

NSW LAW REFORM COMMISSION

DISCUSSION PAPER 33 (1996) - SENTENCING

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Terms of Reference

Pursuant to section 10 of the Law Reform Commission Act 1967 (NSW), the Attorney General, the Honourable Jeff Shaw QC MLC, referred the following matter to the Law Reform Commission by letter dated 12 April 1995:

To inquire into and report on the laws relating to sentencing in New South Wales with particular reference to:

- (i) the formulation of principles and guidelines for sentencing;
- (ii) the rationalisation and consolidation of current sentencing provisions;
- (iii) the adequacy and use of existing non-custodial sentencing options with particular reference to home detention and periodic detention;
- (iv) the adequacy of existing procedures for the release of prisoners by the Offenders Review Board and the Serious Offenders Review Council and the benefits that might accrue from the review of the decisions of the Offenders Review Board and the Serious Offenders Review Council by judicial officers; and
- (v) any related matter.

In undertaking this reference, the Commission should have regard to the proposals in relation to sentencing contained in the Australian Labor Party policy documents formulated in Opposition.

Participants

The Law Reform Commission is constituted by the *Law Reform Commission Act 1967*. For the purpose of this reference, the Chairman, in accordance with the Act, created a Division comprising the following members of the Commission:

Mr Michael Adams QC

The Hon Justice John Dowd

The Hon Justice David Hunt

Her Hon Judge Angela Karpin

The Hon G J Samuels AC QC (until 28 February 1996)

Professor Michael Tilbury (Commissioner-in-Charge)

Professor David Weisbrot

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Submissions

The Commission invites submissions on the issues raised in this Discussion Paper. Submissions and comments must reach the Commission by **21 June 1996**. Suggestions for further issues which should be considered are welcome.

All enquiries and submissions should be directed to:

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Who can make a submission?

Anyone can make a submission or comment. If you have an opinion on the matters under review or personal experience of the issues involved, the Commission would like to hear from you. You do not need legal qualifications to make a submission, although the Commission welcomes input from the legal community.

Use of submissions and confidentiality

Submissions made to the Commission may be used in two ways:

Because the law reform process is a public one, copies of submissions are normally made available by the Commission on request to other persons or organisations. If you would like your submission to be treated as confidential, please indicate on your written submission or oral comments. Any request for a copy of a submission marked "confidential" will be determined in accordance with the *Freedom of Information Act 1989* (NSW).

In preparing its report, the Commission will make reference to submissions made in response to this Discussion Paper. However, a request for confidentiality will be respected by the Commission in relation to the publication of submissions.

Thus, if you would like your submission treated as confidential, please indicate this on your written submission or when making oral comments.

Summary of Proposals

The Discussion Paper contains 46 proposals for reform of sentencing laws. These reflect the Commission's tentative conclusions. Submissions and comments are sought on these proposals. In addition, at the end of each chapter there are a series of questions. Some of these questions relate to the proposals, but others raise further issues. The Commission also invites responses to these questions. Set out below is a summary of the proposals.

Proposal 1

Statutory provisions relating to sentencing in New South Wales ought to be consolidated.

Proposal 2

Sentencing legislation should identify the purposes of punishment without attempting to place them in any hierarchy.

Proposal 3

Sentencers should provide reasons justifying any decision to impose a sentence of imprisonment of six months duration or less.

Proposal 4

Section 5(2) and (3) of the *Sentencing Act 1989* (NSW) should be repealed.

Proposal 5

There should be a general legislative presumption in favour of concurrent sentences.

Proposal 6

There should be statutory recognition of partly cumulative sentences.

Proposal 7

Section 9(3) of the *Sentencing Act 1989* should be amended to allow cumulative sentences to be imposed during the currency of an existing term of imprisonment.

Proposal 8

The provisions dealing with multiple sentences should incorporate the effect of the provisions in s 26B and 34(2) of the *Prisons Act 1952* (NSW) and in s 447A of the *Crimes Act 1900* (NSW).

Proposal 9

Sections 13A(9)(a) and (d) of the *Sentencing Act 1989* should be repealed.

Proposal 10

Judges should have the discretion to impose a minimum term of imprisonment with an additional term of life at the initial sentencing hearing.

Proposal 11

Section 13A(5) of the *Sentencing Act 1989* (NSW) should be redrafted to accommodate the criticisms of it in *Purdey*.

Proposal 12

Section 13A(8)(a) of the *Sentencing Act 1989* should be repealed and s 13A(8)(b) should be amended to allow the Court to direct that the applicant may not re-apply for a period of up to ten years.

Proposal 13

The *Habitual Criminals Act 1957* (NSW) and s 115 and 443 of the *Crimes Act 1900* (NSW) should be repealed.

Proposal 14

The *Community Protection Act 1994* (NSW) should be repealed.

Proposal 15

There should be no distinctions between

- "penal servitude" and "imprisonment";
- "felonies" and "misdemeanours";
- "hard labour" and "light labour"

and the expressions "penal servitude," felonies," "misdemeanours," "hard labour" and "light labour" should no longer be used.

Proposal 16

The Offenders Review Board be renamed the Parole Board.

Proposal 17

Members of the Offenders Review Board should be appointed for a fixed term of three years.

Proposal 18

The Offenders Review Board should provide the offender with a full statement of the reasons on which an order for parole is refused.

Proposal 19

Sections 23 and 41 of the *Sentencing Act 1989* should be repealed.

Proposal 20

Administrative review of decisions of the Offenders Review Board should be available in the Administrative Law Division of the Supreme Court.

Proposal 21

The Offenders Review Board should be empowered to defer consideration of parole for up to two years after a refusal to make a parole order or, where a parole order has been revoked, 12 months after return to custody.

Proposal 22

Parole supervision for periods in excess of three years should not be terminated without the consent of the Offenders Review Board.

Proposal 23

Section 25 of the *Periodic Detention of Prisoners Act 1981* (NSW) should be amended to make clear that, on application by the Commissioner or detainee, the court has power to cancel the order "if it appears to the court that there is good reason for doing so".

Proposal 24

Stage II of the Periodic Detention scheme should be discontinued.

Proposal 25

Periodic detention should be generally available for periods of less than three months.

Proposal 26

Sentencing legislation should provide for home detention as a sentencing option.

Proposal 27

Community Service Orders should be available as a sentencing option for all offences.

Proposal 28

A breach of a CSO should not itself constitute an offence.

Proposal 29

The term "bond" should replace "recognizance" in legislation.

Proposal 30

In the context of sentencing an offender, a bond for conditional release should be issued only pursuant to a statutory power.

Proposal 31

The maximum period of a bond should be five years.

Proposal 32

Compensation and restitution should not be conditions attaching to a bond.

Proposal 33

Suspended sentences should be reintroduced as a sentencing option in New South Wales.

Proposal 34

In appropriate cases, a charge should be placed on a fine defaulter's property rather than sending the defaulter to prison.

Proposal 35

The current provisions for enforcement of compensation orders with respect to minor offences in s 65 of the *Victims Compensation Act 1987* (NSW) should be repealed. The provisions for enforcement in respect of major offences in s 57 of the *Victims Compensation Act 1987* (NSW) should be extended to minor offences.

Proposal 36

The *Confiscation of Proceeds of Crime Act 1989* (NSW) should be amended to authorise partial forfeiture orders.

Proposal 37

In principle, victim impact statements ought to be generally admissible at sentencing hearings. The purpose of admitting such statements should be to afford a measure of the seriousness of the offence. This purpose should be spelled out in the relevant legislation.

Proposal 38

VIS should only be admissible where they furnish the court with particulars that are not already before the court in evidence or in a pre-sentence report.

Proposal 39

For the purpose of VIS, the "victim" of an offence should be the person against whom the offence was committed or who was a witness to the act of actual or threatened violence and who suffers injury as a result of the offence. Provision should be made for a VIS to be made on behalf of a victim who is under any incapacity.

Proposal 40

The victim should have the option to tender a VIS and the right to request the prosecutor to refrain from presenting the court with details of the injury. The court cannot draw any inference from a failure to provide a VIS.

Proposal 41

VIS ought not to be admissible in homicide cases.

Proposal 42

VIS ought to be signed, or otherwise acknowledged as accurate, by victims before they are received by the sentencing court.

Proposal 43

VIS in sworn written form ought to be tendered by the prosecution at sentencing hearings.

Proposal 44

VIS should address the actual physical, psychological, social and financial consequences of the offence on the victim. They should not address the question of the appropriate sentence which ought to be imposed on the offender.

Proposal 45

The court should have the discretion to rule VIS inadmissible in any case. The author of a VIS should always be subject to cross-examination on its contents.

Proposal 46

Submissions made to the Offenders Review Board addressing the statutory criteria on which a decision to grant parole is based should be sworn, in writing and subject to cross-examination.

1. The Commission's Brief

THE BACKGROUND TO THE COMMISSION'S REFERENCE

1.1 In January 1994 the then Attorney General, the Hon John Hannaford MLC, appointed Dr Roger Brown to undertake a review of sentencing laws and procedures in New South Wales with a view to making recommendations for reform. That review produced an issues paper in June 1994.¹ One recommendation in that paper was that the Commission should be asked to undertake a detailed review of all offences punishable by imprisonment with a view to modernising and rendering consistent the levels of penalty applicable to those offences.²

1.2 Pursuant to this recommendation, the Commission received the following reference from the then Attorney General on 20 October 1994:

The Commission is to review the penalties for offences punishable by imprisonment in New South Wales and to develop consistent and rational criteria for maximum penalties.

In undertaking this review the Commission is to consider:

- whether it is appropriate to classify offences in terms of relative seriousness; and
- the desirability of differentiating between offences of violence and other offences.

Resource constraints meant that the Commission was only able to schedule the commencement of work on this reference for July 1995.

1.3 Following the general election of March 1995, there was a change of government in New South Wales. The new Attorney General, the Hon Jeff Shaw QC, required the Commission, by reference dated 12 April 1995,³ to report generally on the laws relating to sentencing in New South Wales, with particular reference to:

- the formulation of principles and guidelines for sentencing;
- the rationalisation and consolidation of current sentencing provisions;
- the adequacy and use of existing non-custodial sentencing options with particular reference to home detention and periodic detention;
- the adequacy of existing procedures for the release of prisoners by the Offenders Review Board and the Serious Offenders Review Council and the benefits that might accrue from the review of the decisions of the Offenders Review Board and the Serious Offenders Review Council by judicial officers; and
- any related matter.

1.4 These terms of reference are sufficiently broad to encompass the reference from the former Attorney General in 1994. Indeed, the second matter the Commission is directed to consider deals with the same subject matter as the 1994 reference. The Commission has proceeded on the basis that the 1994 reference is incorporated in its present reference.

1.5 The Attorney General has requested the Commission to have regard to the proposals in relation to sentencing contained in the Australian Labor Party policy documents formulated in Opposition. Accordingly, the Commission has had regard to the following policy documents:⁴

- *Labor's Plan to Fight Crime, 1995*,⁵
- *Labor's Law Reform Policy, March 1995*; and

- *Labor's Corrections Policy 1995.*

1.6 Much of *Labor's Plan to Fight Crime* is not directly relevant to the Commission's Sentencing Reference.⁶ However, two major sections of the document are relevant. The first is headed "Sentencing - Making the Punishment fit the Crime". The stated concern of this section is to ensure that offenders receive "appropriate" punishment, which includes:

- mandatory life sentences following conviction for dealing in large commercial quantities of hard drugs;
- life imprisonment following conviction for a new offence of "horrific crime" (that is multiple murder, contract killing and murder or attempted murder in conjunction with violent sexual assault); and
- increased sentences for selling drugs near schools (an automatic increase of five years imprisonment); for burglaries in which the safety of occupants at home are put at risk (up to five years extra imprisonment); and for purchasing alcohol for children.

The punishments proposed are seen as necessary to satisfy the "community's desire for justice".⁷

1.7 The second relevant section is headed "Victims' Rights". The underlying assumption is that "victims of crime deserve better".⁸ To this end, there should be:

- a Charter of Victim's Rights, whose provisions would bind government agencies, and which would include the right of victims to be notified of court hearings, sentencing, avenues of appeal and victims' compensation;
- a Victims of Crime Bureau, whose task would be to refer victims to support services; to co-ordinate court services for victims; to assist in preparation for compensation hearings, and of victim impact statements and submissions about an offender's pending release; and, to inform victims of the offender's location in the criminal justice system;
- a Victim Support Officer in each police patrol unit to assist victims;
- court procedures which minimise the trauma suffered by victims during trial; and
- effective and swift restitution (from the offender) and compensation to the victims of crime, including giving victims the option of claiming compensation either under the victims' compensation legislation or as part of the sentencing process.⁹

Many of these policies are intended to reflect the importance of the counselling and rehabilitation of victims of crime, and it is to this that *Labor's Law Reform Policy* directs emphasis as far as resources are concerned.¹⁰

1.8 A number of sentencing proposals are found in *Labor's Corrections Policy* and *Labor's Law Reform Policy*. Apart from matters specifically mentioned in the Commission's terms of reference, they envisage the introduction of measures to ensure:

- the use of imprisonment as a sentence of last resort for non-serious offenders;¹¹
- a stronger and more meaningful periodic detention regime;¹²
- the encouragement of the use of non-custodial options, steps being taken to ensure their greater enforceability and utility;¹³
- the elimination of imprisonment for fine defaulters, accompanied by the development of procedures designed to ensure the greater enforceability of fines in practice;¹⁴

- the strengthening of judicial education with a view to ensuring, amongst other things, the elimination of inconsistencies in sentencing.¹⁵

1.9 A matter relevant to one of the Commission's terms of reference is the policy that sitting judges should be responsible for sentencing and releasing prisoners. A judge or magistrate of the court which sentenced the offender would authorise release to parole or a community-based program when satisfied that the offender has served the sentence in the manner intended by the court. For non-serious offenders, a judge would sign release papers only after considering a report from the Offenders Review Board. Release of serious offenders would require a judge to conduct a court hearing to consider submissions from the Offenders Review Board, the Serious Offenders Review Council and from victims.¹⁶ The stated purpose of these policies is to achieve "a fairer, more secure system which ensures that prisoners serve their sentences as the court intended" and to "ensure all prisoners serve the sentence justice demands".¹⁷

COMMENT ON THE TERMS OF REFERENCE

1.10 One of the Commission's terms of reference requires a consideration of "the adequacy of existing procedures for the release of prisoners by ... the Serious Offenders Review Council and the benefits that might accrue from the review of the decisions of ... the Serious Offenders Review Council by judicial officers". The main function of the Serious Offenders Review Council ("SORC") is the management of serious offenders while in custody.¹⁸ SORC has no responsibility for the release of prisoners from custody;¹⁹ its role in the parole decision is only indirect, namely, to provide reports to the Offenders Review Board.²⁰ The management functions of SORC are part of prison administration and are not related to this reference. Its reporting functions are not in themselves readily amenable to judicial review except as part of the parole decision of the Offenders Review Board. This is considered in Chapter 7.²¹

THE SCOPE OF THE REFERENCE

A comprehensive review of sentencing law

1.11 The Commission's terms of reference are wide. Although we are directed to focus our attention on four specific matters, the reference potentially encompasses a review of the whole of the law relating to sentencing. Two such major reviews have occurred in Australia in the last two decades. First, the Australian Law Reform Commission began a review of Commonwealth and Australian Capital Territory law relating to the imposition of punishment for offences in 1978. An interim report was published in 1980²² and a final report in 1988.²³ The result was the addition of a new part to the *Crimes Act 1914* (Cth) dealing with the sentencing, imprisonment and release of federal offenders.²⁴ Secondly, a sentencing committee was established in Victoria in 1985 to review the laws and practices of sentencing in that State and to make recommendations for reform. That committee reported in 1988,²⁵ its work eventually resulting in the *Sentencing Act 1991* (Vic). In addition to these Australian inquiries, there have been a number of major reviews overseas.²⁶

1.12 The Commission has agreed with the Attorney General that this reference will receive priority among our current projects.²⁷ A comprehensive review of the laws of sentencing within a one-year, or even a two-year, period has the potential to consume the entire resources of the Commission for that period. Therefore, the Commission has decided to break this reference up into at least three phases and to report separately on each phase. The first phase of our inquiry, to which this Discussion Paper is directed, will concentrate on the general principles of sentencing law in New South Wales. It is our intention to report to the Attorney General on this part of the reference in the second half of 1996.

Special groups of offenders

1.13 The second phase of our inquiry will be directed to an examination of the particular problems which arise in sentencing groups of offenders who require special consideration. A principal focus of the second phase will be the sentencing of Aboriginal offenders, young offenders and offenders with an intellectual disability. Other groups which deserve special consideration include corporate offenders and female offenders. The special considerations which apply to the sentencing of offenders in these and other groups require discrete treatment,

both in terms of research and community consultation, to ensure that important issues to which they give rise are not lost in a general review of the law of sentencing.

Aboriginal offenders

1.14 As far as Aboriginal offenders are concerned, research and community consultation will need to focus, amongst other matters, on the following considerations:

- The existence of any express or implicit discrimination in the sentencing of Aboriginal offenders.²⁸ An example may be the increase rate of over 100% in the Aboriginal population of New South Wales gaols since the introduction of the *Sentencing Act 1989* (NSW) (the “truth in sentencing” legislation),²⁹ a rate much higher than that for non-Aboriginal offenders (which is just below 40%). One reason for this may be that the majority of Aboriginal offenders are sentenced to short periods of imprisonment and that the unavailability of parole for sentences of six months or less³⁰ as well as the abolition of remissions brought about by the truth in sentencing legislation, impacts disproportionately on those serving short sentences for minor crimes.³¹
- The relevance of socio-economic factors (including alcohol abuse) to sentencing.³² The issue here is the extent to which the courts ought to take into account, as a mitigating factor in sentencing, the fact that the socio-economic conditions in which many Aboriginal people live are appalling in comparison to those in which the majority of the population lives.
- The relevance of Aboriginal law to the imposition of punishment.³³ The issues here centre on the extent to which the courts ought to apply the sanctions of Aboriginal law to Aboriginal offenders, or, perhaps, suspend a sentence to enable the Aboriginal offender to undergo traditional punishment.³⁴ Another issue is whether or not the courts should increase or decrease a sentence because of the perception of the seriousness of the crime in the Aboriginal community from which the offender comes.³⁵
- The impact of sentences on Aboriginal offenders. Aboriginal deaths in custody have been the subject of official inquiry and much debate.³⁶ They raise the question of the extent to which the courts ought always to consider, as a relevant factor of hardship, the potential impact of a custodial sentence on an Aboriginal offender.³⁷ This, in turn, raises the question of the extent to which special use should be made, in the treatment of Aboriginal offenders, of non-custodial options (whether available under Aboriginal law or not).

Young offenders

1.15 Sentencing principles differ in respect of persons under the age of 18.³⁸ More generally, such principles receive distinct emphasis in the case of young offenders.³⁹ Age reduces responsibility, less emphasis is given to general deterrence and special consideration is given to the prospects of rehabilitation.⁴⁰ A number of practical considerations require discrete investigation:⁴¹

- **The classification of offences.** The issue here is whether young offenders should be treated differently according to the seriousness of the offence.⁴² For example, the general effect of s 17 of the *Children (Criminal Proceedings) Act 1987* (NSW) is that a child offender who is charged with a “serious indictable offence” is treated no differently from an adult for sentencing purposes.
- **The determination of a sanction hierarchy.**⁴³ The objectives pursued in the sentencing of young offenders generally create a strong presumption against the use of custodial punishments (whether committal to an adult prison or to a children’s detention centre). To achieve this end, and to make clear the circumstances in which non-custodial options should be used, it may prove useful to create a hierarchy of sanctions to which the court is bound to have regard in sentencing young offenders.⁴⁴

Offenders with an intellectual disability

1.16 At present, intellectual disability is a relevant factor in sentencing to the extent to which it:

- operates in mitigation of sentence, either generally⁴⁵ or because the impact of imprisonment is likely to be more burdensome on an offender with an intellectual disability than in the case of other offenders;⁴⁶
- constitutes a “special circumstance” for the purpose of determining the ratio of the minimum to the additional term of imprisonment under s 5(2) of the *Sentencing Act 1989* (NSW).⁴⁷

As with young offenders, the purposes of punishment receive distinct emphasis, generally with less weight on retribution and deterrence.⁴⁸ As with Aboriginal offenders, special consideration needs to be given to non-custodial (or quasi-custodial) sentencing options.⁴⁹

1.17 Some of the issues concerning the sentencing of persons with an intellectual disability have been, and are being, addressed in the Commission’s reference on People with an Intellectual Disability and the Criminal Justice System.⁵⁰ That reference is expected to report in the first half of 1996.⁵¹ The Commission will have the advantage of drawing, and where necessary building, on the report and conclusions of that reference in the second phase of this sentencing reference.

Statutory maximum penalties

1.18 The third phase of our inquiry will be directed to an examination, and rationalisation, of the maximum penalties which legislation makes applicable to criminal offences in New South Wales. These maxima have been imposed by the legislature from time to time without express consideration of the relative seriousness of the offences to which they apply. Because prescribed statutory maxima are the initial factor taken into account by the courts in the determination of the quantum of sentence,⁵² they potentially contribute to sentence disparity to the extent to which they do not, comparatively, reflect the objective seriousness of the offence.⁵³

1.19 The Commission will attempt to provide an appropriate framework for the categorisation of offences for penalty purposes. A number of factors are potentially relevant to the development of such a framework.⁵⁴ They include:

- an analysis of the values sought to be protected by criminal prohibitions;
- current judicial sentencing practice;
- comparisons to related jurisdictions;
- professional opinion;
- public opinion; and
- common sense judgment.

Many of these factors are potentially susceptible to empirical analysis. The comparative weight to be accorded to any one of them is, obviously, an important part of any attempt to develop a scale of seriousness. Their analysis should reveal, amongst other matters, whether there is a need for the creation of a category of “horrible crime” for sentencing purposes.⁵⁵

1.20 Some inquiries have already attempted the task of categorising offences in terms of seriousness.⁵⁶ A Victorian Task Force⁵⁷ proposed a ranking of offences whose framework appears in the *Sentencing Act 1991*.⁵⁸ The Act is not, however, an unqualified success in this respect. First, the reclassification of statutory maxima in terms of the Act’s framework remains to be carried out for all legislative offences with the exception of those in the *Crimes Act 1958* (Vic).⁵⁹ Secondly, since the passage of the *Sentencing Act*, the Victorian Parliament has

passed legislation which sets maximum penalties without reference to the framework of the Act and which creates gross disparities in terms of that framework.⁶⁰

THE COURSE OF THE REFERENCE TO DATE

1.21 The Commission began work on this reference in July 1995. The primary focus of our work to date has been to identify, primarily through research, areas in current sentencing law which appear to be in need of reform and, where possible, to formulate tentative proposals for that reform.

1.22 In doing so, we have had the benefit of the views of many persons and organisations with experience in sentencing. First, we have considered the submissions which were made to the Attorney General's Sentencing Review in 1994. Secondly, we invited comments on our terms of reference from interested organisations and individuals. In all, we received 25 submissions. Thirdly, we have had constructive consultations with relevant government and other bodies in New South Wales, including the Judicial Commission of New South Wales, the Department of Corrective Services, the Probation Service, the Serious Offenders Review Council and the Offenders Review Board. Fourthly, we have met with victims' groups and, on 4 October 1995, we hosted a Victims Seminar at Parliament House designed to promote dialogue on sentencing between judges, magistrates and victims. The seminar was addressed by members of victims' support groups, by the Premier of NSW, the Attorney General and the Director of Public Prosecutions.

THE PURPOSE OF THIS DISCUSSION PAPER

1.23 The Commission is committed to community involvement in all its law reform projects. Community involvement is especially important in contentious areas of the law such as sentencing. The purpose of this Discussion Paper is to provide all interested members of the community with the preliminary results of our research, in order to lay the foundation for informed discussion and debate in the community on reform of sentencing law generally, and, in particular, on the tentative proposals for reform which we put forward in this paper.

1.24 Following the publication of this Discussion Paper, the Commission will begin a period of extensive community consultation. Part of the consultation process is to encourage comments and suggestions from interested groups and members of the public on the issues and proposals which are raised in this Discussion Paper. To assist in the preparation of such responses, we have summarised at the end of each chapter the questions which have been discussed in that chapter and on which we particularly seek responses from the community.

1.25 *The Commission stresses that the views expressed in this Discussion Paper, and the proposals which we put forward, are not our final recommendations. It is true that we have reached tentative agreement on reform in some areas of sentencing law, especially where (as in the case of victims) we have already had the benefit of considerable community consultation. Our tentative agreement is, however, subject to revision in the light of further research and consultation, including the submissions which we receive in response to this paper. Where we have reached a tentative agreement on reform of the law and that agreement necessitates a change in the present law, we have expressed our preliminary view in the form of a proposal for reform. A list of such proposals appears at p xvii. The purpose of doing this is merely to indicate the direction in which our research is taking us. A Report containing our final recommendations to the Attorney General will only be prepared after we have completed our research and consultation process.*

OUTLINE OF THIS DISCUSSION PAPER

1.26 This Discussion Paper is divided into six parts. *Part 1*, which comprises Chapters 1-3, constitutes an introduction to the reference and to the general law of sentencing in New South Wales.

Chapter 1 describes the reference and the manner in which the Commission intends to manage it.

Chapter 2 deals with two overriding problems of sentencing law in New South Wales, currently an amalgam of common law and a number of statutes. The first is the question of consolidation of the law. The second is the extent to which the law needs rationalisation to address issues of alleged sentence disparity and leniency.

Chapter 3 considers the underlying purposes and principles of sentencing law.

1.27 *Part 2*, which comprises Chapters 4-6, deals with the law relating to imprisonment as a sentencing option.

Chapter 4 describes the structure of imprisonment law in New South Wales, including the relationship between minimum terms of imprisonment (which must be served) and additional terms (during which the offender becomes eligible for release on parole); how multiple terms of imprisonment are imposed and served; life sentences; and how the law deals with dangerous and repeat offenders.

Chapter 5 discusses how the courts take into account the various factors operating in any case to determine the appropriate sentence. These factors include those relevant to the nature of the offence and of the offender; the offender's response to the charge; the effect of the offence and its sanction; and the relevance of the sentence imposed on a co-offender.

Chapter 6 investigates various methods which have been developed, or suggested, to guide the discretion of the judge in arriving at the appropriate sentence.

1.28 *Part 3* of the paper deals with release from custody. It consists of Chapter 7 which deals with the law relating to parole and the operation of the Offenders Review Board.

1.29 *Part 4* of the paper, which comprises Chapter 8, deals with periodic detention, a punishment which is only partly custodial and to which parole is inapplicable.

1.30 *Part 5*, which comprises Chapters 9 and 10, deals with non-custodial punishments.

Chapter 9 deals with community-based punishments. These include intensive supervision orders, community service orders, probation, suspended and deferred sentences, and conferencing.

Chapter 10 considers monetary penalties, namely fines and two orders ancillary to sentencing, namely reparation and confiscation orders.

1.31 *Part 6* of the paper, which comprises Chapter 11, deals with the role of victims in sentencing. It considers the general needs of victims in the criminal justice system, victim impact statements and the role which victims ought to have at parole hearings.

Footnotes

1. New South Wales, Attorney General's Department, *Sentencing Review 1994* (Sydney, June 1994) (hereafter *Attorney General's Sentencing Review*).

2. *Attorney General's Sentencing Review* at 56.

3. The terms of reference are formally set out at p xiii.

4. The three listed documents are consolidated with other relevant policy statements and material in *ALP Law and Order Policy Documents*.

5. *Labor's Plan to Fight Crime, 1995: Policing Streets, Preventing Crime, Punishing Criminals, Protecting Victims* (hereafter *Labor's Plan to Fight Crime*).

6. But some parts are relevant. Thus, the policing section of the Policy envisages the expansion of a Minor Offenders Punishment Scheme which deals with community youth conferences where the offender and a willing victim are brought together before a police or court officer with the aim of determining punishment and restitution, the offender taking responsibility for the crime (*Labor's Plan to Fight Crime* at 2). The crime prevention section of the Policy envisages a similar scheme applying in the school context to violent or disruptive pupils (*Labor's Plan*

to *Fight Crime* at 4) and also envisages that offenders (particularly graffitists) serving Community Service Orders will be required to serve their order by removing graffiti. Again, alcohol-affected offenders are to be directed by the courts into rehabilitation programs to the cost of which they will be required to contribute on a means-tested basis: *Labor's Plan to Fight Crime* at 5.

7. *Labor's Plan to Fight Crime* at 5-6.

8. *Labor's Plan to Fight Crime* at 7.

9. *Labor's Plan to Fight Crime* at 7-9. See also *Labor's Law Reform Policy* at 11-12.

10. *Labor's Law Reform Policy* at 12.

11. *Labor's Corrections Policy* at 4.

12. *Labor's Corrections Policy* at 19-20.

13. *Labor's Corrections Policy* at 4-5.

14. *Labor's Corrections Policy* at 7; *Labor's Law Reform Policy* at 19.

15. *Labor's Law Reform Policy* at 20.

16. *Labor's Corrections Policy* at 21-22.

17. *Labor's Corrections Policy* at 21.

18. See paras 7.27-7.31.

19. SORC does, however, have responsibility for the pre-release programs of certain prisoners: see para 7.27.

20. SORC may also report to the Supreme Court on s 13A applications: see paras 4.83-4.86.

21. See paras 7.66-7.74.

22. Australian Law Reform Commission, *Sentencing of Federal Offenders* (ALRC 15, 1980).

23. Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988). See also Australian Law Reform, *The Commonwealth Prisoners Act* (ALRC 43, 1988).

24. *Crimes Act 1914* (Cth) Part 1B, inserted by the *Crimes Legislation Amendment Act (No 2) 1990* (Cth). See also *Crimes Act 1900* (ACT) Pt XII Div 1, inserted by the *Crimes (Amendment) Act (No 2) 1993* (ACT).

25. Victoria, Attorney-General's Department, *Sentencing: Report of the Victorian Sentencing Committee* (Melbourne, 1988) 3 Volumes.

26. See Canada, Report of the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Canadian Government Publishing Centre, 1987); Ireland, Law Reform Commission, *Consultation Paper on Sentencing* (Dublin, March 1993).

27. See New South Wales Law Reform Commission, *Annual Report 1995* at 12. For a list of the Commission's current projects, see New South Wales Law Reform Commission, *Digest 1995* at 38-44.

28. See Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (ALRC 31, 1986) Volume 1 at paras 533-534.

29. See New South Wales, Aboriginal Justice Advisory Committee, *Report 1993-1995* (Attorney General's Department, Sydney, December 1995) at 48.

30. *Sentencing Act 1989* (NSW) s 7.
31. See M Sharp, "‘Truth’ Law Doubles Black Jail Numbers" *Sydney Morning Herald* (28 September 1995) at 3.
32. See especially *R v Fernando* (1992) 76 A Crim R 58 at 62-63 per Wood J. See also paras 5.50-5.53; H McRae, G Nettheim and L Beacroft, *Aboriginal Legal Issues: Commentary and Materials* (Law Book Co, 1991) at 272-273.
33. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (ALRC 31, 1986) Volume 1 at paras 504-522.
34. This gives rise to many complex questions concerning Aboriginal law and its relationship with the general law: see G Zdenkowski, "Customary Punishment and Pragmatism: Some Unresolved Dilemmas" (1994) *Aboriginal Law Bulletin* 26.
35. See, generally, Recommendation 20 in *The Recognition of Aboriginal Customary Laws* (ALRC 31, 1986).
36. See especially Australia, Royal Commission into Aboriginal Deaths in Custody, *National Report: Overview and Recommendations* (Canberra, AGPS, 1991). For a recent expression of concern particularly in relation to young Aboriginal offenders, see M Woodrow, "Introduction" in Aboriginal and Torres Strait Islanders Social Justice Commissioner, *Third Report 1995* (AGPS, Canberra, 1995).
37. On hardship generally see paras 5.111-5.113.
38. The *Children (Criminal Proceedings) Act 1987* (NSW) applies special principles, in the case of children, to: the exercise of criminal jurisdiction (s 6); penalties generally (Part 2 Division 4); and penalties in the Children's Court (Part 3 Division 4). See *R v P* (1991) 53 A Crim R 112 at 114 (NSW CCA). See generally A Freiberg, R Fox and M Hogan, *Sentencing Young Offenders* (ALRC, Sentencing Research Paper 11, 1988).
39. See *R v P* at 116. Compare *R v Nichols* (1991) 57 A Crim R 391 (NSW CCA); *R v Hawkins* (1993) 67 A Crim R 64 (NSW CCA).
40. See para 5.43.
41. There have recently been a number of major reviews and initiatives affecting the juvenile justice system: for a list, see NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues* (DP 35, 1994) at para 13.6. See also Human Rights and Equal Opportunity Commission, *Juvenile Justice and Young People of Non-English Speaking Background: Discussion Paper* (Sydney, 1994).
42. See generally *Children (Criminal Proceedings) Act 1987* (NSW) Part 2 Division 4.
43. See C Cunneen and R White, *Juvenile Justice: An Australian Perspective* (Oxford University Press, Melbourne, 1995) at 220-221.
44. As in *Children (Criminal Proceedings) Act 1987* (NSW) s 33.
45. See *R v Vangelder* (NSW CCA, No 60107/93, 28 February 1994, unreported); *R v Bassett* (NSW SC, No 70082/93, 20 May 1994, Hunt CJ at CL, unreported). Compare *R v Tucker* (NSW CCA, No 60254/90, 13 April 1992, unreported). See further para 5.60.
46. For example, *R v Bailey* (1988) 35 A Crim R 458. See further paras 5.111-5.113.
47. *R v Shinfield* (NSW CCA, No 60090/93, 13 May 1993, unreported); *R v Saunders* (NSW CCA, No 60480/90, 18 February 1992, unreported); *R v Powell* (NSW CCA, No 60647/91, 23 March 1993, unreported) (brain damage).

48. *R v Letteri* (NSW CCA, No 60407/91, 18 March 1992, unreported) at 14 per Badgery Parker J (with whom Gleeson CJ and Sheller JA agreed). See also *R v Champion* (1992) 64 A Crim R 244. Compare *R v Mason-Stuart* (1993) 68 A Crim R 163 at 164; *R v Shinfield* (NSW CCA, No 60090/93, 13 May 1993, unreported).
49. See New South Wales Law Reform Commission, *People With an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues* (DP 35, October 1994) at paras 11.57-11.73.
50. See *People With an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues* at Chapter 11.
51. See New South Wales Law Reform Commission, *Annual Report 1995* at 15.
52. See paras 3.42, 5.9-5.12.
53. See paras 2.20-2.21. The Canadian Sentencing Commission was of the view that, in practice, maximum penalties "have little impact upon the sentences handed down by judges and only serve to confuse the public": see *Sentencing Reform: A Canadian Approach* (Canadian Government Publishing Centre, Ottawa, 1986) at 199-200.
54. See P H Rossi, E Waite, C E Bose and R E Berk, "The Seriousness of Crimes: Normative Structure and Individual Difference" (1974) 39 *American Sociological Review* 224; K Pease, J Ireson, S Billingham and J Thorpe, "The Development of a Scale of Offence Seriousness" (1977) 5 *International Journal of Criminology and Penology* 17; P H Rossi and J P Henry, "Seriousness: A Measure for All Purposes?" in M W Klein and K S Teilmann (eds), *Handbook of Criminal Justice Evaluation* (Sage Publication, London, 1980) at 489-505; A von Hirsch, "Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and Their Rationale" (1983) 74 *Journal of Criminal Law and Criminology* 209; R Fox and A Freiberg, "Ranking Offence Seriousness in Reviewing Statutory Maximum Penalties" (1990) 23 *ANZ Journal of Criminology* 165.
55. See para 1.6.
56. Canada, Report of the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Canadian Government Publishing Centre, Ottawa, 1986) at 195-210; Australian Law Reform Commission, *Sentencing: Penalties* (DP 30, 1987) at Chapter 3; Victoria, Attorney-General's Department, *Sentencing: Report of the Victorian Sentencing Committee* (Melbourne, 1988) Volume 1 at 293-322; Victoria, Sentencing Task Force, Report to the Attorney-General, *Review of Statutory Maximum Penalties in Victoria* (Melbourne, 1989). See also Ireland, Law Reform Commission, *Consultation Paper on Sentencing* (Dublin, March 1993) at 300-308.
57. Victoria, Sentencing Task Force, Report to the Attorney-General, *Review of Statutory Maximum Penalties in Victoria* (Melbourne, 1989).
58. *Sentencing Act 1991* (Vic) s 109.
59. See A Freiberg, "Sentencing Reform in Victoria: A Case-Study" in C Clarkson and R Morgan (eds), *The Politics of Sentencing Reform* (Clarendon Press, Oxford, 1995) at 67.
60. *Freiberg (1995)* at 67.

2. The Rationalisation and Consolidation of Sentencing Law

2.1 The Commission's terms of reference require us to consider the "rationalisation and consolidation of current sentencing provisions".¹ This raises the issue of the extent to which the law relating to sentencing, which is found both in the common law and in several statutory provisions, ought to be consolidated. This, in turn, raises two separate questions:

Is there a case for the consolidation of existing statutory provisions?

Is there a case for the incorporation of common law principles (or some of them) in any consolidating statute (or statutes)?

Whatever the answer to the second question, the Commission, for the reasons set out in paras 2.7-2.11, does not favour a codification of sentencing law which would attempt to supplant the common law.

THE CONSOLIDATION OF SENTENCING LAW

2.2 The principles on which sentencing are based are found in the common law,² with some statutory modification.³ The more general concern of statute is with the prescription of maximum penalties for particular offences; with the regulation of procedural aspects of sentencing; and with non-custodial sentencing options. Such legislation has proliferated on an ad hoc basis without reference to general principles or any organising framework. This mosaic of laws dealing with sentencing appears unsatisfactory because:

- it fails to yield a comprehensive guide to the principles of sentencing law to which reference can easily be made;⁴ and
- it gives rise to a real risk of error where counsel fails to draw the attention of the court to the appropriate source to which reference should be made.

These deficiencies and dangers have been recognised by the legislatures of most Australian jurisdictions which have recently consolidated their sentencing laws.⁵

2.3 The Law Society, in its response to the Attorney General's Sentencing Review, agreed that sentencing provisions ought to be consolidated, but felt that memoranda referring to the new statutes should be included in any remaining enactments as a cross referencing tool for the benefit of lay people.⁶ In a submission to the Commission, the Department of Corrective Services submitted that the existing system should be retained and the *Periodic Detention of Prisoners Act 1981* (NSW), *Community Service Orders Act 1979* (NSW), and *Prisons Act 1952* (NSW) should be kept separate unless it is possible to disentangle the sentencing provisions from the existing legislation without the need for extensive cross referencing and unless doubts are resolved as to administrative responsibility for various parts.⁷ The concerns expressed by the Law Society and the Department of Corrective Services do not raise any principled objections to consolidation. In principle, the Commission favours the consolidation of sentencing provisions.

Proposal 1

Statutory provisions relating to sentencing in New South Wales ought to be consolidated.

2.4 The Commission's tentative view is that the concerns of the Department of Corrective Services can be met if consolidation occurs in two statutes: the first to deal with sentencing principles and policy (for example, the allocation of minimum and additional terms); the second to deal with sentencing administration (for example, the operation of the Offenders Review Board). Western Australia has recently consolidated its sentencing provisions along these lines.⁸ The following table sets out a tentative proposal for division.⁹

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Statute	Sentencing law	Sentencing Administration
<i>Children (Community Service Orders) Act 1987</i>	Part 2	Part 3-6
<i>Children (Criminal Proceedings) Act 1987</i>	Part 2 Div 4; Div 5; Part 3 Div 4	Part 3 Div 5
<i>Children (Detention Centres) Act 1987</i>		Whole of Act
<i>Community Protection Act 1994</i>	Sections 5-18, 24, 29	Sections 19-23
<i>Community Service Orders Act 1979</i>	Sections 4-12, 19, 25-26D	Sections 3A, 13-18, 20-24, 26E-27
<i>Crimes Act 1900</i>	Section 19A; Part 12; Sections 476(7), 476(7A), 553-555; Part 15	Part 13
<i>Criminal Procedure Act 1986</i>	Part 6	Part 7, 8
<i>Drug Misuse and Trafficking Act 1985</i>	Sections 33A, 34, 35	
<i>Fines and Penalties Act 1901</i>		Whole of Act
<i>Habitual Criminals Act 1957</i>	Sections 4-6, 9	Sections 8, 10
<i>Justices Act 1902</i>	Sections 80, 80A, 80AA, 80AB, 83, 84A-86	Sections 49-50, 82, 86A-97
<i>Periodic Detention of Prisoners Act 1981</i>	Sections 5-5B	Sections 5C-36
<i>Pre-trial Diversion of Offenders Act 1985</i>	Whole of Act	
<i>Prisons Act 1952</i>	Sections 26B(1), (2), (4) & (5), 26D, 26E, 34(2)	Part 10
<i>Sentencing Act 1989</i>	Part 2; Part 4	Parts 3-6
<i>Summary Offences Act 1988</i>	Sections 10A(2), 10A(3), 10B(2), 10B(3), 33	

2.5 The above table is based on the following considerations:

- The *Mental Health Act 1990* (NSW) will continue to deal with those living with mental disorders.
- Provisions are listed notwithstanding that consideration is given in this Discussion Paper to their amendment or repeal.
- Provisions dealing with definitions and objects will need to be dealt with appropriately.
- Procedures relating to appeals are not included in either category.¹⁰
- Provisions dealing with the enforcement of sentences are included in the category of sentencing administration.

2.6 The Commission invites submissions on the following:

- whether provisions relating to juvenile sentencing should be contained in separate statutes or, perhaps, a consolidated statute dealing with the sentencing of juvenile offenders;¹¹
- whether all aspects of prison administration should be contained in the sentencing administration statute or in a *Prison Act*; and
- whether other legislative provisions should be included in the consolidated statutes.

THE RATIONALISATION OF SENTENCING LAW

2.7 While the Commission supports the consolidation of current statutory provisions dealing with sentencing law in New South Wales, that consolidation should not, in our view, attempt to include the principles of the common law. We realise that the trend of recent sentencing legislation in other Australian jurisdictions is to incorporate common law principles into consolidated sentencing legislation.¹² We are strongly of the view that the law of New South Wales ought not to go down this path for a number of reasons.

2.8 First, the reduction of common law principles to statutory form is likely to stultify the development of the law, especially if the consolidation is taken as some form of code. A major characteristic of sentencing law is the wide discretion which resides in the sentencing judge to determine the punishment to be imposed on the offender. In exercising that discretion, the judge endeavours “to make the punishment fit the crime, and the circumstances of the offender, as nearly as may be”.¹³ The discretion involves a synthesis of all factors relevant to the offence and offender to produce an appropriate sentence.¹⁴ That discretion is informed by sentencing principles and policies of the broadest kind.¹⁵ By making the discretion a statutory one, its exercise is inevitably constrained by the words and purposes of the statute. This compromises the flexibility and evolutionary nature of the common law discretion, as well as its ability to adapt to societal changes. The Commission believes that it is essential to retain the flexibility of the common law in order to achieve justice in individual cases. The point is well made by the former Chief Justice of Tasmania, Sir Guy Green:

The rationale for vesting discretionary power in judges is based upon long experience of the processes of decision-making, which shows that there are certain classes of cases which are only capable of being justly determined by the exercise of a discretion rather than by the application of rigid, minutely defined rules laid down in advance. No amount of a priori theorising about sentencing can prevail over that simple empirical conclusion derived from centuries of judicial experience.¹⁶

2.9 Secondly, the broad purposes and principles which characterise common law sentencing are not, in the Commission’s view, in need of restatement or reform.¹⁷ They are the product of a long evolution. At different times and in different contexts, some assume greater importance than others.¹⁸ An attempt to “reform” them is likely to fail. An example is the Australian Law Reform Commission’s attempt to exclude general deterrence from the purposes of punishment. Pursuant to recommendations of that Commission,¹⁹ the *Crimes Act 1914* (Cth) mentions only specific deterrence as a factor in sentencing.²⁰ But the omission of general deterrence proved unworkable in practice and has led to its judicial reinstatement.²¹

2.10 Thirdly, it is impossible to provide an exhaustive list of the factors relevant to each offence and each offender to which the court must have regard in sentencing. This is recognised in the recent consolidated sentencing legislation in several Australian jurisdictions, where phrases like “any other relevant matter” are added to the list of factors to which the court must have regard in sentencing.²² Yet the mere listing of such factors contains dangers of its own. For example, what conclusion is to be drawn from the failure of the lists in most jurisdictions to resolve the difficulties which surround the application of particular factors at common law?²³

2.11 Fourthly, it follows that reduction of the common law to statutory form serves no obvious purpose in terms of law reform. At the same time, reduction of the common law to statutory form runs the real risk of obfuscating the law. An example is provided by s 16A of the *Crimes Act 1914* (Cth). Section 16A(2) contains a list of the matters which the court must take into account in sentencing; these matters are relevant both to the circumstances of the offence and of the offender. Yet s 16A(2) is subject to the overriding requirement in

s 16A(1) that in determining a sentence for a federal offence, a court “must impose a sentence ... that is of a severity appropriate in all the circumstances of the offence”. Does this mean that s 16A(1) limits s 16A(2) by allowing the court to have regard to the matters in s 16A(2) (such as the personal circumstances of the offender) only where doing so does not take the sentence out of the range of sentences “appropriate in all the circumstances of the offence”? If so, the personal circumstances of the offender will not be considered at all.²⁴

2.12 The Commission’s view is that statutory rationalisation of the whole of sentencing law (including the common law) could only be justified if some inherent structural or other defect in the present law requires such radical reform. It is often suggested that the existence of the wide judicial discretion in sentencing is itself that defect.²⁵ This gives rise to the perceived problems of sentence disparity and sentence leniency.

Sentence disparity

2.13 The emphasis on the individualisation of justice in sentencing necessarily leads to the rejection of punishment by reference to a tariff, although a series of cases may establish, or the Court of Criminal Appeal may lay down, a range of sentence for specified categories of offence for offenders with particular characteristics.²⁶ In *R v Warfield*,²⁷ responding to an argument for a lesser punishment by reference to cases in which sentences lower than that given to the offender were handed down, Justice Hunt said:

[I]t is quite wrong to compare the sentence under challenge directly with that imposed upon another offender (who is not a co-offender) simply because the two offenders may have similar characteristics and may have committed similar crimes. What must be looked at is whether the challenged sentence is within the range appropriate to the objective gravity of the particular offence and to the subjective circumstances of the particular offender, and not whether it is more severe or more lenient than some other sentence (other than that of a co-offender) which merely forms part of that range.²⁸

2.14 The absence of a tariff does not mean that the court has no concern with consistency. It is a principle of justice that like cases must be treated alike. That is equally a principle of common law sentencing.²⁹ The principle finds practical expression in the common approach to the exercise of the sentencing discretion in the reasoning of sentencing officers and appeal courts.³⁰

2.15 Given consistency of approach, it is difficult to understand how an argument for sentence disparity can be made, unless the simple fact that two offenders are convicted of the same offence, yet receive substantially different sentences, is taken as evidence of such disparity. Yet sentence disparity cannot be inferred simply from the observation that individuals convicted of the same offence have been sentenced differently.³¹ The circumstances in which one offence is actually committed may be very different from the circumstances of another, even though the offences themselves share the same legal definition. The range of aggravating and mitigating factors that may be relevant to a particular case is so wide that precisely the same combination of factors may never occur in more than one case. We illustrate this fully in Chapter 5 where we consider the most important factors relevant to the determination of sentences in individual cases.

