proving particularly effective to halt the spread of drug addiction, especially among the young. The federal Royal Commission of Inquiry into Drugs, conducted by Mr. Justice E.S. Williams, produced a report, the cover of which symbolically presented a regional map, showing Australia as a fragmented island of separate States and Territories.¹ The report urged a national strategy against drug abuse and argued strongly for a uniform Drug Trafficking Act.² The foibles of the operation of the present Commonwealth and State laws on drugs are amply illustrated in the Royal Commission report. Among inconsistencies pointed to are:

- . Penalties provided by legislation are inconsistent.
- . There is inconsistency exhibited by the judiciary in imposing penalties.
- . Legislative fragmentation leads to differences in interpreting legislation.³

It seems likely, whether or not the proposals of the Williams Royal Commission are adopted, that the Commonwealth's involvement in criminal laws to deal with drugs of addiction will increase. Certainly, the Commonwealth's involvement in the criminal law of Australia is expanding significantly.⁴ The role and importance of the Australian Federal Police are likely to enlarge. Yet until 1980 no comprehensive report has been produced examining the federal criminal justice system and punishment and sentencing of offenders

against Commonwealth laws in Australia. That lacuna has now been partly filled. The fifteenth report of the Australian Law Reform Commission, Sentencing of Federal Offenders, was tabled in the Australian Parliament on 21 May 1980 by Attorney-General Durack. Printed copies of the report became available in September 1980. The report examines the rationale, flow, incidents and available methods of punishing federal offenders in Australia. It proposes many reforms. The report and its recommendations go far beyond the punishment and sentencing of offenders against the drug laws of the Commonwealth. But because of the growing federal involvement in drug laws, the already identified problems of inconsistency and the general study of the criminal justice process contained in the report, it may be apt to call attention in these pages to some of the main themes dealt with.

The report is produced as an interim report. This course has been adopted both because of the need to permit community and expert discussion of the proposals contained in it and because several specific topics are not dealt with, but are reserved for the second stage. One of those topics relates to the punishment of offenders against Commonwealth drug and narcotic laws. It is pointed out that the punishment and treatment of persons convicted of such offences are, in part, governed by international obligations.⁵ Moreover, many judges and correctional authorities called to the attention of the Law Reform Commission the specific problems which Commonwealth laws dealing with drug offenders have created in State prisons.

The imprisonment, often for very long periods, of drug offenders, has introduced into Australian prisons new tensions, and particular problems. By and large, such offenders are said to be younger, better educated, more intelligent and more demanding than traditional prisoners. Moreover, there is an increasing number of them. Suggestions for alternative Commonwealth treatment of federal drug and narcotic offenders have been made to the Royal Commission on Drugs.⁶

Consideration of the response of the criminal law to the offender whose offence is related to alcohol or other drug intoxication was addressed in the Law Reform Commission's fourth report, Alcohol, Drugs and Driving.⁷ In that report, the Commission dealt with the countermeasures necessary to deal with the problem of drivers affected by alcohol or other drugs.⁸ The provision of diversion programmes and the need to emphasise education and prevention rather than an 'after-the-event' cure was stressed. The Commission's proposals have been reflected in the Motor Traffic (Alcohol and Drugs) Ordinance 1977 (A.C.T.).

In short, although it is not specific to drug offenders, and although indeed the special problems of such offenders are postponed to a later report, the Law Reform Commission's report, Sentencing of Federal Offenders, does tackle some of the underlying problems of the criminal justice system in Australia as it concerns punishment and sentencing. Specifically, it addresses the problem of inconsistency and fragmentation which is a feature of the concern of the Royal Commission on Drugs. It may therefore be useful to review, in broad terms, the proposals of the Law Reform Commission. That is the purpose of this article.

THE REPORT AND ITS APPROACH

The sentencing report does not make light reading. It is a document of 636 pages. The Commissioner in charge of the project was Professor Duncan Chappell. In the preparation of the report, the Law Reform Commission had the collaboration of the Australian Institute of Criminology, the Law Foundation of New South Wales, a group of consultants from all parts of Australia and commentators and correspondents from all over the world.

