PROBATION OFFICERS' ASSOCIATION OF VICTORIA

ANNUAL GENERAL MEETING

SATURDAY, 24 OCTOBER, 1981

INTERNATIONAL HOUSE, PARKVILLE, VICTORIA

REFORMING THE PUNISHMENT OF CRIMININAL OFFENDERS

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

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ACTION ON SENTENCING REFORM

A week ago the Commonwealth Attorney-General, Senator P.D. Durack QC, tabled in Federal Parliament a little noticed Bill to amend the Crimes Act 1914 of the Commonwealth. The Crimes Act Amendment Bill 1981 revives consideration of the report of the Australian Law Reform Commission on Sentencing of Federal Offenders.[1] The provisions of the Bill incorporate important proposals in the Australian Law Reform Commission report dealing with such matters as:

- securing consistency in the ratio between fines payable both by natural persons and corporations and maximum sentences of imprisonment provided for by Commonwealth law;
- restriction on the imposition of sentences of imprisonment for Commonwealth offences;
- revision of the procedures for the enforcement and recovery of unpaid fines;
- provision of new procedures for time or further time to pay a fine imposed for a Commonwealth offence;
- discharge of offenders without proceeding to conviction;
- conditional release of offenders after conviction, including upon condition that the person will, during the period specified, be subject to the supervision of a probation officer[2];
- provision, in the case of convicted Commonwealth offenders, of non-custodial alternatives to imprisonment available in respect of State offenders but so far not available for Commonwealth offenders.

In his Second Reading Speech in Parliament, the Attorney-General also indicated that a key proposal of the Law Reform Commission's report, for the establishment of a Sentencing Council, is being pursued by him. The Attorney-General indicated that he has written to the State Attorneys-General proposing that a Sentencing Council, consisting of Federal, State and Territory judges, should be established administratively to discuss sentencing guidelines. The Attorney-General's announcement indicates a departure from the recommendation of the Commission, in confining the Council to judges it also indicates a clear acceptance of the need for new institutional arrangements that will assure a greater measure of consistency in the punishment of offenders.

The Australian Law Reform Commission's report on Sentencing of Federal Offenders arose out of a reference given to it by Senator Durack in 1978. The report was tabled in Federal Parliament in May 1980. The document is a major study, being the first national examination of sentencing ever carried out in the Australian Commonwealth. The Commissioner in charge of the project was Professor Duncan Chappell, now of Canada. The Commissioners were assisted by a team of consultants drawn from various disciplines, viewpoints and parts of this large country. Among the consultants were Dr. A.A. Bartholomew, consultant psychiatrist with the Department of Health in Victoria, Mr. L.B. Gard, Director of the Department of Correctional Services in South Australia, Mr. J.G. Mackay, Director of the Probation and Parole Service in Hobart, judges, magistrates and police. Though the Commissioners were responsible for the final recommendations, the consultants took an active part in our deliberations.

The Commission's report contained 129 recommendations. To it were attached two draft Bills for Commonwealth Acts. One proposed legislation in respect of the victims of Commonwealth and Territory crimes. The Attorney-General has indicated his intention shortly to introduce legislation for criminal compensation in the Australian Capital Territory, which will take into account the Commission's recommendations. The other draft Bill proposed a Crimes Act Amendment Act. As I have indicated, the matters which were given priority in this draft Bill have now been followed by the Attorney-General's legislation currently before the Parliament. Moreover, a number of recommendations contained in the report on an interim or tentative basis have sufficiently recommended themselves to the Attorney-General to warrant incorporation in the current proposal.

Law reform, especially in sensitive and controversial matters such as criminal punishment is always bound to be, does not always move so quickly. The introduction of an important measure to reform Commonwealth sentencing law, much of it based on a report of the Law Reform Commission delivered 15 months ago, is an initiative that deserves the attention (and I should say the commendation) of all.

I am listed to speak to you about reforming the punishment of criminal offenders. Though an important section of the Commission's report deals with probation, and though some parts of that section have now been accepted by the government and carried forward into the Crimes Act Amendment Bill, I will not confine myself to the subject of probation alone. You will be speaking of this topic during the rest of your conference. It would be a departure from my assigned task were I to limit myself to talking about Commonwealth sentencing reform as it affects probation officers. Those of you who are specially interested in this topic should secure both copy of the Law Reform Commission's report and copy of the Attorney-General's Bill.