2.16 Meanwhile, the point can be made by presenting two hypothetical examples of the offence of armed robbery, governed by s 97 of the *Crimes Act 1900* (NSW). This offence carries a maximum penalty of twenty years imprisonment.

Case 1

An 18 year old man pleads guilty to the offence of armed robbery at the earliest available opportunity. He is addicted to heroin, and was experiencing symptoms of withdrawal at the time of the robbery, which was not planned. The offence was committed for the purpose of obtaining money to buy drugs. While walking through a park, he comes across another young man walking alone, and seeing that no one else is about, he decides to rob him. He threatens the victim with a small switch-blade, which the offender carries on a regular basis. The offender runs away with approximately fifty dollars. He has a brief criminal record for minor drug and public order offences. There is evidence that the offender is of below average intelligence.

Case 2

A 35 year old man is convicted of armed robbery after a long trial. The robbery was committed on a bank, and the evidence shows that several months were spent planning the crime with two co-accused. The offender brandished a loaded shotgun during the robbery, threatening to kill customers and tellers if they refused to comply with his demands. The offenders escape with several thousand dollars. The offender has a long criminal record for offences involving violence and dishonest acquisition, including a conviction for armed robbery committed in similar circumstances.

Both of these cases are examples of armed robbery. Yet the circumstances of each case are quite different. Both the circumstances of the offence itself, and the circumstances of the offender, are dissimilar. Sentence disparity may, conceivably, result from the failure of judges to apply themselves to the principle of sentencing consistency; or from the operation of various subjective considerations resulting in different outcomes for cases which are only superficially similar; or from a combination of the above.

2.17 Arguments that unwarranted sentence disparity exists must, therefore, identify systematic and substantial variation in sentences for very similar cases. The evidence which might prove unwarranted sentence disparity is often circumstantial and impressionistic,³² and the statistical methods for measuring it are complex and unsatisfactory.³³ A recent study of the Bureau of Crime Statistics and Research attempted to evaluate, as a factor influencing "judge-shopping",³⁴ the extent and impact of sentence disparity in the District Court. The study compared the incidence of the imposition of sentences of imprisonment by District Court judges. Two sample groups were selected. One group comprised the five judges who sentenced offenders to imprisonment in proportionally the highest number of cases. The other group comprised the five judges who sentenced offenders in proportionally the lowest number of cases. The study purported to find substantial disparities between the sentencing behaviour of the two groups.³⁵ According to the study, the disparities were reflected across particular offence categories and could not be explained by judges dealing with offences of different seriousness.³⁶ The Commission is not persuaded that this study provides evidence of general sentencing disparity in the District Court. First, the study selected two groups of judges whose sentences, proportionally, fell at the extremes of relevant ranges. It therefore says nothing of the sentences of the remaining 42 judges whose sentencing patterns fell between the two extremes (where an impressionistic view of the percentages is not suggestive of disparity).³⁷ Secondly, the study selects as sentence-relevant characteristics only plea and type of offence, all other remaining characteristics being assumed to vary randomly across cases dealt with by different judges.³⁸ As we have just attempted to show,³⁹ such an assumption simply cannot be made.

2.18 The recent popularity of the "just deserts" theory of sentencing with its emphasis on proportionality,⁴⁰ has given prominence to the discussion of sentence consistency. In truth, the debate about sentence consistency has been around for many years. It was, for example, a recurrent theme in proposals for the reform of sentencing in the second half of the nineteenth century.⁴¹ With or without "just deserts", sentence consistency will continue to be debated into the foreseeable future.

2.19 The Commission is of the view that sentence "disparity" should only be considered a problem if it can be shown that like offenders who have committed crimes in like circumstances have not been punished equally. Of course, in so far as sentencing disparity can be shown to be unwarranted, it is desirable to identify methods which may improve sentence consistency. The Commission is not, at this stage of our inquiry, persuaded that any of the statutory reforms which are aimed at the reduction of sentencing "disparity" by limiting judicial discretion and which have been adopted in other jurisdictions, should be followed in New South Wales.⁴²

Statutory sentence disparity

2.20 The initial factor relevant to the determination of the quantum of sentence for any crime is the maximum penalty which legislation applies to it.⁴³ That penalty reflects the legislature's view of the seriousness of the offence,⁴⁴ with the maximum reserved for the worst types of the offence in question.⁴⁵ Parliament has specified maximum penalties for offences at different times and without the benefit of a

consistent policy to determine what the maximum penalty for each offence should be. The result is that the maxima are often said to be inconsistent,⁴⁶ though this assumes at least some agreement on criteria for ranking of offences in terms of seriousness.

2.21 Even where a court regards the maximum penalty as too high or too low, it will nevertheless accord the penalty its normal weight in determining the seriousness of the offence.⁴⁷ In such cases, the maximum penalty can, obviously, operate as a factor contributing to “disparity” since the starting point of consideration of offence seriousness is artificial. The third phase of this reference will be devoted to the question of whether or not it is justifiable and feasible to rank offences in terms of seriousness.⁴⁸

Sentence leniency

2.22 The fallacy of making an argument about sentence disparity from a comparison of different sentences for the same offence is obviously compounded when a comparison is made between different sentences for different offences. In both cases the purpose of the argument is often not simply to identify disparity, but also to argue that the sentence in one of the cases is too lenient in comparison to the other. Many of the most virulent attacks on sentencing - usually by the media - concern supposedly lenient sentences which appear to be significantly different from sentences handed down for the same or for “less serious” crimes.⁴⁹

2.23 To be plausible, such an argument would have to take into account not only the particular circumstances of the offence and of the offender, but also, where different offences are involved, an agreed gradation of the relevant offences in terms of comparative seriousness. Even then, there would have to be some agreed definition of “leniency” to act as a reference point for assessing such claims. This point could not itself be fixed without agreement as to the underlying objects of punishment.

2.24 The Commission is not aware of any empirical studies which show that sentences in New South Wales are too lenient either in absolute terms or, for example, in comparison to sentences in other Australian jurisdictions.⁵⁰ Indeed, those members of the Division who have experience of practice outside New South Wales are of the view that sentences served here tend to be longer than in other Australian jurisdictions. The *Sentencing Act's* abolition of remissions without any corresponding reduction of sentences⁵¹ must have contributed to this result. Other jurisdictions which have abolished remissions have offset the effect of abolition by making appropriate reductions in sentences.⁵²

A matter of community concern?

2.25 The Commission has given serious consideration to whether or not a radical reform of the sentencing system is necessary because sentence disparity and leniency - particularly the latter - is a matter of community concern. The community's faith in the criminal justice system must, of course, be maintained. As Sir John Barry once wrote:⁵³

[The criminal law] must be administered publicly in such a fashion that its activities can be understood by ordinary citizens and regarded by them as conforming with the community's generally accepted standards of what is fair and just. Thus it is a fundamental requirement of a sound legal system that it should reflect and correspond with the sensible ideas about right and wrong of the society it controls, and this requirement has an important influence on the way in which the judges discharge the function of imposing punishments upon persons convicted of crime.

2.26 The problem is how to determine whether or not the punishments imposed by the courts reflect community values. Media assertion of community concern is, of course, insufficient. Such assertions may occur in a number of contexts - for example, in the course of promoting a viewpoint favoured by the media or their informants; or of sensationalising the news, often by playing on the public's fear of crime.⁵⁴

2.27 Nor must “community concern” be confused with any particular political platform, whether media driven or not. Sentencing issues are often included in the law and order platforms of political parties.⁵⁵ Sections of the media, “for whom the responsibility for the decline of civilization as it [knows] it [can] be placed at the door

of the criminal-justice system”,⁵⁶ often promote such agenda. An important example of the dangers of confusing sentencing issues with a political platform is provided by media involvement in the victims movement. Lucia Zedner has written of the victims movement which emerged in the USA in the 1960s and 1970s:

Largely conservative in outlook, often seeking a more punitive response to offenders, it was in some states associated with demands for the reintroduction of the death penalty. Dissatisfied with the existing responses to victims, the movement demanded a reorientation of the criminal justice system to take account of the needs, and, increasingly, the “rights” of victims.⁵⁷

2.28 Clearly there is a danger that such a movement can be exploited, perhaps willingly, by a law and order political lobby.⁵⁸ This can result in the genuine concerns of victims⁵⁹ being distorted and misrepresented. Significantly, Victim Support, the largest and oldest victim support group in the United Kingdom, has distanced itself from entering into debates on sentencing policy for the very reason that it does not wish its mission to be compromised by the politics of the law and order lobby.⁶⁰

2.29 Even where the views of the community on sentencing are independently sought and tested, it is essential to ensure that those views are based on full facts, not, for example, on media reports. To quote Sir Guy Green once again:

Media reports about particular sentences rarely, if ever, disclose all the relevant materials and factors. But in order properly to appreciate what actuated a sentence one needs to know the facts (as they were presented in court not as they were presented later in, say, a television interview of the complainant’s mother), the offender’s personal circumstances and prior convictions, the contents of any pre-sentence reports, what submissions were made in mitigation, whether there were any statutory legal constraints upon the exercise of the discretion and the *full* reasons given by the judge for the sentence which he or she imposed. Some of those factors might be reported in a particular case but very rarely would they all be reported and even more rarely would they all be reported accurately. Public views about sentencing must also be assessed in the light of the fact that only a relatively small proportion of sentences are reported and many of those which are, are atypical (which is often why they are regarded as reportable). In short, the conclusions about sentencing reached by the average member of the public are drawn largely from inaccurate or inadequate reports of a small and unrepresentative sample of sentencing cases.⁶¹

2.30 Without full facts, it is likely that the public’s views of sentencing will be based on a perception of crime which is distorted by stereotypes often involving images of violence, and which is fuelled by an erroneous belief that crime can be punished away.⁶² This means, at least, that the tools for conducting surveys of community attitudes require a high degree of sophistication,⁶³ as is recognised, for example, in relation to crime victim surveys.⁶⁴ Responding to earlier surveys which were based on a single question which asked the interviewee whether he or she thought judicial sentences too lenient and whose results portrayed the public as more punitive than judges, later surveys have presented the interviewee with at least some facts before eliciting a response.⁶⁵ Some results suggest that, when confronted with the facts of particular cases, members of the public would impose sentences broadly in line with the actual sentences given by courts, or, sometimes, more lenient sentences.⁶⁶ Others continue to suggest that the public would impose longer sentences than judges.⁶⁷ The Commission is not aware of any recent surveys of this nature in New South Wales. In our view, there is no persuasive empirical evidence to suggest that the sentences imposed by the courts are out of step with community values.⁶⁸ In such a context, a “uniform inflation of sentences would not do justice to the complexity of public views”.⁶⁹

QUESTIONS ARISING IN CHAPTER 2

1. Should statutory provisions dealing with sentencing be consolidated?
2. Should sentencing provisions be consolidated into two statutes, one dealing with sentencing law, the other dealing with sentencing administration?

3. Should provisions dealing with sentencing of juveniles be contained in a separate statute or statutes?
4. Should all aspects of prison administration be included in a statute dealing with sentencing administration?
5. Should a consolidation of sentencing law incorporate the principles of the common law?
6. Can unwarranted disparity or unjustifiable leniency in sentences be identified?
7. Is sentence disparity or leniency a matter of community concern?

Footnotes

1. The Commission's terms of reference are set out at p xiii.
2. For example, the principles relating to punishment (Chapter 3) and the determination of sentences in individual cases (Chapter 5).
3. See, eg, *Justices Act 1902* (NSW) s 80AB which states the principle for Local Courts that imprisonment is a sentence of last resort. Compare *Crimes Act 1914* (Cth) s 17A. See also Chapter 4 dealing with the statutory regulation of the ratio between minimum and additional terms.
4. See *Roos v DPP* (1994) 34 NSWLR 254 at 256 per Handley JA (dealing with the sentencing of juveniles).
5. See *Crimes Act 1914* (Cth) Part 1B; *Crimes Act 1900* (ACT) Part XII (inserted by *Crimes (Amendment) Act (No 2) 1993* (ACT)); *Penalties and Sentences Act 1992* (Qld); *Criminal Law (Sentencing) Act 1988* (SA); *Sentencing Act 1991* (Vic); *Sentencing Act 1995* (NT); *Sentencing Act 1995* (WA); *Sentencing Administration Act 1995* (WA).
6. Law Society of New South Wales, *Submission to Attorney General's Sentencing Review* (25 July 1994).
7. New South Wales, Department of Corrective Services, *Submission* (4 September 1995).
8. *Sentencing Act 1995* (WA) and *Sentencing Administration Act 1995* (WA). See also *Sentencing (Consequential Provisions) Act 1995* (WA). The legislation was assented to on 16 January 1996.
9. Only those provisions which are to be transferred need to be repealed from their original statutes although, in some cases, this may result in the repeal of an entire Act.
10. See, for example, *Criminal Appeal Act 1912* (NSW) s 5D, 5DA, 5E, 6A, 6AA, 7, and 9.
11. This would include Part 4 of the *Sentencing Act 1989* (NSW) in addition to *Children (Community Service Orders) Act 1987* (NSW), *Children (Criminal Proceedings) Act 1987* (NSW) and *Children (Detention Centres) Act 1987* (NSW).
12. See *Criminal Law (Sentencing Act) 1988* (SA) especially s 10-11; *Crimes Act 1914* (Cth) especially Part 1B Division 2; *Sentencing Act 1991* (Vic) especially Part 2; *Penalties and Sentences Act 1992* (Qld) especially Part 2; *Crimes Act 1900* (ACT) especially Part XII Division 1; *Sentencing Act 1995* (NT) especially Part 2; *Sentencing Act 1995* (WA) especially Part 2 Division 1 (to a lesser extent).
13. *Webb v O'Sullivan* [1952] SASR 65 at 66 per Napier CJ. See also *Budget Nursery Pty Ltd v FCT* (1989) 42 A Crim R 81 at 85 (NSW CCA).

14. *R v Williscroft* [1975] VR 292 at 300.
15. *R v Geddes* (1936) 36 SR (NSW) 554 at 555 per Jordan CJ. The purposes and policies underlying sentencing are considered in Chapter 3.
16. G Green, "The Concept of Uniformity in Sentencing" (1996) 70 *Australian Law Journal* 112 at 119-120.
17. See generally Chapter 3.
18. See paras 3.22-3.23.
19. Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988) para 37.
20. *Crimes Act 1914* (Cth) s 16A(2)(j).
21. See *R v Paull* (1990) 20 NSWLR 427; *DPP v El Kaharni* (1990) 21 NSWLR 370. See also *R v Sinclair* (1990) 51 A Crim R 418; *R v Corbett* (1991) 52 A Crim R 112; *R v Lambert* (1990) 51 A Crim R 160.
22. *Criminal Law (Sentencing Act) 1988* (SA) s 10(o); *Crimes Act 1914* (Cth) s 16A(2); *Sentencing Act 1991* (Vic) s 5(2)(g); *Penalties and Sentences Act 1992* (Qld) s 9(2)(p); *Crimes Act 1900* (ACT) s 429A(1); *Sentencing Act 1995* (NT) s 5(2)(s).
23. See para 5.4.
24. See Green at 120-121. Compare *Sentencing Act 1995* (WA) s 6-8.
25. The dissatisfaction of wide judicial discretion in sentencing is, partly, a response to the "just deserts" theory with its emphasis on proportionality (see paras 3.4-3.5) and, partly, a manifestation of a wider concern with uncontrolled discretion which emerged particularly after Davis' famous study of discretion in 1969: see K C Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, Baton Rouge, 1969).
26. See, for example, *R v Ferrer-Esis* (1991) 55 A Crim R 231.
27. (1994) 34 NSWLR 200.
28. *Warfield* at 207 per Hunt CJ at CL (with whom McInerney and James JJ agreed). Compare the approach of the English Court of Appeal: see A Ashworth, *Sentencing and Penal Policy* (Weidenfeld and Nicolson, London, 1983) at 35-42.
29. See paras 3.38-3.40.
30. Green at 117.
31. D Weatherburn, *Sentence Disparity and its Impact on the NSW District Criminal Court* (Report 34, New South Wales Bureau of Crime Statistics and Research, 1994) at 5.
32. Green at 113-115; R G Fox, "Controlling Sentencers" (1987) 20 *ANZ Journal of Criminology* 218 at 223. For a summary of some Canadian research, see Department of Justice, Canadian Sentencing Commission, *Empirical Research on Sentencing* (1988) at 15-18.
33. Weatherburn at 7-8.
34. Ultimately, the suggestions that sentence disparity may effect the willingness of defendants to plead guilty or to abscond from bail could not be evaluated with any certainty: Weatherburn at 14-15.
35. Weatherburn at 10. The judge who sentenced offenders proportionally most frequently did so in 61.2% of cases where the offender pleaded guilty to the charge(s). The judge who sentenced offenders proportionally least frequently did so in 26.4% of cases where the offender pleaded guilty.

36. Weatherburn at 10. If the group who least often used imprisonment as a sentencing option also tended to deal with the least serious cases, the disparity may have been explained on this basis.

37. Weatherburn at 11.

38. Weatherburn at 9.

39. See para 2.8.

40. See paras 3.3-3.5.

41. See D A Thomas, *Constraints on Judgment: The Search for Structured Discretion in Sentencing 1860-1910* (University of Cambridge, Institute of Criminology, Occasional Series No 4, 1979).

42. See paras 6.36-6.66.

43. *R v Oliver* (1980) 7 A Crim R 174 at 177 per Street CJ. See paras 3.42, 5.9-5.12.

44. *Oliver* at 177.

45. *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 478.

46. For example, *Attorney General's Sentencing Review 1994* at 56.

47. Consider paras 5.9-5.10.

48. See paras 1.18-1.20.

49. A recent highly publicised example was the five year recognisance imposed upon Graeme MacDonald, who was convicted of manslaughter, and sentenced in November 1995: see, for example, Editorial, "Sentence Doesn't Fit the Crime" *Daily Telegraph Mirror*, 18 November 1995, at 10; N Vincent, "A Killer Goes Fishing" *Daily Telegraph Mirror*, 20 November 1995, at 3. The sentence was quashed and a custodial punishment imposed by the Court of Criminal Appeal: *R v MacDonald* (NSW CCA, No 60700/95, 12 December 1995, unreported). The media was less critical: see "Appeal Judges End Fishing Killer's Freedom - Back to Jail" *The Daily Telegraph Mirror*, 12 December 1995, at 1-2.

50. In any event, the argument that there should be uniformity in sentencing between Australian jurisdictions fails to take into account the influence of local conditions: see Green at 117-118.

51. See para 4.13.

52. For example, *Sentencing Act 1991* (Vic) s 10; *Sentencing Act 1995* (NT) s 58.

53. *The Courts and Criminal Punishment* (Government Printer, Wellington, 1969) at 14-15. Sir John Barry (1903-1969) was a judge of the Supreme Court of Victoria. He was the first Chairman of the Parole Board of Victoria and Chairman of the Department of Criminology at the University of Melbourne.

54. See P Grabowsky and P Wilson, *Journalism and Justice: How Crime is Reported* (Pluto Press, Sydney, 1989). See also P Schlesinger and H Tumber, *Reporting Crime: The Media Politics of Criminal Justice* (Clarendon Press, Oxford, 1994).

55. The NSW State elections in March 1995 are an example. Law and order issues had featured prominently in the election campaign, so much so that there was "widespread criticism of both sides of politics for conducting a law-and-order 'auction' in a bid to win votes on the crime issue": see "Crime Debate in NSW Out of Order" *Weekend Australian*, 11-12 March 1995, at 22. In contrast to Labor's sentencing policy which has been outlined in paras 1.5-1.9, the Coalition offered a "three strikes and you're in" alternative: see especially Tony Vinson, "Fahey's Three Strikes Policy is the Latest Bid in a Decade-Long Devil's Auction" *Sydney*

Morning Herald, 13 March 1995, at 13; G Zdenkowski, "Due Process Pushed Aside in the Rush to be Seen as Tough on Law and Order" *Sydney Morning Herald*, 2 March 1995, at 15.

56. A Freiberg, "Sentencing Reform in Victoria: A Case Study" in C Clarkson and R Morgan, *The Politics of Sentencing Reform* (Clarendon Press, Oxford, 1995) at 51.

57. M Maguire, R Morgan and R Reiner, *The Oxford Handbook of Criminology* (Clarendon Press, Oxford, 1994) at 1227.

58. See R Harding, "Equal Time for Victims" *The Bulletin* 13 September 1995 at 36-37. That the rhetoric of victims' rights is used as the basis for a punitive law-and-order political platform is one reason for an apparent reaction against the victims' movement which has recently emerged in Canada. Other reasons include the motivation behind the movement (which seems to be vengeance rather than justice) and its middle-class orientation which is unrepresentative of the majority of victims of violent crime - that is, the poor who know their attackers. See L Stern, "Victims Rights: Have They Tipped the Scales Too Far?" *The Ottawa Citizen* (8 November 1995).

59. See para 11.12.

60. Harding at 36.

61. Green at 116.

62. For a convincing refutation of this belief, see especially K Hamburger, "The Director-General's Perspective" in Queensland Corrective Services Commission, *Annual Report 1994/95* (Brisbane, 1995) at 6-9.

63. See D Indermaur, "Public Perception of Sentencing in Perth, Western Australia" (1987) 20 *ANZ Journal of Criminology* 163.

64. See *Crime Victim Surveys*, Proceedings of a Conference Held at Griffith University, 18-29 November 1994 (Criminal Justice Commission, Brisbane, 1995).

65. See J Roberts and A Doob, "Sentencing and Public Opinion: Taking False Shadows for True Substances" (1989) 27 *Osgoode Hall Law Journal* 490.

66. Roberts and Doob. See also M Hough and D Moxon, "Dealing With Offenders: Popular Opinion and Views of Victims - Findings From the British Crime Survey" (1985) 24 *The Howard Journal* 160.

67. D Indermaur, "Perceptions of Crime Seriousness and Sentencing in Western Australia", paper presented at the 7th Annual Conference of the Australian and New Zealand Society of Criminology, Melbourne, 3 October 1991.

68. See also Canada, Department of Justice, Canadian Sentencing Commission, *Empirical Research on Sentencing* (1988) at 53-57. Compare Australian Law Reform Commission, *Sentencing of Federal Offenders* (ALRC 15, 1980) at para 136.

69. Roberts and Doob at 515.

3. Purposes and principles of sentencing law

3.1 A number of underlying purposes and principles informing sentencing law are identified in case law and statute. Most have been developed in the context of the use of imprisonment as a sentencing option, in addressing the two issues of whether or not the offender should be sent to prison, and, if so, what the appropriate length of the sentence should be. The reason why sentencing principles have developed almost exclusively in relation to the use of imprisonment is attributable to the seriousness of a sentence of imprisonment and the fact that the vast majority of sentencing appeals involve appeals against the length of a term of imprisonment. However, the purposes and principles of sentencing apply to all forms of punishment that sentencers may impose. It is, therefore, appropriate to address these purposes and principles at the beginning of any review of sentencing law. Their application in the context of imprisonment is discussed in Chapter 5.

THE RATIONALE OF PUNISHMENT

3.2 The objectives and aims of punishment are traditionally stated as retribution, deterrence, rehabilitation and incapacitation. The Commission agrees with Sir John Barry that this classification is something of an oversimplification, since:¹

[i]t ignores or leaves inarticulate, for example, [other purposes which the criminal law serves by its solemn procedures as a teacher of minimal standards of morality and behaviour; as an agency for the expression of public indignation and condemnation; and as a force operating to produce cohesion within society.

With this in mind, the Commission would add “denunciation” to the list of objectives of punishment.² We would not, however, add reparation.³

Retribution

3.3 Retribution is the notion that the guilty ought to suffer the punishment which they deserve. As such, it is an important aim of sentencing.⁴ As a philosophical basis for punishment, retribution has, in the past two decades, experienced a revival among punishment theorists (particularly in the United States), and re-emerged in the concept of “just deserts”.⁵ This revival was largely brought about by a growing disillusionment with the emphasis on rehabilitation as an objective of contemporary penal systems, together with the indeterminate nature of sentences caused by systems of conditional release in the United States.

3.4 Just deserts regards punishment as a due consequence of criminal activity. In this sense, it adds nothing to the concept of retribution and merely begs the question of what is “just”. Just deserts has, however, become associated with a particular view of sentencing which has emerged in some United States jurisdictions. With the objective of avoiding the perceived injustices of sentence disparity,⁶ that view seeks to confine wide sentencing discretion. It does so by focusing on the objective gravity of offences, largely excluding reference to the individual circumstances of offenders and their prospects of rehabilitation. This leads to the development of scales ordering the seriousness of offences and their relationship to particular penalties.⁷ Sentences are then imposed in accordance with the scales.

3.5 The “just deserts” sentencing regimes of some American jurisdictions are inapplicable in New South Wales (and Australia generally), where sentences in any case continue to reflect all the circumstances of the offence and of the offender.⁸ It is true that “just deserts” appears to have been accepted as the overriding sentencing objective in a number of Australian and overseas inquiries into sentencing.⁹ Significantly, these inquiries embraced the just deserts philosophy without any suggestion that factors relevant to the offender should not continue to temper the sentence in any case,¹⁰ and without any preoccupation with the more severe restrictions upon sentencing discretion which have occurred in some US jurisdictions.¹¹ In the Commission’s view, this version of just deserts is merely a reflection of the common law principle of proportionality which places limits, in terms of the gravity of the offence in issue, on the severity of the punishment.¹² It is in this sense that legislation in a number of Australian jurisdictions appears to accept just deserts as one of the governing purposes of punishment,¹³ or, indeed, the primary principle of punishment.¹⁴

Deterrence

3.6 There are two kinds of deterrence: first, specific deterrence, which aims to dissuade the offender from committing further crime; and secondly, general deterrence, which aims to dissuade others, who have been made aware of the punishment inflicted upon the offender, from committing crime. One of the main purposes of punishment is the protection of the community from crime by making it clear to the offender and others that they will be appropriately punished if they behave in like fashion. Punishment does not prevent the commission of all

similar crimes,¹⁵ but it is accepted, though probably incapable of demonstration, that it prevents many crimes (for example, those involving foresight or planning as opposed to those committed impulsively) that would have occurred if no, or only light, punishment were to result.¹⁶ In *DPP (Cth) v El Karhani*, a case involving the importation of a traffickable quantity of heroin by an elderly man from Lebanon, who was funded and instructed by an apparently unknown person, the Court of Criminal Appeal said:

[The trial judge] observed in this case that it was most unlikely that this elderly, frail and sick man would ever be tempted to offend again. But that leaves another audience to be addressed It is those in Lebanon, or elsewhere outside Australia, who might be tempted to organise or commit this type of offence. To them it is necessary to send the message of general deterrence. To the extent that his Honour felt unable to consider that matter, when he should have, the exercise of his sentencing discretion miscarried.¹⁷

3.7 Deterrence is listed as one of the objects of punishment in some recent legislative enactments in Australia.¹⁸ For example, the *Crimes Act 1900* (ACT) provides that "the deterrent effect that any sentence or order ... may have on any person" is a matter to which the court shall have regard.¹⁹ That Act also provides that the severity of any sentence cannot be increased because of the prevalence of the offence.²⁰ Thus, while the need to deter offenders is accepted as a legitimate objective of the sentencing regime, severely deterrent sentences are not to be justified by the level of occurrence of a particular offence.

3.8 The crucial justification for deterrence is the functional one of preventing future crime. But this justification has been questioned on four principal grounds:²¹

- First, there is doubt about the extent to which, empirically, punishment actually prevents the commission of future offences.
- Secondly, assuming that punishment does deter, it is argued that it is the threat of detection and resulting punishment (in some form), rather than the level of punishment, which deters the offender. If so, then it follows that a positive deterrent response (for example, by setting higher penalties) achieves little or nothing in terms of the incidence of crime.
- Thirdly, accounting for deterrence, particularly general deterrence, in setting punishment can be seen as unjustly punishing the offender for what others might do, as opposed to what the offender has in fact done ("scapegoating").
- Fourthly, there is considerable doubt as to the efficacy of the communication of the penalties to the wider audience upon which the general deterrence depends.

Denunciation

3.9 Denunciation, in the context of sentencing, is achieved by the imposition of a sentence the severity of which makes a statement that the offence in question is not to be tolerated by society either in general or in a specific instance. The statement made may be directed at any combination of the public at large, victims, potential offenders and individual offenders. In part its aims are similar to that of deterrence. It has also been seen to be associated with retribution.²²

3.10 The Victorian Sentencing Committee noted the following justifications for having denunciation as an aim of sentencing:

- To prevent crime by making a public statement that certain offences will not be tolerated.
- To achieve social coherence through the making of symbolic statements that certain crimes will not be tolerated by the community.
- To appease victims of crimes.
- To make a symbolic statement to the offender him or herself that society will not tolerate the commission of the crime for which he or she has been convicted.²³

However, the Committee also made reference to the fact that effective denunciation is reliant upon sufficient publicity and to the possibility that denunciation may not effect the public's perception of the seriousness of an offence even if such an effect could be measured.²⁴

3.11 Denunciation is included in the *Sentencing Act 1991* (Vic) among the purposes for which a sentence may be imposed.²⁵ The Court of Criminal Appeal has, on some occasions, made reference to denunciation as an aim of sentencing. It is often referred to when dealing with sentences involving periodic detention. Justice Hunt has noted the view held by the Court that periodic detention has “a strong degree of leniency built into it and as being outwardly less severe in its denunciation of the crime.”²⁶ The use of denunciation can be seen clearly in the judgment of Acting Justice Lee, with which Justice Sully agreed, in *R v McKenna*, a case which dealt with an offence of homosexual intercourse with a boy under the age of sixteen:

A non-custodial sentence such as, for instance, periodic detention will rarely be appropriate because such a sentence having inevitably a strong built-in element of leniency ... lacks the element of denunciation of the crime which is of vital importance in the case of laws designed to protect young persons and thus necessary if deterrence is to be achieved.²⁷

3.12 More recently in *R v MacDonald*,²⁸ a case of manslaughter, the Court of Criminal Appeal dealt with a Crown appeal on the grounds of inadequacy against a sentencing decision of Justice Abadee who held that, having regard to all the circumstances of the case, a custodial sentence was not called for. The Court held that, in the circumstances, even though it had been decided that the offender should spend no further time in custody, it was not appropriate to refrain from passing sentence, even if only back dated to cover the substantial period already spent in custody. “Society was entitled to have the conduct of the respondent denounced at least in that fashion”.²⁹

3.13 It could be said that life sentences handed down under the regime before the *Sentencing Act 1989* (NSW) contained a strong element of denunciation in that sentences appeared appropriately long, while in reality they would be significantly shorter. In fact it has been suggested, on a theoretical level, that it may be possible to conceive of a public ritual which preserves the “condemnatory function” of punishment while dispensing with its usual physical manifestations.³⁰

Rehabilitation

3.14 Rehabilitative approaches to punishment emphasise the changes that can and should be brought about in offenders' behaviour in the interests of society and of offenders themselves. Rehabilitative theories rely heavily on the idea that social, psychological, psychiatric or other factors outside a person's direct control wholly or partly determine or influence that person's actions, including the commission of crimes. Rehabilitative approaches tend to assume that the factors leading to the commission of crime can be accurately identified, and that treatment or assistance can be prescribed to remove the causes of the undesirable behaviour.

3.15 The rehabilitative ideal has had a long history in Australia. Rehabilitation appears to have been at least one of the consequences of the system of transportation to the Australian colonies, although it is by no means clear that the rehabilitative ideal played any part in the sentencing of offenders to transportation.³¹ Much, however, appears to have depended on the attitudes of administrators of the system.³²

3.16 Where the offender's chances of rehabilitation are good, this will be an important factor in determining sentence.³³ For example, when rehabilitation is underway at the time of sentencing, leniency has often been held to be warranted,³⁴ especially where the offender is young.³⁵ Again, where there is convincing evidence that a custodial sentence would jeopardise rehabilitation which has already been achieved, this may constitute special circumstances warranting a non-custodial sentence.³⁶ By contrast, the fact that it cannot be shown that an offender has no chance of rehabilitation does not prevent a sentencing judge awarding the maximum penalty available.³⁷

3.17 Although rehabilitation is listed as a purpose of sentencing in the recent sentencing legislation of some Australian jurisdictions,³⁸ research has questioned its ability to achieve its goals.³⁹ However, even the Victorian Sentencing Committee, which was heavily influenced by a just deserts approach to sentencing, questioned the reliability of these research findings, pointing to poor methodology, lack of understanding of the goals of rehabilitation, lack of agreed criteria for determining success, lack of sophisticated distinctions between results which indicate success and those indicating failure, and concentration upon custodial rehabilitation programs.⁴⁰

Incapacitation

3.18 Incapacitation is the notion of rendering an offender incapable of committing further offences while he or she is incarcerated. It is listed in some of the recent Australian sentencing legislation as one of the purposes of punishment.⁴¹ Its justification is that the community is entitled to be protected, at least from those who are likely to re-engage in serious violent criminal conduct.⁴²

3.19 Incapacitation is closely associated with the notion of criminal propensity, that is, the likelihood of an offender committing further crime (often of a particular type). It therefore relies upon techniques of prediction. The

accuracy of prediction is an important issue and the subject of heated debate. The opponents of selective incapacitation argue that the predictive techniques involved in this process are inevitably flawed and this is also productive of injustices.⁴³ Indeed, the attempts which have been made in the United States to measure the amount of criminal activity which could and would have been prevented by use of imprisonment, appear inconclusive.⁴⁴ Ethical objections to the appropriateness of incapacitation as a factor in sentencing centre on its potential to generate disproportionate punishment.⁴⁵ The High Court has held that the likelihood of offending again is not a factor to be taken into account in the imposition of a sentence beyond what is proportionate to the crime.⁴⁶

3.20 Incapacitation in the sense used in the previous two paragraphs needs to be clearly distinguished from preventive detention, that is, the detention of persons for crimes which they may commit in the future. Preventive detention is a concept which does not exist at common law. Legislation in both New South Wales⁴⁷ and Victoria⁴⁸ has, however, recently adopted the concept. This legislation is examined in Chapter 4.⁴⁹

Other matters?

3.21 A provision of the sentencing legislation in the Australian Capital Territory lists one of the purposes of a sentence as being to “encourage the offender to make appropriate reparation to any victim of the offence”.⁵⁰ Reparation requires the offender to indemnify the victim for the injury caused as a result of the offender’s criminal conduct. Reparation would link punishment to the victim’s need for restitution or compensation, rather than to the gravity of the offender’s conduct. This poses a philosophical challenge to the idea that punishment is imposed because the criminal law of the State has been broken. For this reason, reparation is most commonly regarded as an adjunct to the options available to sentencers when imposing punishment on an offender.⁵¹ The Commission does not regard reparation as one of the aims of sentencing or as a part of the sentencing process. It is merely an ancillary measure or adjunct to the sentencing process.⁵²

The Commission’s view of the objectives of punishment

3.22 The Commission’s tentative view is that it is impossible to identify among the varying philosophical approaches to punishment a dominant rationale which should or could rationally guide the reform of sentencing law, nor do we believe that it is desirable to do so. In our view all the approaches identified above remain potentially relevant in determining sentence, their force in the circumstances necessarily deriving from the facts of the particular case.⁵³ The court must impose a sentence which emerges as a compromise between the competing factors, regardless of which punishment theory is currently in vogue. As H L A Hart wrote many years ago, “any morally tolerable account of [the institution of criminal punishment] must exhibit it as a compromise between distinct and partly conflicting principles”.⁵⁴ For example, deterrence will generally prove the more important object of punishment for offences such as armed robbery,⁵⁵ serious drug violations,⁵⁶ supply of drugs to children,⁵⁷ bribery and attempts to circumvent court processes,⁵⁸ and offences against children.⁵⁹ By contrast, rehabilitation will generally take precedence over deterrence in cases involving young offenders,⁶⁰ and people with an intellectual disability or a mental illness.⁶¹ This is not to say that rehabilitation is irrelevant in the former or deterrence in the latter cases.

3.23 The Commission believes the importance attached to any particular goal or goals of sentencing inevitably varies from time to time, reflecting changes in society and community perceptions. Currently, sentencing theory tends to identify just deserts (however defined) as the predominant goal of punishment. To some extent, this reflects a current concern with notions of proportionality. By way of contrast, in 1949, rehabilitation was clearly identified as the ultimate objective of sentencing by the Supreme Court of the United States, which said:

Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become the important goals of criminal jurisprudence.⁶²

3.24 The Commission considers it important that there should be legislative endorsement of the fundamental purposes, outlined above, which courts must consider when sentencing offenders.

Proposal 2

Sentencing legislation should identify the purposes of punishment without attempting to place them in any hierarchy.

PRINCIPLES OF SENTENCING

3.25 Appellate courts have established and articulated *qualitative* principles relating to sentencing. The determination of the appropriate sentence in any case is largely determined by the application of those principles to the facts of the case and to the circumstances of the individual offender. The purpose of this section is to discuss the principles which apply to sentencing generally, rather than to those which focus on the circumstances

of the individual offender. The latter are considered in Chapter 5.

Imprisonment as a last resort

3.26 Full-time imprisonment is the gravest sanction. Deprivation of liberty is the most serious form of punishment that can be imposed under our law. In reality, imprisonment involves much more than this. The Commission cannot shut its eyes to the oppressive and brutalising effect that the prison environment can have on inmates.⁶³ Not surprisingly, it is a fundamental principle of sentencing at common law that imprisonment is the punishment of last resort, to be imposed only where a non-custodial punishment is inappropriate.⁶⁴

3.27 The principle of imprisonment as a last resort has received statutory recognition in New South Wales. Section 80AB of the *Justices Act 1902* (NSW) prevents an order of a full-time term of imprisonment being imposed by a magistrate "unless satisfied, having considered all possible alternatives, that no other course is appropriate." The principle is recognised more generally in the recently enacted sentencing legislation in other Australian jurisdictions.⁶⁵

3.28 Section 17B of the *Crimes Act 1914* (Cth) prohibits the imposition of a sentence of imprisonment for minor offences of dishonesty or property damage (where the total value is not more than \$2,000) unless there are "exceptional circumstances" warranting such a sentence. The provision applies only where the offender has not been previously sentenced to imprisonment for any offence.

3.29 Section 11 of the *Criminal Law (Sentencing) Act 1988* (SA) prohibits a sentence of imprisonment unless:

- (a) the defendant has shown a tendency to violence towards other persons; or
- (b) the defendant is likely to commit a serious offence if allowed to go at large; or
- (c) the defendant has previously been convicted of an offence punishable by imprisonment; or
- (d) any other sentence would be inappropriate, having regard to the gravity or circumstances of the offence.

3.30 Section 9(2) of the *Penalties and Sentences Act 1992* (Qld) states that a court must have regard to the principles that imprisonment be used as a last resort *and* that community-based sanctions are preferable. Subsection 4 complements the general principle:

A court may impose a sentence of imprisonment on an offender who is under the age of 25 years and has not previously been convicted only if the court, having -

- (a) considered all other available sentences; and
- (b) taken into account the desirability of not imprisoning a first offender;

is satisfied that no other offence is appropriate in all the circumstances of the case.

Where a sentence of imprisonment is imposed, the court must state and formally record the reasons for the sentence, and send a copy of those reasons to the Criminal Justice Commission.⁶⁶ A sentence is not invalidated merely because of a failure to state the reasons for sentence, but the failure to do so may be considered if the sentence is appealed.⁶⁷ The Probation and Parole Officers Association of New South Wales has submitted that a similar provision should be adopted in New South Wales.⁶⁸

3.31 Section 6(4) of the *Sentencing Act 1995* (WA) prohibits the imposition of a sentence of imprisonment unless the seriousness of the offence means that no other sentence is appropriate, or the interest in protecting the community requires it. Section 35 requires the court to provide written reasons for imposing an aggregate term of imprisonment of 12 months or less.

3.32 The question arises as to whether there is a need to give greater effect to the principle of imprisonment as a last resort in New South Wales. Statistical evidence is of little help.⁶⁹ However, the Commission believes that greater substance can be given to the principle that imprisonment is the sanction of last resort if offenders who are guilty of offences which would attract short terms of imprisonment are, generally, diverted from custodial sentences. Potentially, this involves a large number of offenders. Approximately 60% (3,077) of the total fixed and minimum term sentences imposed by Local Courts in 1994 (5,111) were for 6 months or less.⁷⁰

3.33 One possible way of achieving this objective would be to set a minimum length of sentence which must

accompany any decision to imprison an offender. The effect of such a provision would be that, where a judge or magistrate would otherwise have sentenced the offender to a term of imprisonment less than the minimum duration selected (say three months), a non-custodial order must be used instead. The concern about this option is that sentencers might simply increase the length of shorter sentences in order to ensure that certain offenders served a period of imprisonment. If sentencers responded in this way, the proposal would fail to achieve its objective.

3.34 The Commission has, therefore, provisionally opted for a proposal that judges and magistrates should provide reasons justifying any decision to impose a sentence of imprisonment of six months duration or less. It is hoped that this requirement, in conjunction with the principle that imprisonment should be used as the sanction of last resort, will encourage judges and magistrates to use imprisonment more appropriately. A further possibility, which might be used in conjunction with this proposal, is the abolition of imprisonment as a sentencing option for certain minor offences. The Australian Law Reform Commission suggested in 1988 that certain offences - such as those involving social security, tax, customs and quarantine - should be assessed with a view to eliminating imprisonment as a sentence for their commission.⁷¹ The Commission invites comments on this suggestion.

Proposal 3

Sentencers should provide reasons justifying any decision to impose a sentence of imprisonment of six months duration or less.

Proportionality

3.35 Proportionality is a central principle in the sentencing of offenders at common law. As developed in Australian jurisprudence, proportionality operates to restrain excessive, arbitrary and capricious punishment by requiring that punishment must not exceed the gravity of the offence.⁷² The key decisions on the principle of proportionality are *Veen v The Queen*⁷³ (*Veen No 1*) and *Veen v The Queen (No 2)*⁷⁴ (*Veen No 2*). *Veen No 2* produced a majority judgment which is authority for the proposition that proportionality of punishment to the gravity of an offence is the predominant objective of sentencing, and a sentence cannot be extended beyond what is proportionate merely to protect the community from the offender's propensity to further offending. However, community protection is relevant in exercising the sentencing discretion, that is, when determining what is a proportionate sentence. The minority view is consistent with that of the majority on the predominance of the proportionality principle, and on the rejection of the notion that a sentence can be increased beyond what is proportionate to the instant offence for the purpose of community protection. Both the minority and majority formulation of proportionality conceive the principle as establishing the outer limit of punishment.⁷⁵

3.36 In the light of *Veen No 2*, it can be said that the factors which are generally relevant to the determination of proportionate punishment are those which account for:⁷⁶

1. the degree of harmfulness of the conduct, including
 - the actual repercussions of offending (restricted by the rule that the offender cannot be sentenced because of circumstances which amount to an uncharged or acquitted crime);⁷⁷
 - the method by which the crime was committed (for example, breach of trust)⁷⁸; and
 - the vulnerability of the victim.⁷⁹
 - and
2. the extent of the offender's culpability, including
 - the sophistication of the crime (although the fact that the offender played a minor role in the commission of the offence goes to mitigation),⁸⁰
 - the offender's mental condition, intellectual disablement or below average intelligence,⁸¹ and
 - the criminal history of the offender.⁸²

Sufficient punishment

3.37 Proportionality is also relevant in ensuring that a minimum level of punishment is imposed upon the offender, in that a sentence which fails to give sufficient weight to the objective seriousness of the offence (and is

therefore manifestly inadequate) will be quashed. In *R v Dodd*,⁸³ the offender confessed to a homicide. In determining the original sentence there were said to be powerful subjective circumstances in the offender's favour, in particular the fact that he had, after ten years, volunteered his confession without any inquiries by the police. Quashing the original sentence of three years periodic detention, the Court of Criminal Appeal noted the serious objective circumstances of the offence and held that inadequate attention had been given to them. The Court stated:

[M]aking due allowance for all relevant considerations, there ought to be a reasonable proportionality between a sentence and the circumstances of the crime, and we consider that it is always important in seeking to determine the sentence appropriate to a particular crime to have regard to the gravity of the offence viewed objectively, for without this assessment the other factors requiring consideration in order to arrive at the proper sentence to be imposed cannot properly be given their place.⁸⁴

The Court instead imposed a fixed term of three years imprisonment.

Consistency

Parity between co-offenders

3.38 There is no general rule that the same sentence must be passed on co-accused. But the court must take into account the sentence imposed on a co-offender so that there is no justifiable sense of grievance arising from sentence disparity.⁸⁵ Where matters such as age, background and previous criminal history (and all other subjective characteristics of the offender) differ significantly between co-offenders, a court is not required to equate the sentences,⁸⁶ though it should articulate the reasons for any disparity in the sentences passed.⁸⁷

Between offenders generally

3.39 The likelihood of a similarity of conduct and antecedents is more remote as between offenders who are not co-offenders. Even here, however, consistency remains a general objective in sentencing. In *Bugmy v The Queen*,⁸⁸ Justices Dawson, Toohey and Gaudron reviewed the minimum terms that had been set by the Victorian courts for life sentences handed down in that State. They concluded that the effective minimum term of nineteen years for murder exceeded the minimum terms that had been set for other offenders (including a seventeen year sentence for a triple murder). Their Honours observed:

Uniformity of sentencing is a matter of importance. It cannot be pressed too far but what does emerge is that the minimum term fixed for the applicant is higher than any other in the statistics furnished to the Court of Criminal Appeal. That of itself is a matter calling for some scrutiny of the minimum term on the part of the appellate court.⁸⁹

3.40 The Court of Criminal Appeal has observed that where the alleged disparity does not concern co-offenders, the test is whether the sentence under review was outside the *range* of sentences appropriate to the objective gravity of the offence and the subjective circumstances of the offender.⁹⁰ Judicial officers have the discretion to sentence offenders to a range of sentences within reasonable limits. The extent of the range varies considerably for different offences and different circumstances within each offence. The range of circumstances which are relevant to the objective gravity of an offence, and the subjective circumstances of the offender, is very broad. In many cases, the basic circumstances of the offence and of the offender will be comparable. However, there is likely to be variation on at least some of the relevant considerations. This means that, generally, it is artificial to aim for consistency of outcome.