The project started from the disability that arises from Australia's well known poverty in national crime statistics. To address this defect and to provide a sound basis for understanding the problems to be dealt with in proposing reform, the Commission embarked upon a unique series of legal and empirical research studies. In terms of orthodox legal research, projects were initiated addressed to sentencing and punishment as explained in the decisions of the courts, in the practice of other criminal justice officials (police, departmental officers, prosecutors etc.) or as provided for in federal legislation.

In addition to this research, a notable feature of the project was the systematic collection of empirical data concerning the opinions and attitudes of key personnel in the criminal justice process. Five national surveys were conducted directed to:

- . judges and magistrates engaged in sentencing
- . federal (and some State) prisoners
- . public opinion
- . Australian Federal Police files.

Undoubtedly the most novel of these projects was the detailed questionnaire addressed to judicial officers throughout Australia. In March 1979 a survey form was distributed by mail to 506 judicial officers throughout Australia. The officers surveyed were judges and magistrates, Federal and State, Federal Court, Supreme Court, District or County Court and Magistrates' Courts and in the Territories as well as other jurisdictions.

The only judicial officers of Australia omitted were the justices of the High Court of Australia and judges in specialised jurisdictions who are not (or not normally) involved in sentencing. Amongst the latter were judges of the Family Court, industrial courts and workers' compensation courts.

The survey was designed by Professor Chappell in close consultation with Mr. Peter Cashman of the Law Foundation of New South Wales. In the preparation of the survey, the Commission collaborated closely with the Law Foundation. It was a unique enterprise. So far as is known, no similar national survey of judicial officers has ever been attempted in any common law country.

What is perhaps most remarkable and encouraging is the response. A response to the survey would have taken an average of two hours. All of the persons addressed are busy public officials, unused to interrogation of this kind. Some expressed reservations about the survey technique and the questionnaire itself. Yet 74% of the group sampled returned a response, many with detailed personal comments and suggestions for the consideration of the Commission. Such a response rate is extremely high for a voluntary survey. Certainly, it is adequate to provide a statistically valid sample of the judicial officers of Australia.

The Commission's report is able to draw upon the responses received. Neither the judicial survey nor any of the other questionnaires administered may control the decision of the Law Reform Commissioners. However, it appears appropriate, in approaching the reform of the law in such a controversial domain, to seek out the views of those most immediately affected. Of course, there are dangers in too simplistic an approach to the survey technique. These are fully appreciated by the Law Reform Commission. With due allowance for this problem, it seems likely that the future of law reform, including in the area of criminal justice, will include more attention to the modern procedures of social research. John Hogarth in his important book, Sentencing as a Human Process, expressed this point 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 confronting 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.⁹

THREE MAIN THEMES

I have now outlined the approach adopted by the Commission and some of the research projects which led up to the report. Three main themes are stressed in the report as indicating the direction that sentencing reform should take, at least in the Commonwealth's sphere. Put shortly, these are the need for greater consistency and uniformity in the punishment of federal offenders, the need to provide more alternatives to imprisonment and the need to do more for the victims of crime:

- * Consistency and Uniformity. The first theme stresses 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 institutional steps.
- * Alternatives to Imprisonment. The second 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.
- * Victims of Crime. The third theme is the need to do more for the victims of crime. 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.

CONSISTENCY AND UNIFORMITY IN PUNISHMENT

The first concern of the report was to measure and assess the degree of inconsistency and disuniformity in punishment of persons convicted of Commonwealth offences and to propose means of reducing the factor of disparity. In a country of continental size, with scattered communities, often isolated from each other, it is not surprising that inconsistency and disconformity occur in criminal punishment. Under constitutional and institutional arrangements adopted to date, federal offenders in Australia are usually bailed, charged, committed, tried and imprisoned or otherwise punished by State officers. In these circumstances disparity in punishment is almost institutionally guaranteed. Since the establishment of the Federal Parliament in 1901, many laws have been enacted containing provision for criminal offences and punishment.