I propose to adhere to the topic that has been assigned to me. In the light of the Commission's recent report, I will endeavour to give you a general picture of the matters that seemed important to us. Of course, we were looking at the area of Commonwealth law and at the position of convicted Commonwealth offenders. I do not presume to comment on the position of State law and State offenders. But as Mr. Jona has pointed out on a previous occasion, because Commonwealth offenders tend to be bailed by State police, tried in State courts, dealt with on appeal by State appeal courts, sentenced to State prisons and dealt with by State correctional and probation authorities, it is impossible to ignore the consequences of Federal reform for the State criminal justice system. This fact of life was fully recognised by the Law Reform Commission. By the same token, I am sure that equal recognition will be given by State colleagues to the responsibilities of the Commonwealth to attend to its own criminal justice system. Where injustices are perceived that warrant action, it can surely not be the obligation of the Commonwealth (any more than of a State) to delay its own legislative or administrative action indefinitely, pending the consent of the tardiest jurisdiction in the country.

The Bill introduced in the last week, and the initiative of the Commonwealth Attorney-General towards a national Sentencing Council, indicates a clear acceptance by the Commonwealth of the responsibility to concern itself with criminal justice law reform in its own domain. Precisely because of the inextricable links between the Commonwealth and the State, so clearly pointed out by Mr. Jona, we can, I hope, learn from each other. The cause of effective and lasting reform will be better ensured if this is the approach we

take. It is the reason that I am here today. I am sure I will learn about the moves for probation reform in Victoria. Indeed, I have already been given copy of the program document on a 'community-based probation service' issued by the Department of Community Welfare Services and your Association.[3]

A BRACE OF SENTENCING REPORTS

The Law Reform 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 was, in 1980, introduced into 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 Sentencing Commission with power to lay down guidelines to be considered by Federal judicial officers.[4]

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.[5]

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.[6] 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.[7] 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 recommendations made by a Royal Commission in 1978 has been substantially changed. The Magistrates Courts have been made District courts. In 1979 the New Zealand Minister for Justice initiated a major review of the country's penal policy and institutions.[8] A Committee of Inquiry was established, chaired by Mr. Justice Casey of the High Court of New Zealand. Within the last month this committee, known as the Penal Policy Review Committee, delivered an interim report. The report contained a number of tentative recommendations including:

- that mandatory life sentences for murder seem no longer appropriate;
- that the present prison population of New Zealand should be reduced with greater emphasis being put on fines and/or community-based sentences as an alternative;
- that the use of statutory remissions of prison sentences be increased;
- that the imprisonment of young persons aged up 17 be restricted by law;
- that the fine system be overhauled, possibly to introduce a day-fine system linked to the offender's net income;
- that prisons be made smaller and that they should be spread more widely throughout the country closer to present population centres; and
- that specialist prison help be upgraded.[9]

A number of the proposals contained in the New Zealand interim report appear to bear close similarity to the recommendations of the Australian Law Reform Commission.

Quite apart from these overseas efforts, we had before us in Australia 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.[10] 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 Commission into New South Wales Prisons conducted by Mr Justice Nagle[11], the report into New South Wales Parole Release Procedures made by a committee chaired by Judge Muir[12], a report on the Western Australian Parole System by Mr K.H. Parker, Q.C.,[13] and a report by the

Nelson Committee in Victoria.[14] 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.[15]

Australia began its recorded history as a penal colony. It is therefore not surprising that it has seen 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, at least in the institutions we presently provide. 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.[16] Prisons were once called 'reformatories'. But if they do not reform, and on the contrary all too frequently instil cumulative criminality, whilst costing the community dearly, 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 Australian Law Reform Commission's report, three major themes emerged. Two of them have been picked up in the new Commonwealth Crimes Act Amendment Bill 1981 or in the announcement by the Commonwealth Attorney-General. The three themes were:

- the need for greater consistency and uniformity in punishment of like offenders committing like offences;
- the need for more alternatives to imprisonment;
- the need to do more for the victims of crime.