Totality

3.41 In many cases, a series of events which lead to an offender's conviction will provide evidence of more than one offence and lead to multiple convictions of that offender. The courts have dealt with this by stating that the total sentence imposed upon an offender must reflect the totality of the offending, so that the aggregate sentence is just and appropriate to the totality of the criminal behaviour. This may be achieved by making the sentences wholly or partly concurrent, or by lowering individual sentences.⁹¹ The court is not restrained by any statutory maximum penalty applicable to individual offences,⁹² and should be careful to avoid an overly lenient sentence by too close attention to the principle of totality.⁹³ The principle of totality is the foundation for the law relating to concurrent and cumulative sentences, which is considered in Chapter 4.⁹⁴

Statutory maximum to be imposed for worst class of case

3.42 The statutorily imposed maximum penalty is the first point of reference in the determination of the quantum of the sentence, since this provides an indication of the legislature's view of the seriousness of the offence. The statutory maximum is to be reserved for the worst category of offence (not the worst case that can

be imagined) to which that maximum applies.⁹⁵

Sentence to be passed for crime proved against the accused, and no other

3.43 The requirement that a sentencing judge must take into account all the circumstances of the offence is qualified by the overriding principle, affirmed by the High Court in *De Simoni v The Queen*,⁹⁶ that no one should be punished for an offence of which he or she has not been convicted. Accordingly, where a statute prescribes a maximum punishment for an offence, and a higher maximum penalty where the same substantial offence has been committed in circumstances of aggravation, then the existence of such aggravating conduct as a matter of fact cannot be taken into account by the sentencer if the more serious offence was not charged in the indictment. In *R v Overall*,⁹⁷ the Court of Criminal Appeal held, therefore, that to take into account the fact that grievous bodily harm had been caused by the offender, when only actual bodily harm had been charged in the indictment, was contrary to the *De Simoni* principle.⁹⁸ By contrast, offences less serious than the offence charged in the indictment may be taken into account in sentencing the offender for the principal offence.⁹⁹

3.44 Section 7(3) of the *Sentencing Act 1995* (WA) now provides:

If the statutory penalty for an offence is greater if the offence is committed in certain circumstances than if it is committed without the existence of those circumstances, then -

- (a) an offender is not liable to the greater statutory penalty unless he or she has been charged and convicted of committing the offence in those circumstances; and
- (b) whether or not the offender was so charged, the existence of those circumstances may be taken into account as aggravating factors.

The effect of this provision appears to be that circumstances of aggravation - which might otherwise create a more serious discrete offence that has not been charged - may be used to increase the penalty that might otherwise have been imposed for the lesser offence. Of course, this penalty may not be increased beyond the maximum penalty prescribed for the (lesser) offence. The Commission's tentative view is that the law of New South Wales should not enact a provision to this effect. In our view, the principle in *De Simoni* is fair to the offender.

QUESTIONS ARISING IN CHAPTER 3

1. **Should all of the traditional objectives of punishment be identified in sentencing legislation?**
2. **Does just deserts have a special role to play amongst the objects of punishment? If so, what role?**
3. **Should general deterrence be an object of sentencing? Is it appropriate to punish an offender for an offence partly on the basis that he or she may serve as an example for others tempted to behave similarly?**
6. **Does the principle that imprisonment is the sanction of last resort impose a practical restraint upon the resort to imprisonment by sentencing judges? Should the principle be complemented by practical measures aimed at increasing the use of non-custodial measures?**
7. **Should judges and magistrates be required to provide reasons justifying any decision to imprison an offender for a period of six months or less?**
8. **Should imprisonment be eliminated as a sanction for some offences? If so, for what types of offence?**
9. **Is there any need for a legislative provision expressly dealing with aggravating conduct which may establish a separate offence, but which has not been charged against the accused in the indictment?**
10. **If such a provision is required, are the provisions of the Western Australia Act adequate and fair?**

Footnotes

1. J M Barry, *The Courts and Criminal Punishment* (1969) at 14-15.
2. See paras 3.9-3.13.
3. See paras 3.21.
4. *R v Nichols* (1991) 57 A Crim R 391.
5. The work which played a major role in the revival of the retributivist sentiment inherent in the “just deserts” theory of punishment was A von Hirsch, *Doing Justice: The Choice of Punishments* (New York, 1976).
6. But see paras 2.13-2.19. Some American writers would dispute that this is the real objective of the just deserts theory, preferring to regard it, for example, as merely an academic justification for a law and order political platform which reacts to rehabilitation as a “failed, soft-headed, liberal concept”: see L G Forer, *A Rage to Punish: The Unintended Consequences of Mandatory Sentencing* (Norton & Co, New York, 1994) at 51. But, at least in theory, just deserts is neutral as to severity levels. The principal protagonist of just deserts, Andrew von Hirsch, recognises this and argues that both ordinal and cardinal values be assigned to punishment: see A von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Rutgers UP, New Brunswick, 1985).
7. See paras 6.51-6.66. See also A Ashworth, *Sentencing and Penal Policy* (Weidenfeld and Nicolson, London, 1983) at 273.
8. See para 2.8.
9. Canada, Report of the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Canadian Government Publishing Centre, 1987); Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988); Victoria, Attorney-General’s Department, *Sentencing: Report of the Victorian Sentencing Committee* (Melbourne, 1988) 3 Volumes; Ireland, Law Reform Commission, *Consultation Paper on Sentencing* (Dublin, March 1993).
10. See generally Chapter 5.
11. See paras 6.51-6.64.
12. *Veen v The Queen (No 2)* (1988) 164 CLR 465. See further paras 3.35-3.37. Victoria, Attorney-General’s Department, *Sentencing: Report of the Victorian Sentencing Committee* (Melbourne, 1988) Vol 1 at 122
13. *Sentencing Act 1991* (Vic) s 5(1)(a); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a); *Sentencing Act 1995* (NT) s 5(1)(a); *Sentencing Act 1995* (WA) s 6(1). Compare *Crimes Act 1900* (ACT) s 429 and s 429A(1)(j).
14. *Crimes Act 1914* (Cth) s 16A(1). See also *Criminal Justice Act 1991* (Eng) s 2(2) (dealing with the determination of the length of custodial sentences).
15. A well-known example is the lack of the deterrent effect of the death penalty: see F E Zimring and G Hawkins, *Deterrence: The Legal Threat in Crime Control* (University of Chicago Press, Chicago, 1973) at 189-190.
16. *R v Radich* [1954] 1 NZLR 86 at 87. See also *R v Cooke* (1955) 72 WN (NSW) 132 at 136; *R v Rushby* [1977] 1 NSWLR 594 at 598.
17. *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370 at 378 per Kirby P, Campbell and Newman JJ.
18. *Sentencing Act 1991* (Vic) s 5(1)(b); *Penalties and Sentences Act 1992* (Qld) s 9(1)(c); *Sentencing Act 1995* (NT) s 5(1)(c). Compare s 16A(2)(j) of the *Crimes Act 1914* (Cth) which, unsuccessfully attempted to identify only specific deterrence as a factor in sentencing: see para 2.9.
19. *Crimes Act 1900* (ACT) s 429A(1)(i).
20. *Crimes Act 1900* (ACT) s 429B(e).
21. See especially Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988) para 37; *Sentencing:*

Report of the Victorian Sentencing Committee (Melbourne, 1988) Volume 1 at 66-75. For a defence of deterrence, see J Q Wilson, *Thinking About Crime* (rev ed, New York, 1983) at 117-144.

22. Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987) at 142.

23. Victoria, Attorney-General's Department, *Sentencing: Report of the Victorian Sentencing Committee* (Melbourne, 1988) Volume 1 at 102.

24. Victoria, Attorney-General's Department, *Sentencing: Report of the Victorian Sentencing Committee* (Melbourne, 1988) Volume 1 at 103. On these points see also: Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987) at 142-143.

25. *Sentencing Act 1991* (Vic) s 5(1)(d).

26. *R v Hallocoglu* (1992) 29 NSWLR 67 at 73, and the authorities there cited.

27. *R v McKenna* (NSW CCA, No 60705/91, 16 October 1992, unreported) at 9 per Lee AJ.

28. NSW CCA, No 60700/95, 12 December 1995, Gleeson CJ, Kirby P and Hunt CJ at CL, unreported.

29. *MacDonald* at 9.

30. J Feinberg, "The Expressive Function of Punishment" in R A Duff and D Garland (eds), *A Reader on Punishment* (Oxford University Press, New York, 1994) 73 at 87.

31. Punitive rather than penitential ideals appear to have been to the fore: *Report from the Select Committee of the House of Commons on Transportation* (London, 1838) in J M Bennett and A C Castles (eds), *A Source Book of Australian Legal History* (Law Book Co, Sydney, 1979) at 1-2.

32. Compare the views of Lachlan Macquarie on the reforming of convicts (Governor Macquarie to the Duke of York (25 July 1817) in Bennett and Castles at 6) and the practices of George Arthur in Van Dieman's Land (see A C Castles, *An Australian Legal History* (Law Book Company, Sydney, 1982) at 258-259) with the views of the British government on severity of punishment and deterrence (Earl of Bathurst to Commissioner Bigge (6 January 1819), in Bennett and Castles at 6-8). Jeremy Bentham, in advocating his "panopticon," concluded in 1802 that transportation's real purpose was incapacitation and that it could result in little deterrence and no reformation: J Hostettler, *The Politics of Punishment* (Barry Rose Law Publishers, Chichester, 1994) at 136-138.

33. Eg *R v Osenkowski* (1982) 30 SASR 212.

34. *Duncan v The Queen* (1983) 47 ALR 746.

35. *R v Mosley* (NSW CCA, No 60037/91, 30 April 1991, unreported).

36. See *R v Thompson* (1992) 64 A Crim R 365.

37. *R v Garforth* (NSW CCA, No 60500/93, 23 May 1994, unreported) at 13.

38. *Crimes Act 1914* (Cth) s 16A(2)(n); *Sentencing Act 1991* (Vic) s 5(1)(c); *Penalties and Sentences Act 1992* (Qld) s 9(1)(b); *Crimes Act 1900* (ACT) s 429(2)(a); *Sentencing Act 1995* (NT) s 5(1)(b).

39. See Victoria, Attorney-General's Department, *Sentencing: Report of the Victorian Sentencing Committee* (Melbourne, 1988) Volume 1 at 80-84.

40. *Report of the Victorian Sentencing Committee* Volume 1 at 87.

41. *Sentencing Act 1991* (Vic) s 5(1)(e); *Penalties and Sentences Act 1992* (Qld) s 9(1)(e); *Crimes Act 1900* (ACT) s 429(2)(a); *Sentencing Act 1995* (NT) s 5(1)(e).

42. See, for example, J Floud and W Young, *Dangerousness and Criminal Justice* (Heinemann, London) 1981 at xvii, 60; N Morris, "On 'Dangerousness' in the Judicial Process" (1982) 39 *Record of the Association of the Bar of the City of New York* 102; J Q Wilson, "Dealing with the High-Rate Offender" (1983) 72 *The Public Interest* 52; N Walker, *Sentencing: Theory, Law and Practice* (Butterworths, London, 1985); N Walker, "Ethical Aspects of Detaining Dangerous People" in Hamilton and Freeman (eds), *Dangerousness: Psychiatric Assessment and Management* (Gaskill, London, 1982) at 24.

43. M Tonry, "Selective Incapacitation: Its Ethics" in A von Hirsch and A Ashworth (eds), *Principled Sentencing* (Northeastern University Press, Boston, 1992) at 167-169.
44. See F E Zimring and G Hawkins, *Incapacitation: Penal Confinement and the Restraint of Crime* (Oxford University Press, New York, 1995) at 80-86 (dealing with the results of surveys conducted by the Rand Corporation in the late 1970s).
45. Zimring and Hawkins (1995) at Chapter 4.
46. *Veen v The Queen (No 1)* (1979) 143 CLR 458 at 467, 468, 482-483, 495; *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 472, 485-486, 490-491, 496.
47. *Community Protection Act 1994* (NSW).
48. *Community Protection Act 1990* (Vic).
49. See paras 4.120-4.126.
50. *Crimes Act 1900* (ACT) s 429(2)(b).
51. See, for example, *Crimes Act 1900* (NSW) s 438; *Crimes Act 1914* (Cth) s 21B; *Penalties and Sentences Act 1992* (Qld) s 35(2); *Sentencing Act 1995* (WA) s 110(1).
52. See paras 10.24-10.44. Restitution as a mitigating factor is also relevant to the quantum of punishment: see paras 5.86-5.92.
53. See *R v Williscroft* [1975] VR 292 at 299.
54. H L A Hart, *Punishment and Responsibility* (Clarendon Press, Oxford, 1968) at 1.
55. *R v Readman* (1990) 47 A Crim R 181.
56. *R v Tedesco* (1982) 7 A Crim R 430.
57. *R v Coleman* (1991) 56 A Crim R 369.
58. *R v Taouk* (1992) 65 A Crim R 387.
59. *R v Burchell* (1987) 34 A Crim R 148.
60. *R v GDP* (1991) 53 A Crim R 112. Although see *R v Pham* (1991) 55 A Crim R 128.
61. *R v Champion* (1992) 64 A Crim R 244. See further paras 5.55-5.60.
62. *Williams v New York* (1949) 337 US 241 at 248.
63. See, generally, *Report of the Royal Commission into New South Wales Prisons* (NSW Government Printer, Sydney 1978) ("Nagle Report"); Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988) Chapter 3; G Zdenkowski and D Brown, *The Prison Struggle: Changing Australia's Penal System* (Penguin Books, Ringwood, 1982).
64. *R v Parker* (1992) 28 NSWLR 282.
65. *Crimes Act 1914* (Cth) s 17A; *Sentencing Act 1991* (Vic) s 5(4); *Penalties and Sentences Act 1992* (Qld) s 9(2)(a)(i); *Crimes Act 1900* (ACT) s 429C; *Sentencing Act 1995* (WA) s 6(4).
66. *Penalties and Sentences Act 1992* (Qld) s 10(1).
67. *Penalties and Sentences Act 1992* (Qld) s 10(2).
68. Probation and Parole Officers Association of New South Wales, *Submission* at 9.
69. A superficial view of the statistics for 1990-1994 is that the use of imprisonment (as opposed to non-custodial

sentences) may be on the increase: see New South Wales Bureau of Crime Statistics and Research, *Key Trends in Criminal Justice - 1994* (BCSR, 1995). While the number of persons sentenced to imprisonment fell in both the Supreme Court (by 37.9%) and in Local Courts (by 5.8%) (at 7, 9, 10), imprisonment was the punishment in a greater proportion of cases involving the sentencing of men - Local Courts (up 4.6%), District Court (up 15%) and Supreme Court (up 15.5%) (at 7, 11). However, no conclusions can be drawn from this data which fails to account for the throughput of trials in the system.

70. Data taken from New South Wales Bureau of Crime Statistics and Research *New South Wales Criminal Courts Statistics 1994* (BCSR, 1995) at Tables 1.10, 1.11.

71. Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988) at para 59.

72. See especially R G Fox, "The Meaning of Proportionality in Sentencing" (1994) 19 *Melbourne University Law Review* 489.

73. (1979) 143 CLR 458.

74. (1988) 164 CLR 465.

75. *Veen (No 2)* at 472 per Mason CJ, Brennan, Dawson and Toohey JJ, at 486 per Wilson J. See also *Hoare v The Queen* (1989) 167 CLR 348 at 354.

76. See Fox (1994) at 498-503.

77. See paras 5.29-5.37.

78. See paras 5.25-5.28.

79. See paras 5.33.

80. See paras 5.19-5.24.

81. See paras 5.55-5.60.

82. In *Veen No 2* at 477-478 the majority (Mason CJ, Brennan, Dawson and Toohey JJ) said: "It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender or offenders from committing further offences of a like kind. Counsel for the applicant submitted that antecedent criminal history was relevant only to a prisoner's claim for leniency. That is not and has never been the approach of the courts in this country and it would be at odds with the community's understanding of what is relevant to the assessment of criminal penalties". See also the dissenting judgments of Wilson J at 488, Deane J at 491 and Gaudron J at 496. For discussion on this and the judgment in *Baumer v The Queen* (1988) 166 CLR 51, see D Hunt and H Donnelly, "The Objective Circumstances of the Case and Prior Record" (1995) 7 *Judicial Officers Bulletin* 57 at 58.

83. (1991) 57 A Crim R 349.

84. *Dodd* at 354. Consider also *R v Russell* (NSW CCA, No 60248/94, 15 December 1995, unreported).

85. *Lowe v The Queen* (1984) 154 CLR 606. See further para 5.115.

86. *Lowe* at 609 per Gibbs CJ; *R v Gibson* (1991) 56 A Crim R 1 at 7 per Carruthers J.

87. *Lowe* at 622 per Dawson J.

88. (1990) 169 CLR 525.

89. *Bugmy* at 538 per Dawson, Toohey and Gaudron JJ.

90. *R v Ellis* (1993) 68 A Crim R 449, per Hunt CJ at CL at 461. Compare the dissenting judgment of Kirby P at 456-59. See also *R v Visconti* [1982] 2 NSWLR 104.

91. *Mill v The Queen* (1988) 166 CLR 59. See also *R v Close* (1992) 31 NSWLR 743.

92. *R v Begnell* (NSW CCA, No 60799/91, 26 November 1992, unreported). Compare England, Advisory Council on Penal System, *Sentences of Imprisonment: A Review of Maximum Penalties* (HMSO, 1978) at 96.

93. *R v Todd* [1982] 2 NSWLR 517.

94. See paras 4.46-4.64.

95. *R v Oliver* (1980) 7 A Crim R 174.

96. *De Simoni v The Queen* (1981) 147 CLR 389.

97. (1993) 71 A Crim R 170 (Mahoney JA and Allen J, Hunt CJ at CL dissenting).

98. *Overall* at 175 per Mahoney JA.

99. *R v Garforth* (NSW CCA, No 60500/93, 23 May 1994, unreported) at 7-8; *Overall* at 177 per Hunt CJ at CL.

4. The Structure of Imprisonment in New South Wales

USE OF IMPRISONMENT AS A SENTENCING OPTION

4.1 In 1994, imprisonment accounted for 6.05% (5,111) of sentence dispositions at New South Wales Local Courts and 52% (1,938) in higher courts.¹ Between 1990 and 1994, the total sentenced prisoner population in New South Wales rose by almost 36% (and by almost 38% for male prisoners).²

4.2 New South Wales has one of the higher rates of imprisonment in Australia.³ Statistical analysis fails to account for this. The size of a prisoner population is a function of both the rate of entry into the prison system and the length of sentence.⁴ Using data relating to these factors, the Bureau of Crime Statistics and Research has conducted two studies (one published in 1992,⁵ the other in 1995)⁶ which have attempted to explain the differences between the New South Wales and Victorian rates of imprisonment - Victoria being the State which is demographically most similar to New South Wales, yet with an imprisonment rate almost half that of New South Wales.

4.3 As to entry into the prison system, the studies show that relatively more people are charged and appear before the courts in New South Wales than in Victoria, and that relatively more people are sent to prison.⁷ This may be attributable to more efficient policing or to a higher crime rate in New South Wales.⁸ Further, New South Wales population and reception rates are inflated by the availability of periodic detention (which is not a sentencing option in Victoria). New South Wales also has a much larger fine defaulter prison population than Victoria. As to length of stay, when periodic detainees and fine defaulters are removed from the data, New South Wales prisoners were found to spend about 20% longer in custody than Victorian prisoners.⁹ It is not, however, known whether longer custodial periods in New South Wales are due to heavier sentences being imposed for each category of offence, or whether New South Wales courts deal with a more serious profile of offenders.¹⁰

4.4 The Commission is gravely concerned at the level of imprisonment in New South Wales, particularly at the length of time served.¹¹ Length of sentences inevitably increased in New South Wales as a result of the "truth in sentencing" legislation's abolition of remissions without any corresponding reduction in sentences.¹² The Commission urges that further research be undertaken into the level of imprisonment in New South Wales to attempt to provide answers to the questions raised by the statistics in paragraphs 4.2 and 4.3. In particular, research should be directed to an investigation of whether a pattern of longer sentences in New South Wales (as opposed to, say, Victoria), is consistent across categories of offences.¹³

REMISSIONS AND PAROLE¹⁴

4.5 Remission of sentences of imprisonment operates to reduce a sentence so that the offender may be released unconditionally before the date on which the term of the sentence expires. Remission of sentence was a practice that existed from the earliest days of the colony. The power originated in Governor Phillip's Commission of 1787, and first received legislative recognition in the *Prisons Regulations 1867*, made under the Prisons Act of 1840 (4 Vic No 29). Three sorts of remissions developed:

earned - those which accrued as a result of the good behaviour (and were forfeited by the misconduct) of the prisoner while in custody;

unearned - those that accrued automatically in accordance with a predetermined rate;

windfall - those attributable to external factors, such as strike action by prison warders or a Royal visit.

4.6 The availability of remissions was regulated in all legislative re-enactments of the *Prisons Act*. Regulation 110 of the Regulations published in 1968 provided for a remission of up to one-third of the term of imprisonment to which the offender was sentenced. In practice, the grant of such remissions was "virtually automatic."¹⁵ In addition, amendments to the *Prisons Act 1952* in 1968 allowed for remissions of up to fifteen calendar days per month of custody to be granted by the Corrective Services Commission "as it considered to be appropriate,

having regard to the prisoner's general conduct during the whole of that month and to the prisoner's performance in industry or education or both during that month."¹⁶

4.7 Another factor which affected the length of time offenders actually spent in custody was parole, which was introduced by the *Parole of Prisoners Act 1966*. Parole has its roots in the idea that punishment should rehabilitate the offender back into the community as much as possible. Section 4 of the Act required judges to specify - in addition to the total or "head" sentence of the court - a "non-parole period", which was a component of the former. The non-parole period commenced at the beginning of the offender's sentence, and the offender could not be released from custody until that period expired. It represented the minimum time which justice required the prisoner serve in custody, having regard to all the circumstances of the offence.¹⁷ Upon the expiry of the non-parole period (yet during the currency of the total sentence) the offender became eligible to be released from prison under parole supervision, and upon certain conditions. The prisoner had no right to be released after the expiry of the non-parole period. A Parole Board was formed to decide whether prisoners who had served their non-parole period should be released before the total sentence of the court expired.

4.8 Since its introduction in the 1960s, parole existed in addition to remissions. This co-existence raised particular problems in determining the length of time an offender would actually spend in custody. Before parole was introduced, remissions could simply be deducted from the total sentence length. With the introduction of parole in New South Wales, sentences comprised two distinct periods: the total, or head sentence (from which remissions were deducted); and the non-parole period (from which remissions were not deducted). This left open the theoretical possibility that remissions, when deducted from the head sentence, would result in the unconditional release of a prisoner prior to the expiration of the non-parole period (and therefore before the commencement of the period during which the prisoner was eligible for parole). In practice, eligibility for parole arose before entitlement to unconditional release, via remission.¹⁸

4.9 In 1983, the *Probation and Parole Act 1983* replaced the *Parole Act 1966*. Under the Regulations of the new Act, a prisoner was entitled to reductions from the non-parole period in proportion to the reductions which would be made from the head sentence due to remissions.¹⁹ While remedying the problem referred to above, the new regime created its own problems. In particular, the sentencing process was increasingly criticised because of a perception that sentences handed down by the trial judges were not matched by the period of time actually spent in custody.

[T]he courts ... were quick to point out the difference between appearance and reality which necessarily resulted from a legislative scheme under which sentencing judges specified a non-parole period, before the expiration of which a prisoner was not to be released from custody, existing alongside a system of remissions which applied to the period so specified. The result was an absence of what came to be referred to in later public debate as "truth in sentencing".²⁰

4.10 The "absence of truth" occurred because the courts consistently held that remissions should not be taken into account when setting the non-parole period of the sentence.²¹ As the offender had no legally enforceable right to remissions, the courts were not at liberty to extend the non-parole period by an amount representing the likely "discount" on sentence which would be obtained through remissions.²² In addition, there was community confusion and resentment as to so-called early release of prisoners.²³ Media treatment of these issues did not always clarify the position.²⁴ Moreover, the issues of parole, remissions and early release (and the legitimate roles of the judiciary and the executive in these areas) were merged in the public debate with a small number of instances of early release involving corrupt payments.²⁵ It was against this historical background that the *Sentencing Act 1989* (NSW) was enacted.

"TRUTH" IN SENTENCING

The basic provisions of the *Sentencing Act 1989*

4.11 The *Sentencing Act 1989* (NSW) lays down new principles for the determination of sentences of imprisonment. Section 3 specifies the objects of the legislation:

- (a) to promote truth in sentencing by requiring convicted offenders to serve in prison (without any reduction) the minimum term or fixed term of imprisonment set by the court; and

- (b) to provide that prisoners who have served their minimum terms of imprisonment may be considered for release on parole for the residue of their sentences.

4.12 The *Sentencing Act* applies only to sentences of imprisonment. It has no application to the range of non-custodial options (such as fines and community service orders) which are available to judicial officers.²⁶ Nor does the Act apply to terms of imprisonment imposed:²⁷

for default of payment of any fine or penalty;

for life, or for an indeterminate period;

upon a habitual criminal under the *Habitual Offenders Act 1957* (NSW); or

by way of periodic detention under the *Periodic Detention of Prisoners Act 1981* (NSW).

Further, the Act does not apply to any sentence of "detention in strict custody" made under s 25 or s 39 of the *Mental Health (Criminal Procedure) Act 1990* (NSW).²⁸

4.13 A key feature of the Act is the abolition of all remissions.²⁹ This has the effect that the minimum duration of the offender's incarceration is determined by the sentencing judge and is not subject to subsequent administrative modification (eg by allowing remissions to reduce the term). The offender must serve the minimum term of the sentence. This is what is meant by "truth in sentencing".³⁰

4.14 The *Sentencing Act* has also made important changes to prisoners' eligibility for release on parole (that is, release after the minimum term has expired, and during the currency of the additional term). Under the *Probation and Parole Act 1983* (NSW), prisoners enjoyed the presumption that they would be released on parole at the expiry of their non-parole period.³¹ The *Sentencing Act* has reversed that presumption, requiring the Offenders Review Board to be satisfied that release is appropriate, "having regard to the principle that the public interest is of primary importance".³² The law and procedure relating to parole is discussed in Chapter 7.

Minimum and additional terms of imprisonment

The necessity for minimum and additional terms

4.15 The core provision of the *Sentencing Act 1989* (NSW) is s 5, which reads:

- (1) When sentencing a person to imprisonment for an offence, a court is required:
- (a) firstly, to set a minimum term of imprisonment that the person must serve for the offence;
and
 - (b) secondly, to set an additional term during which the person may be released on parole.
- (2) The additional term must not exceed one-third of the minimum term, unless the court decides there are special circumstances.
- (3) If a court sets an additional term that exceeds one-third of the minimum term, the court is required to state the reason for that decision.
- (4) The minimum and additional terms set for an offence together comprise, for the purposes of any law, the term of the sentence of the court for the offence.

Under this section, an offender sentenced to a term of imprisonment must be sentenced to both a minimum and an additional term. The minimum term represents the term of imprisonment which the prisoner must serve in gaol. The additional term represents the term during which the prisoner is eligible to be released on parole.

4.16 The only exception to the requirement of fixing a minimum and an additional term occurs where the judge imposes a fixed term of imprisonment under s 6 of the Act. A fixed term has the same effect as a minimum term, but without an additional term attached. Section 6(2) of the *Sentencing Act* 1989 permits the court to set a fixed term of imprisonment:

- (a) because of the nature of the offence or the antecedent character of the person; or
- (b) because of other sentences already imposed on the person; or
- (c) for any other reason that the court considers sufficient.

4.17 Where the court would otherwise sentence the offender to a total sentence of six months or less, he or she must be sentenced to a fixed term of imprisonment.³³ The effect of this provision is that short term prisoners are ineligible for parole.³⁴

The ratio of minimum to additional terms

4.18 Section 5(2) of the Act provides that the additional term must not exceed one third of the duration of the minimum term, unless there are "special circumstances." The effect of the subsection is to limit substantially the exercise of judicial discretion in passing sentence upon an offender. In the absence of "special circumstances", the duration of the offender's parole is limited to a maximum of one quarter of the total sentence. However, the sentencing judge has the discretion, subject to the general principles of sentencing law, to impose an additional term of less than one third of the minimum term. While a sentencer who is minded to set an additional term exceeding one-third of the minimum term is constrained by s 5(2), there is nothing in the wording of the subsection constraining the discretion in relation to additional terms less than one-third of the minimum term.³⁵

Setting the minimum term

4.19 Independently of the constraints imposed by s 5(2) of the *Sentencing Act*, it is important to note that the minimum term, or non-parole period, represents the time that the sentencer determines the offender must, in justice, serve in gaol given the circumstances of the crime and of the offender.³⁶ Thus, factors influencing the determination of the total sentence are also relevant, though not necessarily of the same weight, in determining a minimum term.³⁷ The minimum term is not to be seen as the shortest time required before the offender's prospects of rehabilitation can be assessed, but rather as mitigation of punishment through conditional freedom.³⁸

Methodology

4.20 A question has arisen about how the courts should approach their task in setting the minimum term of a sentence under s 5 of the *Sentencing Act* 1989. Does the section require the minimum term to be calculated in isolation from the additional term? Or should the court focus on the total sentence, determining the minimum term as a component of the total sentence? The weight of authority favours the view that an appropriate total sentence should be set as a starting point.³⁹ Other authority asserts that a minimum term be set before the additional term.⁴⁰ A third view suggests a provisional assessment focusing on the minimum term.⁴¹ A fourth view is that the court should not be constrained by any particular approach.⁴²

4.21 On the face of the legislation, it is clear that the minimum term is to be set before the additional term.⁴³ This approach to sentencing was termed the "bottom up" approach in the Second Reading Speech.⁴⁴ It differs from the approach taken under the previous regime, which required the head sentence to be specified, followed by the specification of the component non-parole period (analogous to the minimum term). The Minister explained the "bottom up" procedure as follows:

The court will begin by focusing on the question of how much time a person must spend in prison. The court's answer to this question will become the minimum term of imprisonment. The court will then turn its mind to the period that it thinks the prisoner should spend on parole. This period - to be called the additional term - will then be added to the minimum term of imprisonment.⁴⁵

4.22 In a submission to the Commission, Justice Dunford has argued that the “bottom up” process was intended by the Act and should be restored. He argues that s 5(1) should be amended so that sentencers are required to “consider and set” a minimum term first (as opposed merely to setting the minimum term first).⁴⁶ One advantage of this approach may be that it would underline the point that a totally new sentencing regime began with the *Sentencing Act 1989*.⁴⁷ This could result in a reconsideration of sentencing ranges and neutralise the effect of the Legislature’s failure to specify that the abolition of remissions ought to be taken into account by the courts in determining sentence length.⁴⁸

4.23 The Commission’s provisional view, which we develop below,⁴⁹ is that s 5(2) of the *Sentencing Act 1989* should be repealed. If this occurs, there will no longer be a predetermined ratio between the minimum and additional terms. In that event, it is difficult to see how proper consideration can be given to the appropriateness of the total sentence unless that sentence is itself the subject of initial determination. Even if our recommendation that s 5(2) be repealed is not accepted, the Commission would still tentatively be of the view that the sentencing court should commence with a total or head sentence, before proceeding to apportion the minimum and additional term components of the sentence. Even where an artificial ratio governs the relationship between the head sentence and the minimum term, it does not necessarily follow that setting the minimum term will automatically result in an appropriate head sentence by simple application of the ratio.

“Special circumstances” under the Sentencing Act 1989

4.24 Section 5(2) requires the existence of “special circumstances” before an additional term exceeding the prescribed ratio can be applied to the offender’s sentence. Statistics from the Judicial Commission show that 47% of all sentences with an additional term, dispensed by the higher courts, departed from the “one third” rule of s 5(2).⁵⁰ About 30% of all appeals against sentence to the New South Wales Court of Criminal Appeal in 1992 raised the issue of “special circumstances” in the appeal, and about 50% of such appeals were successful in altering the 3:1 ratio of the minimum and additional terms.⁵¹ The frequency of such appeals has prompted the Court of Criminal Appeal to suggest that sentencing judges deal with the special circumstances provision in every case,⁵² although failure to do so will not necessarily provide the basis for quashing the sentence on appeal to the Court of Criminal Appeal.⁵³

Case law

4.25 In *R v Phelan*,⁵⁴ the Court of Criminal Appeal held that more than mere subjective features of the case were required to substantiate “special circumstances” under the Act:

“Special” does not necessarily mean “unusual”, but it does mean something more than merely a subjective feature of the case. What does constitute a matter as a special circumstance within the meaning of s 5(2) is its production of the need or the desirability for the offender to be subjected to an extended period of conditional release subject to supervision on parole. That need or desirability may arise from the prospect of particular difficulties in adjustment after long periods in custody, or from the greater prospect of rehabilitation if supervised whilst on parole than from a longer period of incarceration.⁵⁵

In the instant case, Justice Hunt observed that to allow the applicant’s guilty plea, his co-operation with the authorities, the restitution he had made, his age, prior good character and gambling addiction, to satisfy the “special circumstances” requirement “would effectively remove the adjective ‘special’ from the subsection”.

4.26 The purpose of parole (available during the additional term of the offender’s sentence) is rehabilitative. It is, therefore, for the prisoner’s benefit.⁵⁶ It also serves the public interest. In interpreting the nature of “special circumstances” under s 5(2), the Court of Criminal Appeal has stated that the term refers to “those circumstances which justify enlarging in the prisoner’s favour the existing rehabilitative ideal of s 5.”⁵⁷ The value of supervised release following imprisonment is, therefore, a policy consideration informing the interpretation of s 5 special circumstances. But the offender is disadvantaged if a sentence which departs from the 3:1 formula does not decrease the length of the minimum term. This would be contrary to the rehabilitative ideal. A sentence might be produced which was in fact greater than the court thought appropriate in the circumstances.⁵⁸ Accordingly, the extension of the additional term is accompanied by a reduction of the minimum term. The sentencing judge

should commence with “the need or the desirability of a longer than usual additional term, not the need or the desirability of a shorter than usual minimum term”.⁵⁹ The fact that considerations have been taken into account in setting the offender’s minimum term of imprisonment is no basis for excluding them from the range of special circumstances under subsection (2).⁶⁰

4.27 Factors which the courts have regarded as special circumstances include:

a discrete or non-continuous period of pre-sentence custody;⁶¹

a requirement that the offender serve a cumulative sentence;⁶²

the fact that the offender has been subjected to “double jeopardy” in the determination of sentence, where the Crown has appealed against an inadequate sentence;⁶³

the fact that an offender will spend all or most custody in strict protection;⁶⁴

the “powerful subjective circumstances”, stemming from the lack of opportunity, and an environment of alcohol and violent abuse which are often part of Aboriginal communities, accompanied by a desire for rehabilitation.⁶⁵

Statistics

4.28 Beyond the range of situations which are specifically identified in case law, observations about the nature of “special circumstances” can be derived from statistics. Statistical information records the characteristics of both the offence and the offender, and provides a general overview of the meaning of special circumstances.

4.29 **Offence characteristics.** Data from the Judicial Commission for 1992 show that special circumstances are identified in more than 40% of cases where the total sentence exceeds two years.⁶⁶ They are found to exist in more than 60% of serious offences against the person (murder, manslaughter and malicious wounding) and found less frequently in property and drug offences.⁶⁷

4.30 **Offender Characteristics.** Special circumstances are more often found in cases:

involving younger offenders than in cases involving older offenders. Special circumstances were found in 60% of cases involving offenders younger than 20 years of age, while they were found in less than 40% of cases involving offenders over the age of 41.⁶⁸

where the offender is female (over 60% of cases) than where the offender is male (less than 50%).⁶⁹

where the offender has lower educational qualifications (over 50% of cases) than where the offender has trade or tertiary qualifications (just over 20% of cases).⁷⁰

the offender is unemployed or not in the labour force, than where the offender is employed.⁷¹

The position in other jurisdictions

4.31 In 1988, the Australian Law Reform Commission made recommendations generally consistent with the operation of s 5(2) and (3) of the *Sentencing Act 1989* (NSW). The Australian Law Reform Commission recommended that the proportion of a sentence served in prison (as opposed to the period in which the offender was eligible for parole) should be governed by legislation, and should represent 70% of the total sentence.⁷² It was proposed that discretion be retained to reduce this proportion in “exceptional circumstances”, but in no case should it fall below 50% of the total sentence.⁷³ The recommendation for the mandatory non-parole portion was accompanied by recommendations for mandatory release on parole at the conclusion of the required non-parole period and the retention of earned remissions.⁷⁴

4.32 In the recently enacted Northern Territory legislation, non-parole periods must be at least 50% of the head sentence, and at least eight months in duration.⁷⁵ The *Sentencing Act 1995* (WA) provides that at least one-third of sentences six years or less must be served before eligibility for parole arises. For sentences over six years, the offender becomes eligible two years prior to serving two-thirds of the total sentence.⁷⁶ Other jurisdictions do not specify a proportionate relationship between the minimum and additional terms.

The effect of s 5(2)

4.33 While both the rationale adopted by the Court of Criminal Appeal for finding special circumstances and the procedure adopted for determining the duration of the minimum term encourage the importation of traditional (common law) judicial discretion into determinations under s 5(2),⁷⁷ Justices Hunt and Sheller have called for “urgent legislative review” of the necessity and operation of s 5. Their Honours have observed that its restriction upon the exercise of judicial discretion overlooks the varied situations assessed during the process of sentencing. Meanwhile, correction of the arbitrary effect of the section has produced a “patchwork” approach by the Court of Criminal Appeal on a case by case basis, which is unsatisfactory.⁷⁸

The impact of “truth in sentencing”

4.34 It was not the government’s intention in introducing the *Sentencing Act 1989* to increase the length of prison sentences and thereby compound the problem of prison overcrowding.⁷⁹ However, the Act does not direct judges to take into account the abolition of remissions. The Court of Criminal Appeal has held that, in determining the duration of the minimum term, a sentencer cannot take into account the likelihood that an offender would have benefited from remissions under the previous system.⁸⁰ And, while the 1989 legislation involves a “fresh approach to sentencing”⁸¹ which, in principle, frees sentencers from the need to adhere to sentencing ranges established under the old regime,⁸² the sentencing patterns which existed before 1989 remain generally relevant.⁸³

4.35 Of the statistical studies conducted to determine the impact of the legislation, the most relevant for our purposes is a study conducted by the Department of Corrective Services in 1990.⁸⁴ It suggests that despite average aggregate sentences being shorter, the average time to be served in custody has increased. In comparing sentences served before with those handed down after the introduction the *Sentencing Act*, it was found that the average minimum or fixed terms handed down following the legislation was 294 days, a 20% increase from the average of 244 days served previously.⁸⁵ This estimated increase is equivalent to an overall increase in the prison population of at least 525 sentenced prisoners held on any one day.⁸⁶

4.36 The statistics must, however, be interpreted with much caution. Sentencing and imprisonment are processes affected by many variables and it is impossible that any single factor or factors can be isolated as responsible for such changes as occur. For example, it has been suggested that prison overcrowding may be more a result of higher arrest rates than increases in length of custody. The daily average number of prisoners in New South Wales had been increasing since the 1984-85 financial year, well before the introduction of the *Sentencing Act*.⁸⁷ In the end, all that can be said with reasonable certainty is that the *Sentencing Act 1989* has, generally speaking, resulted in offenders serving significantly longer periods in custody, and this in turn is one of several important determinants of the prison population and the imprisonment rate.

Proposals for reform

4.37 Criticisms of the *Sentencing Act 1989* focus upon increases in custodial lengths and the corresponding impact on prison overcrowding⁸⁸ - the relevance of the latter being that overcrowding significantly increases the harshness of the physical and social environment of gaol and hence, in effect, the severity of the level of punishment. Central to these criticisms is the failure of the legislature to ensure that the abolition of remissions did not result in offenders’ serving longer periods in custody. Victorian and Commonwealth legislation have also abolished remissions, but courts in those jurisdictions are required to take the absence of remissions into account when imposing sentence.⁸⁹ The insertion of a like provision into the legislation in New South Wales some six years after the introduction of “truth in sentencing” legislation would probably be difficult. Even if the provision were only to apply prospectively, the Commission would not favour it, since it would, in our view, lead to an

artificial reduction in the length of terms of imprisonment and to a loss of public confidence in the criminal justice system.

4.38 An alternative, which would be even more controversial, would be to reintroduce remissions. The Commission cannot think of any arguments (other than ones of political and economic expediency) for unearned remissions. Earned remissions are a different matter. They provide an incentive to good behaviour, education or good works and promote rehabilitation. For these reasons, the Law Society has recently made representations to the Minister of Community Services arguing for their reintroduction.⁹⁰ The Minister referred these representations to the Commission for consideration as part of this reference.⁹¹

4.39 The Commission's tentative view is against the reintroduction of earned remissions, but we expressly invite comments on this important issue. While we agree with the theoretical arguments in favour of earned remissions, we do not believe that the corruption and abuse potentially arising from the power imbalance which surrounds their administration, makes their reintroduction feasible.⁹² The Law Society has attempted to meet this objection by arguing that integrity can be given to a system of earned remissions by openness, accountability, consistency and wide publicity, and by giving to an independent body (such as the Offenders Review Board) responsibility for their allocation. In the Commission's view this suggestion may not work in practice, because it would rely on behavioural and other reports from within the prison system, with all the potential for abuse which that involves. In our view, the rehabilitative goal of punishment is sufficiently advanced by allowing the courts greater freedom than that given by s 5(2) of the *Sentencing Act* in fixing the ratio of the minimum to the additional term.

4.40 Many of the submissions made to the Attorney General's Sentencing Review were in favour of the abolition of s 5(2) of the *Sentencing Act 1989*. Reasons in favour of abolition were the prospect of shorter periods of imprisonment (followed by longer periods on parole),⁹³ discouraging unwarranted appeals and the desirability of greater judicial discretion.⁹⁴ Justice Dunford has argued that the case law on "special circumstances" has developed to provide "an excuse" for reducing the minimum term, and submits that s 5(2) and (3) should be repealed.⁹⁵ A submission to the Commission by the Department of Corrective Services has also recommended the abolition of s 5(2). The Department cited increases in the length of custodial sentences as the reason for its submission on this point.⁹⁶ However, it was also argued that the considerable case law, which has developed the meaning of special circumstances, created some basis for greater consistency in sentencing.

4.41 The Commission agrees that s 5(2) has "deprived the courts of this State of a valuable sentencing option, and it has imposed an almost unyielding straight jacket upon them".⁹⁷ The Commission is, therefore, of the view that s 5(2) and (3) of the *Sentencing Act 1989* (NSW) should be repealed without legislative replacement. The effect will be that, in cases in which a fixed term sentence is not imposed, the ratio between the minimum and additional terms is set in the sentencing judge's discretion.⁹⁸

Proposal 4

Section 5(2) and (3) of the *Sentencing Act 1989* (NSW) should be repealed.

MULTIPLE SENTENCES

Aggregate sentences?

4.42 Section 12 of the *Sentencing Act 1989* states that where an offender is sentenced to more than one term of imprisonment, the court must set minimum and additional terms, or a fixed term, for each sentence imposed. The Department of Corrective Services has submitted that this requirement is confusing and increases the potential for error where many terms of imprisonment are imposed.⁹⁹ The Department's chief point of concern is the expiry date of the last minimum term, as this is the date on which the offender is eligible to be considered for parole. A major concern for the Offenders Review Board, on the other hand, is the sentence with the longest additional term, as the expiry of this sentence marks the end of the parole period.¹⁰⁰ To deal with these problems, the Department of Corrective Services submits that the courts should hand down an aggregate sentence with a single minimum term.

4.43 The Attorney General's Sentencing Review also raised the possibility of imposing an aggregate sentence featuring a single minimum term.¹⁰¹ The Review pointed to the requirement under Commonwealth law for the imposition of a single non-parole period accounting for all offences.¹⁰² In Victoria, a single non-parole period must be imposed by the court where it proposes to sentence an offender to a non-parole period before the expiry of a previous non-parole period.¹⁰³ A procedure also exists under New South Wales law for recognising a single sentence for multiple offences where the offender has admitted guilt in certain circumstances.¹⁰⁴

4.44 Several submissions to the Attorney General's Sentencing Review suggested that changes to the operation of s 12 were either undesirable or unnecessary. It was pointed out that it was important to know exactly how the sentence of a person convicted of multiple offences was calculated,¹⁰⁵ and that imposing a single minimum term might pose difficulties where (for example) one conviction was subsequently quashed on appeal.¹⁰⁶ The Bar Association was in favour of imposing single non-parole periods in respect of multiple offences.¹⁰⁷

4.45 The Commission has not come to any view on this issue, but seeks submissions on the value of requiring courts to impose a single sentence (composing one minimum term and one additional term) which accounts for all offences of which the offender has been found guilty.

Cumulative sentences

Concurrent or cumulative?

4.46 Where an offender is sentenced for multiple offences or where the offender has already been sentenced for a previous offence, the court must decide whether the sentences are to be served concurrently or cumulatively. The court has the discretion to order sentences be served concurrently, that is, at least one sentence must commence at the same time as another sentence. The effect of such an order is that the shorter sentence of imprisonment is subsumed by the longer term. The court may also order that a sentence is cumulative upon another sentence. If such an order is made, the cumulative sentence commences only after the previous sentence expires.

4.47 A cumulative sentence has the effect of prolonging the duration of the time spent in custody by offenders. The Australian Law Reform Commission recommended the insertion of a clear legislative presumption in favour of concurrent, rather than cumulative, sentencing.¹⁰⁸ The Australian Law Reform Commission was of the view that cumulative sentences should be imposed in exceptional circumstances only, and these should be specified by the court. The rationale for the Australian Law Reform Commission's recommendation was that offenders should not be subjected to an "excessively severe penalty" having regard to the total "criminality" of the incident(s) concerned. A presumption in favour of concurrent sentences applies in the Australian Capital Territory,¹⁰⁹ the Northern Territory,¹¹⁰ Victoria,¹¹¹ Queensland¹¹² and Western Australia.¹¹³

4.48 In New South Wales, a presumption in favour of cumulative sentences exists where any person is convicted of assault or other offence against the person, and the offence was committed while the offender was serving a sentence of imprisonment.¹¹⁴

4.49 The Commission's tentative view is that there should be a legislative presumption in favour of concurrent sentences for the reasons which have been articulated by the Australian Law Reform Commission.