A Federal Police force has been established. A Federal Court has been set up. Yet for all these moves, the great bulk of the work of dealing with federal crime remains with State agencies. Federal offenders are tried in State courts, sentenced by State judges and magistrates and where sentenced to imprisonment in a State, are held in State prisons. Under the Constitution, the States are required to receive into their prisons persons accused or convicted of offences against laws of the Commonwealth.¹⁰ Strangely enough, parole decisions and the decision to release Commonwealth offenders on licence, are made not by State Parole Boards but by Commonwealth authorities (the Commonwealth Attorney-General and the Governor-General). Because of the differing State parole laws and the language of the Commonwealth Prisoners Act, quite different parole provisions apply to federal offenders depending upon where they are convicted in different parts of the country. Overwhelmingly, the federal offender is merged into the criminal justice system of the particular State (or Territory) in which he is charged, prosecuted and sentenced. Because different attitudes to criminal punishment arise in different jurisdictions of Australia, present institutional arrangements tend to preserve disparity in punishment, even though the same Commonwealth offence may be involved and identical or similar facts relating to the offence and the offender may be proved.

Quite apart from institutional considerations promoting disparity in the punishment of federal offenders in Australia, there are also large elements of personal discretion which have their effect. Even within the one jurisdiction, the presence of a substantial discretion in a judicial officer can lead to significant differences of punishment. In fact, inconsistency in criminal punishment may begin long before a matter reaches the judiciary. At the earliest stage of the criminal justice process, the relevant police and prosecutor have responsibility to decide whether or not to charge an offender and, if a charge is laid, which of several usually available criminal offences will be chosen as appropriate to the circumstances. As a result of its inquiries, the Commission concluded that charging decisions are at present based upon 'vaguely articulated and unpublished factors which are obscure and hesitant even for those involved in making the decision'.¹¹ Disparities are shown in a number of cases prosecuted to conviction in Australia in respect of a variety of Commonwealth offences.¹² The need for publicly available prosecution guidelines is stressed. The danger of secret negotiations, plea bargaining and unreviewable discretion is called to attention. One might say that in a large country with decentralised prosecutorial decision-making, the risks of disparities in criminal punishment grow. Without prosecutions, criminal punishment is left to the vagaries of individual conscience. It is self-evident that a decision of whether or not to prosecute and, if so, for what offence, is vital to the punishment of an offender against Commonwealth laws. The report stresses the need to bring greater consistency into the decision to prosecute.

The range of punishments which may be imposed upon an offender after conviction is typically expressed in legislation in the most ample terms. Parliament usually does virtually nothing to guide the judicial officer. In most cases it simply states the maximum he may impose. Even where an appeal is brought, the appeal court will usually uphold a wide measure of discretion in the judicial officer who heard the case. It will not interfere simply because the punishment was atypically high or atypically low. It will not interfere simply because it would itself have imposed a different punishment. Except in the most general terms, the appeal courts do not attempt to rationalise and systematise consistency in levels and patterns of punishment. The High Court of Australia has shown a marked disinclination to assume the role of reviewing sentencing decisions on a national basis.

Faced with these institutional and personal considerations which discourage uniformity of punishments, the Law Reform Commission had to make a threshold choice. Is it preferably that a convicted federal offender should be treated as uniformly as possible throughout Australia or should the emphasis of the Commonwealth's criminal justice system remain that of virtually integrating federal offenders into the local State or Territory criminal justice machinery? Until now, the latter policy choice has been taken. The proliferation and likely future growth of federal crime, the availability and desirability of remedial machinery and the importance attached to equal punishment as an attribute of justice, led the Commissioners to the view that the time had come for a change in the Commonwealth's policy concerning offenders against its laws.

Although Professor Chappell was inclined to propose the complete divorce of federal criminal cases and their separate handling in federal courts and punishment in federal prisons (as is the case in the United States and partly in Canada), there was unanimity in the view that it was no longer acceptable that an offender against the same Commonwealth law should be treated with significant difference in different parts of Australia, whether in respect of the decision to prosecute, the nature of the prosecution brought, the sentence imposed or the manner in which it was to be served.

On the contrary, the Law Reform Commission unanimously suggested a series of measures aimed at promoting greater national consistency and uniformity in the punishment of federal offenders and reducing the sources of the inconsistency and disparity. In brief, the Commission's proposals to this end included:

- * the 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 PROPOSED SENTENCING COUNCIL

Probably the most radical suggestion of the report is the proposal for the establishment of an Australian Sentencing Council. The object was to promote consistency as a matter of good management and organisation of the criminal justice system, without so much reliance upon chance factors as exists at present.