On the first two, the Commonwealth Attorney-General has moved. Action on the third is promised.

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 or 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 as I have said. 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, as you know, 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. This did not strike us as just.

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 wholly 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 happen to be 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 propose 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 was that it was 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 Attorney-General has already indicated his interest in securing greater consistency in prosecution decisions by Federal prosecutors. The disparities and inconsistencies which presently exist in the Crimes Act of the Commonwealth concerning the ratio between maximum fine and maximum terms of imprisonment are now dealt with by a formula proposed in the 1981 amending Bill.[17] The provision of appeals to the Federal Court, reform of parole and grievance mechanisms for prisoners have not yet been dealt with. However, as has been said, the Attorney-General has initiated discussions with his State colleagues to propose the establishment administratively of a Sentencing Council, which would discuss sentencing guidelines. Guidelines as recommended by the Law Reform Commission could make an important contribution to consistency, not only horizontally (i.e. as between different States in respect of Commonwealth offenders) but also vertically (i.e. as between Commonwealth and State offenders in the one State).

THE SENTENCING COUNCIL

The proposal for a Sentencing Council was undoubtedly the most far-reaching recommendation in the Law Reform Commission's report. The aim of the move was to ensure that general uniformity and consistency of criminal justice punishment is made a matter of good management rather than good fortune. The thinking of the Law Reform Commission was 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.[19]

It was proposed by the Australian Law Reform Commission that the Council should comprise mainly 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 Attorney-General's announcement appears to contemplate limiting the Council to judges only. It is not yet clear how it will be serviced.

The report of the Law Reform Commission reflected the survey which was conducted among judicial officers throughout Australia, 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 urged a different course. Although there was undoubtedly a need to cure manifest inconsistencies, injustices and omissions in Federal laws, the mandatory sentence was not recommended. On the contrary, it was suggested that the mandatory statutory sentence was too susceptible to ephemeral political pressure towards the ineffective increase in levels of punishment. Furthermore, it excluded 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.[18]

The report proposed 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 an offence. The guidelines were not to be coercive, substituting one form of oppression for another. Instead, they were to 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', informal consultations and the idiosyncratic considerations which at present affect the practices of sentencing and criminal punishment.

As I have said, the idea of a Sentencing Council and of sentencing guidelines is not uniquely Australian. According to very recent newspaper reports, the New Zealand Secretary for Justice has submitted to that country's Penal Policy Review Committee establishment of a Sentencing Council, apparently modelled on that recommended by the Australian Law Reform Commission. 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 depart from it but must provide the reasons for doing so. The guidelines themselves are regularly reviewed by the judiciary.

PAROLE ABOLITION OR REFORM

The second major proposal of the Law Reform Commission's report was 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 the following:

- 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'.[20]
- 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 generally, all know that the 'long sentence' will not usually 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 acknowledged 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 was 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 was stressed in this connection. If the proposal to abolish parole were not accepted or is delayed for a time, the report urged immediate steps radically to reform the system of parole as it affects Commonwealth prisoners in Australia. Among the reforms urged were:

- 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.

None of these matters have been dealt with in the Bill currently before the Commonwealth Parliament. Reform of Federal parole remains for the future. I am aware that the issue may shortly have to be confronted in Victoria. I understand that an Opposition Bill is shortly to be introduced into the Victorian Parliament titled 'The Community Welfare Services (Abolition of Parole) Bill'. It will be important in any move towards determinate sentencing and away from the discretionary elements of parole that one oppression is not substituted for another. An integral part of the Australian Law Reform Commission's scheme for the abolition of parole was the introduction of sentencing guidelines, established by a Sentencing Council, that would promote a general, orderly and consistent reduction of current levels of imprisonment. As an Australian

average, they are far higher than those of most countries of the OECD. Although the levels in Victoria are significantly lower than in other parts of Australia, I believe that it is important that abolition of parole should be accompanied by institutional arrangements to ensure that the determinate sentence imposed by the court is influenced by sentencing guidelines which take account of the general policy to reduce the use and term of imprisonment as a punishment.

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 up 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 pointed 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 wider 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 provisions 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.