Proposal 5

There should be a general legislative presumption in favour of concurrent sentences.

Section 9 of the Sentencing Act 1989

4.50 Section 9 of the *Sentencing Act 1989* (NSW) governs the effect of a cumulative sentence upon any minimum or additional terms:

- (1) If a court imposes a further sentence of imprisonment which is to be cumulative on a previous sentence imposed by the court or to which the person is subject (being a previous sentence

which has a minimum term), the further sentence must commence at the end of the minimum term of the previous sentence.

(2) If there is more than one previous sentence which has a minimum term, the further sentence must commence at the end of the minimum term that last expires.

(3) If the further sentence is imposed during the additional term for the previous sentence or during the additional term that last expires, the further sentence must commence on the day it is imposed or on an earlier day specified by the court.

...

(6) Otherwise, this section does not affect any law relating to the time when a sentence commences or commenced, or comes to an end, and any power of a court to direct that a sentence is to commence at the expiration of another sentence.

Section 9(1)

4.51 Section 9(1) of the *Sentencing Act* requires sentences cumulative upon a previous sentence to commence at the end of the minimum term of the previous sentence. However, in *R v Elder*, the Court of Criminal Appeal held that s 9(1) imposes no fetter upon the discretion of the sentencer to impose a sentence partly concurrent and partly cumulative on an existing minimum term.¹¹⁵ Partly cumulative terms are expressly recognised in Commonwealth legislation,¹¹⁶ and, acting from an abundance of caution, the Commission is of the view that legislation ought to recognise the possibility of partly cumulative sentences.

Proposal 6

There should be statutory recognition of partly cumulative sentences.

Section 9(3)

4.52 Section 9(3) requires that a sentence imposed while an offender is serving the unexpired portion of an additional term must commence at the date it is imposed, or on an earlier date specified by the court. The Chief Magistrate has forwarded to the Commission the concerns of a Sydney Magistrate about the operation of this subsection.¹¹⁷ An offender was serving part of an additional term, which had just over four months left to run. The Magistrate wished to impose a four month sentence on the offender for an assault. The effect of s 9(3) is that the term of imprisonment served by the offender was only marginally longer than the duration of sentence served at the time the additional term expired. A similar issue arises where the offender is sentenced for escaping from lawful custody during the unexpired portion of an additional term.¹¹⁸

4.53 Another problem in the interpretation of s 9(3) arises where a prisoner is serving part of an unexpired additional term (parole not having been granted) from one sentence and the remainder of a fixed term from another sentence at the time the court imposes a cumulative (third) sentence upon the offender. This situation arose for consideration in *R v Blanchard*¹¹⁹ and in *R v Arnold*.¹²⁰ In both cases, the Court of Criminal Appeal held that the last cumulative sentence must commence on the day it is imposed, or on an earlier day specified by the court.

4.54 However, in the latter decision, Justice Hunt dissented from the judgments of Chief Justice Gleeson and Justice Abadee. His Honour argued that s 9(3) had no application to the situation where the offender was serving a fixed term (as opposed to a minimum term, which is expressly provided for in that subsection). Justice Hunt held that s 9(6) applies to fixed term sentences, thereby removing them from the ambit of the requirements set out in s 9(3).¹²¹ Significantly, Chief Justice Gleeson accepted that the majority decision was founded upon a literal, rather than purposive, construction of s 9,¹²² while Justice Abadee referred to the "anomalies" that might result from the same construction.¹²³ Chief Justice Gleeson referred to the possibility of legislative amendment of the section, and Justice Hunt regarded amendment of s 9(3) as a matter of "overwhelming urgency".¹²⁴

4.55 As noted above,¹²⁵ the Department of Corrective Services has submitted that an aggregate sentence should be imposed on an offender convicted of multiple offences. The Department further submits that aggregate sentences will correct the problems identified with cumulative sentences.¹²⁶

4.56 The Commission's tentative view is that s 9(3) should be amended to allow cumulative sentences to be imposed during the currency of an existing term of imprisonment.

Proposal 7

Section 9(3) of the *Sentencing Act 1989* should be amended to allow cumulative sentences to be imposed during the currency of an existing term of imprisonment.

Cumulative sentences, escape from lawful custody and prison offences

4.57 The concerns about the operation of s 9(3) where an escape from custody has occurred, have been mentioned above.¹²⁷ These concerns arise because, amongst other matters, the provisions of other legislation require additions to be made to a term of imprisonment where a prisoner escapes from imprisonment¹²⁸ or is guilty of a prison offence.¹²⁹ To the extent to which such other legislative provisions are in conflict with the provisions of the *Sentencing Act*, the latter Act prevails.¹³⁰ The Attorney General's Sentencing Review suggested that any revision of the cumulative sentence provisions should make allowance for the relevant provisions under other legislation.¹³¹ The Commission tentatively agrees.

Proposal 8

The provisions dealing with multiple sentences should incorporate the effect of the provisions in s 26B and 34(2) of the *Prisons Act 1952 (NSW)* and in s 447A of the *Crimes Act 1900 (NSW)*.

Restrictions on imposing cumulative sentences

4.58 Section 444(4) of the *Crimes Act 1900 (NSW)* prevents a magistrate from imposing:

- (a) more than one sentence of imprisonment or penal servitude to be served consecutively on any other sentence of imprisonment or penal servitude then imposed on, or being served by, the offender; or
- (b) sentences of imprisonment or penal servitude, to be served consecutively, totalling more than three years.

4.59 An exception to these provisions applies, by virtue of s 444(5), where the offence(s) involved an assault on a prison officer while in the execution of his or her duty. The legislature has recognised that prisoners who assault a prison officer should be liable to greater punishment by magistrates than other offenders. The Department of Corrective Services has submitted that s 444(5) should be amended to include any offence committed while the offender is serving a sentence of imprisonment.¹³²

4.60 Section 444(5) was inserted into the *Crimes Act 1900* by the *Crimes (Amendment) Act 1980*. The provision was added in response to several assaults against prison officers (particularly one occurring in Goulburn gaol) where subsequent charges had been brought in the Local Courts. There is no requirement to bring the charges in the Local Court, and the Second Reading Speech to the amending Act refers to the availability of the District Court to hear such charges.¹³³ Because of the District Court's unfettered jurisdiction in this area, the problems to which the amendment was directed, were described as "limited". During the second reading of the Bill, the Minister noted:

I emphasize that this bill does not seek to undermine the general principle that there must be limitations upon the power of magistrates to sentence offenders to lengthy terms of imprisonment. There is no intention to cut into what is now the jurisdiction of the District Court.¹³⁴

4.61 In this context, it may be argued that the jurisdiction of the Local Court should not be widened by amending s 444(5) to include any offence committed during the course of imprisonment. The Attorney General's Sentencing Review reported that it received widespread opposition to the idea of removing the three-year limit contained in s 444(4), although Magistrates tended to favour its abolition.¹³⁵ The amendments suggested by the Department of Corrective Services and outlined in paragraph 4.59 are narrower in their scope than complete abolition of s 444(4). The Commission's present view is that s 444(4) and s 444(5) should not be amended. However, we invite submissions on the amendment suggested by the Department of Corrective Services.

Cumulative sentences and a right to be released on parole

4.62 Section 24 of the *Sentencing Act 1989* makes release from gaol on parole mandatory for offenders who have been sentenced to a term of imprisonment for three years or less, and whose minimum term has expired. Offenders serving sentences longer than three years have no such entitlement. While the Offenders Review Board must consider their applications for parole at the expiry of their minimum term, these offenders have a right to release only when their total sentence (that is, including the additional term) expires.

4.63 Subsection 24(4) applies to offenders who are already serving a term of imprisonment of longer than three years duration at the time they are sentenced to another term of imprisonment of less than three years duration. Such offenders cannot rely on any right to be released at the expiry of the minimum term of the latter sentence. They must be entitled to release under the provisions applying to offenders serving sentences of more than three years, before they can be released on parole.¹³⁶

4.64 Where an offender is sentenced to a term of imprisonment cumulative upon an existing sentence, it is possible that the first sentence (minimum and additional term) will expire before a minimum term of the cumulative sentence. In this situation, the former term of imprisonment cannot restrict the offender's right to release, as the total sentence has expired. If the cumulative sentence (in total) is for three years or less, the offender has a right to release on parole when the minimum term of that sentence expires. The Attorney General's Sentencing Review suggested that offenders should not have a right to be released in such circumstances, and that the Offenders Review Board should decide whether parole is appropriate in the circumstances.¹³⁷ The Commission expresses no opinion on this issue, but welcomes submissions addressing it.

LIFE SENTENCES

Background to the current law

4.65 Prior to the *Sentencing Act 1989*, most offenders sentenced to a term of life imprisonment in fact served a term in gaol considerably less than a natural life sentence. Under s 463 of the *Crimes Act 1900* (NSW), which has since been repealed, offenders could be released from prison prior to the completion of the sentence imposed by the sentencing judge. The provision stated:

The Governor may grant to any offender a written licence to be at large within limits specified in the licence but not elsewhere, during the unexpired portion of his sentence, subject to such conditions endorsed on the licence as the Governor shall prescribe, and while such offender continues to reside within the limits so specified, his sentence shall be suspended.

4.66 Section 463 was often invoked when dealing with offenders sentenced to imprisonment for life. The use of the section meant that, on average, life sentence prisoners served 11.7 years, with almost 93% of lifers serving 15 years or less.¹³⁸ Exercise of the power to release on licence was at the discretion of the executive. It was a power similar to the one which provided prisoners with remissions and suffered the same fate as remissions. The release on licence scheme was repealed by s 5 of the *Prisons (Serious Offenders Review Board) Amendment Act 1989* (NSW) in order to accommodate the "truth in sentencing" system.¹³⁹

Natural life sentences

4.67 The provisions of the *Sentencing Act 1989* relating to the setting of minimum and additional terms of imprisonment do not apply to a life or any other indeterminate period of sentence.¹⁴⁰ A life sentence is the

legislatively prescribed maximum penalty for murder¹⁴¹ and commercial drug trafficking.¹⁴² Since 12 January 1990,¹⁴³ “life” means that the sentence must be served for the period of the prisoner’s “natural life”. The repeal of the Release on Licence scheme means that there is no longer any provision for an offender sentenced to life imprisonment to be released from gaol except in the exercise of the royal prerogative.¹⁴⁴

Principles applicable to the imposition of a natural life sentence

4.68 Both s 19A of the *Crimes Act 1900* (which prescribes a natural life sentence as the maximum penalty for murder) and s 33A of the *Drug Misuse and Trafficking Act 1985* (which prescribes a natural life sentence as the maximum penalty for commercial drug trafficking) preserve the availability of lesser penalties.¹⁴⁵ As at November 1995, a natural life sentence under s 19A had been imposed on nine occasions.¹⁴⁶ The Commission is not aware of any natural life sentence imposed under the *Drug Misuse and Trafficking Act*.

4.69 The common law principle that the maximum penalty for any offence should be reserved for the worst category of case for which the maximum penalty is prescribed¹⁴⁷ is not displaced by s 19A.¹⁴⁸ When determining whether the circumstances of the offence disclose the worst category of case, it is incorrect to consider whether it might be possible to envisage a worse case, since “ingenuity can always conjure up a case of greater heinousness.”¹⁴⁹ Accordingly, it is inappropriate to compare the facts of a particular case to those in which a life sentence has been previously handed down, and simply point to greater gravity in those other cases.¹⁵⁰ In *R v Twala*, Justice Badgery-Parker (with whom Justices Carruthers and Finlay agreed) stated the principle as follows:

[I]n order to characterise any case as being in the worst case category, it must be possible to point to particular features which are of very great heinousness and it must be possible to postulate the absence of facts mitigating the seriousness of the crime (as distinct from subjective factors mitigating the penalty to be imposed). Of course, it goes without saying, that the court is entitled to consider the facts in the [relevant cases] to assist in the calculation of the degree of criminality in the subject case.¹⁵¹

In referring to circumstances which would prevent the imposition of a life sentence, it appears that the sentencer should look only to those objective features which would relevantly mitigate the seriousness of the offence. In *Twala*, the mental disturbance of the offender (as opposed to a psychiatric illness) as a result of the breakdown of his marital relationship sufficiently mitigated the offence to avoid the “worst category” label.

Mandatory life sentences

4.70 Following the abolition of capital punishment in New South Wales in 1955, offenders convicted of murder were subject to a mandatory life sentence.¹⁵² In 1982, the courts were given a limited discretion to award sentences less than life imprisonment, where extenuating circumstances relating to the culpability of the offender existed.¹⁵³ In October 1995, the Government placed the *Crimes Amendment (Mandatory Life Sentences) Bill 1995* before Parliament. The explanatory note to the Bill states that its object is to amend the *Crimes Act* “to specify the circumstances in which it will be mandatory for a court to impose a life sentence on a person found guilty of murder or of trafficking in large commercial quantities of heroin or cocaine.”¹⁵⁴

4.71 In relation to a conviction for murder, the Bill proposes the following addition to the *Crimes Act 1900* as s 431B:

(1) A court is to impose a sentence of penal servitude for life on a person who is convicted of murder, if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence.

...

(3) Nothing in subsection (1) affects section 442.

Section 442 of the *Crimes Act* allows the sentencing judge to pass a sentence less than a life sentence, where a section of the Act makes an offender liable to such punishment.

4.72 The Commission can see a number of problems with this provision.¹⁵⁵ First, it is strictly unnecessary in that it adds nothing to the law as it currently stands. The courts already have the discretion to pass a life sentence where a statute permits and where the circumstances of the offence, the culpability of the offender and the furtherance of sentencing objectives so require.¹⁵⁶ Secondly, it is, of course, difficult to refer to a “mandatory” sentence in any meaningful sense, when a co-existing provision expressly preserves the discretion to pass a lesser sentence.¹⁵⁷

4.73 Nevertheless, it might be argued that, at a time when the common law has come under criticism, a restatement of the law by the legislature operates to support and reinforce the law and the courts which have an independent constitutional duty to ascertain and apply it. In this context, it may matter little that the criticism is ill-informed or inappropriate: the legislature might reasonably consider that it has a responsibility to lend its weight to supporting the law as applied by the courts. This argument is, by its very nature, a political rather than a legal one.

4.74 In respect of the trafficking of commercial quantities of heroin and cocaine, the Bill requires the imposition of a life sentence applying the same criteria as those which apply in respect of murder.¹⁵⁸ However, in respect of the drug offences, the court must also be satisfied that:

- (a) the offence involved:
 - (i) a high degree of planning and organisation; and
 - (ii) the use of other people acting at the direction of the person convicted of the offence in the commission of the offence, and
- (b) the person was solely or principally responsible for planning, organising and financing the offence, and
- (c) the heroin or cocaine was of a high degree of purity, and
- (d) the person committed the offence solely for financial reward.

Where these criteria are satisfied, the court must apply a sentence of life imprisonment.¹⁵⁹

4.75 The gravity of the conduct required before a life sentence becomes mandatory is exceptionally high. If the criteria come to be treated as a code, there is a danger that this may make it harder to impose a life sentence on someone who would otherwise be deserving of one but whose circumstances do not fall precisely within the legislative provisions. This could also lead to marked sentence disparity between cases which are similar in all but a few respects, some attracting a mandatory life sentence and others not. Under these circumstances, it may be doubted whether the resort to life sentences for drug trafficking could ever be more frequent than it is at present.

4.76 More generally, the Commission is just as opposed to mandatory life sentences as it is to other statutory minimum penalties (except in cases involving minor fixed penalties, such as traffic offences).¹⁶⁰ The potential rigidity of such sentences interferes with the discretion of the sentencing judge which must be preserved if justice is to be done in individual cases. Further, the introduction of mandatory life sentences is likely to have an adverse impact on the efficiency of the criminal justice system. Persons facing such sentences are likely to be less willing to plead guilty to the charges laid against them. This will place an increased burden on the courts, and prosecution and law enforcement agencies.¹⁶¹ Research from the Judicial Commission of New South Wales which evaluated the impact of the abolition of s 19 mandatory life sentences (and their replacement by the s 19A discretionary life sentence regime) revealed a marked increase in the number of guilty pleas for murder.¹⁶² The Commission also notes that, with respect to persons below the age of 18 years, the provisions of the Bill are probably in conflict with Article 37 of the *Convention of the Rights of the Child 1989* which requires at least the provision of a minimum term as part of a life sentence.¹⁶³

4.77 The Commission, tentatively, does not favour mandatory life sentences in New South Wales, but invites submissions on this matter, particularly referable to the proposed s 431B.

Section 13A re-determinations of life sentences

4.78 Section 13A of the *Sentencing Act 1989* (NSW) was introduced by the *Sentencing (Life Sentences) Amendment Act 1989*, accompanying the repeal of the release on licence scheme, and the introduction of s 19A of the *Crimes Act 1900*. To avoid the natural life amendments having retrospective effect, s 13A provides for the potential conditional release of life sentence prisoners who were serving their terms when the amendments came into operation. Section 13A provides for applications to have a minimum and additional term of imprisonment determined for prisoners sentenced to life imprisonment. The re-determination provisions apply only to "existing life sentences", that is, life sentences imposed before or after the enactment of the section, but excluding:

sentences for murder under s 19A of the *Crimes Act 1900*; or

sentences for the cultivation, production or supply of a large commercial quantity of prohibited drugs or plants, under s 33A of the *Drugs Misuse and Trafficking Act 1985* (NSW).

For such offenders, the original "natural life" sentence cannot be re-determined at any stage of the punishment.

4.79 "Existing life sentence" prisoners who have served at least eight years of their sentence may apply to the Supreme Court for the determination of minimum and additional terms of imprisonment.¹⁶⁴ If the court decides to make the determination, the original life sentence is replaced,¹⁶⁵ and the minimum term is taken to have commenced on the date of the original sentence (or at the date the offender was remanded into custody).¹⁶⁶ The number of offenders eligible, or who may become eligible (after serving 8 years of their sentence), to apply for a determinate sentence is necessarily finite.¹⁶⁷ The Serious Offenders Review Council has confirmed that the last offender who will become eligible to apply for a re-determination may lodge his application in the year 2000. In total, 257 prisoners are eligible, or will become eligible, to apply for a determinate sentence. As at 1 November 1995, the Supreme Court has heard 162 s 13A applications, of which the vast majority (153) have been granted. Six applications have been refused, and the remaining three decisions have been reserved. An additional 30 applications have been filed, and a further 14 prisoners eligible to apply for a re-determination have not yet lodged an application.¹⁶⁸

4.80 A successful s 13A application does not result in the offender's immediate release from custody. A successful application merely entitles the offender to certainty about the expiry of the minimum period he or she must spend in gaol. These terms may expire many years after the date of the successful application, and even then entitle the offender only to be considered by the Offenders Review Board for release on parole.

4.81 The principles applicable to standard sentencing procedure are generally applicable to determination of life sentence applications under s 13A.¹⁶⁹ For example, in *Crump's* case, Justice Allen referred to the importance of proportionality, the totality principle and the law's abhorrence of preventive detention, when assessing applications.¹⁷⁰ However, an important practical difference between the initial sentencing hearing and the subsequent application proceedings is that the offender's progress toward rehabilitation since being imprisoned can be evaluated in the latter forum. Naturally, this will be an important factor in deciding whether or not to set a determinate sentence.¹⁷¹

4.82 The Commission has a number of concerns with several aspects of s 13A of the *Sentencing Act*. These relate both to its internal working and to its wider implications for the sentencing regime in New South Wales.

Matters to be taken into account when considering applications

4.83 Section 13A(9) sets out several factors to which the court must have regard when considering an application for a determinate sentence:

- (a) the knowledge of the original sentencing court that a person sentenced to imprisonment for life was eligible to be released on licence under section 463 of the *Crimes Act 1900* and of the practice relating to the issue of such licences; and

(b) any report on the person made by the [Serious Offenders] Review Council and any other relevant reports prepared after sentence (including, for example, reports on the person's rehabilitation), being in either case reports made available to the Supreme Court; and

(c) any relevant comments made by the original sentencing court when imposing the sentence; and

(d) the age of the person (at the time the person committed the offence and also at the time the Supreme Court deals with the application),

and may have regard to any other relevant matter.

4.84 Subsection (9) poses significant difficulties of interpretation. The drafting of paragraph (a) has been severely criticised by the Court of Criminal Appeal in recent life sentence re-determination appeals. Paragraph (a) is expressly concerned with the knowledge of the relevant release practices of the judge who originally sentenced the offender, yet it is difficult to see what relevance this knowledge can have for a current determination under the section. As Justice Hunt has pointed out on a number of occasions, all life sentences for murder which are eligible for re-determination by the Supreme Court were imposed mandatorily. Prior to 1982, a sentencing judge had no discretion to pass a sentence other than imprisonment for life once a verdict of murder had been established. After the 1982 amendments, life sentences remained mandatory in the absence of circumstances which significantly diminished the offender's culpability. Accordingly, knowledge of the judge of the release on licence practices then applicable was not relevant to the determination of the appropriate sentence.¹⁷²

4.85 Finding the provision ambiguous, Justice Hunt referred to the Minister's Second Reading Speech which accompanied the legislation. That Speech referred to the fact that most life sentence prisoners would have envisaged release after a period of ten to thirteen years imprisonment, and that this should be taken into account under s 13A. In contrast, Justice Allen construed paragraph (a) as providing an objective footing for determining the relevant knowledge of release on licence practices.¹⁷³ The knowledge of the "original sentencing court" is not the actual knowledge of the sentencing judge, but the "relevant knowledge of judges of [the Supreme] Court dealing with criminal matters at that time"¹⁷⁴ - that knowledge being of the estimated duration of a sentence before release on licence.

4.86 The decision in *Crump*¹⁷⁵ disclosed both a lack of uniform interpretation of s 13A(9)(a) and strong dissatisfaction with the drafting of the paragraph. The Commission is at a loss to determine how any sensible meaning can be given to s 13A(9)(a) of the *Sentencing Act 1989*. In our view, it ought to be repealed. So, in our view, should the rest of s 13A(9) with the exception of s 13A(9)(b) and (c). Section 13A(9)(d) refers to a matter which is already relevant to the court's task.

Proposal 9

Sections 13A(9)(a) and (d) of the *Sentencing Act 1989* should be repealed.

Availability of additional terms of life imprisonment

4.87 Section 13(c) of the *Sentencing Act 1989* (NSW) prevents the setting of minimum and additional terms of imprisonment where a sentence of imprisonment for life is imposed at the original sentencing hearing. This prevents the possibility of an offender serving a minimum term of imprisonment, followed by conditional release on parole for the remainder of his or her life. However, for those life sentence offenders eligible to apply for a determinate sentence under s 13A of the *Sentencing Act*, the Supreme Court is expressly empowered (where it agrees to set a determinate sentence) to impose an additional term for the remainder of the offender's natural life.¹⁷⁶ When setting a determinate sentence under s 13A, sentencers accordingly have greater discretion to deal with very serious offenders.

4.88 A submission from Justice Dunford has suggested that it should be possible to fix a minimum term of a determinate number of years with an additional term of life imprisonment at the initial sentencing hearing.¹⁷⁷ The Australian Law Reform Commission recommended in 1988 that any offender sentenced to life imprisonment should be considered for parole after ten years.¹⁷⁸ It is difficult to evaluate the effect that such a reform would have upon life sentences imposed upon conviction. On the one hand, offenders who otherwise would have been

sentenced to a natural life sentence might benefit from the prospects of being released on parole during their additional term (which would apply for the remainder of the offender's life). This could provide a powerful incentive for reform for prisoners who would otherwise have no prospect of release.¹⁷⁹ On the other hand, it is possible that sentencers would be encouraged to impose more life sentences, in the knowledge that offenders released on parole during their additional terms would be returned to prison for the remainder of their lives if they breach parole conditions (however unlikely this might be).

4.89 The Commission tentatively favours Justice Dunford's suggestion. It would allow the court to impose a life sentence but fix a minimum term of imprisonment with an additional term of life at the initial sentencing hearing. The implementation of this suggestion would not be difficult if our recommendation that s 5(2) of the Act be repealed is accepted.¹⁸⁰ Section 13(c) of the *Sentencing Act 1989* would, of course, need to be restricted to cases of natural life sentences (as defined by Parliament).¹⁸¹

Proposal 10

Judges should have the discretion to impose a minimum term of imprisonment with an additional term of life at the initial sentencing hearing.

Commencement of minimum terms

4.90 If the court chooses to grant the application to have a minimum and additional term determined under s 13A, the commencement date of the minimum term is governed by subsection (5), which provides:

A minimum term set under this section is to commence on the date on which the original sentence commenced or, if the person was remanded in custody for the offence, the date on which the first such remand commenced.

4.91 In *Re Purdey*, Justice Hunt drew attention to the inadequacy of the drafting of this provision since it fails to account for the situation where a life sentence was imposed upon a prisoner already serving a sentence.¹⁸² This inadequacy arises because the principle of totality applies to the actual length of sentence an offender is likely to serve, and not merely to sentences imposed for offences "committed as part of a connected and roughly contemporaneous series of offences".¹⁸³ Purdey was already serving sentences for armed robbery at the time his life sentence for murder was imposed. However, as subsection (5) requires the minimum term to commence at the time of the original sentence (or at the time of the first remand for the offence), a sentence which adequately accumulates the terms of imprisonment appropriate to Purdey's total criminality could not be imposed. The Commission's tentative view is that s 13A(5) should be redrafted to take into account the comments in *Purdey*.

Proposal 11

Section 13A(5) of the *Sentencing Act 1989* (NSW) should be redrafted to accommodate the criticisms of it in *Purdey*.

Restrictions upon application for determination of life sentences

4.92 In 1993, the *Sentencing (Life Sentences) Amendment Act* amended s 13A to give the court power to prevent re-application for re-determination where an offender has been sentenced to life imprisonment. Section 13A(8) now provides:

If the Supreme Court declines to determine a minimum term and an additional term, the court may (when making that decision) direct that the person who made this application:

- (a) never re-apply to the Court under this section; or
- (b) not re-apply to the Court under this section for a specified period.

4.93 These directions may be made only where the person was sentenced for the crime of murder and “it is the most serious case of murder and it is in the public interest that the determination be made.”¹⁸⁴ If a person is directed never to re-apply for a determinate sentence, the person must serve the existing life sentence for the term of the person’s natural life.¹⁸⁵ In any case where the court declines the application, but makes no direction about the offender’s future application, the offender may not re-apply within two years of the court’s refusal to pass a determinate sentence.¹⁸⁶

4.94 One submission to the Commission has claimed that these provisions would make offenders eligible to a form of penalty not available at the time of the commission of the offence.¹⁸⁷ Such a provision may be in breach of international law, specifically Article 15.1 of the *International Covenant on Civil and Political Rights* (1966), which provides:

No one shall be held guilty of any offence ... which did not constitute a criminal offence under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

4.95 Central to this argument is the idea that the liability of the offender to a “natural life” sentence under the current regime is more severe than the previous “indeterminate” life sentence (which was accompanied by the prospect of release on licence).¹⁸⁸ While life sentence prisoners certainly had no legal right to be released from prison under the previous regime,¹⁸⁹ practically, there remains a significant difference between a discretion to refuse to fix a release date (which existed under the release on licence regime) and a power to declare permanently that release will not be considered.¹⁹⁰ The only answer to the argument is that a power of release under the prerogative of mercy does still remain.¹⁹¹

4.96 Whatever the force of this argument, it may still be argued that offenders should not be directed never to re-apply for a determinate sentence under s 13A. To make such an order effectively dismisses any hope of rehabilitation, and provides the prisoner with no incentive to reform. A periodic review of life sentences provides the Supreme Court with an opportunity to assess objectively the progress of the individual offender toward rehabilitation. Such an opportunity can be regarded as valuable, even where the prospects of rehabilitation are considered very low at the time an application for a determinate sentence has been rejected. Accordingly, the Commission is, provisionally, of the view that s 13A(8)(a) of the *Sentencing Act* should be repealed and that s 13A(8)(b) should be amended to allow the Court to direct that the applicant may not re-apply for a period of up to ten years. In turn, this requires the repeal of s 13A(8A) and the amendment of s 13A(8C) and s 13A(12).

Proposal 12

Section 13A(8)(a) of the *Sentencing Act* 1989 should be repealed and s 13A(8)(b) should be amended to allow the Court to direct that the applicant may not re-apply for a period of up to ten years.

PROTECTIVE SENTENCES

4.97 “Incapacitation” is usually articulated as one of the aims of punishment.¹⁹² While the language of incapacitation is not common in Australian discussions of sentencing (at least by courts), the same underlying concept is often invoked when reference is made to community protection, protective sentencing or the desirability of indefinite or indeterminate sentencing. In one sense, community protection is the object of all sentencing decisions. However, the term is also used to refer to various approaches to sentencing in Australia, which have as their purpose imprisonment of an offender beyond so-called proportional punishment. The High Court has declared, at least as far as the common law is concerned, that proportionality is the basic principle governing custodial sentences in Australia: “The fundamental principle of proportionality does not permit the increase of a sentence of imprisonment beyond what is proportional to the crime merely for the purpose of extending protection of society from the recidivism of the offender”.¹⁹³ This means that any form of sentencing aimed at community protection beyond proportionality (“protective sentencing”) is a deviation from the general rule which requires justification. Such deviations have emerged in various Australian jurisdictions.

4.98 Protective sentences have taken diverse forms which should be carefully distinguished:

- indefinite (or indeterminate) sentences;
- additional fixed sentences; and
- preventive detention orders.¹⁹⁴

Some caution is required in making comparisons between jurisdictions. For example, habitual offender legislation in New South Wales takes the form of an additional fixed sentence,¹⁹⁵ whereas legislation dealing with habitual criminals in South Australia involves indefinite detention.¹⁹⁶

Indefinite sentences

4.99 Indefinite sentences are penalties imposed without a finite termination date. Courts may impose such penalties ab initio or as an indefinite extension of a normal fixed sentence. Although theoretically the term can apply to other penalty types, it usually refers to indefinite imprisonment and will be so understood in the material which follows.¹⁹⁷ The power to impose indefinite sentences is widely available in Australia.¹⁹⁸ Such a power is not currently available in New South Wales.¹⁹⁹ The question for consideration is whether such sentences should form part of New South Wales sentencing law, having regard to their prevalence in other jurisdictions.

Types of indefinite sentence

4.100 Although indefinite sentences all share the characteristic of having an indefinite period of custody, two different types are distinguishable: an older type, involving indefinite extensions terminable by executive act;²⁰⁰ and indefinite sentences terminable by judicial review. The latter are now the more common and apply, in schemes which are quite similar, in Queensland, Victoria, the Northern Territory and Western Australia.²⁰¹ The intention has been to introduce some elements of due process and to reduce the apparent arbitrariness of indeterminate punishment. The Victorian example is considered below.

Indefinite prison sentences in Victoria

4.101 Following repeal of the habitual criminal legislation in Victoria in 1991,²⁰² the Victorian government amended the *Sentencing Act 1991* (Vic) to introduce a power to impose indefinite sentences on serious offenders.²⁰³ The legislation was largely based on similar provisions in Queensland.²⁰⁴

Key provisions

4.102 A court may sentence any person over 21 who has been convicted of a serious offence²⁰⁵ to an indefinite term of imprisonment, whatever the prescribed maximum penalty might be.²⁰⁶ The court must not fix a non-parole period in respect of the indefinite sentence²⁰⁷ but must specify a "nominal sentence" equal in length to the non-parole period it would have fixed had the court decided to impose a fixed term.²⁰⁸ An indefinite sentence may only be imposed if the court is satisfied by the prosecution, to a high degree of probability,²⁰⁹ that the offender is a serious danger to the community because of his or her character, past history, age, health or mental condition; the nature and gravity of the serious offence and any special circumstances.²¹⁰ In determining whether the offender is a serious danger to the community the court is obliged to consider whether: the serious offence is exceptional; anything relevant to this issue is contained in the certified transcript of any proceeding against the offender in relation to a serious offence; there is any medical, psychiatric or other relevant report received by it; there is a risk of serious danger to other members of the community if an indefinite sentence were not imposed; and there is a need to protect members of the community from that risk.²¹¹ An application for an indefinite sentence can be brought by the DPP or initiated by the court.

4.103 If an indefinite sentence is imposed, the court is required to state and record its reasons.²¹² Provision is made for review of indefinite sentences by the court. A review is to be taken, on the application of the DPP, as soon as practicable after the nominal sentence has been served.²¹³ The offender may seek a review every three years.²¹⁴ At review hearings reports can be sought by the court and both sides may challenge the contents of

any such reports.²¹⁵ Unless the court is satisfied to a high degree of probability that the offender is still a serious danger to the community, at any such review hearing, the court must order the discharge of the indefinite sentence. In this event, the court must also make the offender subject to a five year reintegration program administered by the Adult Parole Board.²¹⁶ The offender and the DPP are both entitled to appeal to the Full Court of the Victorian Supreme Court in relation to the result of the review.

Judicial consideration

4.104 The legislation has recently been considered in the Victorian Court of Appeal in *R v Carr*.²¹⁷ The applicant pleaded guilty to a series of serious offences arising out the circumstances of a sexual assault by him on a 77 year old woman. He was due to be sentenced when the DPP made an application for an indefinite sentence which was opposed by the applicant. The court imposed prison terms in relation to three counts and an indefinite sentence in relation to the two counts of rape. The applicant admitted 57 prior convictions between 1975 and 1993. Many of these were for burglary, theft and street offences but included five incidents (with multiple convictions on each occasion) involving sexual assaults. The application for leave to appeal against the sentence was dismissed. The Court of Appeal held that the sentencing court had carefully reviewed and correctly applied the statutory criteria to the facts of the case. The offence was exceptional (the rape of a 77 year old woman by a 36 year old man); previous offences were often accompanied by physical violence, perpetrated on impulse, often on total strangers, without planning or regard to the consequences. The court had been satisfied to a high degree of probability that the applicant was a serious danger to the community. The major challenge by the applicant to the decision of the sentencing court was to the court's inability to predict future dangerousness. It was argued that the legislation required an assessment of a future risk which could not, in fact, be made. According to the applicant, the sentencing court was wrong in holding that the issue for decision in relation to serious danger was: is the offender a serious danger were he now to be released? However, the Court of Appeal upheld the statutory construction of the sentencing court: the primary question for that court was whether the prisoner was at the time of sentencing a serious danger to the community.²¹⁸

Arguments in favour of indefinite sentences

4.105 Key arguments raised in favour of indefinite sentences include:

- The community is entitled to be protected against those likely to commit crimes involving serious violence. If such greater safety is attainable via indefinite sentences, extended imprisonment is justified.²¹⁹ And, incapacitation through imprisonment of offenders convicted of serious violent crimes renders them physically incapable of committing further crime.
- The notion of proportionality as a limiting principle is subject to justifiable exceptions. An exception is justifiable where the past record of violent crime is manifest.²²⁰
- Selective incapacitation is a useful way of more rationally allocating prison resources. The task is to identify high-rate offenders and to target them.²²¹
- Concern about potential injustice can be met by careful selection of offenders who are likely to commit violent offences using suitable criteria and imposing requirements for expert evaluations and stringent levels of proof.²²²
- Concern about changes in behaviour patterns in offenders incarcerated in this manner can be met by devising suitable review mechanisms.
- Indefinite sentences in Australia, in various forms, are not novel. Indeed all jurisdictions in Australia (other than New South Wales and the Australian Capital Territory) have adopted indefinite sentences of some kind. Presumably there was a public demand for such laws and they were introduced after careful consideration.

Arguments against indefinite sentences

4.106 Arguments against indefinite sentences centre on the efficacy, justice, and ethics of indefinite sentencing:

- Justice requires that a punishment be proportional to the crime and this fundamental principle is embodied in the common law of sentencing in Australia.²²³ The High Court has described indeterminate detention as “stark and extraordinary”.²²⁴ Ultimately, an indefinite sentence breaks “the vital nexus between the offence and the sentence. Instead it maximises the link between the offender and the sentence. No longer can it be said that the punishment fits the crime. Under this philosophy the punishment fits the criminal”.²²⁵
- Selective incapacitation, directed at dangerous offenders, is inevitably problematic. Predictive techniques are notoriously flawed. One of the key proponents of indefinite sentencing for dangerous offenders,²²⁶ concedes that at least half of those classified as risks will be wrongly placed in this category.²²⁷ Parke and Mason remark:
- [T]here is a wealth of material on the assessment of risk and the prediction of dangerous behaviour. But despite these vast outpourings, there are no reliable actuarial and statistical devices as yet that can predict with any degree of certainty the likelihood of dangerous behaviour. Following an exhaustive inquiry into draft legislation authorising the preventive detention of dangerous offenders, the Victorian Parliament’s Social Development Committee concluded that, despite great efforts to develop useful indices of violent crime the predictive usefulness of those indices had still not been established.²²⁸
- Indefinite sentences, based on flawed predictions, amount to arbitrary imprisonment. Such imprisonment is a violation of human rights. Arguably, such punishment amounts to “cruel and unusual punishment”.²²⁹ Critics of indefinite sentences in Victoria have argued that such sentences violate the *International Covenant on Civil and Political Rights* (ICCPR) to which Australia is a signatory. Although the ICCPR is not part of domestic law in Australia, and accordingly, is not directly enforceable, a person adversely affected by indefinite sentence provisions could seek to petition the Human Rights Committee of the United Nations pursuant to the First Optional Protocol to the ICCPR.²³⁰
- It is difficult to prove the criteria as to dangerousness stipulated in existing legislation. For example, in Queensland judges are required to assess “the risk of serious harm to members of the community if an indefinite sentence were not imposed”.²³¹
- It is questionable whether the discipline of psychiatry has the relevant expertise in predicting dangerousness. Moreover, is such prediction for the purpose of extending the imprisonment of an offender an appropriate role for psychiatry?²³²
- The procedural safeguards in existing legislation fail to prevent the potential for injustice through predictive error.
- Indeterminate sentencing legislation has distinct implications for the type of criminal to be imprisoned under it. “It will ensure that more often than justice dictates, criminals imprisoned will be young, poor, disadvantaged and members of certain racial minorities. Less often than justice demands will the imprisoned criminal be affluent and corrupt - particularly as white-collar criminals are often more able to show that they will not repeat their criminal activity”.²³³
- Victims may be placed at greater risk as desperate offenders may resort to homicidal violence to escape detection or to escape, if caught.²³⁴
- Juries may be reluctant to convict.²³⁵
- There may be a reduction in the rate of guilty pleas for offences involving serious violence and the prosecution’s power to secure plea-bargains may thereby be weakened.²³⁶
- Although it is difficult to estimate the actual impact, some commentators have pointed to the serious potential cost implications of indefinite sentences in terms of the prison population.²³⁷

The Commission's view

4.107 The legislation dealing with indefinite sentences in various Australian jurisdictions is based on the understandable and laudable concern to protect the community from violent crime. However, on the available evidence it is difficult to justify the efficacy of such legislation even if one accepts this utilitarian approach as the guiding principle. Obviously the restraint which flows from extended detention inevitably prevents the offender from having the opportunity to commit crime during this period. Yet it cannot be said with any confidence that such crimes would have been committed. Even the protagonists of indefinite detention acknowledge that predictive techniques are flawed and that "false positives" are commonplace.

4.108 When one considers the objections to indefinite detention based on justice and ethical concerns together with the unreliability of predictive techniques, the case against such measures, despite their superficial attraction as a means of dealing with a difficult social problem, is compelling. The Commission does not favour the introduction of indefinite sentence legislation in New South Wales. We agree with the comments of Parke and Mason in their analysis of the Queensland legislation:

Part 10 of the Penalties and Sentences Act 1992 is based upon, first, the assumption that it is just to incarcerate offenders beyond what is proportional for the crime committed on the basis that they are dangerous, and, secondly, that it is possible to accurately forecast dangerousness. Both assumptions are at best arguable and at worst unjust and misleading.²³⁸

Additional sentences

Habitual criminals legislation

4.109 The *Habitual Criminals Act 1957* (NSW) provides for certain offenders to be declared "habitual criminals", on whom an additional term of imprisonment may then be imposed. The criteria which must be satisfied before an offender may be pronounced a habitual criminal are:

that he or she is at least 25 years of age;

that he or she has served at least two previous, separate terms of imprisonment (other than the punishment to be imposed for the commission of the instant offence) for indictable offences;

that these offences were not dealt with summarily without the offender's consent; and

that the judge is satisfied, having considered the prospects of the offender's reformation or the prevention of crime, that it is expedient to imprison the offender for a substantial time.²³⁹

4.110 Once an offender has been pronounced a habitual criminal, he or she must be sentenced to a term of imprisonment of at least five and not more than fourteen years in length.²⁴⁰ The offender should first be sentenced according to the crime of which he or she has been convicted, followed by the pronouncement that the offender is a habitual criminal, and the appropriate sentence imposed on that pronouncement.²⁴¹

4.111 Section 6(2) of the *Habitual Criminals Act 1957* (NSW) provides that any sentence being served by the offender at the time he or she is pronounced a habitual offender is to be served concurrently with the sentence imposed under the *Habitual Criminals Act*. The two sentences, however, are separate and distinct. On appeal against pronouncement as an habitual criminal there is no power to review the sentence for the offence.²⁴²

4.112 Under corresponding South Australian provisions, offenders convicted of two or more violent offences (or three or more offences, in the case of specified property offences) may be declared habitual criminals.²⁴³ The significant difference between the New South Wales and South Australian legislation is that offenders declared habitual criminals under the latter are liable to be detained in custody "until further order."

4.113 Many submissions to the Attorney General's Sentencing Review favoured the abolition of the *Habitual Criminals Act*. Notably, the Office of the Director of Public Prosecutions was in favour of the repeal of extended sentence provisions.²⁴⁴ Given the fact that such provisions have fallen into disuse, the DPP's view is very

significant. The discretion vested in the DPP is relevant to the decision to prosecute, *and* the provisions under which the alleged offender will be charged. The DPP's view of the value of such provisions is likely to influence the choice of legislation under which offences are prosecuted.

4.114 The Australian Law Reform Commission recommended the repeal of the corresponding provisions in s 17 of the Commonwealth *Crimes Act 1914*.²⁴⁵ The Australian Law Reform Commission was of the view that the provisions were based upon preventative detention; inconsistent with the objective of promoting just punishments; and in contravention of the *International Covenant of Civil and Political Rights*.²⁴⁶ Section 17 was repealed in 1990.²⁴⁷

Additional sentences upon second or third convictions

4.115 Section 443 of the *Crimes Act 1900* (NSW) allows a sentencing judge to impose an additional sentence upon convicted offenders who have been previously convicted of one or more indictable offences. The quantum of the potential additional punishment varies according to the nature of the instant offence of which the offender has been convicted, and the number of previous convictions of the offender. If the offender is convicted of a felony, then in the case of one previous conviction or sentence, he or she is liable to an additional period of between two and ten years imprisonment. In the case of two or more previous convictions or sentences, he or she is liable to an additional period of between three and fourteen years imprisonment.²⁴⁸

4.116 Where the instant offence is a misdemeanour, the offender is liable to serve an additional punishment of between six and eighteen months imprisonment.²⁴⁹ The additional penalty may be imposed only where the presiding judge is of the opinion that the maximum punishment provided for an offence is insufficient in the circumstances.²⁵⁰

4.117 Section 114 of the *Crimes Act 1900* (NSW) sets out the offence of being armed, possessing implements to commit certain property offences, being disguised with intent to commit a felony or misdemeanour, or entering or remaining on property with intent to commit a felony or misdemeanour. It is followed by s 115 which provides:

Whosoever, having been convicted of any felony or misdemeanour, afterwards commits any offence mentioned in section 114, shall be liable to penal servitude for ten years.

The relevant procedural requirements of s 443 and s 115 are significantly different. While the former provision provides for additional punishment, s 115 provides for an additional offence - not merely a higher statutory maximum penalty.²⁵¹ The ramification of this distinction is that proceedings commenced under s 115 require the prosecution to prove afresh the commission of the offence provided for by s 114 (of which the accused has already been found guilty).

The Commission's view

4.118 The Attorney General's Sentencing Review pointed out that the provisions for extending sentences are very rarely used, and that previous criminality is a factor already taken into account when a judicial officer fixes the sentence for the instant offence.²⁵² Consultation with the Department of Corrective Services revealed that the *Habitual Criminals Act 1957* had not been used since the 1970s, and that s 115 and 443 of the *Crimes Act 1900* "appear[ed] equally unused."²⁵³ However, the 1991 decision of the Court of Criminal Appeal in *Tillot*²⁵⁴ indicates that use of s 115 has not fallen completely into disuse. But the construction placed on s 115 in that decision would appear to be a disincentive for the prosecution to rely upon that provision.

4.119 The fact that these provisions have fallen into disuse might also be the basis for a suggestion for the introduction of a new form of habitual offenders legislation. A submission was made to the Attorney General's Sentencing Review that habitual criminals legislation should be retained, but with a narrower scope, applying only to offenders with histories of violent crimes.²⁵⁵ The Commission can find no argument in support of this submission. The twin stated aims of habitual offenders legislation are rehabilitation and crime prevention or community protection. The pursuit of these objectives extend the offender's sentence beyond its proportion to the instant offence. Given its centrality as a sentencing principle,²⁵⁶ the Commission is of the view that here (as elsewhere)²⁵⁷ a justification must be found for any departure from it. That justification has not been made out in

the case of habitual offenders legislation. The Commission's tentative view is, therefore, that such legislation should be repealed.

Proposal 13

The *Habitual Criminals Act 1957 (NSW)* and s 115 and 443 of the *Crimes Act 1900 (NSW)* should be repealed.

Preventive detention

4.120 The *Community Protection Act 1994 (NSW)* was enacted with the express intention of protecting the community by providing for the preventive detention of one Gregory Wayne Kable.²⁵⁸ It was originally intended that the Act be expressed in general terms to allow the Supreme Court, where satisfied that certain specified criteria had been met, to make a preventive detention order, interim detention order, or issue an arrest warrant. The Bill was passed in its current restricted form following parliamentary and community criticism of the proposals.²⁵⁹ Although it now applies only to one person, the Act warrants consideration because its provisions could be extended to the more general application which was first considered in 1994.

4.121 The main provisions of the Act are set out in s 5 which provides:

(1) On an application made in accordance with this Act, the Court may order that a specified person be detained in prison for a specified period if it is satisfied, on reasonable grounds:

- (a) that the person is more likely than not to commit a serious act of violence; and
- (b) that it is appropriate, for the protection of a particular person or persons or the community generally, that the person be held in custody.

(2) The maximum period to be specified in an order under this section is 6 months.

(3) An order under this section may be made against a person;

- (a) whether or not the person is in lawful custody, as a detainee or otherwise; and
- (b) whether or not there are grounds on which the person may be held in lawful custody otherwise than as a detainee.

(4) More than one application under this section may be made in relation to the same person.