The proposed Council is not, it should be stressed, the earlier suggestion of a multi-disciplinary sentencing committee, to which judicial officers would hand the offender over, once convicted. This notion, which was once fashionable, is open to objection on several grounds. What is proposed here is a body which can provide sentencing guidelines which will be available to assist the judiciary towards consistency, whilst not being legally binding on it.

Similar proposals have been made in the United States. Important legislation is currently before the Congress. A number of State jurisdictions have implemented legislation for the provision of sentencing guidelines. Such guidelines preserve the appropriate element of judicial discretion whilst maintaining the pre-eminence of the judiciary, judges and magistrates alike, in criminal sentencing. The aim is to make sentencing more systematic and to do so in an open way, by which the whole process may be submitted to public review and, where appropriate, criticism. I recently viewed a video cassette demonstrating the way in which the system operates in several States of the United States. Judicial officers are provided with a 'grid' which charts the factors relevant to the offence and the factors relevant to the offender. A 'mean' sentence, pursuant to the guidelines, is then proposed, giving due weight to the factors identified in the guidelines, fixed within the overall maximum laid down by the legislature. This grid and its accompanying explanatory documents are prepared by court staff. They are made available to the prosecution and defence alike. The representatives of the prosecution and defence, and, in the case viewed, the accused himself, are given the opportunity to comment upon the weighting of the factors, the applicability of the guidelines and the proposed sentence suggested. The judicial officer is not bound to follow the suggested 'mean' sentence. But he is bound, if he differs, to express his reasons for doing so. These reasons may then be reviewed on appeal.

The judicial officers interviewed concerning the grid indicated their frank scepticism about the system when proposed and first introduced. However, they also indicated the enormous assistance which the system had provided for them and the greater consistency which was introduced by the grafting upon discretionary elements of a measure promoting an appropriate degree of uniformity.

To prepare the guidelines it is suggested that the Sentencing Council should be able to look at the offences provided for by law in a principled and conceptual way. Courts of Criminal Appeal must frequently depend upon the chance factor of whether or not an appeal will be brought in a particular category of offence or upon a particular point of principle or law. A Sentencing Council would not be limited by considerations of this kind. Moreover, it could superintend research of a systematic and organised nature performed by an appropriate research secretariat.

The Law Reform Commission has suggested that the Council should comprise a majority of judicial officers, including at least one magistrate. It should include other people with relevant expertise and community interest. All members should serve part-time.

It should prepare detailed and publicly available guidelines which spell out the general and particular criteria which a sentencing judge or magistrate should keep in mind in the exercise of his discretion in punishing persons convicted of Commonwealth offences. These guidelines should provide judicial officers with publicly available guidance, grounded in proper statistical analysis, as a supplement to court decisions. Under present arrangements, the latter too frequently depend upon haphazard, chance factors of appeal and idiosyncratic views of particular judicial officers. Sentencing guidelines should replace informal 'tariff', 'tariff books', hurried conversations between busy judges or magistrates and the personal considerations which at present may affect too greatly the practices of sentencing in criminal punishment.

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.¹³

ABOLITION OR REFORM OF FEDERAL PAROLE

A second radical suggestion of the Law Reform Commission's report is that parole in the case of Commonwealth offenders should either be abolished in its present form or significantly overhauled. Although parole doubtless began as an endeavour humanely to reduce lengthy sentences, when this was considered appropriate and safe to do, in practice parole introduces disparities and administrative discretions which cause acute, and often justifiable, feelings of injustice. Four principal defects of parole are outlined in the Commission's report. First, it promotes indeterminacy and uncertainty in punishment. Secondly, it assumes that conduct in society can be predicted at all on the basis of conduct 'in a cage'.¹⁴ Thirdly, it is presently conducted largely in secrecy and most parole decisions are simply not reviewable in an open court forum. Fourthly, 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 large, 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.