Sub-clause 9(1) of the Crimes Amendment Bill 1981 proposes the insertion in the Commonwealth Crimes Act of the following provision:

> 20AB(1) Where under the law of a State or Territory a court is empowered in particular cases to pass a sentence or make an order known as a community service order, a work order, a sentence of periodic detention, an attendance centre order, a sentence of weekend detention or an attendance order, or to pass or make a similar sentence or order or a sentence or order that is prescribed for the purposes of this section, in respect of a person convicted of an offence against the law of the State or Territory, such a sentence or order may in corresponding cases be passed or made by that court or any federal court in respect of a person convicted before that first-mentioned court, or before that federal court in that State or Territory, of an offence against the law of the Commonwealth.

The Commonwealth Bill also introduces legislative guidelines for the use of imprisonment in respect of Commonwealth offenders in terms consistent with the proposals of the Law Reform Commission. Sub-clause 5(1) of the Bill proposes the insertion of a new section in the Commonwealth Crimes Act, s.17A. Whilst accepting the primary thrust of the Law Reform Commission's report, and the suggested obligation of the court sentencing a person to prison, to state its reasons in writing and to cause the reasons to be entered in the records of the court, the Commonwealth Bill did not adopt the criteria for imprisonment proposed by the Commission (namely endangering life or personal property, or that no other punishment would be sufficiently severe in the case of repeated offences). Just the same, the adoption of the following principle may be useful in directing the attention of judicial officers to the need to restrict the imposition of sentences of imprisonment and fully to explore alternatives:

> 17A(1) A court shall not pass a sentence of imprisonment on any person for an offence against the law of the Commonwealth, or of the Australian Capital Territory or an external Territory that is prescribed for the purposes of this section, unless the court, after having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case.[21]

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, the draft legislation attached to it and now in the proposed amendments to the Crimes Act.[22]

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[23];
- comprehensive proposals for a variety of non-custodial sentences to be available in the Capital Territory;
- review of the 'day fine' system to redress the present inequalities in the imposition of fines upon people of different means;
- review of deportation, in its punishment aspects;
- 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 offenders;
- 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.

Since the delivery of its interim report in May 1980, the Commission has not been able to proceed to the completion of the final report. This inability has arisen from the departure of Professor Chappell, and the lack of a full-time Commissioner with suitable experience and qualifications to lead the project to conclusion. It is my hope that in 1982, when Professor Robert Hayes completes his work on the Commission's important privacy reference, he will be able to turn to the completion of the sentencing project. Enough has been said to show that progress has been made. But enough has also been said to show that much remains to be done.

FOOTNOTES

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

2. Crimes Amendment Bill 1981 (Cwlth), sub-clause 9(1) (inserting s.20(1)(a)(iv)).

3. Victoria, Department of Community Welfare Services and Probation Officers' Association, Community-Based Probation Service Program Document, August 1981.

4. See Senate Committee on the Judiciary, Report to Accompany S.1437, Govt. Printer, Washington D.C., 1977 (U.S.A.). See also Tonry and Morris, 'Sentencing Reform in America', in Glazebrook (ed.) Reshaping the Criminal Law, 434, 441-444 (1978).

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

6. 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.

7. See review (1980) 6 Commonwealth Law Bulletin 722.

8. 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.

9. Reported in Law Talk (NZ Law Society), 2 October 1981, 135.

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

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

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

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

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

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

16. See in general Tonry and Morris, n.4 above.

17. Crimes Amendment Bill 1981 (Cwlth), para. 4(1)(b).

18. ALRC 15, Summary.

19. ibid.

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

21. Crimes Amendment Bill 1981 (Cwlth), sub-clause 5(1). See also sub-sections 17A(4) and (5) limiting the application of the section.

22. Crimes Amendment Bill 1981 (Cwlth), sub-clause 6(1), (s.18B(1)).

23. The Law Reform Commission, Discussion Paper No. 10, Sentencing : Reform Options (ALRC DP 10), 1979, para. 25f. Preliminary views were stated in favour of a range of such institutions. At present persons are sent to NSW prisons. See also the Law Reform Commission, Child Welfare (ALRC 18), 1981, forthcoming.