Applications are made under the Act by the Director of Public Prosecutions.²⁶⁰ The Supreme Court can only make a detention order when it is satisfied that the DPP's case has been proved on the balance of probabilities.²⁶¹

Arguments in favour of the legislation

4.122 It is claimed by some that there is a gap in the protection which the criminal law affords, in that it provides for punishment of those convicted of violent offences but, generally, does not provide for the prevention of violent acts. This was the argument put forward by the then Attorney General in his second reading speech for the *Community Protection Bill 1994 (NSW)*²⁶² He also stated that the government would not "shirk" the responsibility of protecting the community from persons who present a real danger. The answer to such a claim is that the criminal justice system simply cannot provide a perfect guarantee against crime.

4.123 Justice Deane has also acknowledged the need for preventive detention to be available at the expiration of terms of some who have been convicted for violent offences:

[T]he protection of the community obviously warrants the introduction of some acceptable statutory system of preventive restraint to deal with the case of a person who has been convicted of violent

crime and who, while not legally insane, might represent a grave threat to the safety of other people by reason of mental abnormality if he were to be released as a matter of course at the end of what represents a proper punitive sentence. Such a statutory system could, one would hope, avoid the disadvantages of indeterminate prison sentences by being based on periodic orders for continuing detention in an institution other than a gaol and provide a guarantee of regular and thorough review by psychiatric and other experts.²⁶³

This proposal does not encompass some aspects of the New South Wales legislation, in particular the provision which does not require the commission of an offence or the previous detention of the subject.

Arguments against the legislation

4.124 There have been numerous challenges to the constitutionality of the provisions of the Act.²⁶⁴ Although no such challenge has been successful to date,²⁶⁵ it can be argued that it is a fundamental principle of a democratic society that, save for carefully defined exceptions relating to the law of bail, contempt, mental illness and migration, citizens shall not be imprisoned unless they have been convicted of a criminal offence following the finding of a tribunal of fact, beyond reasonable doubt. A law which authorises preventive detention of an individual who has not been so convicted (and who does not come within other well-defined exceptions) constitutes an infringement of a fundamental human right. Three members of the Court of Appeal have expressed misgivings concerning the use of preventive detention. Justice Clarke said:

A preventive detention order which enables the imprisonment of a person who has not been convicted of a crime ... prima facie, constitutes an infringement of a fundamental human right.²⁶⁶

4.125 Article 9.1 of the *International Covenant on Civil and Political Rights* deals with detention.²⁶⁷

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

It seems, however, that the provisions of the *Community Protection Act 1994* (NSW) are consistent with this article, as they are with other articles.²⁶⁸ Justice Mahoney, while expressing misgivings about such provisions, stated:

If such provisions are to be enacted, the circumstances in which a person may be detained should be clearly stated, should be capable of clear proof or disproof, should be independently administered, and should be capable of ongoing appeal and review.

But, in my opinion, it is proper to accept that there are circumstances in which such legislation may be justified. There is no breach of human rights if the circumstances warrant such an enactment.²⁶⁹

4.126 Other arguments against the Act include the insufficiency of balance of probabilities as the standard of proof in relation to the deprivation of liberty, and the serious practical problems involved in relying on the prediction of future violent behaviour.²⁷⁰ Notwithstanding the safeguards included in the Act as it currently stands, it can be said that the provisions could still be open to abuse.²⁷¹ The Commission is tentatively of the view that the *Community Protection Act 1994* (NSW) should be repealed.

Proposal 14

The *Community Protection Act 1994* (NSW) should be repealed.

NOMENCLATURE

4.127 Sections 9 and 10 of the *Crimes Act 1900* (NSW) provide that a "felony" is an offence punishable by penal servitude, while a misdemeanour is punishable by imprisonment. While gaoled offenders are liable to be sentenced to either "penal servitude" or "imprisonment", there is no longer any practical difference between the

two types of sentence. Accordingly, there no longer appears to be any rational basis for maintaining these distinctions.

4.128 The Department of Corrective Services has submitted that the distinction between penal servitude and imprisonment be abolished.²⁷² The Attorney General's Sentencing Review also proposed abolition of this distinction, as well as the distinction between felonies and misdemeanours.²⁷³ However, the Review also referred to the fact that some offences under the *Crimes Act 1900*²⁷⁴ have as one of their elements the commission of (or intent to commit) a felony. Such offences - if they retained this element - could be amended so that the offence is established where a crime carrying a maximum penalty of a certain number of years was committed. Consideration will also have to be given to s 4 of the *Felons (Civil Proceedings) Act 1981* (NSW) under which a person convicted of a felony who is still in custody requires the leave of the court to institute civil proceedings. If the substance of this provision is to be retained, it will require redrafting. Alternatively, it could be repealed if it is thought that convicted persons should have access to the courts as of right.²⁷⁵

4.129 Both the Sentencing Review and the Department of Corrective Services argued for the abolition of the distinction between "hard labour" and "light labour".²⁷⁶ The main provision supporting this distinction is s 554 of the *Crimes Act 1900*. Again, no practical distinction exists between the two, and the Department of Corrective Services has the authority under the *Prisons Act* to determine the classification of prisoners.

4.130 The Commission tentatively agrees with the submissions which have been made to abolish these outdated distinctions. We particularly invite submissions on whether there are any consequences resulting from abolition which we may have overlooked.

Proposal 15

There should be no distinctions between

"penal servitude" and "imprisonment";

"felonies" and "misdemeanours";

"hard labour" and "light labour"

and the expressions "penal servitude," felonies," "misdemeanours," "hard labour" and "light labour" should no longer be used.

QUESTIONS ARISING IN CHAPTER 4

- 1. Should earned remissions be re-introduced into the imprisonment regime in New South Wales? If yes, how should such a re-introduction apply to prisoners currently serving sentences? If no, should the legislation nevertheless now provide that the abolition of remissions is to be taken into account in determining sentences?**
- 2. Should s 5(2) and (3) of the *Sentencing Act 1989* (NSW) be repealed? If so, should anything be put in their place?**
- 3. Should courts be required to impose a single sentence (composing one minimum term and one additional term) which accounts for all offences of which the offender has been found guilty?**
- 4. Should there be a general legislative presumption in favour of concurrent sentences?**
- 5. Should there be statutory recognition of partly cumulative sentences?**
- 6. Should s 9(3) of the *Sentencing Act 1989* be amended to allow cumulative sentences to be imposed during the currency of an existing term of imprisonment?**

7. Should s 9(3) be amended to apply to fixed terms being served by the prisoner?
8. Should the provisions dealing with multiple sentences incorporate the effect of the provisions in s 26B and 34(2) of the *Prisons Act 1952* (NSW) and in s 447A of the *Crimes Act 1900* (NSW)?
9. Should the exception provided by s 444(5) of the *Crimes Act 1900* (NSW) be amended to include *any* offence committed by a prisoner?
10. Should offenders retain the automatic right to parole (without consideration by the Offenders Review Board) where they are serving a sentence of more than three years and receive a cumulative sentence of less than three years such that the original sentence expires before completion of the minimum term of the cumulative sentence?
11. Should provision ever be made for mandatory life sentences? If so, in what types of cases?
12. Should s 13A(9)(a) and (d) of the *Sentencing Act 1989* be repealed?
13. Should judges have the discretion to impose a minimum term of imprisonment with an additional term of life at the initial sentencing hearing?
14. Should s 13A(5) of the *Sentencing Act* be redrafted according to the comments made in *Purdey*?
15. Should s 13A(8)-(8C) of the *Sentencing Act 1989* (NSW) be modified or repealed?
16. Should legislation providing for indefinite sentences be introduced in New South Wales? If so, what form should it take?
17. Should habitual criminals legislation be repealed? If not, what is the rationale for its continued existence?
18. Should the *Community Protection Act 1994* be repealed?
19. Should there continue to be distinctions between “penal servitude” and “imprisonment”, between “felonies” and “misdemeanours”, and between “hard labour” and “light labour.” If not, should all these expressions, except “imprisonment,” be no longer used?

Footnotes

1. New South Wales Bureau of Crime Statistics and Research, *Criminal Courts Statistics 1994* (BCSR, 1995) at Tables 1.6, 4.7.

2. New South Wales Bureau of Crime Statistics and Research, *Key Trends in Criminal Justice - 1994* (BCSR, 1995) at 38.

3. In 1993, 15,866 persons were held in prisons across the country, 7,632 (48%) of whom were held in New South Wales: see S Mukherjee and D Dagger, *Australian Prisoners 1993* (Australian Institute of Criminology, Canberra, September 1995) at 19. The national rate of imprisonment of 86.2 per 100,000 population is significantly lower than the New South Wales rate of 105 per 100,000. Western Australia (121.7 per 100,000) and the Northern Territory (286.1 per 100,000) also had rates significantly higher than the national rate. South Australia has approximately the national rate, while Queensland (75.6 per 100,000), Tasmania (51.8 per 100,000), the Australian Capital Territory (31.4 per 100,000) and Victoria (54.3 per 100,000) all had rates

significantly lower than the national figure: see Australian Institute of Criminology, *Australian Prison Trends* (No 215, April 1994) at Table 2.

4. *Why Does NSW Have a Higher Imprisonment Rate Than Victoria?* Crime and Justice Bulletin No 23 (NSW Bureau of Crime Statistics and Research, 1995) at 1.

5. *Imprisonment Rates in NSW and Victoria: Explaining the Difference* Crime and Justice Bulletin No 14 (NSW Bureau of Crime Statistics and Research, 1992).

6. *Why Does NSW Have a Higher Imprisonment Rate Than Victoria?* at 23.

7. *Imprisonment Rates in NSW Wales and Victoria* at 5; *Why Does NSW Have a Higher Imprisonment Rate Than Victoria?* at 2.

8. *Why Does NSW Have a Higher Imprisonment Rate Than Victoria?* at 2, 4. Likewise, the rate of imprisonment in the Northern Territory may, at least partially, be attributable to higher rates of serious violence (especially murder) in the Territory than in New South Wales.

9. *Why Does NSW Have a Higher Imprisonment Rate Than Victoria?* at 2.

10. *Why Does NSW Have a Higher Imprisonment Rate Than Victoria?* at 4.

11. See para 2.24.

12. See paras 4.35.

13. *Why Does NSW Have a Higher Imprisonment Rate Than Victoria?* also draws attention to the need for this research.

14. The discussion of remissions and parole in this section is drawn largely from the decision of the Court of Criminal Appeal in *R v Maclay* (1990) 19 NSWLR 112 at 115-121. See also D Weatherburn, "Appellate Review, Judicial Discretion and the Determination of Minimum Periods" (1985) 18 *ANZ Journal of Criminology* 272.

15. *Maclay* at 116.

16. *Maclay* at 116.

17. *Power v The Queen* (1974) 131 CLR 623 at 627.

18. *Maclay* at 117-118.

19. As recommended by the Muir Report: New South Wales, *Report of the Committee Appointed to Review the Parole of Prisoners Act 1966* (Government Printer, Sydney, 1979).

20. *Maclay* at 119. See also the decision in *R v Yates* [1985] VR 41 at 47 (CCA).

21. *R v Paivinen* (1985) 158 CLR 489; *Hoare v The Queen* (1989) 167 CLR 348; *R v O'Brien* [1984] 2 NSWLR 112.

22. Some statistical information suggests that sentencers tended to increase the length of non-parole periods to offset the perceived effect of remissions under the *Probation and Parole Act 1983*. See D Weatherburn, "Appellate Review, Judicial Discretion, and the Determination of Minimum Periods" (1985) 18 *Australia and New Zealand Journal of Criminology* 272 at 280.

23. Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988) at paras 69-71.

24. P Grabowski and P Wilson, *Journalism and Justice: How Crime is Reported* (Pluto Press, 1989) at Chapter 5; G Zdenkowski, "Sentencing: Problems and Responsibility" in D Chappell and P R Wilson (eds), *The Australian Criminal Justice System: The Mid 1980s* (Butterworths, Sydney, 1986) at 227-228.
25. See J Chan, *Doing Less Time: Penal Reform in Crisis* (Institute of Criminology, Monograph Series No 2, Sydney, 1992).
26. See Chapters 9-10.
27. *Sentencing Act 1989* (NSW) s 13.
28. *Sentencing Act 1989* (NSW) s 13(d).
29. *Sentencing Act 1989* (NSW) Sch 3 cl 8 (repealing *Prisons Act 1952* Pt 11).
30. In some American writings the expression is also used to suggest that there must be a high ratio (eg 85%) between the minimum and additional terms.
31. *Probation and Parole Act 1983* (NSW) s 26.
32. *Sentencing Act 1989* (NSW) s 17.
33. *Sentencing Act 1989* s 7.
34. In contrast, the Australian Law Reform Commission recommended that *all* prisoners should be eligible for parole, including those imprisoned for short periods: see *Sentencing* (ALRC 44, 1988) at paras 79-80.
35. *R v GDR* (1994) 35 NSWLR 376 (CCA).
36. *Power v The Queen* (1974) 131 CLR 623; *Bugmy v The Queen* (1990) 169 CLR 525 at 536-538; *R v Maclay* (1990) 19 NSWLR 126; *R v Grmusa* [1991] 2 VR 153 at 158; *R v Longshaw* (1993) 114 FLR 423 at 426-428. See also D Weatherburn, "Sentencing Principles and Sentence Choice" in M Findlay and R Hogg (eds), *Understanding Crime and Criminal Justice* (Law Book Co, Sydney, 1988) at 263.
37. *Bugmy* at 537 (risk of reoffending and interests of community protection).
38. *Bugmy*.
39. *R v Radford* (NSW CCA, CCA 60706/90, 21 August 1991, unreported); *R v Close* (1992) 31 NSWLR 743 at 749, 758; *R v Gower* (1991) 56 A Crim R 115 at 118; *R v Morgan* (1993) 70 A Crim R 368 at 372.
40. Especially *R v Maclay* (1990) 19 NSWLR 112 at 126.
41. *R v Moffitt* (1990) 20 NSWLR 114, 118, 121, 125; *R v Gower* (1991) 56 A Crim R 115 at 118 at 118-119 per Priestley JA.
42. *R v Morgan* (1993) 70 A Crim R 368 at 377 per Allen J.
43. *Sentencing Act 1989* s 5(1).
44. New South Wales, *Parliamentary Debates (Hansard)*, Legislative Assembly, 10 May 1989 at 7906. See also P Hidden, "The Sentencing Act: An Historical Overview" (1992) 3 *Current Issues in Criminal Justice* 287 at 291; M Campbell, "Changing Horses" (1992) 3 *Current Issues in Criminal Justice* 298 at 300-301.
45. New South Wales, *Parliamentary Debates (Hansard)*, Legislative Assembly, 10 May 1989 at 7906.
46. Justice Dunford, *Submission* (7 August 1995) at 1-2.

47. See also *R v Maclay* (1990) 19 NSWLR 112 at 122.
48. But see para 4.35.
49. See paras 4.24-4.41.
50. I McKinnell, D Spears and R Takach, "*Special Circumstances*" Under the Sentencing Act 1989 (NSW) (Judicial Commission of New South Wales, Monograph Series No 7, Sydney, 1993) at 4.
51. McKinnell, Spears and Takach at 8.
52. *Brindley v The Queen* (1993) 66 A Crim R 204 at 207.
53. *R v Astill (No 2)* (1992) 64 A Crim R 289.
54. *R v Phelan* (1993) 66 A Crim R 446.
55. *Phelan* at 449 per Hunt CJ at CL.
56. *Moffitt* at 116 per Samuels JA.
57. *Moffitt* at 116. This contrasts with the interpretation of s 20A of the (now repealed) *Probation and Parole Act 1983*, which also required that the period during which the offender was eligible for parole was restricted to one third of the non-parole period. In *Griffiths v The Queen* (1989) 167 CLR 372 the High Court held that departure from the formula of s 20A was justified only in special or exceptional circumstances. However, as s 20A was directed only toward a statutorily defined group of "serious offenders", the provision was punitive in nature. *Moffitt* held that the same considerations do not apply under the *Sentencing Act 1989*. See also *R v Simpson* (1992) 61 A Crim R 58 at 60 per Hunt CJ at CL.
58. *Moffitt* at 118 per Samuels JA, at 134 per Badgery-Parker J.
59. *R v Phelan* at 449-450.
60. *Moffitt* at 117 per Samuels JA, at 121 per Wood J.
61. *Close* at 748 per Hunt CJ at CL.
62. *R v Simpson* (1992) 61 A Crim R 58; *R v Pollock* (1993) 67 A Crim R 166; *R v Close* at 748-749 per Hunt CJ at CL.
63. *R v Hunter* (NSW CCA, No 60056/91, 12 August 1992, unreported); *R v Wotherspoon* (NSW CCA, No 60558/92, 4 December 1992, unreported).
64. *R v Astill (No 2)* (1992) 64 A Crim R 289.
65. *R v Fernando* (1992) 76 A Crim R 58. For a detailed coverage of factors which have been accepted as special circumstances, see the Appendix to E Matka, *NSW Sentencing Act 1989* (NSW Bureau of Crime Statistics and Research, 1990).
66. I McKinnell, D Spears and R Takach, "*Special Circumstances*" Under the Sentencing Act 1989 (NSW) (Judicial Commission of New South Wales, Monograph Series No 7, Sydney, 1993) at 5.
67. McKinnell, Spears and Takach at 5.
68. McKinnell, Spears and Takach at 6.
69. McKinnell, Spears and Takach at 6.

70. McKinnell, Spears and Takach at 7.
71. McKinnell, Spears and Takach at 7.
72. Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988) at xxxi.
73. ALRC 44 at xxxi.
74. ALRC 44 at para 84.
75. *Sentencing Act 1995* (NT) s 54. At least 70% of the head sentence must be served where the offender has been convicted of sexual assault: s 55.
76. *Sentencing Act 1995* (WA) s 94.
77. See McKinnell, Spears and Takach at 14.
78. *Close* at 745 per Sheller JA, at 752 per Hunt CJ at CL.
79. New South Wales, *Parliamentary Debates (Hansard)*, Legislative Assembly, 10 May 1989 at 7907.
80. *R v Maclay* (1990) 19 NSWLR 112 at 122-124.
81. *Maclay* at 122.
82. *Maclay* at 126 (pointing out that patterns under previous legislation may have been influenced by a “fictional element”).
83. See *R v Corbett* (1991) 52 A Crim R 112 at 115-117 (NSW CCA).
84. A Gorta and S Eyland, *Truth in Sentencing: Impact of the Sentencing Act 1989* (Department of Corrective Services, Research Publication No 22, June 1990).
85. Gorta and Eyland at 11. This comparison is made on the basis that, since the abolition of remissions, the minimum or fixed terms will reflect the time served in prison reasonably accurately. Subsequent empirical surveys, dealing with the length of minimum or fixed terms handed down both before and after the legislation have shown varying results within the court hierarchy and are inconclusive: see E Matka, *NSW Sentencing Act 1989* (New South Wales Bureau of Crime Statistics and Research, Legislative Evaluation Series, 1991); M Cain and V Roby, “The Impact of Truth in Sentencing: Part 1 - The Higher Courts” (Judicial Commission of New South Wales, *Sentencing Trends No 2*, March 1992); M Cain and V Roby, “The Impact of Truth in Sentencing: Part 2 - The Local Courts” (Judicial Commission of New South Wales, *Sentencing Trends No 3*, June 1992). The Judicial Commission has also conducted a study of the impact of the legislation upon juvenile offenders: M Cain and G Luke, *Sentencing Juvenile Offenders and the Sentencing Act 1989 (NSW): The Impact of Legislative and Administrative Change in the Children’s Court 1982-1990* (Judicial Commission of New South Wales, Monograph Series No 4, December 1991); New South Wales Bureau of Crime Statistics and Research, *Key Trends in Criminal Justice - 1994* (BCSR, 1995) at 7-11.
86. Gorta and Eyland at 13. If prisoners are detained for the aggregate term (ie including the additional term) this would represent an increase of 831 sentenced prisoners held on any one day.
87. Gorta and Eyland at 10.
88. See generally J Chan, “The New South Wales Sentencing Act 1989: Where Does Truth Lie” (1990) 14 *Criminal Law Journal* 249; D Brown, “Battles Around Truth: A Commentary on the Sentencing Act 1989” (1992) 3 *Current Issues in Criminal Justice* 329; D Brown, “What Truth?” (1989) 14 *Legal Services Bulletin* 161; G Zdenkowski, “Contemporary Sentencing Issues” in D Chappell and P Wilson (eds), *The Australian Criminal Justice System: The Mid 1990s* (Butterworths, Sydney, 1994) at 203-209. See also A Freiberg, “Truth in Sentencing?: The Abolition of Remissions in Victoria” (1992) 16 *Criminal Law Journal* 165.

89. *Sentencing Act 1991* (Vic) s 10; *Crimes Act 1914* (Cth) s 19AA. A monitoring study of the effect of the Victorian legislation found that minimum periods of imprisonment remained relatively stable after s 10: see A Freiberg, "Sentencing Reform in Victoria: A Case-Study" in C Clarkson and R Morgan (eds), *The Politics of Sentencing Reform* (Clarendon Press, Oxford, 1995) at 76-78. See also *Crimes Act 1900* (ACT) s 454, which provides that the absence of remissions in the State in which the offender will serve the sentence must be taken into account when imposing the sentence. The most recent abolition of remissions occurred in 1995 in the Northern Territory (*Prisons (Correctional Services) Amendment Act (No 2) 1994* s 6). Offenders sentenced to a term of imprisonment of less than twelve months who would otherwise serve a longer sentence are entitled to a shorter sentence: *Sentencing Act 1994* (NT) s 58. The section expires in the year 2000: s 58(5).
90. Law Society of New South Wales to the Hon Bob Debus MLA, 27 November 1995.
91. Hon Bob Debus MLA to the Commission, 15 January 1996.
92. Compare *Report of the Commission into New South Wales Prisons* (NSW Government Printer, Sydney, 1978) ("Nagle Report") Volume 2 at 463.
93. Uniting Church Board for Social Responsibility, *Submission to the Attorney General's Sentencing Review* (27 July 1994); Ministry for the Status and Advancement of Women, *Submission to the Attorney General's Sentencing Review* (25 July 1994).
94. Public Defenders Chambers, *Submission to the Attorney General's Sentencing Review* (12 August 1994) at 1; Office of the Director of Public Prosecutions, *Submission to the Attorney General's Sentencing Review* (27 July 1994) at 1; Legal Aid Commission of New South Wales, *Submission to the Attorney General's Sentencing Review* (25 July 1994) at 1.
95. Justice J R Dunford, *Submission* (7 August 1995) at 1-2.
96. NSW Department of Corrective Services, *Submission* (4 September 1995) at 21.
97. *R v Hawkins* (1993) 67 A Crim R 64 at 70 per Hunt CJ at CL (with whom Grove and McInerney JJ agreed).
98. For principles applicable to setting the minimum term, see para 4.19.
99. NSW Department of Corrective Services, *Submission* (4 September 1995) at 18.
100. NSW Department of Corrective Services, *Submission* (4 September 1995) at 18-19.
101. *Attorney General's Sentencing Review* at 15.
102. *Crimes Act 1914* (Cth) s 19AB, 19AD.
103. *Sentencing Act 1991* (Vic) s 14. See also *Sentencing Act 1995* (NT) s 57.
104. *Criminal Procedure Act 1986* (NSW) Part 6, although the Court of Criminal Appeal has held that serious offences should be separately charged (and therefore placed outside the scope of the procedure): *R v Morgan* (1993) 70 A Crim R 368. Note also "general sentences" in Tasmania: see K Warner, *Sentencing in Tasmania* (Federation Press, Sydney, 1991) at 194-199.
105. Mr Ivan Potas, *Submission to Attorney General's Sentencing Review* (11 August 1994).
106. Public Defenders, *Submission to Attorney General's Sentencing Review* (12 August 1994).
107. Bar Association of New South Wales, *Submission to Attorney General's Sentencing Review* (2 August 1994).
108. Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988) at para 66.

109. *Crimes Act 1900* (ACT) s 443 (other than sentences imposed for fine default).
110. *Sentencing Act 1995* (NT) s 50.
111. *Sentencing Act 1991* (Vic) s 16 (other than sentence imposed: for fine default; on a prisoner in respect of a prison offence or an escape offence; on a serious sexual offender for a sexual offence or a violent offence; on any person for a sexual or violent offence when the offender was on parole for a similar offence: s 16(1A)).
112. *Penalties and Sentences Act 1992* (Qld) s 154.
113. *Sentencing Act 1995* (WA) s 188.
114. *Crimes Act 1900* (NSW) s 444(3). See also *Sentencing Act 1991* (Vic) s 16(2)-(6). Compare *Crimes Act 1900* (NSW) s 442A.
115. CCA NSW, No 60452/92, 2 September 1993, unreported.
116. See *Crimes Act 1914* (Cth) s 19.
117. A George LCM, *Submission* (4 February 1995) (forwarded by I H Pike, Chief Magistrate).
118. *R v Andrews* (NSW CCA, No 60621/91, 28 April 1993, unreported).
119. *R v Blanchard* (NSW CCA, No 60420/90, 10 September 1991, unreported).
120. *R v Arnold* (1993) 30 NSWLR 74.
121. *Arnold* at 76 per Hunt CJ at CL.
122. *Arnold* at 74 per Gleeson CJ.
123. *Arnold* at 85 per Abadee J.
124. *Arnold* at 75 per Gleeson CJ, at 77 per Hunt CJ at CL.
125. See para 4.42.
126. Department of Corrective Services, *Submission* at 22.
127. Para 4.52.
128. See *Crimes Act 1900* (NSW) s 447A; *Prisons Act 1952* (NSW) s 34(2).
129. *Prisons Act 1952* (NSW) s 26B(1)(e), (4) and (5).
130. *R v Andrews* (CCA NSW, No 60621/91, 28 April 1993, unreported).
131. *Attorney General's Sentencing Review* at 22.
132. Department of Corrective Services, *Submission* (18 October 1995).
133. New South Wales, *Parliamentary Debates (Hansard)*, Legislative Assembly, 26 March 1980 at 5969.
134. New South Wales, *Parliamentary Debates (Hansard)*, Legislative Assembly, 26 March 1980 at 5969.
135. *Attorney General's Sentencing Review* at 24. See also R Dive, *Submission* (19 July 1995).
136. *Sentencing Act 1989* Part 3 Division 2.

137. *Attorney General's Sentencing Review* at 22.
138. Nguyen Da Huong and B Thompson quoted in J Nicholson "Resentencing Serious Offenders: A Commentary on the New South Wales Model" (1992) 16 *Criminal Law Journal* 216 at 217. For a detailed empirical study of the use of life sentences in Australia, see A Freiberg and D Biles, *The Meaning of 'Life': A Study of Life Sentences in Australia* (Australian Institute of Criminology, Canberra, 1975).
139. NSW, *Parliamentary Debates (Hansard)*, Legislative Assembly, 30 November 1989, at 14052, 14054 (Second Reading Speech to the *Prisons (Serious Offenders Review Board) Amendment Bill*).
140. *Sentencing Act 1989* (NSW) s 13(c).
141. *Crimes Act 1900* (NSW) s 19A.
142. *Drugs Misuse and Trafficking Act 1985* (NSW) s 33A.
143. That is, the date on which the *Crimes (Life Sentences) Amendment Act 1989* (NSW) was proclaimed. The introduction of natural life sentences was the subject of considerable controversy: see G Zdenkowski, "Contemporary Sentencing Issues" in D Chappell and P Wilson (eds), *The Australian Criminal Justice System: The Mid 1990s* (Butterworths, Sydney, 1994) at 184-187.
144. See *Sentencing Act 1989* (NSW) s 53. Compare re-determination of life sentences under s 13A: see 4.78-4.86.
145. *Crimes Act 1900* (NSW) s 19A (3); *Drug Misuse and Trafficking Act 1985* (NSW) s 33A(2).
146. See Parliament of New South Wales, Legislative Council, Standing Committee on Law and Justice, *Report on the Crimes Amendment (Mandatory Life Sentences) Bill 1995* (Report No 1, November 1995) at 15.
147. See para 3.42.
148. *R v Twala* (Court of Criminal Appeal, NSW, 4 November 1994, No 60187/93, unreported).
149. *Veen v R* (No 2) (1988) 164 CLR 465 at 478; *Twala* at 2.
150. *Twala* at 7.
151. *Twala* at 7.
152. G Zdenkowski, "Contemporary Sentencing Issues" in D Chappell and P Wilson (eds) *The Australian Criminal Justice System: The Mid 1990s* (Butterworths, Sydney, 1994) at 184.
153. *Crimes Act 1900* (NSW) s 19, which was replaced by s 19A considered in para 4.67. See Zdenkowski (1994) at 184.
154. The High Court has held by majority (Gibbs CJ, Murphy and Aickin JJ, Wilson and Brennan JJ dissenting) that very clear words are required before a sentence of life imprisonment would be considered a mandatory punishment: *Sillery v The Queen* (1981) 35 ALR 227. Murphy J suggested, obiter, that Parliament may not be competent to pass such a law (at 234).
155. For a detailed account of arguments against the Bill, see Parliament of New South Wales, Legislative Council, Standing Committee on Law and Justice, *Report on the Crimes Amendment (Mandatory Life Sentences) Bill 1995* (Report No 1, November 1995) at 43-52.
156. *R v Garforth* (NSW CCA, No 60500/93, 23 May 1994, unreported) at 13.

157. See G Zdenkowski, *Submission* to the Legislative Council's Standing Committee on Law and Justice's Inquiry into the *Crimes Amendment (Mandatory Life Sentences) Bill 1995*, 6 November 1995, at 7-8, reproduced in Appendix 3 of the Committee's *Report*.

158. Proposed s 431B(2) *Crimes Act 1900* (NSW).

159. Proposed s 431B(2)(4).

160. See paras 6.46-6.50.

161. Legislative Council, Standing Committee on Law and Justice, *Report on the Crimes Amendment (Mandatory Life Sentences) Bill 1995* at 46-47.

162. D Spears and I MacKinnell, "Sentencing Homicide: The Effect of Legislative Changes on the Penalty for Murder" (*Sentencing Trends* No 7, Judicial Commission of New South Wales, June 1994) at 3, 4.

163. Article 37(a) provides that "neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age". See Law Society of New South Wales, *Submission* (21 November 1995).

164. *Sentencing Act 1989* (NSW) s 13A(3).

165. *Sentencing Act 1989* (NSW) s 13A(6).

166. *Sentencing Act 1989* (NSW) s 13A(5).

167. Since 12 January 1990 there are only natural life sentences: see para 4.67.

168. Data provided by the Office of the Director of Public Prosecutions, 3 November 1995.

169. *Re Purdey* (1992) 65 A Crim R 441; *R v Crump* (NSW CCA, No 60080/93, 30 May 1994, unreported) at 51 per Allen J.

170. *Crump* at 51 per Allen J

171. One NSW Public Defender has suggested that the advantages of this should be generalised by providing that *all* offenders who would receive a minimum term of five years or more should be re-sentenced after serving five years in gaol of an indeterminate sentence. At the re-sentence hearing, the judge would set a determinate sentence of a minimum and additional term, along the lines currently applying for life sentence prisoners under s 13A of the *Sentencing Act 1989*. The purpose of the suggested reform is twofold: first, to allow the trial judge to evaluate objectively the progress of all serious offenders towards rehabilitation; and secondly, to provide a substantial incentive to the prisoner to reform: see J Nicholson "Resentencing Serious Offenders: A Commentary on the New South Wales Model" (1992) 16 *Criminal Law Journal* 216 at 222.

172. *Re Purdey* (1992) 65 A Crim R 441 at 444, per Hunt CJ at CL; *Crump* at 9 per Hunt CJ at CL.

173. *Crump* at 24.

174. *Crump*, at 23-24 per Allen J.

175. NSW CCA, No 60080/93, 30 May 1994, unreported (leave to appeal to the High Court refused: (1995) 129 ALR 719; 69 ALJR 570).

176. For a determinate sentence of this type, see *R v Rees* (NSW CCA, No 60565/93, 22 September 1995, unreported).

177. Justice J R Dunford, *Submission* (7 August 1995) at 2.

178. Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988) at para 84.
179. See G Zdenkowski, "Contemporary Sentencing Issues" in D Chappell and P Wilson (eds), *The Australian Criminal Justice System: The Mid 1990s* (Butterworths, Sydney, 1994) at 185-186.
180. See Proposal 4.
181. Currently, sentences under s 19A of the *Crimes Act 1900* (NSW) and s 33A of the *Drug Misuse and Trafficking Act 1985* (NSW).
182. *Re Purdey* (1992) 65 A Crim R 441 at 446, per Hunt CJ at CL.
183. *Re Purdey* at 446.
184. *Sentencing Act 1989* (NSW) s 13A(8C).
185. *Sentencing Act 1989* (NSW) s 13A(8A). To date, no prisoner has been directed never to re-apply under s 13A for a determinate sentence.
186. *Sentencing Act 1989* (NSW) s 13A(8B). Only 6 of the 162 applications for a determinate sentence have been refused by the Supreme Court: data provided by the Office of the Director of Public Prosecutions (3 November 1995). All of the failed applications were filed prior to 21 November 1993, the date on which the amendments inserting subsections (8A)-(8C) came into effect. Accordingly, all six prisoners may make a second application two years from the date of the initial refusal.
187. Associate Professor David Brown, *Submission* (13 September 1995) at 2. See also G Zdenkowski, "Door Slams Shut on Lifers" *The Bulletin* 23 November, 1993, at 22; T Anderson "Victims' Rights or Human Rights?" (1995) 6 *Current Issues in Criminal Justice* 335.
188. Anderson at 342.
189. Just as they had no "right" to remissions: see *R v Maclay* (1990) 19 NSWLR 112.
190. See G Zdenkowski, "Retrospective Punishment in NSW" (1994) 3(1) *Human Rights Defender* 5 at 10.
191. *Sentencing Act 1989* (NSW) s 53.
192. See paras 3.18-3.20.
193. *Chester v The Queen* (1988) 165 CLR 611 at 618 per Mason CJ, Brennan, Deane, Toohey and Gaudron JJ. See further paras 3.35-3.37.
194. Strictly speaking, the last mentioned are not sentences but involve imprisonment of individuals (who have not committed an offence) on the basis of predictions about their potential violent behaviour. The *Community Protection Act 1994* (NSW) which authorises such detention of a named individual is discussed in paras 4.120-4.126.
195. *Habitual Criminals Act 1957* (NSW). See paras 4.109-4.111.
196. *Criminal Law (Sentencing) Act 1988* s 22.
197. Indefinite prison sentences should be distinguished from the "normal" custodial sentence in which the minimum term is often indeterminate in the sense that release is not automatic at the end of the minimum term. The effluxion of this period often (as in NSW under the terms of the *Sentencing Act 1989*) leads to an eligibility date for release to parole by the relevant authority.
198. See *Criminal Law Sentencing Act 1988* (SA) s 22-23; *Penalties and Sentences Act 1992* (Qld) Part 10; *Sentencing Act 1991* (Vic) s 18A-18P; *Sentencing Act 1995* (NT) s 65-78; *Sentencing Act 1995* (WA) s 98-101.

199. Distinguish additional fixed sentences imposed on habitual offenders in NSW (see paras 4.109-4.119) and preventive detention orders imposed pursuant to the *Community Protection Act 1994* (see paras 4.120-4.126).

200. For example, *Criminal Code 1913* (WA) s 662(a), repealed by *Sentencing (Consequential Provisions) Act 1995* (WA).

201. *Sentencing Act 1991* (Vic) s 18A-18P; *Penalties and Sentences Act 1992* (Qld) Pt 10; *Sentencing Act 1995* (NT) s 65-78; *Sentencing Act 1995* (WA) s 98-101.

202. *Social Welfare Act 1970* (Vic) s 192.

203. For a detailed critique see R Fox, "Legislation Comment: Victoria Turns to the Right in Sentencing Reform: The Sentencing (Amendment) Act 1993 (Vic)" (1993) 17 *Criminal Law Journal* 394.

204. *Penalties and Sentences Act 1992* (Qld) Part 10.

205. As defined in *Sentencing Act 1991* (Vic) s 3. Fox (1993) at 407 notes that over 50 crimes varying greatly in gravity are covered by this definition.

206. *Sentencing Act 1991* (Vic) s 18A.

207. Section 18A(2).

208. Section 18A(3).

209. That is, on the *Briginshaw* test located between the ordinary civil standard of proof on the balance of probabilities and the criminal standard, beyond reasonable doubt.

210. Section 18B(1).

211. Section 18B(2).

212. Section 18G.

213. Section 18H(a).

214. Section 18H(b).

215. Sections 18I, 18J and 18K.

216. Section 18M(1).

217. Vic CA, 19 December 1995, Charles JA, Crockett AJA and Southwell AJA, unreported.

218. In the first, and to date only, application for an indefinite sentence made under the equivalent Queensland legislation, *Penalties and Sentences Act 1992* (Qld) Part 10, the District Court in Cairns declined to order an indefinite sentence: *R v Eather* (District Court Qld, 26 October 1993, Daly DCJ, unreported). The prisoner had pleaded guilty to five charges of carnal knowledge by anal intercourse and three of indecent assault involving three boys all two years of age. For further discussion and an extensive critical review of this legislation generally, see J Parke and B Mason, "The Queen of Hearts in Queensland: A Critique of Part 10 of the Penalties and Sentences Act 1992 (Qld)" (1995) 19 *Criminal Law Journal* 312.

219. See D Wood, "Dangerous Offenders and Civil Detention" (1989) 13 *Criminal Law Journal* 324; J Floud and W Young, *Dangerousness and Criminal Justice* (Heinemann, London, 1981) at 180.

220. Floud and Young at 10.

221. James Q Wilson, "Selective Incapacitation" in A von Hirsch and A Ashworth (eds), *Principled Sentencing* (Northeastern University Press, Boston, 1992).
222. For example, Norval Morris, "Incapacitation with Limits" in von Hirsch and Ashworth (1992). Arguably, current legislation in Australia does not meet the requirements on which Morris insists.
223. See paras 3.35-3.37.
224. *Chester v The Queen* (1988) 165 CLR 611 at 619.
225. Parke and Mason at 330.
226. Jean Floud, the principal author of the so-called Floud Report: J Floud and W Young, *Dangerousness and Criminal Justice* (Heinemann, London, 1981).
227. See von Hirsch and Ashworth (1992) at 104.
228. Parke and Mason at 322.
229. In *Sillery v The Queen* (1981) 55 ALJR 509 at 513, Murphy J, obiter dicta, questioned the constitutional competence of the Commonwealth Parliament to pass legislation having such an effect.
230. This procedure came into force in Australia on 25 December 1991. The provisions of the ICCPR which might be the subject of such a petition include: Art 7 which prohibits "cruel, inhuman and degrading treatment or punishment" and Art 10.3 which states that the key aim of penal systems is the "reformation and social rehabilitation" of offenders. For further discussion, see R Fox, "Victoria Turns to the Right in Sentencing Reform: The Sentencing (Amendment) Act 1993 (Vic)" (1993) 17 *Criminal Law Journal* 394 at 410-411.
231. *Penalties and Sentences Act 1992* (Qld) s 163(4)(d).
232. Parliament of Victoria, Social Development Committee, *Inquiry into Mental Disturbance and Community Safety: Third Report: Response to the Draft Community Protection (Violent Offenders) Bill* (Government Printer, Melbourne, 1992) at 30-38.
233. Parke and Mason at 330.
234. Fox (1993) at 412.
235. Fox (1993) at 412.
236. Fox (1993) at 412-413.
237. Fox (1993) at 413.
238. Parke and Mason at 328.
239. *Habitual Criminals Act 1957* (NSW) s 4.
240. *Habitual Criminals Act 1957* (NSW) s 6(1)
241. *R v Roberts* [1961] NSW 681; (1959) 78 WN (NSW) 329.
242. *Roberts* per Street CJ and Herron J.
243. *Criminal Law (Sentencing) Act 1988* (SA) s 22.
244. Office of the Director of Public Prosecutions (NSW), *Submission to the Attorney General's Sentencing Review* (27 July 1994).

245. Australian Law Reform Commission *Sentencing* (ALRC 44, 1991) at para 230.
246. ALRC 44 at para 230.
247. *Crimes Legislation Amendment (No 2) 1990* (Cth) s 6.
248. *Crimes Act 1900* (NSW) s 443(1).
249. *Crimes Act 1900* (NSW) s 443(2).
250. *R v Mclvor* (1933) 50 WN (NSW) 57.
251. *R v Tillott* (1991) 53 A Crim R 46 at 54.
252. *Attorney General's Sentencing Review* at 11.
253. *Attorney General's Sentencing Review* at 11.
254. (1991) 53 A Crim R 46.
255. *Attorney General's Sentencing Review* at 12.
256. See paras 3.35-3.37.
257. See para 4.97.
258. *Community Protection Act 1994* (NSW) s 3.
259. In 1992 the Victorian government proposed making a similar act, the *Community Protection Act 1990* (Vic) (which also applied against a specified individual, Gary David) generally applicable but, owing to a highly critical report on the proposed law by the Social Development Committee of the Victorian Parliament, the bill did not proceed: see Victorian Parliament, Social Development Committee, *Inquiry into Mental Disturbance and Community Safety: Third Report: Response to the Draft Community Protection (Violent Offenders) Bill* (April 1992). The original Act lapsed in April 1994.
260. *Community Protection Act 1994* (NSW) s 8.
261. *Community Protection Act 1994* (NSW) s 15.
262. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 27 October 1994 at 4790.
263. *Veen v R (No 2)* (1988) 164 CLR 465 at 495.
264. *DPP v Kable* (1994) 75 A Crim R 428; *DPP v Gregory Wayne Kable* (NSW SC, No 13152/94, 30 December 1994, Hunter J, unreported); *Gregory Wayne Kable v DPP* (NSW SC, No 13152/94, 23 February 1995, Levine J, unreported); *Kable v DPP* (1995) 36 NSWLR 374.
265. The High Court heard argument in the matter in December 1995 following the granting of special leave to appeal: *Gregory Wayne Kable v The Director of Public Prosecutions of New South Wales* (High Court of Australia, 18 August 1995, Dawson, Toohey and McHugh JJ, unreported). Judgment is currently reserved in the matter.
266. *Gregory Wayne Kable v DPP* (1995) 36 NSWLR 374 at 395.
267. Compare the European Convention on Human Rights Article 5.1 of which expressly recognises the possibility of preventive detention in some form: "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law; ... (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent

legal authority on reasonable suspicion of having committed an offence *or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so*".

268. For example: Article 8.2 (against servitude); Article 9.3 (right to prompt trial); Article 14.2 (presumption of innocence with respect to criminal charges); Article 14.7 (against double jeopardy)

269. *Kable v DPP* (1995) 36 NSWLR 374 at 379.

270. See para 4.106. Strictly, the principle of proportionality is inapplicable since a sentence is not in issue.

271. See the points raised by Justice Mahoney in *Kable v DPP* (1995) 36 NSWLR 374 at 378-379.

272. New South Wales, Department of Corrective Services, *Submission* (4 September 1995) at 24.

273. *Attorney General's Sentencing Review* at 9-10.

274. See s 106, 107, 109, 111-114.

275. See Australian Law Reform Commission, *Sentencing: Prisons* (DP 31, 1987) at paras 133-138.

276. *Attorney-General's Sentencing Review* at 10; Department of Corrective Services, *Submission* at 24.

5. Factors Determining Individual Sentences

5.1 This chapter addresses the principal factors which courts take into account in determining the sentence of imprisonment which is to be imposed on an offender. The operation of these factors is considered both at common law and under sentencing legislation which has recently been enacted in several Australian jurisdictions. The operation of these factors is very much case-specific both at common law and under legislation. Their effect on sentence determination lies in the discretion of the sentencing officer. The Commission's tentative view is that this is both appropriate and inevitable to ensure the individualised justice for which sentencing law calls.¹

5.2 A central issue is whether a more rational and consistent approach to sentencing could be achieved by providing legislative guidance as to the factors which should be taken into account in sentence disposition. In most Australian jurisdictions, the legislature has now begun the process of identifying and tabulating relevant factors.² In South Australia, the Australian Capital Territory and under federal law, the lists are permissive in the sense that the courts are required to consider such matters in the list as are relevant and known to the court. But in Queensland, Victoria and the Northern Territory, the legislation requires courts to have regard to the matters in the list. In all cases, the lists are open-ended, non-exhaustive and allow other matters to be taken into account.³ In fact, listed factors represent only a small proportion of those that have been referred to by the courts. The factors are listed in no order of priority or importance and no attempt is made to state whether a particular factor is relevant as an aggravating or mitigating factor,⁴ although this is often obvious - as, for example, where the legislation mentions the "degree to which the person has shown contrition".⁵ Many of the factors are very general, such as the requirement to consider the "nature and gravity of the offence" and the reference to prior convictions. In a few cases the statutory guideline reverses the common law position. But for the most part the lists merely state factors which would be taken into account at common law.

5.3 The Commission's tentative view is that the factors relevant to sentencing disposition, the most important of which we discuss in this chapter, ought not to be listed in consolidated sentencing legislation.⁶ Our first, and overriding, reason is that such a listing could lead to a very literal approach which would destroy the flexibility essential to achieving justice in individual cases (as the common law now strives to do). This danger would be magnified if the legislation were seen as a code. Secondly, we are not convinced that the sentencing guidelines recently enacted in other Australian jurisdictions add anything to the common law. It is difficult to see how they promote a more rational or consistent approach to sentencing than does the common law. To the extent to which they do not change the common law, there seems no particular point to them. This is especially true to the extent to which they fail to resolve difficulties which exist at common law - as they tend to do in failing to specify whether certain matters are relevant to aggravation or mitigation,⁷ or failing to deal with difficult concepts.⁸

5.4 Where difficulties do exist, or are perceived to exist, in this area of the common law, the Commission is in no doubt that, generally speaking, they are better resolved by development of the common law, free from the constraints of statute. The attempt to reduce the common law to statutory form runs the risk of creating a lack of clarity and precision in the law. Take two examples:

- The legislation in the Australian Capital Territory now provides that a court shall not increase the severity of the sentence that it would otherwise impose because of the offender's behaviour in court.⁹ The effect is unclear. The provision clearly means that a sentence cannot be increased because the offender's behaviour in court showed a lack of remorse, a proposition which accords with the common law.¹⁰ But does it also mean that in considering whether to mitigate the sentence on grounds of remorse, the behaviour of the offender in court cannot be taken into account? This would reflect neither the common law nor common sense.¹¹
- It would be extremely difficult to reduce to statutory form the many variable factors which may need to be taken into account when considering the sentencing of a woman without reinforcing outmoded stereotypes of womanhood,¹² or the many factors which are relevant to sentence in cases of misappropriation of property involving a breach of trust.¹³

In short, the Commission agrees with the dissenting opinions expressed in the Australian Law Reform Commission that “[w]hat is needed here is the development of principle, not an exercise in statutory interpretation”.¹⁴

5.5 In this chapter we identify areas where we think that the common law may need reform. We have, however, deliberately refrained from making specific proposals for reform in this area of the law. We have chosen instead either to state the arguments for or against particular propositions or to indicate our provisional support for one view or another. In both cases, we seek community input into what the law ought to be. We also invite comments on whether reform in any particular area should be left to the common law or should be imposed by statute.