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 report frankly acknowledges the difficulty of abolishing federal parole, without similar moves in the States. It suggests that if parole abolition is rejected or delayed, important reforms of federal parole are urgently needed. Some of those listed include:

- * 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 proposal designed to secure greater consistency and uniformity of punishment is that appeals in federal criminal cases should no longer lie to State Courts of Criminal Appeal (institutionalising the disparities of views adopted in different States) but to the Full Court of the Federal Court of Australia.

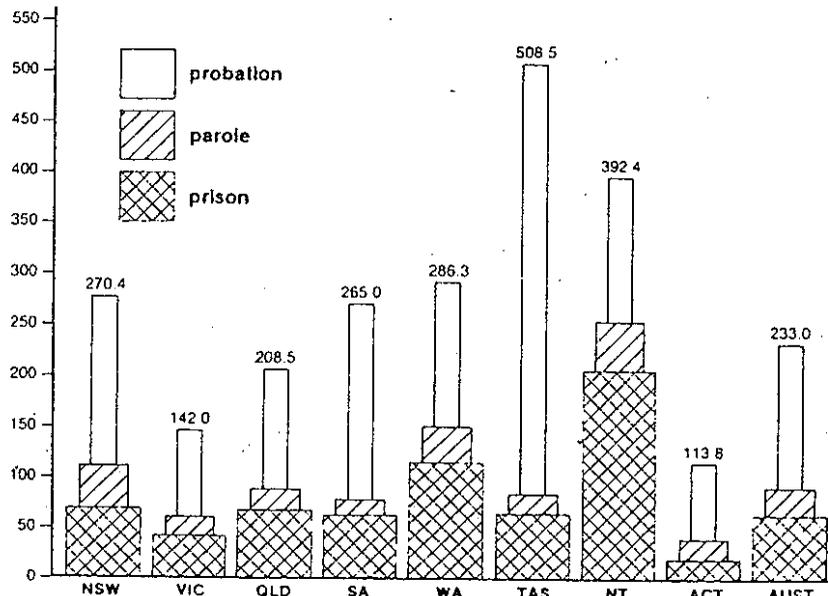
There is no more orthodox and time-honoured method of promoting consistency in criminal punishment than review by an appeal court. Indeed, within a given jurisdiction, this has been one means by which the worst features of disparity of punishment, seen in the United States, have been avoided in the Australian States.

Consistent with the initial determination of the Commission that due attention should be given to the Commonwealth's own responsibility to assure general consistency in the punishment of offenders against its laws, wherever they may be convicted in Australia, the Commission quite naturally turned to the orthodox method of appeal review. Until lately an appropriate superior federal court did not exist for this purpose. Such a court now exists in the Federal Court of Australia. Directing criminal and sentencing appeals in Commonwealth criminal matters to that Court is justified as a regular, sensible and thoroughly orthodox means of contributing to greater consistency and uniformity in the application of federal criminal laws and sentencing principles. Until now the Commonwealth has largely abdicated its responsibilities for the criminal law made by the Federal Parliament. The provision of appeals to the Federal Court may be a means of reducing the disparities which have attended this abdication. Indeed, it may be a means of promoting, by example and persuasion, greater consistency in criminal punishment in different jurisdictions in Australia, in respect of State offences.

ALTERNATIVES TO IMPRISONMENT

The terms of reference to the Law Reform Commission required it to be considered the alternatives to imprisonment which may effectively be adopted in the case of persons convicted of Commonwealth offences. The report points to the significantly different levels of imprisonment, probation and parole of offenders in different parts of Australia. Figure 6 in the Commission's report tells the tale:¹⁵

PERSONS IN PRISON, ON PAROLE AND ON PROBATION PER 100 000 OF POPULATION, AUSTRALIAN STATES AND TERRITORIES, NOVEMBER 1979



Source: Australian Institute of Criminology, D. Biles.