5.6 The purpose of this chapter is three-fold. First, to draw attention to the wide variety of matters which the court must take into account in sentencing offenders. This adds substance to the point, made in Chapter 2, that no two cases are identical, either by reason of the circumstances of the offence or by reason of factors pertaining to the offender. Arguments about sentence disparity must bear this in mind. Secondly, to isolate any particular factors which may be in need of reform with a view to eliciting submissions concerning them. Thirdly, to outline how the various factors are translated in practice into a sentence of imprisonment.¹⁵

5.7 The factors considered by the courts fall into five broad categories,¹⁶ namely, those:

- relevant to the nature of the offence;
- relevant to the nature of the offender;
- relevant to the offender’s response to the charges;
- relating to the effect of the offence and sanction; and
- relating to the relevance of the sentence imposed on a co-offender.

FACTORS RELEVANT TO THE NATURE AND GRAVITY OF THE OFFENCE

5.8 The nature and gravity of the offence is obviously a central consideration affecting sentencing discretion. With the proviso that the facts cannot be relied on by the sentencing court as constituting the ingredients of a more serious offence than the offence of which the offender has been convicted,¹⁷ the gravity of an offence in a particular case will depend on the facts relating to the offence including the objective circumstances and the offender’s state of mind. The gravity of a particular offence *type* is determined by the legislative view of gravity and, perhaps, by the prevalence of the offence.

Legislative view of gravity: steering by the maximum

5.9 Courts have long recognised that they are to have regard to the maximum penalty as an indication of the gravity of the offence. As Chief Justice Street indicated in *R v Oliver*:

The first initial consideration is the statutory maximum prescribed by the legislature for the offence in question. The legislature manifests its policy in the enactment of the maximum penalty which may be imposed ... this reflects a legislative view of the seriousness of the criminal conduct.¹⁸

Courts should pay due regard to legislative policy which fixes the statutory maxima to determine how seriously a particular crime should be regarded even where there are inconsistencies in the relativities of the various maxima.¹⁹

5.10 An elaboration of the requirement that courts have regard to the maximum penalty is the principle that the maximum penalty is reserved for the worst type of case falling within the relevant prohibition.²⁰ In *Veen v The Queen (No 2)*, Chief Justice Mason and Justices Brennan, Dawson and Toohey explained that this principle

does not mean that a lesser penalty must be imposed if it can be possible to envisage a worse case; ingenuity can always conjure up a case of greater heinousness. A sentence which imposes the maximum penalty offends this principle only if the case is recognisably outside the worst category.²¹

This is an important principle because its observance secures proportion and comparability among sentences.²² The principle applies even if the maximum is thought by the judge to be too high. As Justice Hunt said in *R v Hawkins*: "It is none of his or her business to say that the maximum provided is too high. That is a matter for the legislature, not for the individual judge."²³ There is some conflict about whether the principle applies when the maximum is thought to be too low,²⁴ but equally that should be none of the court's business.

5.11 Courts must also have regard to a number of other factors as indicators of the legislative view of gravity of offence:

- minimum penalties;²⁵
- increases in statutory maxima;²⁶
- other legislative change in relation to the offence;²⁷
- legislative reductions;²⁸ and
- international covenants ratified by Australia.²⁹

5.12 Clearly, in the light of these principles, it is important that the legislation is consistent in the penalty provisions it imposes, properly reflecting the seriousness of individual offences in prescribed statutory maxima. The manner in which this should be done will form the focus of the third phase of this inquiry by the Commission into sentencing law.³⁰

Prevalence of the offence

5.13 The principle that prevalence of an offence is a valid consideration when imposing sentence and one which justifies an increased penalty gained early recognition³¹ and has been repeated many times. It applies in relation to increased prevalence of a particular offence generally;³² of a particular offence committed by a particular group;³³ or of a particular offence in a particular locality.³⁴ The rationale for justifying an increased penalty on the basis of prevalence is usually based upon general deterrence. It follows that the argument for an increased penalty on the basis of prevalence is stronger in cases where the offence is regarded as being susceptible to general deterrence. In *R v Peterson*, Chief Justice Burt said:

[I]t must be accepted that the prevalence of a particular offence in a particular locality or generally at the time of the commission of the offence to be dealt with must play some part in the sentencing process, particularly in emphasising the importance of general deterrence.³⁵

5.14 Although there are doubts about the efficacy of increasing punishment to deter crime,³⁶ courts *do* increase penalties to account for the prevalence of crime. In *R v Dube*, Chief Justice King said:

The much discussed question of the effectiveness of imprisonment as a deterrent to crime, and in particular of the effectiveness of increased levels of punishment, was adverted to during argument. I think that it must be conceded that there is no proven correlation between the level of punishment and the incidence of crime and that there is no clear evidence that increased levels of punishment have an effect upon the prevalence of crime. Nevertheless the criminal justice system has always proceeded upon the assumption that punishment deters and that the proper response to increased prevalence of crime of a particular type is to increase the level of punishment for that crime. I think that courts have to make the assumption that punishments which they impose operate as a deterrent.³⁷

5.15 The need to increase punishment on prevalent offences to satisfy public expectations of denunciation is another basis upon which the principle in relation to prevalence is justified. If a particular offence is perceived by the public as becoming more prevalent, disquiet in the community may lead the courts to believe that the offence should be treated more seriously than it has in the past. In *R v Everett* Justice Zeeman said: "Armed robbery involving the use of a firearm is a crime of increasing prevalence which informed public opinion expects to be dealt with by sentences which mark strong denunciation of that kind of activity."³⁸

5.16 The courts limit the reliance they place on prevalence by ensuring that the sentence must not be greater than the nature and circumstances of the offence call for,³⁹ and by insisting that increased prevalence is properly ascertained.⁴⁰ However, courts have not always been rigorous in the way they ascertain prevalence, relying on unsupported generalised statements and personal knowledge.⁴¹ There is a strong argument that if prevalence is to be relied on, it should be properly established.⁴²

5.17 A sentencing judge is entitled to impose a sentence that exceeds the normal range on the ground of prevalence, but warnings of the need for an increased range are useful and the absence of a prior warning of an increase may be relevant in deciding whether a sentence is manifestly excessive.⁴³ But as the High Court indicated in *Poyner v The Queen*,⁴⁴ where the prevailing standard appears to the sentencing judge to be too lenient, there is no binding principle which requires courts to give a warning before a penalty in excess of the prevailing standard can be imposed. Some appeal courts have shown a reluctance to increase the range for a particular offence on the grounds of prevalence. Thus Justice Dowsett once said in the Queensland Court of Criminal Appeal that to offer an opinion as to the appropriate range, is to give an advisory opinion, something which appeal courts at common law have declined to do.⁴⁵ Other appeal courts have not always been so coy.⁴⁶

5.18 The Australian Law Reform Commission recommended that prevalence not be included in the list of factors relevant to sentence. This recommendation was grounded in the Commission's rejection of general deterrence as a justification for punishment.⁴⁷ It was also based on the difficulty of courts obtaining the necessary statistics to determine whether there had been an increase in the particular offence.⁴⁸ Legislation in the ACT now expressly provides that prevalence is not to be taken into account to increase a penalty.⁴⁹ By contrast, the Queensland and Northern Territory courts are required to take prevalence into account.⁵⁰ Prevalence is not mentioned in the list of factors in the Commonwealth statutory sentencing guidelines, nor is it mentioned in the Victorian or South Australian guidelines. In these jurisdictions, prevalence remains relevant by virtue of the common law.

Premeditation and execution

5.19 Case law establishes that:

- the fact that a crime is carefully and deliberately planned is an aggravating factor;⁵¹
- the degree of premeditation may be inferred from the amount of planning, which in turn may be inferred from a variety of factors, such as choice of target and attempts at disguise;⁵²
- provocation is a factor mitigating crimes of violence;⁵³
- the use of a weapon is an aggravating factor;⁵⁴
- if a violent offence is committed in company this is aggravating.⁵⁵

5.20 The Australian Law Reform Commission recommended that degree of intention, premeditation and planning and whether or not a weapon was used be included in sentencing guidelines.⁵⁶ Legislation in the Australian Capital Territory includes the reason or reasons why the person committed the offence as a relevant factor⁵⁷ and, following the Australian Law Reform Commission, makes relevant the degree to which the offence was the result of provocation, duress or entrapment.⁵⁸

5.21 The issue of provocation is difficult in two respects. First, while it is clear that in many cases a provoked act of violence is regarded as less culpable than a premeditated one, in the context of non-consensual sexual offences, provocation or encouragement is controversial. Despite some judicial support for the proposition that behaviour of the victim interpreted by the offender as an indication that she⁵⁹ may consent to intercourse is mitigating,⁶⁰ such an approach serves to preserve the myth that men cannot control their behaviour beyond some hypothetical point.⁶¹ The Commission's tentative view is that this is undesirable and that a distinction should be made between non-sexual assaults (where provocation should be relevant) and sexual assaults (where provocation ought not to be relevant). Secondly, it is sometimes difficult to draw a distinction between provocation which is mitigating and acts of revenge for a victim's prior unlawful acts. While courts have quite properly condemned offenders who take the law into their own hands, a concession is sometimes made to the fact that the victim is not entirely innocent or that the offender believed the victim had committed an offence.⁶²

5.22 The Commission endorses the approach which holds that the use of a weapon is an aggravating factor in sentencing. In our view, there is a need to discourage the use of weapons, and firearms in particular. The Commission does not, however, support the employment of mandatory increased penalties for use of firearms in the course of the commission of an offence.

Degree of participation

5.23 Courts have referred to the obvious fact that a sentence should reflect the degree of participation of an offender in an offence, so that an offender who is a principal, ringleader or instigator in a criminal venture may expect a more severe sentence than a follower or mere paid agent.⁶³ But in the case of drug trafficking while participation of a lower order must be reflected in the sentence imposed,⁶⁴ persons with a lesser role are not treated with the same degree of leniency as in other crimes.⁶⁵

5.24 Despite the recommendation of the Australian Law Reform Commission to include level of participation as a factor in sentencing guidelines,⁶⁶ no jurisdiction has been so explicit. Guidelines in Queensland, Victoria, the Northern Territory and the Australian Capital Territory cover the issue of degree of participation in more general terms by providing that courts are required to take into account "the extent to which the offender is to blame for the offence",⁶⁷ or "the offender's culpability and degree of responsibility for the offence".⁶⁸ These provisions are wide enough to cover issues in addition to degree of participation, such as issues of premeditation and the mental capacity of the offender.

Breach of trust

5.25 Where circumstances of the offence indicate a breach of confidence or trust by the offender an increased penalty is warranted.⁶⁹ Such a breach attracts an additional penalty on a number of grounds. First, breach of trust adds to the gravity of the crime and justice demands a heavier penalty. Secondly, if public officers or professionals in a position of trust commit offences, public confidence is seriously undermined and so denunciation of such conduct is required.⁷⁰ Thirdly, the difficulty of detection and proof of such offences requires a general deterrent penalty.⁷¹ Moreover, cases of "white collar crime", which often involve a degree of planning, are more appropriate vehicles for general deterrence than crimes of violence.⁷²

5.26 Cases involving breach of trust most commonly occur in relation to defalcation by professionals, agents or trusted employees. But they are not limited to misappropriations of money or property. Offences by public officials involving corruption involve a breach of trust.⁷³ Sexual offences may have an element of breach of trust.⁷⁴ Sometimes drug offences may have such an element.⁷⁵

5.27 Offences committed by police officers and solicitors may also involve a breach of trust. Offences committed by police officers are seriously regarded because of their special position in relation to all offences. In *R v Wright (No 2)*,⁷⁶ the Victorian Court of Criminal Appeal suggested that any offence committed by a police officer, whether committed on duty or not, is a breach of trust because of the oath taken by police officers "to preserve the peace and to put down offenders". This has particular significance in relation to offences concerned with the administration of justice.⁷⁷ Similarly, the position of a solicitor is also an aggravating factor for the offence of attempting to pervert the course of justice.⁷⁸ But, unlike the position of police officers, an offence

committed by a solicitor is not aggravated when it was not committed in the capacity of a solicitor, although it is of relevance in indicating his or her awareness of the criminality of the conduct involved.⁷⁹

5.28 By way of elaboration of the force of breach of trust as a factor affecting sentence in cases of misappropriation, the English Court of Appeal delivered a guideline judgment in *R v Barrick*.⁸⁰ The following were matters which were listed as those to which a court may wish to have regard in determining the proper level of sentence for such an offence:

- the amount of money or value of property obtained;
- the quality and degree of trust reposed in the offender including his or her rank;
- the period over which the fraud or thefts have been perpetrated;
- the use to which the money or property was put;
- the effect upon the victim;
- the impact of the offences on the public and public confidence;
- the effect on fellow employees or partners;
- the effect on the offender;
- matters of mitigation - such as illness, being placed under great strain or excessive responsibility, delay and co-operation with the authorities.⁸¹

Consequences and impact on the victim

5.29 In a number of jurisdictions it is expressly provided by statute that any injury, loss or damage resulting from the offence is a matter to be taken into account in passing sentence.⁸² The common law position is that the consequences of criminal acts may properly be taken into account in considering punishment,⁸³ provided that to do so would not involve sentencing the offender for a more serious offence.⁸⁴ It does not follow that because a criminal act does not cause injury it may not be punished severely.⁸⁵ The potential for serious injury is still an important factor,⁸⁶ but at the same time it is relevant that no physical harm or enduring psychological disturbance was caused.⁸⁷ As the Victorian Full Court said in *Webb*:

It is always open to a judge to have regard to the fact that no evil effect resulted from the crime to a victim. That is a common occurrence and a fact quite properly taken into account. But conversely, a learned judge is quite entitled, in our view, to have regard to any detrimental, prejudicial, or deleterious effect that may have been produced on the victim by the commission of the crime.⁸⁸

5.30 The cases have also made the point that the occupational status of the victim may be an aggravating factor. Where the victim is a police officer acting in the execution of his or her duty, the offence is viewed seriously by the courts pursuant to their duty to vindicate the authority of the police by imposing a substantial punishment.⁸⁹

5.31 But there are a number of matters in relation to consequences and victim impact which are controversial and which the Commission identifies as possibly being in need of clarification. These are:

- the responsibility of the offender for unforeseeable consequences;
- the relevance of youth or vulnerability as an aggravating factor;
- the sexual experience of the victim in the case of sexual offences; and

- the wishes of the victim in relation to sentence.

Unforeseeable consequences

5.32 Courts have generally refused to have regard to unforeseeable consequences. In *R v Boyd*⁹⁰ it was suggested that if the consequences are not such as could have been reasonably foreseen by the offender, they should not be used against him or her, but if they ought to have been foreseen they are relevant. In *Boyd* the consequences were criminal acts of a third person. But the decision has been relied upon to support the general proposition that a sentencer should only have regard to reasonably foreseeable consequences.⁹¹ This is contrary to the Tasmanian decision in *R v Wise* where Justice Crisp suggested that “consequences may be material to sentence, whatever be the consequences of strict morality”.⁹² The problem with this approach is that it ignores the fact that the imposition of criminal responsibility is determined by reference to the offender’s culpability, not by reference to the consequences of the offender’s conduct.⁹³ For this reason the Commission does not support a general rule that an offender should be liable at sentencing for consequences which are unforeseeable. The Commission does not, however, object to the admission of evidence of actual injury for the purposes of demonstrating the objective seriousness of the offence.⁹⁴ And we note that where the consequences of an offence are the direct effect of the offender’s acts, for example the impact on the victim of injuries inflicted on that victim by the defendant, it is unlikely that those effects will be excluded from consideration on the basis that they were not foreseen or necessarily foreseeable.⁹⁵

Youth and vulnerability

5.33 In a number of cases, courts have suggested that youth of the victim is an aggravating factor in sexual offences by calling for sentences in the upper range when the victim is very young.⁹⁶ Similarly, it has been suggested that if the victim suffers from some incapacity, such as old age, ill health, mental retardation or a physical handicap, a more severe sentence will also be called for.⁹⁷ Heavier sentences can be justified on the grounds that public perception demands a greater degree of denunciation in such cases, but it should not be assumed that the impact of the offence on a very young victim is necessarily greater. In *R v Rogers*⁹⁸ the Supreme Court of Western Australia referred to the lack of evidence as to whether harm is more likely in the case of younger victims of sexual assault. The Commission’s tentative view is that courts should not assume that any particular category of victim is likely to have suffered more or less harm than another category of victim. On the other hand, it is legitimate to take into account public feelings of outrage; for example, in the case of rape of a very young child or a very old woman.

The sexual experience of victims in the case of sexual offences

5.34 The relevance of the character or occupation of the victim is, in this instance, controversial. Some judicial comments suggest that the rape of a “woman of good repute”, an “ordinary decent housewife” necessarily deserves a more severe sentence than the rape of someone without such a reputation.⁹⁹ In two Victorian cases, *R v Harris*¹⁰⁰ and *R v Hakopian*,¹⁰¹ the fact that the complainant was a prostitute was treated as a mitigating factor on the basis that “the likely psychological effect on the victim of forced [sex] is much less of a factor in this case and lessens the gravity of the offences”.¹⁰² The decision in *Hakopian* attracted a storm of criticism,¹⁰³ the Victorian *Sentencing Manual*¹⁰⁴ preferring the approach of Justice Howse in *R v Henry*:

[P]rostitutes are entitled to the same protection from the law as are chaste women. It would be unthinkable that the courts would apply one law for prostitutes and another for chaste women. However in assessing the heinousness of crimes of this kind, it is quite proper to take into account the likely and actual effect of the crime on the victim, psychiatrically, psychologically and otherwise. In this connection the previous and then current sexual experience of the victim is significant.¹⁰⁵

This accords with the law in New South Wales, where courts have generally rejected the proposition that the crime is less serious because the victim is a sex worker,¹⁰⁶ and where Justice Kirby has said that *Hakopian* is wrong.¹⁰⁷

5.35 More generally, the relevance of the sexual experience of the victim has been challenged on the grounds that it diverts attention from the offence to a judgment of the victim, fostering assessments of them along a

continuum of good and bad and encouraging assumptions that the more sexually experienced are closer to the bad end of the continuum than are the less experienced. The Commission agrees with Zdenkowski that such assumptions confuse sex and sexual assault.¹⁰⁸ The frequency of consensual sexual activity is irrelevant to psychological capacity to deal with the violence inherent in non-consensual sex. Moreover the use of prior sexual history in this way undermines legislative attempts to exclude sexual history from sexual assault trials.¹⁰⁹ A possible solution is to refuse to allow prior sexual history or occupation to be a mitigating factor in sentencing.¹¹⁰ Rather, it is something that could be raised by the prosecution if it were thought to be a factor that aggravated the offence. This would allow for it to be used in cases where loss of virginity has some special status in respect of marriageability, as it has in some ethnic communities.¹¹¹ Perhaps it could even be used where the impact of a sexual assault on a sex worker has resulted in loss of employment.¹¹²

The wishes of the victim in relation to sentence

5.36 There are differing views about the relevance of the wishes of the victim. The general rule appears to be that the wishes of the victim are not taken into account in sentence determination.¹¹³ But in a case of attempted murder of his former de facto wife and the wounding of her friend, the Tasmanian Court of Criminal Appeal regarded the fact the complainants had forgiven the applicant and did not wish any punishment to be imposed was relevant. While not determinative, Chief Justice Green stated this was a factor which militated against giving much weight to considerations of retribution or denunciation in the sentence.¹¹⁴ A similar approach is taken in New Zealand.¹¹⁵

5.37 Taking the wishes of victims into account in imposing sentence can, perhaps, be supported as an extension of the principle which makes restitution to the victim a relevant factor.¹¹⁶ It can also be argued that, in the interests of balance, the views of the victim should be relevant. The Commission is, however, of the view that the wishes of the victim are irrelevant in the sentencing process.¹¹⁷ If weight is to be given to victim's wishes for leniency, undue pressure could be brought to bear on victims to express forgiveness, especially in domestic violence cases.¹¹⁸ It is difficult to see why considerations of denunciation and retribution should be muted in cases of violence. To have regard to victim's wishes in cases of violence suggests the matter is a private one with an outcome that can be negotiated with the victim, rather than a public wrong and a public evil deserving of condemnation.

FACTORS RELEVANT TO THE NATURE OF THE OFFENDER

Prior convictions

5.38 Section 9(2)(f) of the *Penalties and Sentences Act 1992* (Qld) requires a court to have regard to "the offender's character" in passing sentence and s 11(a) directs a court to consider the number, seriousness, date, relevance and nature of previous convictions of the offender in determining character. The Victorian and Northern Territory guidelines have similar provisions.¹¹⁹ Section 10(1) of the *Criminal Law (Sentencing) Act 1988* (SA) and s 16A(2)(m) of the *Crimes Act 1914* (Cth) merely make the character and antecedents of the defendant relevant to sentence without further elaboration, although paragraph (b) in each section makes the course of criminal conduct relevant if the current offence "forms a part of a course of conduct consisting of a series of criminal acts of the same or a similar character". These guidelines do not assist the courts in determining what weight is to be given to prior convictions. Section 7(2)(b) of the Western Australian *Sentencing Act 1995* adopts a different approach by including the offender's criminal record in the list of factors which are not aggravating.

5.39 It has long been the practice for courts to punish repeat offenders more severely than those who have not previously been convicted.¹²⁰ But the principle of proportionality places limits on the extent to which a punishment can be increased because of prior criminality. In *Veen No 2*¹²¹ the High Court made it clear that previous convictions cannot justify a sentence that is longer than is appropriate to the gravity of the current offence either to extend the period of protection of society from the risk of recidivism by the offender or to act as a deterrent. The judgment of the majority (Chief Justice Mason and Justices Brennan, Dawson and Toohey), rejected the applicant's submission that antecedent criminal history was relevant only to an offender's claim for leniency. Rather:

It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind.¹²²

5.40 The courts have made a number of other points about the relevance of prior convictions. These include the following:

- not all prior offences are of equal weight: more weight is given to offences of the same character, and convictions in the children's court are of little relevance;¹²³
- to be relevant a prior offence does not have to be an offence committed and dealt with before the commission of the instant offence;¹²⁴
- a gap in an offender's prior record may be mitigating;¹²⁵ and
- "stale offences" (that is, those remote in time from the instant offence) are generally regarded as irrelevant.¹²⁶

Good character

5.41 It is a "cardinal rule", at common law, that an otherwise good character may operate to reduce the sentence which the facts of the crime would otherwise attract.¹²⁷ Moreover the courts have suggested the following qualifications to the rule that good character is mitigating:

- little weight is given to prior good character when the offence is not an isolated act;¹²⁸
- persons holding high public office who commit a crime relating to that office cannot expect much weight to be given to prior good character;¹²⁹
- prior good character is of less significance in sentencing drug traffickers;¹³⁰ and
- less weight is given to good character when the need for general deterrence is strong.¹³¹

5.42 The Commonwealth and South Australian statutory sentencing guidelines refer merely to the relevance of "character" and "antecedents".¹³² The Victorian and Queensland legislation elaborate on the relevance of character by providing that in determining the character of an offender a court may consider as well as criminal record, "any significant contributions made by the offender to the community" and in Victoria, "the general reputation of the offender".¹³³

Age

5.43 Sentencing guidelines of the Commonwealth and of Queensland, South Australia, the Northern Territory and the Australian Capital Territory merely specify "age" as a relevant consideration without further elaboration.¹³⁴ The common law is more explicit: reform is the dominant consideration in sentencing young offenders and imprisonment is to be avoided wherever a reasonable alternative is open. The dominance of rehabilitation as the goal of punishment in the case of young offenders has survived the general decline in popularity of rehabilitation as a sentencing goal.¹³⁵ A young offender in this context is generally accepted as a person under the age of 21. The rationale for the principle is that the public interest is better served by seeking to avoid the damaging impact of imprisonment on a young offender thereby maximising the chances of rehabilitation. While this principle has often been repeated and applied¹³⁶ (especially where the young offender is being sentenced for a first offence),¹³⁷ exceptions to the principle are recognised in the case of:

- "a crime of considerable gravity";¹³⁸

- “a persistent offender who has shown himself not amenable to disciplinary methods short of gaol”.¹³⁹

5.44 In the case of old offenders, courts have regarded the diminishing life expectancy of the offender as relevant to sentence and have had regard to the need to preserve some measure of life after release.¹⁴⁰ But such considerations cannot be allowed to be a justification for an “unacceptably inappropriate sentence”.¹⁴¹

5.45 These principles, particularly in relation to young offenders, are well known and relatively uncontroversial. However, it is arguable that the need to avoid the damaging effects of imprisonment on young offenders requires some practical reinforcement. To an extent, this will come from adoption of the Commission’s proposal that the use of terms of imprisonment of less than six months must be expressly justified.¹⁴² Section 9(4) of the *Penalties and Sentences Act 1992* (Qld) provides a further possible model. It states that offenders under the age of 25 who have not previously been convicted cannot be sentenced to imprisonment unless all other sentences have first been considered and the court has considered the desirability of not imprisoning a first offender.

Sex

5.46 Judicial pronouncements as to the relevance of sex to sentencing are conflicting. Some courts assert that, as a general principle, the law does not treat males and females differently in the sentencing process. The Court of Criminal Appeal said in *R v Kelson*:

It has been urged upon us that [the sentence] was out of proportion to other sentences imposed upon women who are convicted or plead guilty to manslaughter. There has been no authority to which we have been referred which discloses that the court, or any court, has based its imposition of sentence upon a woman that she should receive a lesser sentence than a man. There is no basis in our view for adopting that approach to sentencing.¹⁴³

By contrast, a Queensland case suggests that the fact the offender is female is something which could fairly be taken into account in arriving at a proper sentence.¹⁴⁴ And a number of unreported decisions of the Victorian Court of Criminal Appeal suggest there is a policy to treat female offenders more leniently.¹⁴⁵

5.47 Whether or not the fact of being female alone should justify a lesser sentence, there are some circumstances in which being female is clearly relevant to sentence. Considerations of pregnancy and the needs of very young children are obvious examples. In such cases a woman may have more success in arguing that the impact on dependants should be taken into account in sentence,¹⁴⁶ or at least that the circumstances are so exceptional as to attract the exception to the general common law principle that hardship to others is not a relevant sentencing consideration.¹⁴⁷ As well, the cultural background of the offender may assume particular importance if the offender is female. In *R v Bibi*,¹⁴⁸ an English case, allowance was made for the fact that the female offender implicated in offences committed by males was a Muslim with a traditional role subservient to men.

5.48 While it is sometimes claimed that women are, in practice, treated more leniently than men at the sentencing stage of the criminal process,¹⁴⁹ such assertions are largely unsubstantiated.¹⁵⁰ Empirical evidence from research in the US and the UK has produced conflicting results. If female offenders are treated more leniently for some offences, it is unlikely to be true for all offences or for unconventional women who are perceived to have offended moral standards or to have repudiated their femininity.¹⁵¹

5.49 Whether a more lenient approach to the sentencing of female offenders is justified is a matter of debate. On the basis that prevalence is relevant to sentence, including prevalence by a particular group of offenders,¹⁵² the undoubted low incidence of female criminality justifies less weight being given to general deterrence and consequently less severe sentences. But, while a decision of the Victorian Court of Criminal Appeal suggests that lower recidivism rates justify leniency,¹⁵³ this is only relevant if there were evidence that sex is independently related to recidivism rates. Another ground on which leniency could be justified is suggested in *R v Neal*, where Justice Brennan said:

The same principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts, including those facts which exist only by reason of the offender's membership of an ethnic or other group.¹⁵⁴

Accordingly, a more lenient approach to Aborigines who have experienced social disadvantage, discrimination, and other difficulties and stresses, has been justified.¹⁵⁵ Similarly, courts could recognise that the actions of women offenders are often rooted in life experiences, disadvantage and problems very different from those faced by men. This should be done in a way which does not reinforce outmoded stereotypes of femininity and womanhood or discriminate against women who have renounced traditional lifestyles.¹⁵⁶

Race

5.50 In practice courts have adopted a more lenient approach when sentencing Aboriginal offenders particularly those living on reserves and in remote areas.¹⁵⁷ The practice is justified not by reference to race alone, but to the social economic and other disadvantages suffered by Aboriginal offenders. In *R v Neal*¹⁵⁸ the High Court considered a case where a sentence of two months imposed on an Aboriginal offender for assault by spitting at the white manager of the local store on the reserve had been increased on an appeal against the severity of sentence. The relevance of living conditions on Aboriginal reserves was considered by both Justices Murphy and Brennan. Justice Murphy stated that race conditions and race relations present a special mitigating factor in Australia and the fact that the applicant was in a position of inferiority in relation to the whites managing the reserve should have been treated as a special mitigating factor in imposing sentence.¹⁵⁹ For Justice Brennan the fact that the incident was accounted for by the problems of life on the reserve was a relevant mitigating factor.¹⁶⁰ His Honour said:

The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the administration of justice.¹⁶¹

Similar views have been expressed, and developed, in a number of other courts.¹⁶²

5.51 In making allowance for "those facts which exist by reason of an offender's membership of an ethnic or other group", courts have made a number of concessions in relation to Aboriginal offenders:¹⁶³

- alcohol may be treated as a larger mitigating factor than in the case of non-Aboriginal offenders;¹⁶⁴
- the likely impact of a custodial sentence should be taken into account where it is likely to have greater impact on an Aboriginal offender;¹⁶⁵
- cultural beliefs may be a mitigating factor;¹⁶⁶
- tribal punishment or traditional pay back is a matter properly to be taken into account;¹⁶⁷
- the wishes of the tribal community of an offender regarding sentence are relevant;¹⁶⁸ and
- forthcoming tribal ceremonies may be a relevant factor.¹⁶⁹

5.52 Notwithstanding recommendations from the Australian Law Reform Commission for legislative endorsement of the principles relating to the relevance to sentence of Aboriginality,¹⁷⁰ general sentencing guidelines do not include reference to the cultural background of the offender. The only exceptions are s 429A(1)(k) of the *Crimes Act 1900* (ACT) and some juvenile justice legislation.¹⁷¹ The Australian Law Reform Commission recommended as follows:

A general legislative endorsement of the practice of taking Aboriginal customary laws into account is appropriate. It should be provided in legislation that, where a person who is or was at the relevant time a member of an Aboriginal community is convicted of an offence, the matters that the court shall have regard to in determining the sentence to be imposed on the person in respect of the offence include, so far as they are relevant, the customary laws of that Aboriginal community, and the customary laws of any other Aboriginal community of which some other person involved in the offence (including a victim of the offence) was a member at the relevant time.¹⁷²

5.53 The extent to which there ought to be a general legislative endorsement in New South Wales of the practice of taking Aboriginal customary laws into consideration, as well as all other issues relating to the sentencing of Aboriginal offenders, are matters which the Commission will be addressing in the second phase of this reference.¹⁷³

Illness and physical disability

5.54 The principle is well accepted that ill health or physical disability is mitigating where it renders punishment more burdensome or where there is a risk of imprisonment having a grave effect on health.¹⁷⁴ It received the endorsement of the High Court in *R v Bailey*.¹⁷⁵ At the same time it is also well accepted that ill health or disability will not allow an offender to escape punishment for a serious crime.¹⁷⁶ It has also been held that physical disability such as blindness and deafness can so affect an offender's perceptions of the world and beliefs as to right and wrong that moral culpability is greatly reduced.¹⁷⁷

Mental disorder

5.55 Apart from referring generally to culpability, statutory sentencing guidelines merely make mental condition a relevant factor together with character and age.¹⁷⁸ The courts have endeavoured to elaborate on the relevance of mental disorder and to confront the issue of the fact that mental disorder may suggest a reduced sentence because of reduced responsibility, but an increased sentence because of the need to protect the public. A reduced sentence can be justified on grounds of reduced culpability and less weight to retribution.¹⁷⁹ A mental disorder, because of the chance of rehabilitation by psychiatric treatment, may provide grounds for a non-custodial sentence.¹⁸⁰ General deterrence is a factor which should often be given little weight in the case of an offender suffering from a mental abnormality because such an offender is not an appropriate medium for making an example to others.¹⁸¹ But where there is evidence that the offender has a propensity for further offences due to a mental disorder, it is not appropriate to reduce the sentence because of the offender's mental state without regard to the fact that such a mental state rendered the offender a risk to society.

5.56 The leading decisions on preventive detention of mentally disordered offenders are the High Court decisions in *Veen (No 1)*¹⁸² and *Veen (No 2)*.¹⁸³ In the first decision the High Court quashed a life sentence imposed on an Aboriginal homosexual prostitute, who on a charge of murder had been found guilty of manslaughter on the basis of diminished responsibility, and possibly provocation. In the circumstances the sentence was too severe. According to Justices Jacobs, Stephen and Murphy, the trial judge's justification of the life sentence on the basis of the likelihood of reoffending infringed the principle that a person must be given the sentence appropriate to the crime and no more. Justice Murphy warned: "Take care that the punishment does not exceed the guilt".¹⁸⁴ While all the justices, except Justice Murphy, would allow the extension of a sentence on a mentally disordered offender to protect society, it was made clear that the sentence must remain proportionate to the crime. *Veen (No 1)* was applied by the Court of Criminal Appeal in *R v Leaver*,¹⁸⁵ an appeal from a life sentence imposed for inflicting grievous bodily harm with intent, where the offender, a borderline defective with serious personality difficulties and a record of offences of violence, caused brain damage to an eleven year old boy by striking him on the head a number of times with a claw hammer. A life sentence was upheld on the basis that viewed objectively, and without resort to the circumstance that the appellant was a danger to society, the offence warranted a life sentence. The appellant's background, mental condition and antecedents afforded no grounds for declining to impose that sentence.

5.57 In *Veen (No 2)*, the High Court again had occasion to consider the issues of the relevance of mental disorder and dangerousness to sentence. Ten months after his release on licence under the sentence of 12 years imposed by the High Court, Veen again stabbed and killed another homosexual. A plea of guilty to

manslaughter was accepted on the basis of diminished responsibility. A life sentence was upheld by a majority of the High Court (Chief Justice Mason, Justices Brennan, Dawson and Toohey) on the grounds that the case was in the worst category, Veen's mental abnormality made him a grave danger to society and a life sentence was appropriate in all the circumstances. Justices Wilson, Deane and Gaudron dissented, considering that, in the light of the errors of principle by both the trial judge and the Court of Criminal Appeal, the matter should be remitted to the Court of Criminal Appeal for reconsideration. The case clearly affirms the principle decided in *Veen (No 1)* that, while the need to protect the community from a dangerous offender is a matter relevant to sentence, the sentence should not be increased beyond that which is proportionate to the gravity of the offence in order to protect society. As Chief Justice Mason, Justices Brennan, Dawson and Toohey said in *Veen (No 2)*:

The principle of proportionality is now firmly established in this country. It was the unanimous view of the court in *Veen (No 1)* that a sentence should not be increased beyond that which is proportionate to the crime in order to merely extend the period of protection of society from the risk of recidivism on the part of the offender ...¹⁸⁶

5.58 There are, however, differences between the majority and the minority in the interpretation of *Veen (No 1)* and in how a proportionate sentence is to be calculated. The majority interpreted the leading majority judgment of Justice Jacobs as determining a proportionate sentence by reference to all the facts of the case, including the mental condition of the offender.¹⁸⁷ But Justice Wilson (with whom Justices Deane and Gaudron agreed) stated that the decision stands as authority for the proposition that a sentence should not be increased beyond the longest sentence that the "objective" features of the offence warrant.¹⁸⁸ It is clear that their Honours intended "objective features" to exclude matters personal to the offender, including mental disorder and future dangerousness. On this view, matters personal to the offender are relevant only to the question of whether the case admits of any leniency being shown to the offender.¹⁸⁹ The mental condition of an offender may justify a degree of leniency, but if the offender is potentially a danger to society, protection of the community may deny any resort to leniency.¹⁹⁰ The majority, on the other hand, state "protection of society is a factor in determining a proportionate sentence",¹⁹¹ but also that "consideration of danger to society cannot lead to the imposition of a more severe penalty than would have been imposed if the offender had not been suffering from a mental disorder".¹⁹² The majority view, of course, represents the law.¹⁹³ However, there are, undoubtedly, misconceptions as to what the law is.¹⁹⁴

5.59 The mental condition of the offender is a difficult matter, perhaps one on which judges may fairly expect some guidance from Parliament. The Commission's tentative view is that any reform of this area of the law should make it clear that the mental disorder of an offender justifies less weight being given to considerations of general deterrence and retribution. It may also need to state that where there is evidence that the offender is likely to be a danger to the public, a sentence cannot be imposed which is disproportionate to the gravity of the offence assessed according to the objective facts of the offence. A further point which could usefully be considered is suggested by s 429A(r) of the *Crimes Act 1900* (ACT), which requires a court to have regard to whether a person is voluntarily seeking treatment for any physical or mental condition which may have contributed to the commission of the offence. There is common law support for the relevance of such a matter.¹⁹⁵

Intellectual disability

5.60 As with mental disorder, the intellectual disability of an offender is mitigating where it reduces culpability.¹⁹⁶ Again, general and personal deterrence are of less relevance in sentencing persons with an intellectual disability.¹⁹⁷ Courts have treated intellectually disabled offenders in the same way as mentally disordered offenders in relation to the issue of protection of the public, recognising that the relevance of protection of the public is subject to the principle asserted in *Veen (No 1)*.¹⁹⁸ In *R v Roadley*¹⁹⁹ a sentence of 6 years imprisonment for sexual penetration of a six year old boy, imposed on a 40 year old paedophile with a mental age of five or six so he could be detained in a psychiatric unit for intellectually disabled offenders, was set aside on the ground that neither the lack of appropriate social security services nor the need to protect the public, justified imprisonment, which in the light of the offence and the offender's intellectual disability, was inappropriate and disproportionate.

Substance abuse

5.61 With a number of exceptions (including the case of Aboriginal offenders),²⁰⁰ courts have generally refused to regard a state of intoxication at the time of the commission of an offence as extenuating. For example, in *R v De Jesus*,²⁰¹ it was argued that sentences for rape, unlawful detention and indecent assault were manifestly excessive having regard to the high state of intoxication of the applicant at the time of the commission of the offences. Rejecting this submission, Justice Smith (with whom Justice Rowland agreed), said:

Such a ground cannot sustain a great deal of argument. It may be that these offences came to be committed because the applicant had far too much to drink on each occasion but it has been repeatedly stated in this Court that drunkenness will not be taken into account as a mitigating factor. The day has long past when somebody can come along and say, 'I have committed these offences but I was full of drink'.²⁰²

5.62 In fact in the case of crimes of violence, the effects of alcohol or drugs may aggravate the seriousness of the offence. Justice Zelling of the Supreme Court of South Australia acknowledged this in *R v Sewell*,²⁰³ where he pointed out that an assault by a person under the influence is more frightening to the average person than an assault by a sober person. Similarly, Justice Wright of the Supreme Court of Tasmania was unimpressed by the claim that intoxication was a mitigating factor in cases involving a lethal weapon:

Indeed, it cannot be left out of account that a drunken man, wielding a lethal weapon such as a shot gun, greatly enhances the potential for disaster, particularly if the victim of the assault sees his only hope of salvation in attempting to wrest the weapon from his assailant.²⁰⁴

5.63 Even when substance abuse amounts to an addiction, it is not a mitigating factor, at least in relation to serious crime. So the fact that an offence was committed to obtain money to support a drug habit is "of little consequence in mitigating the sentence to be imposed".²⁰⁵ In *R v Speiro*, a case of armed robbery, Chief Justice King said:

One feels sympathy for a person who has become entangled in drug addiction, but the courts cannot treat addiction as an excuse, or even a mitigating factor, in relation to serious crime. Those who are addicted to drugs must understand that if they allow their addiction to lead them into serious crime, they must expect to receive the same severe punishment as would be received by others.²⁰⁶

5.64 In some situations the courts have shown more sympathy:

- where there is something which either wholly or partly explains the taking of alcohol or drugs - for example, addiction arising from a painful disease or medical treatment;²⁰⁷
- where the offender has been cured of the addiction or the promise of rehabilitation is great;²⁰⁸
- in the case of Aboriginal offenders;²⁰⁹
- where the offence is out of character;²¹⁰ and
- where, occasionally, intoxication has been allowed to add marginal weight to other factors which mitigate against moral culpability.²¹¹

5.65 Section 429A(n) of the *Crimes Act 1900* (ACT) provides that in determining sentence a court is to have regard to whether the person was affected by a drug or alcohol and the circumstances in which the person became affected. There is no indication whether this is to be a mitigating or an aggravating factor. On the other hand, the Northern Territory *Criminal Code* makes intoxication an aggravating factor by s 154(4), which provides that when a person is convicted of the crime of dangerous act or omission, and at the time of the act or omission he or she is under the influence of alcohol, a further maximum penalty of 4 years applies. As the High Court has pointed out, this provision reflects concern by the legislature over the effect of intoxication on the level of crime,

such that the Northern Territory courts are required to have regard to the higher maximum penalty in cases to which it applies.²¹²

RESPONSE TO THE CHARGES

Contrition

5.66 Courts have long recognised that contrition, repentance and remorse are relevant to sentence leading in a proper case to some reduction of the sentence that would otherwise be imposed.²¹³ Genuine remorse may be evidenced in a number of ways:

- by a plea of guilty;
- by co-operation with the police;
- by making reparation;
- by apologising; and
- by self inflicted injuries or attempted suicide.

While the first three of these matters are mitigating factors in their own right, they may also provide evidence of remorse.

Plea of guilty

5.67 The issue of sentencing discount for guilty pleas has been a contentious one.²¹⁴ There are at least five matters that have to be addressed. First, should a discount be allowed for a bare plea of guilty? Secondly, should there be a discretion to refuse a discount? Thirdly, what factors affect the weight to be attached to the discount in the circumstances? Fourthly, should the sentencing judge be required to state that a reduction has been made? And, fifthly, should the sentencing judge specify the amount of the discount?

Should a bare plea of guilty be mitigating?

5.68 The courts have justified allowing sentence reductions for guilty pleas on the following grounds:

- The plea demonstrates genuine remorse.²¹⁵
- The plea relieves the victim of the burden of giving evidence,²¹⁶ a factor of particular importance where evidence of a young child would have been required.²¹⁷
- The plea obviates a lying story which would have allowed the offender to escape punishment and which, in the circumstances, provides hope for rehabilitation.²¹⁸
- The plea saves time and expense and relieves delays and congestion in the courts.

5.69 The last of the justifications in paragraph 5.68 is controversial. Section 439(1) of the *Crimes Act 1900* (NSW) provides that:²¹⁹

In passing sentence for an offence on a person who pleaded guilty to the offence, a Court must take into account:

(a) the fact that the person pleaded guilty; and

(b) when the person pleaded guilty or indicated an intention to plead guilty,

and may accordingly reduce the sentence that would have otherwise have been passed.

Where a sentence is not reduced because of a guilty plea, the court is required by s 439(2) to indicate this and to state the reasons for failure to do so. This provision, effective from 1 February 1992, did no more than declare the existing common law of New South Wales.²²⁰ In *R v Holder*,²²¹ Chief Justice Street had suggested that the relevance of plea of guilty is subsumed under the general category of contrition to prevent the appearance of the criminal law dealing more harshly with a person who pleads not guilty. But later, in *R v Ellis*, his Honour said (in a judgment in which Justices Hunt and Allen concurred):

This court has said on a number of occasions that a plea of guilty will entitle a convicted person to an element of leniency in the sentence. The degree of leniency may vary according to the degree of inevitability of conviction as it may appear to the sentencing judge, but it is always a factor to which a greater or lesser degree of weight must be given.²²²

5.70 Later decisions in *R v Bond*²²³ and *R v Winchester*²²⁴ confirm that the relevance of a plea of guilty is not subsumed under the category of contrition, but that it may be taken into account as a factor in its own right on the grounds of saving the time and cost involved in a trial. In *Bond*, Justice Kirby, having referred to the congestion of the criminal lists in New South Wales, said:

In such circumstances, I believe there is a strong argument of policy for reflecting in the sentencing policy laid down by this Court, an appropriate measure of allowance for the fact that an accused person has pleaded guilty. Such pleas save enormous public expense. They reduce the congestion of the lists. They permit the courts to attend more speedily and efficiently to those cases which are contested. They allow police, prosecutors and many others to devote their time and energies to other cases where there may be proper and meritorious defences. Under our accusatorial system of criminal justice, it is the accused's right to put the prosecution to proof.²²⁵

Later his Honour asserted:

It upholds a fundamental purpose of the criminal justice system which is not simply to punish the guilty but also to vindicate the society which the system protects and to bring criminal proceedings to a speedy and public end.²²⁶

5.71 The advantages and disadvantages of allowing a discount for a bare plea of guilty have been debated at length.²²⁷ Some of the objections to allowing courts to reduce sentence on the grounds of saving the expense of a trial and reducing congestion of cases and delays are:²²⁸

- it penalises those who plead not guilty;
- it promotes pleas of guilty in cases where the prosecution should justly be put to proof, thus creating the risk that innocent persons will be pressured to plead guilty;
- it smacks of judicial participation in charge bargaining;
- it undermines the principle that a plea must be made voluntarily;
- it is wrong to allow a benefit for merely facing the inevitable or doing what the offender ought to do anyway;
- it is wrong to take into account matters which do not relate to the offence or the offender or the traditional theories of punishment, but relate solely to the administration of the criminal justice system;²²⁹
- increasing guilty pleas will militate against public scrutiny of the police and law enforcers; and
- ultimately, it will create the risk that innocent people will plead guilty.

The advantages are:

- further encouragement to avoid or minimise the ordeal of victims;
- saving the public expense of a trial, including cost saving for legal aid; and
- relieving delays and backlogs.

5.72 While the objections to allowing a discount for a guilty plea are compelling in terms of principle and logic, the pragmatic grounds for allowing the discount are also compelling. Moreover, the following comments of Justice Wright of the Supreme Court of Tasmania provide some response to the principled objections to a discount:

To my mind, it is distasteful and contrary to generally held notions of fairness and balance to contend that genuine contrition and remorse can and should be taken into account in mitigation, but at the same time to claim that the bare fact of a guilty plea is of neutral effect. A prisoner rarely speaks for himself and usually engages counsel to do so. Are we to give weight to the persuasive oratory of counsel expressing regret on behalf of his client, but to ignore the indisputable fact that by pleading guilty the prisoner has entirely relinquished all prospect of acquittal?²³⁰

Should there be a discretion to refuse a discount?

5.73 Section 439(2) of the *Crimes Act 1900* makes plain that there is a discretion to refuse to grant a discount in appropriate cases. Some cases have suggested that where the plea of guilty is a means of inducing the prosecution not to proceed with a more serious charge and/or where the likelihood of conviction is remote, refusal of a discount is justified.²³¹ Other cases have suggested that such matters are merely relevant to weight, and a guilty plea should nevertheless entitle an offender to some discount on grounds of saving of time and expense.²³² The latter represents the approach of the New South Wales courts.²³³

5.74 The Western Australian *Sentencing Act 1995* states explicitly that a plea of guilty is a mitigating factor.²³⁴ So stated there does not appear to be discretion to refuse a sentencing discount in such cases. Given that the justification for allowing a discount is that of saving time and expense of a trial, it is arguable that some recognition for a plea should always be given irrespective of the strength of the case or the fact that the offender was originally charged with a more serious offence. On the other hand, it could be said that such an approach unduly fetters the judge's discretion.

What factors affect the weight of the discount?

5.75 The legislation makes the stage of the proceedings at which the offender pleads guilty or indicates to the authorities an intention to do so a relevant factor in considering the reduction of sentence that should be made.²³⁵ These provisions are declaratory of the common law. But there are other matters that are relevant to weight. As already indicated the strength of the prosecution case may be relevant.²³⁶ In *R v Pereira*,²³⁷ where the respondent was convicted for importing cocaine after being caught red-handed at Sydney airport, there was a massive amount of evidence against him that would have made conviction virtually inevitable. Justice Carruthers (with whom Justices Clarke and Loveday agreed) said: "Allowing for the fact that time and resources of the State have been saved, nevertheless, the pleas of guilty in this case do not attract the full discount."²³⁸ The appeal was allowed on the basis that the sentencing judge had placed too much weight on the pleas of guilty and contrition.

5.76 A different view has been taken by Justice Byrne (with whom Justices McPherson and Moynihan agreed) in the Queensland Court of Criminal Appeal. His Honour said:

I remain to be convinced that this reluctance to make any allowance for guilty pleas in apparently indefensible cases is justified. If ... administrative expediency resulting from a guilty plea is a sufficient basis for moderation in sentencing, it ought not to be decisive against a lesser sentence that conviction seems certain in the event of a trial. Unless there is an incentive for an offender to admit guilt, there is always the prospect the trial will proceed to verdict, if only because the accused perceives that there is nothing to be lost by risking the contest. It was in recognition of the benefits to the administration of criminal justice deriving from a timely plea that in *Davis*²³⁹ the

court reduced sentences in a case said to be unarguable. The offenders, it was thought, were obdurate persons likely to have insisted on a trial unless influenced by the real prospect of a lower sentence on a guilty plea. Another intended benefit of a submission to conviction, one frequently mentioned in sexual cases, is sparing the witnesses the ordeal of a trial. That advantage is no less valuable in seemingly irresistible cases.²⁴⁰

5.77 Justice Byrne also referred to two difficulties in principle with the contention that the effect of a guilty plea should depend on the judge's perception of the strength of the prosecution's case. The first was that the time needed to investigate the weight of the prosecution's case would absorb some of the time saved by avoiding a trial. Secondly, increasing credit for doubtful cases increases the potential to subvert the voluntariness of pleas and increases the risk that persons will plead guilty when they may have been acquitted at trial.

5.78 Justice Hunt has suggested that the strength of the prosecution case is more relevant to the weight to be given to pleas of guilty as an indication of remorse:

The degree of leniency to be afforded will depend on many different factors. The plea may in some cases be an indication of contrition, or some other quality or attribute, which is regarded as relevant for sentencing purposes independently of the mere fact that the prisoner has pleaded guilty. The extent to which leniency will be afforded on this ground will depend to a large degree upon whether or not the plea resulted from a recognition of the inevitable ...²⁴¹

5.79 It is also possible to accept that the weight of the case may be relevant to the amount of the discount in cases where the plea is seen as suggesting a glimmer of hope for future rehabilitation. For if the case is such that a lying story would give the offender some prospect of escaping conviction, then refraining from attempting to lie their way out of the charges may be a positive point in the accused's favour.²⁴²

5.80 The Commission's tentative view is that the argument, that weight should be given to guilty pleas for relieving the victim of the stress of giving evidence in irresistible cases as well as doubtful ones, is persuasive. Clearly avoidance of witness trauma should itself be a factor relevant to the amount of the discount. And rather than strength of the prosecution case, consideration should be focused on the nature and length of the trial avoided as a relevant matter. Strength of the case could then be considered if appropriate in relation to the issue of remorse as suggested in *Winchester and Bond*.

Should a judge be required to state that a discount has been made?

5.81 In some jurisdictions courts are required by statute to state expressly that a reduction has been made for a guilty plea.²⁴³ In New South Wales, the only requirement is that a judge who does not reduce a sentence for a plea of guilty must give reasons why the reduction was not made.²⁴⁴ If there is no statement that a reduction has not been made, then it follows that there has been a reduction. The Commission tentatively prefers a rule which requires the courts to state that a reduction has been made for a guilty plea. Prudence suggests that some reference be made to the fact that a discount has been made in the sentencer's reasons. A failure to do so may indicate this factor has been overlooked.²⁴⁵ Moreover, advertising the discount may encourage others to co-operate.

Should the amount of the discount be specified?

5.82 Australian courts have not generally been prepared to specify a standard or even a range of discounts for a guilty plea. They have answered the question of the amount of discount in general terms rather than precise formulae, using words such as "moderate encouragement to plead"²⁴⁶ or even a "substantial reduction in the objective sentence".²⁴⁷ The response of Chief Justice Asche to a question by the Solicitor-General, in *Jabaltjari*, as to what (if any) discount should be given to a sentence for a plea of guilty, is typical:

[B]ecause the circumstances vary widely it would be wrong and unduly restrictive of a sentencing judge's discretion to fix on any specific percentage reduction even an average; nor has any other State or Federal Court attempted such an exercise.²⁴⁸

5.83 Other arguments against the desirability of quantifying the discount are:²⁴⁹

it will generally be impossible or misleading to do so unless a similar quantification is placed on all other elements;

it gives rise to the “two tier approach” and is contrary the “instinctive synthesis” methodology;²⁵⁰ and

it raises the expectation that a guilty plea will result in a uniform discount, whereas the discount will vary considerably between different cases.

5.84 In favour of a quantified discount it has been argued that:²⁵¹

it affords the offender an opportunity of discerning and challenging the basis of the penalty imposed;

it operates as an incentive for guilty pleas by giving a clear idea of the sort of discount that can be given for a guilty plea; and

to disallow such an approach is an impermissible fetter on a judge’s sentencing discretion.

5.85 The debate between the two views to some extent reflects the opposing views to the two-tiered approach to sentencing on the one hand and the instinctive or intuitive approach on the other.²⁵² But Justice Slicer has recently suggested, in the Tasmanian Court of Criminal Appeal, that one can adopt the intuitive approach in relation to facts relating to the offender and the offence, while using the second stage for matters such as guilty plea, co-operation with the police and informing. His Honour said:

[I]n my opinion ... it is not unreasonable to adopt a two stage process. The determination of the initial sentence could be made by reference to the intrinsic characteristics of the case in accordance with the methodology of “intuitive synthesis”. The second stage would be by reference to the external factors of social utility and public policy. It would not pay regard to subjective characteristics. Its value determined by questions of public policy could be expressed in quantitative terms.²⁵³

Restitution

5.86 Common law sentencing principles recognise that restitution is a mitigating factor in passing sentence. In determining the relevant sentence for an offence, courts take into account the fact that restitution has been made by returning goods or money stolen.²⁵⁴ Failure to take into account restitution made can amount to appellable error.²⁵⁵

5.87 There is, however, some difference of opinion as to the restrictions on the use of restitution as a mitigating factor. Concern that discounts for restitution may amount to a system of offenders buying their way out of crime has led some judges to suggest that restitution should only be relevant where it is coupled with evidence of remorse, a commitment to reform or sacrifice. In *R v O’Keefe*, Justice Stanley (with whom Justices Wanstall and Stable agreed), said:

It would be of the worst example if any sentence induced or tended to induce a belief that offenders would escape punishment if, when convicted, they made or offered restitution. Offenders cannot bargain with the court, and, in effect, buy themselves out of sentences.

....

It would be highly improper to arrive at a lesser sentence for a wealthy man who could and did make restitution, than for a poor man who had not the money to make restitution. It would be exceedingly foolish to accept as genuine every statement from the dock that if the prisoner had the money he would make restitution.²⁵⁶

5.88 More recently, Justice Hunt stated similar concerns about supporting any proposition that mitigation may be purchased. The offender, a bank employee, had made false entries and obtained over \$100,000. He made full restitution. Justice Hunt said:

In many of [the] cases, some emphasis has been placed upon the fact that the amount involved has voluntarily been repaid, but in my view it would be wrong to interpret those cases as supporting any proposition that an offender is able to purchase mitigation. Where there has been a substantial degree of sacrifice involved in the repayment, that is a matter which may properly be taken into account in mitigation. Otherwise, in my view, it is more a matter of aggravation when there has been a loss which is effectively irretrievable than a matter of mitigation when the loss has simply been made good.²⁵⁷

Justice Smart agreed, but distanced himself from Justice Hunt's general comments on restitution, saying: "I regard restitution as an important factor in this type of case, and I would not wish to restrict the use which could be made of that".²⁵⁸ Justice Hunt's view is reflected in a number of legislative sentencing guidelines in Australia.²⁵⁹

5.89 The decision of the Court of Criminal Appeal of Western Australia in *Mickelburg v The Queen*²⁶⁰ supports a broader approach to restitution, suggesting that weight should be given to it even when restitution is expedient because it gives some measure of justice to the victim. Justice Brinsden said:

In the courts of this state it is commonly the practice to give consideration as one of a number of mitigating factors to any restitution the offender may have made to the victim. While a crime is a crime against the community and this one was particularly that, nevertheless one must remember that a crime is often a crime which injures a particular individual. It seems to me the ends of justice are better served if some restitution is made to the victim where restitution is possible. The courts ought to encourage restitution and one way for them to do this is to offer some inducement in the form of a lesser penalty.²⁶¹

This is supported by the legislation in the ACT which makes restitution a factor in its own right independently of remorse or co-operation with the authorities (which are separately listed),²⁶² and which provides that in determining sentence a court shall have regard to "any action the person may have taken to make reparation for an injury, loss or damage resulting from the offence."²⁶³

5.90 Two other issues are controversial in relation to restitution. The first is whether restitution can be mitigating when its source is an indemnity fund or the generosity of a stranger. In *R v Wirth*, Chief Justice Bray said:

It ... seems to me it would be wrong in principle if the generosity of a stranger to the proceedings were permitted in effect to purchase leniency for the offender. The law does not recognise vicarious atonement for crime these are matters which ought not to be allowed to deflect the course of justice.²⁶⁴

A different view was taken of vicarious atonement in *R v O'Brien*²⁶⁵ where the Victorian Court of Criminal Appeal was of the view that contributions from relatives and well wishers made with object of redeeming the good name of the offender and with the object of mitigating the seriousness of the offence are matters which should go to mitigating the penalty.

5.91 The Commission's tentative view is that a general rule will not resolve this issue satisfactorily. The sources of an offender's reimbursement are, potentially, numerous and regard ought to be had to them. Where the source of reimbursement is an indemnity fund, no action may be required of, and no liability may be incurred by, the offender. In such circumstance, restitution should probably not be a factor in sentencing.²⁶⁶ But the situation is entirely different where, as in *Wirth*, the offender has borrowed money and arranged for relatives to secure the loan. Here restitution involves the liability of the offender to make reparation.

5.92 The second controversial issue is whether restitution can be relied on when it results from consent to a civil order or a forfeiture order. The courts have indicated that consent to a civil order or acquiescence in a

forfeiture order is unlikely to be significant without more²⁶⁷ (such as an indication of remorse or co-operation with the authorities).²⁶⁸ Without more, it is merely bowing to the inevitable. In principle, such inevitability ought, as with the inevitability of conviction,²⁶⁹ to be a matter of weight. In the context of forfeiture orders, the total exclusion of restitution may be justified, as a matter of the policy, by appeal to the underlying purpose of forfeiture legislation.²⁷⁰

Co-operation with the police

5.93 An offender may co-operate with the police and the law enforcement authorities in a number of ways:

by voluntarily surrendering to the police and confessing to crimes;

after apprehension, by confessing to the crimes for which the offender was apprehended;

after apprehension, by admitting to offences of which the police were unaware;

by "informing", that is, by revealing information going beyond own involvement, (such as the identity of co-offenders); and

by pleading guilty.

"Pleading guilty" has already been considered.²⁷¹ Informing is considered separately below.²⁷² This section discusses the first three forms of co-operation with the police.

5.94 Section 442B of the *Crimes Act 1900* (NSW) provides that a court may reduce a sentence where the offender "has assisted or undertaken to assist law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to, the offence or other offences." Subsection (2) specifies that the overriding principle to be observed in allowing a reduction is that a court must not reduce a sentence so that the sentence becomes unreasonably disproportionate. Subsection (3) has a detailed list of criteria a court is required to consider in deciding whether to reduce the sentence.²⁷³ The relationship between this section on the one hand, and pleading guilty or informing on the other, has been discussed in a number of contexts.

Voluntary surrender

5.95 Co-operation with the police by surrendering and making a full confession attracts a sentencing discount over and above that allowed for remorse and a plea of guilty. In *R v Ellis*,²⁷⁴ the guilt of the respondent to seven armed robberies was disclosed for the first time when he voluntarily came forward and made a confession. Chief Justice Street, having said that a plea of guilty entitles an offender to an element of leniency, added:

When the conviction follows upon a plea of guilty, that itself is the result of a voluntary disclosure of guilt by the person concerned, a further element of leniency enters into the sentencing decision. Where it was unlikely that guilt would be discovered and established were it not for the disclosure by the person coming forward for sentence, then a considerable element of leniency should properly be extended by the sentencing judge. It is part of the policy of the criminal law to encourage a guilty person to come forward and disclose both the fact of an offence having been being committed and confession of guilt of that offence.

The leniency that follows a confession of guilt in the form of a plea of guilty is a well recognised part of the body of principles that cover sentencing. Although less well recognised, because less frequently encountered, the disclosure of an otherwise unknown guilt of an offence merits a significant added element of leniency, the degree of which will vary according to the degree of likelihood of that guilt being established by the law enforcement authorities, as well as guilt being established against the person concerned.²⁷⁵

Co-operation when apprehended

5.96 Whether co-operation with the police by confessing at an early stage after apprehension is a mitigating factor independently of a plea of guilty and contrition is less clear and was subject to differing views in *R v Bond*.²⁷⁶ The applicant had frankly admitted his guilt in relation to assaulting a woman with intention to have sexual intercourse with her and thereby causing her death. On appeal it was argued that the sentencing judge had erred in failing to regard co-operation with the police as a separate and distinct ground for leniency. A majority of the Court of Criminal Appeal (Justices Badgery-Parker and Wood) held there was no error. Justice Badgery-Parker said:

[I]t does not appear to me to be the case that whenever an applicant confesses his guilt and facilitates the establishment by the police of the details of the particular crime with which he is charged, that he must receive a discount off his sentence over and above that attracted by his plea of guilty and expressions of remorse. The plea of guilty itself attracts some measure of leniency, both as evidence of genuine contrition and because of the saving to the community which it represents by the avoidance of the need for trial. Further discount may be appropriate if it can reasonably be seen that the guilt of the offender could not have been established but for his own co-operation and admissions; but this does not appear to me to be a case of that kind.²⁷⁷

Justice Kirby dissented on this point. In his view, a separate allowance should be made for co-operation with the police and a plea of guilty beyond that allowed for contrition.

Confession to guilt of unknown offences after apprehension

5.97 Where an offender admits to police additional offences of which they would otherwise have been unaware, there is authority that an added element of leniency is warranted.²⁷⁸

Informing

5.98 Despite considerable controversy about the dangers of the practice of offering a discount for informing,²⁷⁹ the principle that a sentence should be reduced for informing is now firmly established. The courts have held that it is in the public interest to encourage offenders to provide the authorities with information which will assist in the apprehension of other offenders. It is also acknowledged that informers experience particular hardship in prison because of the hostility of fellow inmates.

5.99 Section 442B of the *Crimes Act 1900* (NSW), which has already been outlined,²⁸⁰ extends to informing.²⁸¹ This section has clarified a number of issues in relation to informing where there were conflicting judicial opinions, but at least three other matters remain unresolved:²⁸²

should there be a fixed tariff for informing?

should the sentencer specify the discount for informing?

should there be a power on appeal to receive fresh evidence in relation to informing?

A fixed tariff?

5.100 A fixed formula or scale of discounts has been rejected in a number of New South Wales decisions. The circumstances of each case can vary significantly and cases are dealt with on a case by case basis.²⁸³ Moreover it may be open to a sentencing judge to relate the discount only to the most serious offences which are being dealt with.²⁸⁴ But in *R v Perrier*,²⁸⁵ a majority of the Victorian Court of Criminal Appeal apparently approved of the use of a fixed formula in the case of drug couriers. Justice McGarvie referred to the difficulty in apprehending principals in the heroin and drug trade and the need to encourage couriers to overcome their reluctance to implicate the principal traffickers. He approved the view of Justice Stewart, in the *Report of the Royal Commission of Inquiry into Drug Trafficking 1983*, that there has never been sufficient effort to cultivate the informer in organised crime, particularly an informer who is, or has been, part of the criminal syndicate. He then said:

For these reasons I consider that it should become known to those associated with the drug trade that in a case such as this, the courier faces a heavy sentence unless co-operation is forthcoming, but if there is co-operation which results in the conviction of a principal trafficker, a courier who admits the offence and pleads guilty might well have the period of sentence reduced by about two-thirds.²⁸⁶

Justice Murphy agreed with the proposed substituted sentence announced by Justice McGarvie. Justice Brooking dissented. He considered the proportion chosen to be too high, and in any event thought it wrong “to circumscribe the discretion by the use of a formula which is to be applied as a kind of sentencing rule of thumb.”²⁸⁷

5.101 A differently constituted Victorian Court of Criminal Appeal in *R v Schioparlan*²⁸⁸ considered that in the light of the uncertainty as to whether Justice Murphy endorsed the above quoted passage from Justice McGarvie’s judgment, the case could not be regarded as laying down authoritatively a standard discount for drug informers. And in *R v Heaney* the Court considered it was “now clear that in Victoria the sentencing discretion is not to be governed by reference to a tabulated scale of reductions in percentage or other terms”.²⁸⁹ *Perrier* was explained as an example of the extent to which a court may go in reducing the sentence of a courier involved in drug importation for informing in relation to those involved at a more significant level.

Should the discount be specified?

5.102 The Court of Criminal Appeal of South Australia has suggested on a number of occasions that it is a highly desirable practice for a sentencing judge to indicate what sentence would have been imposed if a special discount had not been awarded for incriminating co-offenders or others who have committed crimes.²⁹⁰ Where, in sentencing for a federal offence, there is reduction for an undertaking to co-operate in the future with law enforcement agencies in proceedings in relation to any offence, the court is required to specify the amount of reduction of the sentence or non-parole period.²⁹¹ The Court of Criminal Appeal discussed the matter at length in *R v Gallagher*.²⁹² In this case, it was held that a judge is entitled, but not obliged, to give a discrete quantifiable discount on the ground of assistance to authorities, provided it is possible to do so. But in some cases it may be difficult to identify a separate quantified discount for assistance. In explaining this, Justice Hunt said:

[I]n some cases there will be an overlap between the “utilitarian” consideration of encouraging prisoners to give assistance and what may be called the ordinary subjective features of remorse or contrition which such co-operation may demonstrate.²⁹³

He added: “Nevertheless, if a separate discount for assistance to the authorities can be identified, I would prefer that it be identified”.

5.103 In contrast, the Victorian Courts have indicated a strong dislike for the granting of specified and quantified discounts, stressing that account is to be taken of all matters relevant to mitigation and aggravation and to pronounce the sentence which the “instinctive synthesis” of those matters produces.²⁹⁴ Nevertheless in the recent decision of *R v Mundy*²⁹⁵ the Court did not deny there was a discretion to state the amount of the reduction. Delivering the leading judgment, Justice Nathan said:

I do not think the view that a fixed informer discount should be stated reflects the law. But that is not to say that a sentencing judge might not find it relevant in a particular case to recite a percentage discount so long as it is assigned to the sentencing process then before the court.²⁹⁶

Should there be a power on appeal to receive fresh evidence relating to informing?

5.104 Where an offender continues to give significant assistance to the authorities after sentence and that assistance had not been anticipated by the sentencing judge,²⁹⁷ or the conditions under which the prisoner serves his sentence turn out to be much more severe than anticipated, the matter is one for the executive. It is not for the appeal court to review the sentence on the basis of such further evidence unless proper grounds for receiving fresh evidence are established.²⁹⁸ Nor will evidence which was available at the time of sentence, but

not available at the time of the plea, be accepted on appeal.²⁹⁹ But in *R v Many*,³⁰⁰ the Court of Criminal Appeal allowed the admission of new evidence of facts occurring before sentence which was not “fresh” evidence, on the grounds of “the interests of justice”.

Conduct of the defence

5.105 It has long been established that a more severe sentence should not be passed on an offender because of a plea of not guilty or because of the way in which the defence was conducted.³⁰¹ While what is otherwise appropriate can be reduced by reason of a plea of guilty, it cannot be increased by reason of a plea of not guilty or the conduct of the defence. As was said in the joint judgment of the Victorian Court of Criminal Appeal in *R v Gray*:

It is impermissible to increase what is a proper sentence for the offence committed in order to mark the court's disapproval of the accused's having put the issues to proof or having presented a time-wasting or even scurrilous defence.³⁰²

5.106 In Victoria the question has arisen as to whether it is permissible to take into account a time wasting defence as an indication of lack of remorse. In *R v Yam*,³⁰³ the trial judge had shown considerable irritation at what he regarded as the needless length of the trial. In the course of the plea in mitigation by defence counsel, he remarked that, because the applicant had prolonged the trial by maintaining a time-wasting defence, he was entitled to ignore almost every other mitigating factor that might have been taken into account. In his reasons for sentence, some comments suggested that the “time-wasting disputation” indicated a lack of remorse which justified the same sentence as his co-offender who had played a more significant role and who had more to gain, but whose defence had not been so time consuming. The Court of Criminal Appeal held that the judge had erred in allowing his view as to undue loss or waste of time arising from the conduct of the defence to enter into his sentencing discretion.

5.107 *Yam* was distinguished on its facts by a similarly constituted court in *R v Marjancevic*,³⁰⁴ where one of the grounds of appeal relied upon the alleged error of the trial judge in taking into account the fact that during his trial for property offences, the applicant made long and sustained allegations of gross and improper conduct by the police. The Court held that while the judge's comments supported the view that he thought the defence an opprobrious one, there was nothing to suggest he increased the sentence by reason of such factors. But the Court commented that:

[T]rial judges should take particular care to avoid the creation of a belief in the mind of a prisoner convicted after trial that his sentence will be increased - not just because he chose to defend the charge - but because the judge thought the defence to be time-wasting and/or scurrilous.³⁰⁵

The decision in *Yam* that the conduct of the defence should not enter into the sentencing discretion is qualified by the *Sentencing Act 1991* (Vic) which permits a court to have regard to the conduct of the offender at the trial as an indication of lack of remorse.³⁰⁶ This is not to say that a court can increase a sentence because of the conduct of the defence; only that it may be relevant to the existence of remorse as a mitigating factor.³⁰⁷

Delay

5.108 Delay between apprehension and sentence that is not attributable to the fault of the offender is mitigating.³⁰⁸ The courts have stressed the desirability of disposing of offences promptly.³⁰⁹ There are a number of grounds for regarding delay as mitigating:

if the offender has shown signs of rehabilitation, there is little need for a corrective sentence;³¹⁰

where the stress and anxiety caused by uncertainty of outcome is punishment in itself;³¹¹

the unfairness to the offender of receiving punishment long after the offence;³¹² and

if prosecution was dilatory, as an expression of disapproval by the imposition of a more lenient sentence.³¹³

5.109 It is less clear that delay should be mitigating where it is due to the fact that the offence was not reported or the offender was not apprehended.³¹⁴ This is so particularly in the case of sexual offences where the delay in reporting may be due to threats to the victim. In all cases of sexual offences there are strong policy reasons for not making delay a mitigating factor. Where delay is due to the fact that the offender's responsibility for a known offence is unsuspected until the offender has confessed, delay may be a relevant factor, but "it is not as great as it might be in other circumstances".³¹⁵ In such a case it is probably sufficient that co-operation with the authorities is regarded as mitigating.

Jury's recommendation for mercy

5.110 A jury may make a recommendation for mercy. While such a recommendation should be treated with respect, it remains a recommendation only. In *R v Whittaker*, Justice Isaacs put the position thus:

It is of course the duty of a judge who has the difficult task of determining the proper sentence to be imposed upon a person convicted of a crime to take into his consideration a recommendation by the jury for mercy. But it must be emphasised that it is not part of the verdict; it does not bind the trial judge; it operates only as a recommendation, and the responsibility in the interests of society to impose an appropriate sentence commensurate with the seriousness of the crime remains with the trial judge. It in no way absolves the trial judge from the duty of considering the circumstances of the crime independently for himself, and it in no way requires him to put any remote or strained interpretation upon the facts to find some justification for the rider.³¹⁶

Some courts are more dismissive of jury recommendations, regarding them as "surplusage" on the grounds that punishment is the province of the judge not the jury.³¹⁷

FACTORS RELEVANT TO THE EFFECT OF OFFENCE AND SANCTION

Hardship to the offender

5.111 Where imprisonment will cause particular hardship to the offender, either directly or indirectly, it may be a factor to be taken into account in mitigation of sentence.³¹⁸ The list of what amounts to hardship is not closed. The authorities have extended it to cover:

Loss of status in terms of the disgrace, humiliation and loss of previous standing in the community - a factor especially relevant to white collar offenders for whom "an equivalent gaol term is plainly a severer punishment than it would be for many violent criminals, who could take up much the same life upon leaving gaol as they had led before."³¹⁹

Loss of employment, particularly where that also involves a loss of status.³²⁰ Loss of employment may well tip the balance in favour of a non-custodial penalty, and can be justified on rehabilitative as well as retributive grounds.

The ill-health or disability of the offender, including the age of the offender.³²¹

5.112 In contrast, the Court of Criminal Appeal held in *R v Chenkovit*³²² that relevant hardship was not established by the argument that the offender was a foreign national who would be serving the sentence away from home without the opportunity of receiving visits from friends and family. The Court pointed out that the respondent had made the choice of coming to Australia in furtherance of a conspiracy to import heroin. Nor has the non-eligibility of a foreign national for a minimum security rating or weekend or work release been regarded as a mitigating factor.³²³

5.113 The Australian Law Reform Commission recommended that the list of relevant sentencing considerations include:

- whether a particular type of sanction would cause hardship to the offender; and
- the indirect effects on the offender of conviction or a particular sanction, for example

- loss of, or inability to continue in or obtain, suitable employment;
- loss of pension rights;
- cancellation or suspension of trading or other licence;
- diminution of educational opportunities; and
- deportation.³²⁴

Hardship to others

5.114 The common law position is that hardship to the family of an offender is not a factor which bears on the severity of sentence. Courts have consistently accepted this as the general rule,³²⁵ which can only be departed from in rare and exceptional circumstances.³²⁶ The Australian Law Reform Commission recommended that impact of a particular sanction on third parties should be made a relevant factor on the ground that detrimental impact on the offender's family can itself be a form of punishment on the offender.³²⁷ A number of statutory guidelines³²⁸ now appear to have reversed the common law position,³²⁹ but courts in South Australia and Western Australia have not interpreted the provisions in this way.³³⁰

THE RELEVANCE OF ANY SENTENCE IMPOSED ON CO-OFFENDERS

5.115 Any sentence imposed on a co-offender is relevant to sentence on two grounds. First, the offender should not be left with a justifiable sense of grievance; secondly, the appearance to objective bystanders of injustice by unfair and unequal penalties should be avoided.³³¹ While this basic principle is well settled, it is unclear whether:³³²

a court should depart from the principle of parity where the sentence imposed on the co-offender is inadequate. A difference of opinion on this point emerged in the judgment of the High Court in *Lowe v The Queen*.³³³ Justice Mason expressed the view that a co-offender's sentence was still relevant even if thought to be inadequate, and also that on that account a sentence could be reduced even to a point where it too might be regarded as inadequate. On the other hand, Justice Brennan thought that an inappropriately lenient sentence should not be taken into account. The judgment of Justice Dawson - and perhaps that of Chief Justice Gibbs - gives implicit support for the reduction of a sentence when a co-offender's sentence is too lenient, but whether it could be reduced to the point of inadequacy was not addressed;

a court is under a duty to investigate the background of a co-offender to avoid a disparate sentence.³³⁴

METHODOLOGY

5.116 Once the judge has surveyed all the factors in the case which are relevant to the determination of sentence, he or she will be faced with the question of the appropriate penalty. Assuming that the judge decides that the appropriate penalty is imprisonment, the question then arises as to how all the factors operating in the case are to be translated into a sentence of imprisonment of a particular duration. This raises two questions of methodology:

First, how, generally, is the judge to approach the task?

Secondly, and particularly, does the judge determine sentence length by reference to a standard or tariff derived from past cases?

“Instinctive synthesis” and “two-tier” approaches to sentencing

5.117 One aspect of sentencing which may alter the exercise of judicial discretion is the approach adopted by judges when assessing the various “objective” and “subjective” factors operating on the offence and the offender in imposing sentence. The authorities identify both an “instinctive synthesis” and a “two-tier” approach.

5.118 The “instinctive synthesis” approach is associated particularly with the jurisprudence of the Supreme Court of Victoria. The leading decision is *R v Williscroft*, in which Justices Adam and Starke said:

[I]n our view, it is profitless ... to attempt to allot to the various considerations their proper part in the assessment of the particular punishments presently under examination.

...

We are aware that [our] conclusion rests upon what is essentially a subjective judgment largely intuitively reached by an appellate judge as to what punishment is appropriate.³³⁵

5.119 This view was forcefully restated by the Victorian Court of Criminal Appeal in *R v Young*.³³⁶ In that case the trial judge had adopted the two-tier methodology in arriving at sentence. First, a sentence proportionate to the “objective” gravity of the offence was determined; secondly, the actual sentence was set taking into account the “subjective” factors and circumstances of the offender. The CCA strongly disagreed with this approach:

We see no justification for this course whatever and we think that its adoption would be likely to lead either to the imposition of inadequate sentences or to injustice. It would certainly lead to an increase in appeals against sentence. What is a sentence proportionate to an offence is a matter of discretion and there must in most cases be a range of sentences open to a sentencing judge which are proportionate to the offence. There cannot be said to be a sentence which is *the* proportionate sentence, as the learned judge in his report in these cases said that he had purported to fix. Thus to attempt to fix a proportionate sentence before fixing the sentence to be imposed will only multiply the possibilities of error. Upon what facts is *the* proportionate sentence to be fixed?³³⁷

5.120 By contrast, several decisions from other jurisdictions - notably the Northern Territory and Western Australia - adopt the two stage approach to sentence as a valid form of sentencing methodology.³³⁸

5.121 The New South Wales Court of Criminal Appeal endorsed the Victorian approach in *R v Lett*.³³⁹ The trial judge reviewed the objective facts of the offence, which justified consideration of a life sentence. He then referred to the “strong mitigating circumstances” in relation to the offender before arriving at the actual sentence. Justice Hunt, with whom Justices Sully and Levine agreed, regarded the trial judge’s approach as “unwise”, and referred to the Victorian Court of Criminal Appeal’s critical comments about the “two tiered” approach in *Young*.³⁴⁰ In *Bugmy v The Queen*,³⁴¹ it was argued on appeal that the decision in *Veen (No 2)* required a two stage approach to sentencing. However Justices Dawson, Toohey and Gaudron (the only members of the court to deal with the point) declined to provide any guidance on the issue.³⁴² In the absence of any determination of the issue in the High Court, it appears that the “two-tier” approach to sentencing is not to be adopted in New South Wales.

5.122 The Victorian Sentencing Committee urged a more structured approach to sentencing methodology and this was reflected in cl 5 of Victoria’s *Penalties and Sentences Bill 1989*, which required a sentencer first to “determine what sentence would be proportionate to the offence in the light of the objective circumstances of the offence”, and then to “determine what is the appropriate sentence in all the circumstances of the offence.” This approach was reflected in the County Court *Sentencing Manual*. However, the opposition of the Supreme Court ensured that cl 5 was not enacted.³⁴³

5.123 The argument in favour of the adoption of the two-tier approach to sentence is that it arguably provides better information to the offender and the community as to why a particular sentence was imposed and how it was arrived at. It may also encourage the more uniform adoption of basic sentencing principles.³⁴⁴ However, the impact of importing such a methodology may be over-estimated. First, the methodology is potentially difficult to apply because it assumes that there is a clear demarcation between factors relevant to each tier of the approach. Yet this is not so.³⁴⁵ Secondly, as Justice Murray has pointed out in the Supreme Court of Western Australia, the issue which arises in Courts of Criminal Appeal is whether the sentence is manifestly excessive (or, in the case of Crown appeals, manifestly lenient).³⁴⁶ Effective guidance depends more upon consideration of relevant sentencing ranges for particular categories of case, than upon the adoption of a particular sentencing method.

Sentence ranges and tariffs

5.124 Some jurisdictions have accepted the concept of the “tariff” in sentencing. In New South Wales, reference is more commonly made to the “range” of sentences that would be appropriate to: (i) the crime of which the offender has been convicted, having regard to (ii) the circumstances in which the crime was committed, and (iii) the circumstances of the offender. The observations of Justice Hunt in *R v Morgan*,³⁴⁷ and subsequently in *R v Warfield*,³⁴⁸ indicate that factors in mitigation are incorporated into the tariff or range of sentence considered by the court:

What must be looked at is whether the challenged sentence is within the range appropriate to the objective gravity of the particular offence and to the subjective circumstances of the particular offender, and not whether it is more severe or lenient than some other sentence ... which merely forms part of that range.³⁴⁹

Thus, the range of sentence develops not only with regard to the general offence category (for example, armed robbery) but in relation to typical factual situations that arise within that broad offence (for example, armed robbery of a bank by an offender with prior convictions seeking to support a drug habit, who was armed with a loaded firearm).

5.125 One should avoid thinking of the tariff as a rigid concept imposing strict limits on judicial discretion in sentencing. As Thomas has pointed out, tariffs should be regarded as a “complex *body* of principle” which provide a framework for reference, rather than a single sentence of years or months.³⁵⁰ The tariff is sensitive to the volume of cases which adhere to particular fact situations. The greater the volume of cases that share such circumstances, the better the guidance that the tariff can provide for any particular situation in which the crime was committed. The key points to note about the range are that:

it is relatively loosely defined over time, on a case-by-case basis; and

it is a necessary approach to sentencing, in order to provide a quantitative measure of consistency to a system which is primarily governed by qualitative principles, and which relies upon a large degree of discretion in determining particular sentences.

QUESTIONS ARISING IN CHAPTER 5

1. Should the courts continue to take the prevalence of the offence into account in determining sentences?

2. If prevalence is to be retained as a relevant factor, should any restrictions be imposed on taking it into account, such as:

(a) subject to the principle of proportionality?

(b) a requirement that prevalence or increased prevalence be properly established?

3. What should the courts recognise as provocation for the purposes of sentencing?

4. When should provocation be taken into account in cases of (a) sexual assault and (b) non-sexual assault?

5. Should the use of a weapon in the course of the commission of an offence be regarded as an aggravating factor in sentence?

6. When should breach of trust be an aggravating factor in sentencing in the case of (a) police officers? (b) solicitors? and (c) any other office or occupation?

7. Are the *Barrick* factors useful in enumerating the considerations to be taken into account in cases of crimes of misappropriation involving breach of trust?

8. Should the courts in sentencing an offender take account of the consequences of the offence to the victim when those consequences are unforeseeable? If so, for what purpose ought the consequences to be taken into account?
9. Should the fact that the victim is very young or especially vulnerable be an aggravating factor in sentencing?
10. Should the sexual experience of the victim ever be a factor relevant to sentence for a sexual offence?
11. Should the victim's wish that the offender be not punished or punished only lightly be a relevant factor in sentencing?
12. In what way should a prior record be relevant to sentence?
13. What weight ought to be given to good character where the need for general deterrence is strong?
14. Should reformation continue to be the dominant goal in the sentencing of young offenders?
15. Should New South Wales adopt the rule in s 9(4) of the *Penalties and Sentences Act 1992* (Qld) that offenders under the age of 25 who have not previously been convicted cannot be sentenced to imprisonment unless all other sentences have first been considered and the court has considered the desirability of not imprisoning a first offender?
16. Should the fact that the offender is a woman generally justify a more lenient approach to sentencing? If not, are there ever circumstances in which special consideration should be given to the fact that the offender is a woman?
17. What factors ought the courts to take into account in the sentencing of Aboriginal offenders?
18. To what extent ought illness or physical disability to feature as factors in sentencing?
19. Should the principle of proportionality limit the sentence imposed on offenders with a mental disorder or should danger to the public be allowed to increase sentence?
20. Does the mental disorder of the offender justify less emphasis in sentencing on general deterrence and retribution?
21. Should the fact that a mentally disordered offender is seeking treatment for the disorder which contributed to the commission of the crime be a relevant factor in sentencing?
22. Should the same principles of sentencing apply in the case of offenders with an intellectual impairment?
23. What effect (if any) ought the offender's substance abuse to have at the point of sentencing?
24. Should a bare plea of guilty continue to count as a mitigating factor?
25. If so, should there be a discretion to refuse to make a discount for a plea of guilty?
26. Should the weight attached to the discount for a guilty plea be affected by:
 - (a) the time at which the offender pleaded guilty or indicated an intention to plead guilty?

(b) the inevitability of conviction?

(c) the degree to which psychological trauma to potential witnesses has been avoided or lessened?

(d) the nature of and length of the trial otherwise required?

27. Should a sentencer be required to state that a discount has been made?

28. Ought the amount of discount for a guilty plea to be quantified?

29. When, generally, ought restitution to be taken into account as a mitigating or aggravating factor in sentencing?

30. Should an offender who makes restitution by reason of support from a third party or an indemnity fund receive a discount in sentence?

31. Should an offender who makes restitution by reason of consent to a civil order or acquiescence in a forfeiture order be given a reduction in sentence?

32. When should co-operation with the police attract a discount in sentence over and above that allowed for remorse and a plea of guilty?

33. Should there be a fixed tariff for informing in drug cases?

34. Should the amount of discount for informing be specified by the sentencer?

35. Should there be a power on appeal to receive fresh evidence relating to informing?

36. Should the conduct of the defence ever be taken into account in sentencing?

37. Should delay between apprehension and sentence ever be a mitigating factor where that delay is attributable to some action or inaction on the part of the offender?

38. What weight ought to be given in sentencing to a jury's recommendation for mercy?

39. In what situations should the hardship which imprisonment will impose on the offender be a relevant consideration in sentencing?

40. In passing a sentence of imprisonment on an offender, should the court take into account any hardship which will be suffered by third persons, such as the offender's family or dependants?

41. Should a court depart from the principle of parity when the sentence imposed on the co-offender is inadequate?

42. To what extent should courts investigate the background of a co-offender in order to avoid disparity of sentence?

43. Should the factors discussed in this Chapter be incorporated into consolidated sentencing legislation?

Footnotes

1. See paras 2.7-2.12.

2. *Criminal Law (Sentencing Act) 1988* (SA) s 10; *Crimes Act 1914* (Cth) s 16A; *Sentencing Act 1991* (Vic) s 5(2); *Penalties and Sentences Act 1992* (Qld) s 9(2); *Crimes Act 1900* (ACT) s 429A; *Sentencing Act 1995* (NT) s 5(2). Compare *Sentencing Act 1995* (WA) s 6-8 (which does not attempt to list the factors).
3. The lists vary in length. The ACT list is the most extensive. Compare the list in Victoria.
4. With the exception of s 6-8 of *Sentencing Act 1995* (WA).
5. See paras 5.66-5.85.
6. See paras 2.7-2.12.
7. Such as restitution (see paras 5.86-5.92), substance abuse (see paras 5.61-5.65), and illness and physical disability (see para 5.54).
8. Such as failing to detail premeditation and execution (see paras 5.19-5.22) or degrees of participation (see paras 5.23-5.24); or to resolve the misconceptions emerging from *Veen* (see paras 5.56-5.59).
9. *Crimes Act 1900* (ACT) s 429B(f).
10. See para 5.66.
11. See para 5.66.
12. See paras 5.46-5.49.
13. See paras 5.25-5.28.
14. Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988) at para 171.
15. See paras 5.116-5.125.
16. Our classification is derived from R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (OUP, Melbourne, 1985) at Chapter 11, and K Warner, *Sentencing In Tasmania* (Federation Press, Sydney, 1991) at Chapter 11.
17. *R v De Simoni* (1981) 147 CLR 383.
18. (1980) 7 A Crim R 174 at 177. See also *Sentencing Act 1991* (Vic) s 5(2)(a). And see *Penalties and Sentences Act 1992* (Qld) s 9(2)(b); *Sentencing Act 1995* (NT) s 5(2)(a) (courts to have regard to the maximum and minimum penalty prescribed).
19. See *R v Hayes* [1984] 1 NSWLR 740 at 743 per Street CJ. See also Fox and Freiberg at 450.
20. *R v Postiglione* (1992) 57 A Crim R 301 (NSW CCA); *Reynolds v Wilkinson* (1948) 51 WALR 17.
21. (1988) 164 CLR 465 at 478.
22. *R v McMahon* (1978) 19 ALR 448 (NSW CCA). See paras 3.35-3.40.
23. (1993) 67 A Crim R 64 at 68. Compare D A Thomas, *Principles of Sentencing* (2nd ed, Heinemann, London, 1979) at 30.
24. See Fox and Freiberg at 450; Warner at 258.
25. *R v Weller* (1988) 37 A Crim R 349.
26. *R v Donaldson* [1968] 1 NSWLR 642; *Butler* [1971] VR 892 at 896.

27. *R v Ginder* (1987) 23 A Crim R 1.
28. *R v Dimosantos* (1993) 116 ALR 411.
29. *R v Peel* [1971] 1 NSWLR 247.
30. See paras 1.18-1.20.
31. *R v Ragen* (1916) 33 WN (NSW) 106 (the prevalence of pilfering from wharves in Sydney properly considered); *Hargreaves v Chalkley* (1903) 24 ALT 84 (prevalence of insulting behaviour in a particular neighbourhood relevant).
32. *R v Hayes* [1984] 1 NSWLR 740 (burglary); *R v Williscroft* [1975] VR 292 at 302 (armed robbery); *R v Peterson* [1984] WAR 329 at 332 (armed robbery).
33. *Ris v Wills* [1966] Tas SR 92 at 96 (burglary by youths)
34. *Hargreaves v Chalkley* (1903) 24 ALT 84 (prevalence of insulting behaviour in a particular neighbourhood relevant).
35. *R v Peterson* [1984] WAR 329 at 332, cited with approval by the Court of Criminal Appeal in *R v Morley* [1985] WAR 65 at 70. See also *Martin v Scotland* (1972) 2 SASR 271 at 272 per Walters J.
36. See para 3.8.
37. (1987) 46 SASR 118 at 120.
38. Tas CCA, No A26/1994, 12 April 1994, unreported, at 3 per Zeeman J.
39. *R v Peterson* [1984] WAR 329 at 332 per Burt CJ; *Martin v Scotland* (1972) 2 SASR 271 at 272 per Walter J; *R v Jabaltjari* (1989) 46 A Crim R 47 at 71 per Martin J.
40. *R v Jabaltjari* (1989) 46 A Crim R 47 at 63 per Asche CJ, at 71 per Martin J, at 79 per Angel J.
41. For example *R v Piercey* [1971] VR 647.
42. Fox and Freiberg at 67.
43. *Yardley v Betts* (1979) 22 SASR 108 at 113; *R v Jabaltjari* (1989) 46 A Crim R 47 at 77.
44. (1986) 66 ALR 264.
45. *R v Ryan* (1988) 33 A Crim R 384 (CCA Qld).
46. See *R v Joyce* (1985) 20 A Crim R 384. See also Warner at 65-66.
47. See para 2.9.
48. Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988) at para 98.
49. *Crimes Act 1900* (ACT) s 429B(e). But general deterrence may be taken into account: s 429A(1)(i).
50. *Penalties and Sentences Act 1992* (Qld) s 9(2)(h); *Sentencing Act 1995* (NT) s 5(2)(g).
51. *R v Tait* (1979) 24 ALR 473 at 485; *Hook v Ralphs* (1987) 27 A Crim R 222 at 225; *R v McCormack* [1981] VR 104; *R v Sumner* (1985) 19 A Crim R 210 at 218.
52. *R v Tallon* (1993) 67 A Crim R 42 at 44.