To promote greater consistency in the application of imprisonment, the Commission has suggested provision of legislative guidelines which will emphasise the requirement on judicial officers to approach the use of imprisonment as a last resort and to seek out and apply available alternatives to imprisonment wherever appropriate. In the case of Commonwealth offences, a difficulty is presented here. Under State laws, the alternatives to imprisonment available in different jurisdictions of Australia differ. If no more were done than to pick up the available State alternatives to imprisonment, rendering them applicable to convicted Commonwealth offenders, this would introduce a further element of disuniformity and institutional inconsistency. Having frankly acknowledged this difficulty, the Commission asserts that the provision of alternatives to imprisonment in federal cases is an urgent necessity. Unless and until the Commonwealth is willing and able to provide for a whole range of measures alternative to imprisonment in appropriate, different parts of Australia, the only effective means of advancing the deinstitutionalisation of punishment is to pick up the available State punishments and to permit State judges and magistrates (and those of the Territories) to impose non-custodial punishments upon Commonwealth as well as local offenders. Because of constitutional difficulties, such an arrangement, at least in the States, would require an agreement to be reached between the Executive Governments of the Commonwealth and the States. There is no provision equivalent to s.120 of the Constitution requiring the States to provide non-custodial punishment facilities for convicted federal offenders. However, the significant cost of imprisonment in financial and human terms is now well recognised. The need to promote alternatives to imprisonment is also now generally accepted. Imprisonment rates in some parts of Australia are amongst the highest in the world. Even at the price of advancing for a time the institutional impediments to uniformity of punishment, the Law Reform Commission considered the provision of non-custodial sentences in federal cases both desirable and urgent.

VICTIM COMPENSATION

The third theme of the Commission's report is the provision of adequate compensation for the victims of violent crime and, in the case of their death, their dependants. The Commonwealth and the Australian Capital Territory are now the only jurisdictions of Australia without a publicly funded scheme for such compensation. The Commission's report analyses the schemes which have been adopted in the United Kingdom and in the Australian States. It criticises the provision of a ceiling for maximum compensation existing in all Australian legislation. No such ceiling is provided in the United Kingdom scheme. It criticises the approach taken in the United Kingdom, New South Wales and some other Australian jurisdictions by which compensation payments are an ex gratia provision. It urges that, instead, compensation should be as of legal right.

It criticises the handling of compensation claims at the tail end of a criminal trial addressed to the guilt of the accused. It proposes the adoption of arrangements, as in Victoria, by which Commonwealth and Territory claims are heard and determined by a separate statutory tribunal. The Commission suggests that the appropriate, conceptual solution to the compensation of victims of crime is the adoption of a national compensation scheme. However, as this now looks to be a long way off, the provision of appropriate publicly funded compensation is considered urgent. Draft legislation is attached to the Commission's report. Further measures are foreshadowed to include greater provision for reparation orders in the case of Commonwealth offenders. As is pointed out in the report, most Commonwealth offences relate to non-violent action. Most involve fraud and the so-called 'white collar' crimes. Many relate to offences against the Commonwealth itself. No publicly funded scheme for the compensation of victims of such non violent crimes has yet been attempted. It is in these circumstances that attention to reparation, confiscation of property and criminal bankruptcy will be important in the future.

FUTURE OF THE REFERENCE

The Law Reform Commission's report does not exhaust the reference it received on the punishment and sentencing of Commonwealth offenders. A number of future tasks are foreshadowed, including specific study of the particular problems of punishing and sentencing drug and narcotic offenders. Other tasks listed for the future are as follows:

- * a final recommendation on whether correctional institutions should be recommended for the Capital Territory¹⁶;
- * 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 offenders¹⁷, military, and dangerous offenders, and other special groups (e.g. persons convicted of contempt of Federal courts).

It is possible that the final report of the Commission will include a general Commonwealth sentencing statute, collecting together the provisions of a general character affecting the prosecution, trial, sentencing, parole, probation and other punishment of persons convicted of offences against Commonwealth laws.

CONCLUSIONS

Sentencing is one topic upon which most lawyers and almost every layman have decided points of view. It is impossible to produce a report on criminal punishment without engendering controversy. It was unlikely that a report on Commonwealth offenders could escape controversy. Added to the nature of the topic are the socio-political issues always raised when the relative roles of the Commonwealth and State Parliaments are in issue.

The disparities and inconsistencies in punishment of offenders around Australia, which are called to light in the Royal Commission on Drugs, have a wider context. If one were to start again with the Australian Constitution, it seems doubtful that the criminal law would be omitted from the list of responsibilities of the central Parliament. As in Canada, the provision of a national standard in respect of antisocial conduct would appear to be appropriate, particularly in a country with a small population, high mobility of travel and generally uniform social attitudes. However that may be, the fact remains that the criminal justice system is overwhelmingly a responsibility of the States. This arrangement is unlikely to be changed. Reform of the Commonwealth's criminal justice system must acknowledge these facts of life. But it must also acknowledge the Commonwealth's separate and entirely constitutional concern with its own offences and offenders and its legitimate interest to ensure a just and effective enforcement of its laws.

The effort of the Law Reform Commission's interim report is to promote greater consistency in the punishment of Commonwealth offenders, so that the element of geography is reduced as a controlling or significant factor in the level of punishment for a Commonwealth offence. It also seeks to promote greater use of punishments other than imprisonment, the reform of parole and the provision of more assistance to judicial officers in the 'painful' and 'unrewarding' judicial task of sentencing.¹⁸

New attention to the predicament of the victims of crime, often forgotten participants in the criminal justice drama, is also proposed.

The report is the product of a major enterprise. It could not have been written without the participation and support of large numbers of judges and others engaged in the daily administration of the criminal law. It is now before the Australian community for debate, criticism and improvement. The end result of the process will be a final report which comprehensively reviews our criminal punishment machinery: beginning to end.

Society's fascination with criminal punishment is almost limitless. The 19th Century saw the repeal of some of the more barbarous punishments administered by judges of our tradition. The rack, burning at the stake, drawing and quartering and drowning are not long removed from the English litany of punishments. In our Century capital punishment and corporal punishment have retreated, especially in Australia. The wave of enthusiasm for rehabilitation has come in and has now receded. We are in an era of 'just deserts' with new focus being given to sanctions which, whilst punitive, are not as damaging and as expensive to the State and to the spirit of the prisoner, as custodial punishments are. Much remains to be done. The report of the Law Reform Commission may prove a useful catalyst to focus the Australian debate.

ENDNOTES

- * This note is a modified version of an address delivered to the Second Biennial Convention of the Australian Stipendiary Magistrates' Association, Melbourne, 15 June 1980. It will be published in an expanded form in the Australian Law Journal, December 1980.
1. Australian Royal Commission of Inquiry into Drugs, Report, A.G.P.S., Canberra, 1980 (5 Vols).
 2. *ibid*, book D, 29.
 3. *id*, book D, 23.
 4. Australian Law Reform Commission, Sentencing of Federal Offenders, ALRC 15 (Interim Report), A.G.P.S., Canberra, 1980, Figure 3.
 5. ALRC 15, 309. See for example, Single Convention on Narcotic Drugs of 1951 and the Convention for the Suppression of Dangerous Drugs of 1963. Australia is not a part to the latter Convention.
 6. ALRC 15, 318.
 7. Australian Law Reform Commission, Alcohol, Drugs and Driving, ALRC 4, A.G.P.S., Canberra, 1976.
 8. *ibid*, Chapter 13.
 9. J. Hogarth, 'Sentencing as a Human Process', Uni. Toronto Press, 1971, 29-30.
 10. Australian Constitution, s.120. In the case of Territories prisoners an Executive Agreement, supported by legislation, is relied on.
 11. ALRC 15, 67.
 12. *ibid*, 58. See also Tables 7 and 8.
 13. ALRC 15, Summary.
 14. N. Morris, 'Sentencing Convicted Criminals' (1953) 27 ALJ 186, 198 and N. Morris, 'Sentencing and Parole' (1977) 51 ALJ 523, 527.

15. ALRC 15, 113 (Figure 6).
16. See ALRC DP 10, para. 25f. Where preliminary views are stated in favour of a range of such institutions. At present such persons are sent to N.S.W. prisons.
17. 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.
18. Lord Kilbrandon, 'Children in Trouble' (1966) Brit.J.Crim. 122. See generally B. McKenna, 'A Plea for Shorter Prison Sentences' in Glazebrook (ed) 'Reshaping the Criminal Law', 1978, 434, 441-4., 429.