53. *R v Okutgen* (1982) 8 A Crim R 262.
54. *R v Billam* [1986] 1 All ER 985.
55. *R v Roberts* (1982) 4 Cr App R (S) 8.
56. *Sentencing* (ALRC 44, 1988) at para 89.
57. *Crimes Act 1900* (ACT) s 429A(1)(w).
58. *Crimes Act 1900* (ACT) s 429A(1)(o).
59. Although the law relating to sexual assaults is gender neutral and women do perpetrate such assaults on men and women, the vast majority of such offences involve assaults by men upon women.
60. *R v Wallis* (NSW CCA, No 69, 25 June 1975, unreported,); *R v Webb* [1971] VR 147 at 153; *R v Billam* [1986] 1 All ER 985.
61. See M Fisher and F Ammett, "Sentencing of Sexual Offenders When Their Victims are Prostitutes and Other Issues Arising out of Hakopian" (1992) 18 *Melbourne University Law Review* 683 at 688-689.
62. *R v Wayne* (1992) 62 A Crim R 1 at 9 (NT SC) (D assaulted by the victim three days before the offence); *R v S* (Tas SC, Ser No A 69 of 1991, 3 September 1991, unreported) (that D believed he was punishing his daughter's rapist was regarding as mitigating).
63. *Lowe v The Queen* (1984) 154 CLR 606 at 609 per Gibbs CJ; *R v Pastras* (1993) 65 A Crim R 584 at 588.
64. *R v Tait* (1979) 24 ALR 473 at 487.
65. *R v Laurentieu* (1992) 63 A Crim R 402 at 405-406 per Kirby P; *R v Le Cerf* (1975) 13 SASR 237.
66. *Sentencing* (ALRC 44, 1988) at para 89.
67. *Penalties and Sentences Act 1992* (Qld) s 9(2)(d); *Sentencing Act 1995* (NT) s 6 (2)(c).
68. *Sentencing Act 1991* (Vic) s 5(2)(d). Section 429A(2)(g) of the *Crimes Act 1900* (ACT) merely refers to degree or responsibility for the commission of the offence.
69. The only jurisdiction to include breach of trust in sentencing guidelines is the Australian Capital Territory: see *Crimes Act 1900* (ACT) s 429A(1)(s).
70. *R v Jackson* (1987) 30 A Crim R 230 (cabinet minister); *R v Moyse* (1988) 38 A Crim R 169 (senior police officer); *R v Daly* (1983) 8 A Crim R 433, *R v Pangallo* 56 A Crim R 441 (lawyer).
71. *R v Glenister* [1980] 2 NSWLR 597 at 616.
72. *R v Moffat* (Vic CCA, No 76, 15 December 1992, unreported); *R v Martin* (1994) 74 A Crim R 252 at 256 (Vic CCA); *R v Skeates* [1978] Qd R 85 (general deterrence an important consideration in cases of embezzlement by bank employee). See also para 3.6.
73. *R v Jackson* (1987) 30 A Crim R 230.
74. *R v Bielaczek* (NSW SC, CD70212/1990, 19 March 1992, Badgery-Parker J, unreported) at 10-11; *R v Hermann* (1988) 37 A Crim R 440 at 441 per Kirby P.
75. *R v Broadhurst* (1986) 25 A Crim R 349 at 359 (NSW CCA) (drug offences committed by air freight forwarding agent); *R v Whatley* (Vic CCA, 1/11/1974, unreported) (doctor abusing position to obtain drugs for personal use).

76. [1968] VR 174 at 181.

77. *R v Cosgrove* (1988) 34 A Crim R 299 at 306 (NSW CCA); *R v Jones* (1989) 41 A Crim R 1 at 21 (Vic CCA).

78. *R v Del Piano* (1990) 45 A Crim R 199 at 204.

79. *Del Piano*.

80. (1985) 81 Cr App R 78 at 82. On guideline judgments, see paras 6.36-6.41.

81. The *Barrick* factors have been quoted with approval in a number of Western Australian cases: *Del Piano* (1990) 45 A Crim R 199 at 219 (WA CCA) (a case of secret commissions rather than misappropriation); *R v Carreras* (1992) 60 A Crim R 402 at 407 (WA CCA); *R v Birch* (1993) 69 A Crim R 181 at 185 (WA CCA). The same factors were listed in *R v Bird* (1988) 56 NTR 17 at 33 without reference to *Barrick*.

82. *Crimes Act 1914* (Cth) s 16A(2)(e); *Criminal Law (Sentencing) Act 1988* (SA) s 10(e); *Penalties and Sentences Act 1992* (Qld) s 9(2)(e); *Crimes Act 1900* (ACT) s 429A(1)(e); *Sentencing Act 1995* (NT) s 5(2)(d).

83. *R v Teremoana* (1990) 54 SASR 30; *R v RKB* (NSW CCA, No 60344/1990, 30 June 1992, Badgery-Parker J (McInerney and Loveday JJ agreeing), unreported) at 5. See also *Wise v The Queen* [1965] Tas SR 196 at 201 per Crisp J, at 209 per Neasey J.

84. *De Simoni v The Queen* (1981) 147 CLR 383.

85. *Wise v The Queen* [1965] Tas SR 196 at 202 per Crisp J (a case of dangerous driving where no death or bodily harm caused).

86. *R v McCormack* [1981] VR 104 (foreseeable consequences of a riot which did not eventuate relevant). The emphasis placed on the degree of danger posed in cases of dangerous driving is also an illustration of the importance of potential risks.

87. *R v Bedelph* (1981) 4 A Crim R 192 (assault on the basis of disciplining a 13 year old boy by tying him to a tree in the bush).

88. [1971] VR 147 at 150.

89. For example *R v McCormack* [1981] VR 104; *House v Johnson* [1966] Tas SR 292.

90. [1975] VR 168 at 172 (a case of assault by tying the naked victim to a bed for the purpose of allowing the co-accused to force an admission of rape).

91. See P Mullaly, *Victorian Sentencing Manual* (The Law Printer, Melbourne, 1991) at 188.

92. *Wise* [1965] Tas SR 196 at 201, see also at 209 per Neasey J.

93. See paras 11.19, 11.40.

94. See para 11.40.

95. See *R v Teremoana* (1990) 54 SASR 30; *McCormack v The Queen* (SA CCA, No 894/90, 20 March 1991, unreported); *R v Economedes* (1990) 58 A Crim R 466.

96. For example *R v Dole* [1975] VR 754.

97. Fox and Freiberg at 436.

98. (1989) 44 A Crim R 301 at 304 per Malcolm CJ, at 316 per Brinsden J. See also *R v Gogolin* (NSW CCA, No 225/87, 7 October 1988, unreported). Compare *R v G* (NSW CCA, No 70213/87, 29 June 1989, unreported).

99. See *R v Webb* [1971] VR 147 at 153.
100. Vic CCA, 18 August 1981, unreported.
101. Vic SC, No 187, 8 August 1991, Jones J, unreported.
102. *Hakopian* at 8. An appeal against sentence on the ground that the trial judge had placed too much weight on the fact that the complainant was a prostitute was abandoned and it was conceded that the judge was not in breach of any sentencing principle when he dealt with the matter on the basis that the complainant was a prostitute: *Hakopian* (Vic CCA, No 187, 11 December 1991, unreported).
103. D Cass, "Case Note" (1992) 16 *Criminal Law Journal* 200; G Coos, "Hakopian's Case - Oh Chastity! What Crimes are Committed in thy Name" (1992) 16 *Criminal Law Journal* 160; B Keogh, "Sentencing Sex Offenders in Victoria" (1993) 67 *Law Institute Journal* 396; M Fisher and F Ammett, "Sentencing Sexual Offenders When Their Victims are Prostitutes and Other Issues Arising out of Hakopian" (1992) 18 *Melbourne University Law Review* 683.
104. *Victorian Sentencing Manual* at 487.
105. County Court of Victoria, 6 October 1988, unreported.
106. *R v Marten* (NSW CCA, No 76, 8 July 1982, Street CJ, unreported);. *R v Leary* (NSW CCA, No 60254/93, 8th October 1993, unreported).
107. *Leary* at 6-7.
108. G Zdenkowski, "Contemporary Sentencing Issues" in Chappell D and P Wilson, *The Australian Criminal Justice System - the Mid 1990s* (Butterworths, Sydney, 1994) 171 at 190;
109. See *Crimes Act 1900* (NSW) s 409B.
110. This has the support of the English guidelines case of *Billam* [1986] 1 All ER 985 where the Court said the victim's previous sexual experience was not a mitigating factor.
111. Fox and Freiberg at 458.
112. See K Gilbert, "Rape and the Sex Industry" (1992) *Criminology Australia* 14 for a description of the impact of rape on sex workers.
113. *R v RKB* (NSW CCA, No 60344/90, 30 June 1992, unreported). See also *R v Pritchard* [1973] Cr App R 492; Fox and Freiberg at 458; *Victorian Sentencing Manual* at 189.
114. *R v McGhee* (Tas CCA, Ser A9 of 1994, 2 June 1994, unreported). See also *R v Crime Appeal* [1992] BCL 1905.
115. G G Hall, *Sentencing Guide* (Butterworths, Wellington, 1994) at para 1.5.7.
116. See paras 5.86-5.92.
117. See further para 11.58 (VIS not to address question of appropriate sentence).
118. *R v Glen* (NSW CCA, No. 60738/1993, unreported, 19 December 1994) per Simpson J.
119. *Sentencing Act 1991* (Vic) s 5(1)(c); *Sentencing Act 1995* (NT) s 5(1)(b).
120. For example *Grayson v The King* (1920) 22 WALR 37.
121. (1988) 164 CLR 465.

122. *Veen (No 2)* at 477. The CCA has generally understood *Veen (No 2)* in this sense: see D Hunt and H Donnelly, "The Objective Circumstances of the Case and Prior Record" (1995) 7 *Judicial Officers Bulletin* 57 at 58. See also *R v Barton* (NSW CCA, No 60740/94, 28 July 1995, unreported). In the Commission's view, this understanding is not qualified by apparent statements to the contrary in *Baumer v The Queen* (1988) 166 CLR 51 at 57-58 (where the issue arose incidentally). But compare R Fox, "The Meaning of Proportionality in Sentencing" (1994) 19 *Melbourne University Law Review* 489 at 500.

123. See Fox and Freiberg at 462.

124. For example, *R v Hutchins* (1957) 75 WN (NSW) 75.

125. For example, *R v Boyd* [1975] VR 168.

126. See Thomas at 201.

127. *R v McInerney* (1986) 42 SASR 111 at 113 per King CJ.

128. For example *R v Hermann* (1988) 37 A Crim R 440 (NSW CCA); *R v Sopher* (1990) 70 A Crim R 570 (NSW CCA).

129. *R v Jackson* (1988) 33 A Crim R 413 (NSW CCA).

130. *R v Leroy* [1984] 2 NSWLR 441 at 446-447.

131. *R v Edwards* [1988] VR 481. Compare *Ireland* (1987) 29 A Crim R 353 (NT CCA), a case of dangerous driving, where Maurice J (at 369) expressly disapproved cases which state that virtually no allowance should be made for good character in fixing the head sentence in cases where general deterrence is important, but said of dangerous driving: "It does not matter whether the offender who perpetrates the crime ... is a rogue or a previously upright citizen" (at 371-2).

132. *Crimes Act 1914* (Cth) s 16A(2)(m); *Criminal Law (Sentencing) Act 1988* (SA) s 10(l).

133. *Sentencing Act 1991* (Vic) s 6; *Penalties and Sentences Act 1992* (Qld) s 11. The *Sentencing Act 1995* (NT) s 6 is in almost the same terms as the Queensland provision.

134. *Crimes Act 1914* (Cth) s 16A(2)(m); *Penalties and Sentences Act 1992* (Qld) s 9(2)(f); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1); *Sentencing Act 1995* (NT) s 6(2)(e); *Crimes Act 1900* (ACT) s 429A(1)(k).

135. See paras 3.16, 3.22.

136. For example, *Hill v Katich* [1973] WAR 11 at 12.

137. For example, *R v Smith* (1988) 33 A Crim R 95.

138. *R v Pham* (1991) 55 A Crim R 128 (NSW CCA), *R v Hawkins* (1993) A Crim R 64. Compare *R v GDP* (1991) 53 A Crim R 112 at 115, *R v XYJ* (NSW CCA, No 60823/91, 15 June 1992).

139. *R v Regan* (1993) 67 A Crim R 100 (Vic CCA); *Lahey v Sanderson* [1959] Tas SR 17 at 21.

140. *R v Hunter* (1984) 36 SASR 101; *R v Yates* [1985] VR 41; *R v Davis* (NSW CCA, No 60030/91, 20 August 1991, unreported).

141. *R v Bazley* (1993) 65 A Crim R 154 at 158.

142. See Proposal 3.

143. NSW CCA, 4 June 1982, unreported. A similar view is expressed in *R v Tracey* [1987] Tas R 108 at 120 per Wright J.

144. *R v Friday* (1984) 14 A Crim R 471 (Conolly J).
145. Fox and Freiberg at 465-466. Compare Victoria, Attorney-General's Department, *Sentencing: Report of the Victorian Sentencing Committee* (Melbourne, 1988) Volume 1 at 372 which suggests that judicial attitudes in Victoria are more ambivalent.
146. See *Crimes Act 1914* (Cth) s 16A(2)(p); *Crimes (Sentencing) Act 1988* (SA) s 10(n).
147. *R v Boyle* (1987) 34 A Crim R 206. But see *R v Wirth* (1976) 14 SASR 291 at 293 where Bray CJ said it is difficult to see that more weight should be given to consideration of the offender's family in the case of a woman than in the case of men and added, "the contemporary sociological climate frowns on discrimination on the basis of sex". On hardship, see paras 5.111-5.114.
148. (1980) 2 Cr App R (S) 177.
149. For example D Biles, "Prisons and Prisoners in Australia" in D Chappell and P Wilson (eds), *The Australian Criminal Justice System* (2nd ed, Butterworths, Sydney, 1977) 337 at 352.
150. Warner at 270 note 55.
151. D Farrington and A Morris, "Sex, Sentencing and Reconviction" (1983) 23 *Brit J Crim* 229 at 245; A Worrall, "Out of Place: Female Offenders in Court" (1981) 28 *Probation Journal* 90. See also G Zdenkowski, "Contemporary sentencing issues" in Chappell D and Wilson P, *The Australian Criminal Justice System: The mid 1990s* (Butterworths, Sydney, 1994) 181 note 59.
152. See para 5.13.
153. *R v Stokes* (Vic CCA, 29 May 1981, unreported).
154. *R v Neal* (1982) 7 A Crim R 129 at 145.
155. See paras 5.50-5.53.
156. The dangers in accepting a policy of leniency towards women are briefly discussed in Warner at 271-272.
157. *Jabaltjari v Hammersley* (1977) 15 ALR 94; *R v Friday* (1985) 14 A Crim R 470 (Qld CCA); *R v Bulmer* (1986) 15 A Crim R 155 (Qld CCA); *R v Yougie* (1987) 33 A Crim R 301 (Qld CCA); *Leech v Peters* (1988) 40 A Crim R 350 (SA SC); *Houghagen v Charra* (1989) 50 A Crim R 419 (SA SC) at 422 per Bollen J.
158. (1982) 7 A Crim R 129.
159. *Neal* at 137, 140.
160. *Neal* at 144.
161. *Neal* at 145 per Brennan J.
162. *R v Fernando* (1994) 76 A Crim R 58 at 62-63; *Jabaltjari v Hammersley* (1977) 15 ALR 94 at 98 per Muirhead J; *R v Rogers* (1989) 44 A Crim R 301 at 307 per Malcolm CJ; *R v Minor* (1992) 59 A Crim R 227 at 238 per Mildren J.
163. See generally *R v Fernando* (1994) 76 A Crim R 58 at 62-63 per Wood J.
164. *R v Rogers and Murray* (1989) 44 A Crim R 301 at 315 per Wallace J.
165. For example *R v Juli* (1990) 50 A Crim R 31.
166. For example *R v Shannon* (1991) 56 A Crim R 56.

167. For example *R v Jadurin* (1982) 7 A Crim R 182.
168. For example *R v Minor* (1992) 59 A Crim R 227.
169. For example *R v Jagamara* (NT SC, 18 November 1980, Gallop J, unreported). And see *The Recognition of Aboriginal Customary Laws* (ALRC 31, 1986) Vol 1 at para 514.
170. *The Recognition of Aboriginal Customary Laws* (ALRC 31, 1986) Vol 1 at para 517. See also *Multiculturalism and the Law* (ALRC 57, 1992) at paras 8.13-8.14.
171. *Young Offenders Act 1993* (SA) s 3(3)(e); *Young Offenders Act 1994* (WA), s 46(2)(c).
172. *The Recognition of Aboriginal Customary Laws* (ALRC 31, 1986) Vol 1 at para 517.
173. See para 1.13.
174. *R v Smith* (1987) 44 SASR 587, applied in *R v McDonald* (1988) 38 A Crim R 470 (NSW CCA), *R v Sellen* (1991) A Crim R 313.
175. (1988) 34 A Crim R 154.
176. *R v Jones* (1993) 70 A Crim R 449 (NSW CCA) (offender HIV positive); *Smith* at 589 per King CJ.
177. *R v D* (NSW CCA, 21 December 1984, unreported) (16 year old deaf and dumb Aboriginal broke into a woman's house and raped her several times).
178. *Crimes Act 1914* (Cth) s 16A(2)(m); *Criminal Law (Sentencing) Act 1988* (SA) s 10(l); *Crimes Act 1900* (ACT) s 429A(1)(k). *The Penalties and Sentences Act 1992* (Qld) s 9(2)(f) and the *Sentencing Act 1995* (NT) s 5(2)(e) refer to the "intellectual capacity" of the offender.
179. *R v Smith* (1958) 75 WN (NSW) 198; *R v Anderson* [1981] VR 155; *Veen (No 2)* (1988) 164 CLR 465 at 477; *R v Bell* [1982] Qd R 216; *R v Man* (1990) 50 A Crim R 79 at 83; *R v Skipper* (1992) 64 A Crim R 260 (psychiatric disorder mitigated the respondent's attempts to murder her children).
180. *R v Hurd* [1988] Tas R 126 (suspended sentence).
181. For example *R v Anderson* [1981] VR 155.
182. (1979) 143 CLR 458.
183. (1988) 164 CLR 465. See also *R v Kocan* [1966] 2 NSW 565; *R v Nell* [1969] 2 NSW 563; *R v Leaver* (1981) 6 A Crim R 141.
184. *Veen (No 1)* at 494.
185. (1981) 6 A Crim R 141.
186. *Veen (No 2)* at 472.
187. *Veen (No 2)* at 472
188. *Veen (No 2)* at 485-486
189. *Veen (No 2)* at 488
190. *Veen (No 2)* at 489; and see at 491 per Deane J.
191. *Veen (No 2)* at 474 (as Mason J had indicated in *Veen (No 1)* at 468).

192. *Veen (No 2)* at 477. In *R v Chivers* (1991) 54 A Crim R 272, Thomas J had difficulty reconciling these two passages.

193. For example *R v Barton* (NSW CCA, No 60740/94, 28 July 1995, unreported).

194. Consider dicta in *Baumer v The Queen* (1988) 166 CLR 51 at 57-58 and some other cases (eg *R v Chivers* (1991) 54 A Crim R 272 at 280 per Thomas J, at 292 per Cooper J (Qld CCA); *R v Gooch* (1989) 43 A Crim R 382 at 388 per Malcolm CJ (WA CCA)) which may be inconsistent with the majority view in *Veen (No 2)*. See also R G Fox, "The Killings of Bobby Veen" (1988) 12 *Crim LJ* 339 at 348 and 354. Compare paras 3.36 and 5.39.

195. Warner at 285.

196. For example *R v Masolatti* (1976) 14 SASR 124.

197. *R v Letteri* (NSW CCA, No 60407/91, 18 March 1992, unreported) at 14 per Badgery Parker J (with whom Gleeson CJ and Sheller JA agreed). See also *R v Champion* (1992) 64 A Crim R 244. Compare *R v Mason-Stuart* (1993) 68 A Crim R 163 at 164; *R v Shinfield* (NSW CCA, No 60090/93, 13 May 1993, unreported); *R v Heather* (NSW CCA, No 60933/93, 1 August 1995, unreported). Compare *R v Russell* (NSW CCA, No 60248/94, 15 December 1995, unreported).

198. See *Ciaston* (1987) 27 A Crim R 285 at 286.

199. (1990) 51 A Crim R 336. Compare *R v Leaver* (1981) 6 A Crim R 141.

200. See paras 5.50-5.53.

201. (1986) 20 A Crim R 402 (WA CCA). See also *R v De Souza* (NSW SC, No 70105/94, 10 November 1995, Dunford J, unreported); *R v Redenbach* (1991) 52 A Crim R 95 at 99; *R v Harradine* (1991) 61 A Crim R 200 (that D was grossly affected by alcohol and drugs at the time of the rape of his de facto wife was held to be no excuse); *R v Austin* [1971] Tas SR 227 at 228.

202. (1986) 20 A Crim R 402 at 405.

203. (1981) 5 A Crim R 204. See also *R v Coleman* (1990) 67 A Crim R 306 at 327 per Hunt CJ at CL.

204. *R v Dowie* [1989] Tas R 167 at 185.

205. *R v Halewyn* (1984) 12 A Crim R 202 (armed robbery of service station to support heroin addiction).

206. (1979) 22 SASR 543 at 549. See also *R v Valentini* (1989) 46 A Crim R 23 (NSW CCA); *R v Ellis* (1993) 68 A Crim R 449 (NSW CCA).

207. For example *R v Talbot* (1991) 59 A Crim R 383.

208. For example *R v Fabian* (1992) 64 A Crim R 365; *R v Halewyn* (1984) 12 A Crim R 202.

209. See paras 5.50-5.53.

210. *R v Coleman* (1990) 67 A Crim R 306 at 327 (NSW CCA); *R v Sewell* (1981) 5 A Crim R 204 at 207. See also Fox and Freiberg at 471-473.

211. *R v Wicks* (1989) 44 A Crim R 147 (WA CCA); *R v Coleman* 67 A Crim R 306.

212. *Baumer v The Queen* (1988) 166 CLR 51, followed in *R v Maurice* (1992) 61 A Crim R 30 at 45.

213. *R v Holder* [1983] 3 NSWLR 245; *R v Gray* [1977] VR 225 at 231; *Shannon* (1979) 21 SASR 442; *R v Neal* (1982) 149 CLR 305 at 325 per Murphy J. See also *Crimes Act 1914* (Cth) s 16A(2)(f); *Criminal Law (Sentencing) Act 1988* (SA) s 10(f); *Crimes Act 1900* (ACT) s 429A(1)(v).

214. The Australian Law Reform Commission divided 4:3 on the issue: see *Sentencing* (ALRC 44, 1988) at paras 173-174. A sentencing indication scheme, designed in part to encourage early pleas of guilty which attracted a sentencing discount, operated in New South Wales between 1993 and 1995 (when it was abandoned). For an evaluation of the scheme, see D Weatherburn, E Matka and B Lind, *Sentence Indication Scheme Evaluation - A Final Report* (NSW Bureau of Crime Statistics and Research, Sydney, October 1995).

215. For example *R v Harris* [1967] SASR 316.

216. For example *R v Osmond* [1987] 1 Qd R 429; *R v Schumacher* (1981) 3 A Crim R 441.

217. *R v Fisher* (1989) 40 A Crim R 442 (NSW CCA).

218. *R v Slater* (1984) 36 SASR 524 at 526 per King CJ.

219. The following statutory provisions also require a guilty plea to be taken into account: *Crimes Act 1914* (Cth) s 16A(2)(g); *Sentencing Act 1991* (Vic) s 5(2)(e); *Criminal Law (Sentencing) Act 1988* (SA) s 10(g); *Penalties and Sentences Act 1992* (Qld) s 13; *Crimes Act 1900* (ACT) s 429A(1)(u); *Sentencing Act 1995* (NT) s 5(2)(j). Generally, these provisions clearly apply independently of any other attribute in the offender such as remorse: see *R v Morton* (1986) 23 A Crim R 433 at 437 (Vic CCA).

220. *R v Winchester* (1992) 58 A Crim R 345 at 350.

221. [1983] 3 NSWLR 245.

222. (1986) 6 NSWLR 603 at 604.

223. (1990) 48 A Crim R 1.

224. (1992) 58 A Crim R 345.

225. *Bond* at 6. See also *R v Pereira* (1991) 57 A Crim R 46 (where pleas of guilty did not attract the full discount because of the inevitability of conviction).

226. *Bond* at 8.

227. For a recent discussion, see J Willis, "New Wine in Old Bottles: The Sentencing Discount for Pleading Guilty" in A Kapardis (ed), *Sentencing* (La Trobe University Press, Bundoora, 1995) (Special Issue 13 No 2 of *Law in Context*) Chapter 4.

228. See *R v Shannon* (1979) 21 SASR 442 at 448-450 per King CJ; *R v Bond* (1990) 48 A Crim R 1 at 7-8 per Kirby P; *R v Jabaltjari* (1989) 46 A Crim R 47. See also G Zdenkowski, "Contemporary Sentencing Issues" in D Chappell and P Wilson, *The Australian Criminal Justice System- the mid 1990s* (Butterworths, Sydney, 1994) at 172. See also *Sentencing* (ALRC 44, 1988) at para 173.

229. *R v Jabaltjari* (1989) 46 A Crim R 47.

230. *R v Dowie* [1989] Tas R 167 at 184.

231. For example *R v Shannon* (1979) 21 SASR 442 at 453 per King CJ.

232. For example *R v Giakas* (1988) 33 A Crim R 23 at 27; *Bulger* (1990) 48 A Crim R 239 at 244.

233. For example *Ellis* (1986) 6 NSWLR 603 at 604; *Pereira* (1991) 57 A Crim R 46 at 48 (CCA).

234. *Sentencing Act 1995* (WA) s 8(2).

235. *Crimes Act 1900* (NSW) s 439(1)(b). See also *Penalties and Sentences Act 1992* (Qld) s 13(2); *Sentencing Act 1991* (Vic) s 5(2)(e).

236. See para 5.74.
237. (1991) 57 A Crim R 46.
238. *Pereira* at 48.
239. (1980) 2 Cr App R (S) 168.
240. *R v Bulger* (1990) 48 A Crim R 239 at 244. But see *R v Marshall* (1992) 62 A Crim R 162 at 170 per Davies JA and Williams J (Qld CCA) (no credit for the plea of guilty because of inevitability of conviction for the offence).
241. *Winchester* (1992) 52 A Crim R 345 at 350 per Hunt CJ at CL.
242. *R v Slater* (1984) 36 SASR 524 at 526 per King CJ. See also *Bond* (1990) 48 A Crim R 1 at 7 per Kirby P.
243. For example *Penalties and Sentences Act 1992* (Qld) s 3(3) and (4).
244. *Crimes Act 1900* (NSW) s 439(2).
245. *Victorian Sentencing Manual* at 275.
246. For example *R v Shannon* (1979) 21 SASR 442 at 449 per King CJ.
247. *R v Jabaltjari* (1989) 46 A Crim R 47 at 62 per Asche CJ.
248. *Jabaltjari* at 62-3.
249. See *R v Morton* (1986) 23 A Crim R 433 at 438; *R v Pavlic* (Tas CCA, No A51 of 1995, 25 August 1995, per Green CJ and Wright J, unreported).
250. See paras 5.117-5.123.
251. See *R v Harris* (1992) 59 SASR 300 at 302; *Pavlic* per Slicer J.
252. See paras 5.117-5.123.
253. *Pavlic* at para 47.
254. For example *R v Phelan* (1993) 66 A Crim R 446 (NSW CCA).
255. *R v Chalone* (1990) 49 A Crim R 370 (NSW CCA).
256. [1959] Qd R 395 at 400-401.
257. *R v Phelan* (1993) 66 A Crim R 446 at 448 per Hunt CJ at CL.
258. *Phelan* at 450.
259. *Crimes Act 1914* (Cth) s 16A(2)(f); *Criminal Law (Sentencing) Act 1988* (SA) s 10(f).
260. (1984) 13 A Crim R 365.
261. *Mickelburg* at 370. See also *R v Allen* (1989) 41 A Crim R 51 (Vic CCA) (which is to the same effect).
262. *Crimes Act 1900* (ACT) s 429A(1).
263. *Crimes Act 1900* (ACT) s 429A(1)(f).

264. (1976) 14 SASR 291 at 264.

265. Vic CCA, 13 December 1976, unreported (quoted by F Rinaldi in *Papamihail* [1980] 4 Crim L J 192).

266. Consider *R v Nicholls* (1991) 53 A Crim R 455 at 456, and *Crimes Act 1900* (ACT) s 429A(1)(f).

267. See also *Sentencing Act 1991* (Vic) s 5(2A)(b) (a sentencing court must not have regard to a forfeiture order made under the *Crimes (Confiscation of Profits) Act 1986* (Vic) in respect of property derived or realised as a result of the commission of the offence). See also *Sentencing Act 1995* (WA) s 8 (forfeiture of property to the Crown is not a mitigating factor).

268. See *Sentencing Act 1991* (Vic) s 5(2B).

269. See para 5.78.

270. See paras 10.46-10.47.

271. See paras 5.67-5.80.

272. See paras 5.98-5.104.

273. For legislative provisions in other jurisdictions, see *Penalties and Sentences Act 1992* s 9(2)(i), *Crimes Act 1914* (Cth) s 16A(2)(h); *Crimes Act 1900* (ACT) s 429A(1)(h); *Sentencing Act 1995* (NT) s 5(2)(h); *Criminal Law (Sentencing) Act 1988* (SA) s 10(h).

274. (1986) 6 NSWLR 603.

275. *Ellis* at 604, applied in *R v Stuart* (1990) 47 A Crim R 293 (NSW CCA). See also *R v Heard* (1987) 34 A Crim R 320 (NSW CCA) where an appeal against severity of sentence was allowed and a non-custodial sentence substituted where the appellant surrendered to the police, admitted guilt, identified two co-offenders and gave evidence for the Crown.

276. (1990) 48 A Crim R 1.

277. *Bond* at 15.

278. *R v Stuart* (1990) 47 A Crim R 293 (D confessed to offences committed at large and for which he was not suspected, when arrested for escape).

279. G Zdenkowski, "Contemporary Sentencing Issues" in D Chappell and P Wilson, *The Australian Criminal Justice System-the mid 1990s* (Butterworths, Sydney, 1994) at 173-175.

280. See para 5.94.

281. For provisions in other jurisdictions, see *Crimes Act 1914* (Cth) s 16A(2)(h); *Penalties and Sentences Act 1992* (Qld) s 9(2)(i); *Crimes Act 1900* (ACT) s 429A(h); *Sentencing Act 1995* (NT) s 5(2)(h).

282. The further question whether or not failure to co-operate as promised should be a ground of appeal is answered in the affirmative by s 5DA of the *Criminal Appeal Act 1912* (NSW). See also *Crimes Act 1914* (Cth) s 21E.

283. *R v Cartwright* (1987) 17 NSWLR 243 at 255 per Hunt and Badgery-Parker JJ, at 245 per Mahoney JA; *R v Salameh* (1991) 55 A Crim R 384 at 386 per Smart J, at 388 per Kirby P, at 392 per Lee CJ at CL; *R v Gallagher* (1991) 23 NSWLR 220 at 230 per Gleeson CJ, at 234 per Hunt J; *R v Davies* (NSW CCA, No 60575/94, 1 December 1995, unreported).

284. *Gallagher* at 259.

285. (1990) 59 A Crim R 164.
286. *Perrier* at 172.
287. *Perrier* at 175.
288. (1991) 54 A Crim R 294 at 305.
289. *Heaney* [1992] 2 VR 531 at 560
290. *R v Harris* (1992) 59 SASR 300 at 301; *R v J* (1992) 64 A Crim R 441.
291. *Crimes Act 1914* (Cth) s 21E(1). See also *R v Nagy* [1992] 1 VR 637 at 649 per McGarvie J dissenting.
292. (1991) 23 NSWLR 220.
293. *Gallagher* at 233.
294. *R v Morton* [1986] VR 863; *R v Young* [1990] VR 951; *R v Nagy* [1992] 1 VR 637 per Crockett and Phillips JJ; McGarvie J dissenting. See also paras 5.118-5.119.
295. (1994) 76 A Crim R 92.
296. *Mundy* at 97.
297. *R v Perez-Vargas* (1986) 8 NSWLR 559 at 565.
298. *R v Cartwright* (1989) 17 NSWLR 243 at 257.
299. *R v Schioparlan* (1991) 54 A Crim R 294 at 303.
300. (1990) 52 A Crim R 54.
301. *R v Witham* [1949] QJP 68; *R v Harris* [1967] SASR 316. See also *Crimes Act 1900* (ACT) s 429B(f) and (g).
302. [1977] VR 225 at 231.
303. (1991) 55 A Crim R 116.
304. (1991) 54 A Crim R 431.
305. *Marijancevic* at 446.
306. *Sentencing Act 1991* (Vic) s 5(2C).
307. See para 5.66.
308. *R v Turner* (1981) 6 A Crim R 265 (NSW CCA) (delay caused by the technical administrative oversight of charging offender with escape under State instead of federal law); *R v Allard* (1991) 52 A Crim R 460 (NSW CCA) (staleness of offence mitigating where offender not put on trial and sentenced for almost 5 years from apprehension for supplying heroin).
309. *R v Crawley* (1982) 5 A Crim R 451; *R v Murrell* (1985) 15 A Crim R 303 at 307 per Fox J.
310. *R v Smith* (1982) 7 A Crim R 437 at 442.
311. *R v Smith* (1982) 7 A Crim R 437 at 442.

312. *R v Todd* [1982] 2 NSWLR 517 at 519.
313. *R v Crawley* (1981) 36 ALR 241.
314. See Fox and Freiberg para 11.516.
315. *R v Dodd* (1991) 57 A Crim R 349.
316. (1928) 41 CLR 230 at 240. See also *Crimes Act 1900* (ACT) s 429A(1)(q).
317. See *R v Tappy* [1960] VR 137 at 139; *R v Harris* [1961] VR 236 at 237.
318. For example *Crimes Act 1900* (ACT) s 429A(p).
319. *R v McDonald* (1994) 71 A Crim R 370 at 380.
320. *R v Del Piano* (1990) 45 A Crim R 199 at 208, 215 (disqualification from acting as a company director and disbarment from legal profession).
321. See paras 5.54.
322. (1986) 30 A Crim R 95.
323. *R v Kogelbauer* (1992) A Crim R 357; *R v Pereira* (1991) 57 A Crim R 46 at 49.
324. *Sentencing* (ALRC 44, 1988) at para 170.
325. *Tame v Fingleton* (1974) 8 SASR 507 at 511; *R v Mitchell* [1974] VR 625 at 631; *R v Tilley* (1991) 53 A Crim R 1; *R v Jany* [1966] Qd R 328; *Jarrett v Samuels* (1972) 4 SASR 78.
326. See *R v Alexander* (1994) 78 A Crim R 141 at 145. See also *R v Boyle* (1987) 34 A Crim R 202.
327. *Sentencing* (ALRC 44, 1988) at para 172.
328. See *Crimes Act 1914* (Cth) s 16A(2)(p); *Criminal Law (Sentencing) Act 1988* (SA) s 10(n); *Crimes Act 1900* (ACT) s 429A(1)(m).
329. See *DPP v El Karhani* (1990) 21 NSWLR 370 at 383; *R v Sopher* (1993) 70 A Crim R 570 at 575. Compare *R v Van de Heuvel* (1992) 63 A Crim R 75 (NSW CCA).
330. *R v Adami* (1989) 42 A Crim R 88 (SA CCA); *R v Sinclair* (1990) 51 A Crim R 418 (WA CCA); *R v Burns* (1994) 71 A Crim R 450 (WA CCA).
331. *Lowe v The Queen* (1984) 154 CLR 606.
332. It should be recalled that parity between co-offenders does not automatically follow where there are relevant differences in terms of degree of participation in the offence and in the backgrounds of the co-offenders: see para 3.38.
333. (1984) 154 CLR 606.
334. Warner at 293-294.
335. *R v Williscroft* [1975] VR 292 at 300.
336. [1990] VR 951.

337. *Young* at 960. See also *R v Nagy* [1992] 1 VR 637 at 638 per Crockett J (with whom Phillips J agreed), contra at 650 per McGarvie J; *R v Beaven* (NSW CCA, NSW, 22 August 1991, unreported); *R v Morgan* (1993) 70 A Crim R 368.

338. *R v Ireland* (1987) 49 NTR 10 at 23; *R v Jabaltjari* (1989) 64 NTR 1 at 20; *R v Raggett* (1990) 101 FLR 323 at 334; *Punch v The Queen* (1993) 9 WAR 486 at 493. Compare *R v Longshaw* (1993) 114 FLR 423 at 426 per Kearney J (CCA NT).

339. *R v Lett* (NSW CCA, No 60112/94, 27 March 1995, unreported). See also *R v Gallagher* (1991) 23 NSWLR 220 at 233; *R v Garforth* (NSW CCA, No 60500/93, 23 May 1994, unreported) at 7; *R v Twala* (NSW CCA, No 60187/93, 4 November 1994, unreported) at 6.

340. *Lett* at 8.

341. (1990) 169 CLR 525.

342. *Bugmy* at 535-36.

343. See A Freiberg, "Sentencing Reform in Victoria: A Case-Study" in C Clarkson and Morgan (eds), *The Politics of Sentencing Reform* (Clarendon Press, Oxford, 1995) at 61-62. See also C Corns, "Deconstructing Sentencing Decision-Making in Victoria" (1990) 23 *Australian and New Zealand Journal of Criminology* 145.

344. Corns at 155-156.

345. See 5.117-5.119, and Chapter 3.

346. *Punch* at 496.

347. *R v Morgan* (1993) 70 A Crim R 368. Allen J and Loveday AJ agreed with Hunt CJ at CL.

348. *R v Warfield* (1994) 34 NSWLR 200. McInerney and James JJ agreed with Hunt CJ at CL.

349. *Morgan* at 371; *Warfield* at 207.

350. D A Thomas, *Principles of Sentencing* (Second edition, Heinemann, London 1979) at 29 (emphasis added).

6. Guiding Judicial Discretion

6.1 This chapter looks at the question of whether existing methodologies and principles that guide the exercise of judicial discretion in sentencing are adequate, or need reform or improvement. These techniques vary considerably in the degree of restraint they impose upon judicial discretion. They range from initiatives such as sentencing information (which aims to improve the information to be used within the existing sentencing process), to complex guidelines which substantially remove the scope for discretion to be exercised. Discussion of the various methods which can be used to guide judicial discretion cannot be isolated from the discussion of general sentencing principles in Chapter 3. For example, principles such as imprisonment is a sanction of last resort operate as a guide to sentencing discretion independently of the methods discussed here.

6.2 The interest in techniques for guiding judicial discretion in sentencing stems largely from a perceived failure to achieve consistency in sentencing, one of the objectives to which the sentencing system is dedicated.¹ To the extent to which sentencing disparity ought to be a matter for concern (a question which, as we have pointed out in Chapter 2, is extremely controversial)² it is of course desirable to identify approaches to sentencing which may improve sentencing consistency.

6.3 The Commission's general approach to evaluation of the techniques in this Chapter is to balance the supposed improvement of consistency of sentence outcome against the ability to account for the many factors which are relevant to the determination of sentences in individual cases.³ Our tentative conclusion is that the methods of guiding sentencing discretion which have been suggested, or in some cases trialled in overseas jurisdictions, generally fail to account adequately for the relevant factors which must be taken into account in determining sentences in individual cases. The premise is, of course, that judicial discretion remains an invaluable method of ensuring justice in individual cases, and this discretion must be retained.

METHODS CURRENTLY USED BY THE COURTS TO ACHIEVE CONSISTENCY OF SENTENCING

Sentencing appeals

6.4 The High Court, as the highest court of appeal, has shown itself to be very reluctant to intervene in the sentencing process. Special leave is required before an appeal to the High Court can occur, and the Court has imposed a heavy burden upon a party seeking to obtain it. In *Lowe v The Queen*, Chief Justice Gibbs stated:

[T]o warrant the grant of special leave to appeal against sentence when there has been no want or excess of jurisdiction, it must appear that the case involves some question of law or principle of general importance or that there has been a gross violation of the principles which ought to govern discretion in imposing sentence.⁴

6.5 The High Court is especially reluctant to interfere with sentencing decisions which have been made under legislative provisions which are peculiar to a particular jurisdiction. The construction of provisions "with no precise counterpart in other States" should usually be determined by the particular State courts.⁵

6.6 This makes the Court of Criminal Appeal the final court of appeal against sentence in the vast majority of cases. The principles of sentencing are developed at common law by appeal to the Court of Criminal Appeal. Generally, the legislature provides only limited guidance to sentencing and appeal courts in the form of statutory maximum penalties for particular offences. Although such maxima are the first point of reference for judges and magistrates,⁶ they provide very little guidance when selecting an appropriate penalty in a particular case.

6.7 Appellate review limits the exercise of sentencing discretion in two ways. First, it provides a mechanism for challenging a particular sentencing decision. Secondly, it generates a jurisprudence of sentencing for guidance in future sentencing decisions.⁷ The primary principle governing appeals against sentence is that the Court of Criminal Appeal "does not simply embark upon the task of sentencing afresh, substituting its own opinion for that of the sentencing judge".⁸ Appellate interference is warranted only by a material error of law or fact by the

sentencing judge. Such an error may appear in the reasons given by the trial judge, or may be disclosed by the manifest excess or inadequacy of the sentence imposed.

6.8 The chief advantages of appellate review as a method of guiding judicial discretion are flexibility, and the fact that judges and counsel are obviously experienced in this procedure.⁹ It must be pointed out that several other strategies for improving consistency in the exercise of sentencing discretion are currently incorporated into appellate review. Judicial education, and a sophisticated Sentencing Information System, both of which are discussed below, are two methods which are currently available to both sentencing and appeal judges in New South Wales.

6.9 The key disadvantage of relying upon sentencing appeals to ensure sentence consistency is that the process is purely reactive.¹⁰ The Court of Criminal Appeal can articulate principles of sentencing (including information about appropriate sentence length) only in cases which are appealed to it. Sentencing jurisprudence is also far less developed than case law on many other legal subjects, providing less practical guidance than decisions in these areas.¹¹ As serious crimes and extreme sentences predominate in such appeals, the coverage of sentencing law can be incomplete, particularly for the many minor offences (and non-custodial sentencing options) dealt with in Local Courts. This poses significant structural difficulties in changing sentencing values.

Sentencing information

6.10 The *Judicial Officers Act 1986* (NSW) established the Judicial Commission of New South Wales. Amongst other purposes, the Act was passed "to confer on the Commission functions relating to sentencing consistency".¹² The relevant provision is s 8:

- (1) The Commission may, for the purpose of assisting courts to achieve consistency in imposing sentences:
 - (a) monitor or assist in monitoring sentences imposed by courts; and
 - (b) disseminate information and reports on sentences imposed by courts.
- (2) Nothing in this section limits any discretion that a court has in determining a sentence.

6.11 These functions are primarily discharged by the introduction and maintenance of the Sentencing Information System ("SIS"), a large computerised database providing judicial officers with a wide range of qualitative and quantitative information about sentencing practices in New South Wales. The SIS contains four separate components:

- Sentencing law;
- Sentencing statistics;
- Sentencing facilities; and
- Sentencing calculator.

Sentencing law component

6.12 Sentencing Law contains narrative text on sentencing principles, case law and legislation. Most of the cases are unreported judgments of the New South Wales Court of Criminal Appeal, although some leading cases from other jurisdictions are also included. The Sentencing Law component contains a powerful full text retrieval system, which allows the user to locate, view on the screen, print out or download any document contained in the database. In addition, documents which are logically related to each other have been electronically linked so that the user can easily move between documents. The component also contains examples of the forms of order which may be appropriate, or tailored to suit, the circumstances of the particular case.

6.13 Sentencing Law is divided into a number of subsets:¹³

1. *Full text of judgments.* This contains over 2300 unreported judgments of the Court of Criminal Appeal which can be read and downloaded into a word processor or document, or printed as required.
2. *Case summaries.* This contains almost 1800 short summaries of relevant facts of Court of Criminal Appeal and High Court cases concerning sentencing.
3. *Principles of sentencing.* This is narrative text written by the Judicial Commission which summarises sentencing law and provides citations to the leading authorities supporting the particular principle.
4. *Purple passages.* This contains selected pages of judgments carefully extracted as the essence of a proposition of sentencing. They are similar to “quotations”, providing a quick way of seeing whether the particular case is worth further investigation, and are frequently the more “oft-quoted” extracts of judgments.
5. *Sentencing options and orders.* This is narrative text which discusses each sentencing option and outlines possible uses, constraints, and interactions with other options in all jurisdictions.
6. *Current NSW legislation.* This contains the full text of 24 pieces of current State legislation. Legislative change is recorded on the SIS to form a historical collection of amendments, allowing access to repealed sections of legislation.
7. *Current Commonwealth legislation.* This includes full text of 25 pieces of current Commonwealth legislation, also containing historical information about the legislation.

Sentencing statistics component

6.14 This database contains statistical data on sentences imposed in the Local Court, the higher courts and the Children’s Court. Only statistics resulting from the most recent data are displayed, except where there are fewer than five cases of a particular offence. In such cases, data is retained to ensure that statistics relating to unusual and uncommon offences are as comprehensive as possible.

6.15 The user is able to select:

- the relevant jurisdiction;
- the Act and section number of the principal offence;
- whether other offences are to be taken into account;
- whether the offender is an individual or a corporation;
- and the number of counts of the principal offence.

It is also possible to define specific offender characteristics such as the plea, age, prior criminal record and liberty status of the offender at the time of the commission of the offence.¹⁴

6.16 The information is displayed in a number of tables and graphs which indicate the frequencies in terms of:

- the various kinds of dispositions;
- pecuniary value of fines;
- minimum or fixed custodial terms; and
- full custodial terms imposed.

6.17 The Commission is of the view that the statistics database is deficient in two respects:

The omission of decisions of the Court of Criminal Appeal in the statistics (a deficiency which will be remedial in the next generation of SIS).

The inability to identify from the statistics graph individual cases (especially those from the higher courts) on which the graph is based.

Facilities component

6.18 The Facilities component provides details as to the availability of drug and alcohol counselling, periodic detention and community service work, cross-referenced by geographic location and service type. The database includes separate directories of adult and juvenile facilities containing about 800 documents. Each document is in a standard format providing the street address, postal address, telephone and fax numbers, operating hours, services offered, intake policy and any other special services. This component was designed in co-operation with a number of government agencies to facilitate the regular and timely updating of information. The agencies include: the Department of Juvenile Justice, the Department of Corrective Services, the Probation Service, the Attorney General's Department and the Directorate of the Drug Offensive.

Calculator

6.19 The Sentencing Date Calculator is designed to assist judicial officers to calculate dates required when imposing a custodial sentence.¹⁵ The calculator provides the expiry date of the minimum or fixed term, the expiry date of the additional term and the length of minimum term. In a situation where the statutory formula is not followed, the judicial officer is warned that "special circumstances must exist".¹⁶

Bench books and references

6.20 The Judicial Commission's on-line database also contains bench books and references. The bench books are electronic versions of *Criminal Trial Courts Bench Book*, *Local Courts Bench Book* and *Civil Trials - Judicial Essays and Working Papers*. The references subset contains works relevant to contemporary judicial issues, including sentencing. For example, a recent article entitled *Changes in Evidence Law and Practice - An overview* by J D Heydon, has been included. Documents contained in the Bench Books and Reference component are electronically linked to the Court of Criminal Appeal Judgments, and to the New South Wales and Commonwealth legislation subsets where relevant.

Evaluation

6.21 The SIS is designed to inform judges and magistrates about penalties without imposing any particular option or duration of sentence for a particular case. An appeal against sentence is not affected by the availability of the SIS. Appeals are based upon the facts of the case and the application of the relevant law, not on the information presented in the SIS. The SIS merely seeks to encourage sentencing consistency by making an increased volume of reliable empirical information easily available to judges and magistrates. It is designed to "assist and inform sentencers when contemplating future decisions".¹⁷

6.22 It is important to note that the SIS does not seek to fetter the discretion of the judicial officer in choosing the appropriate penalty or the quantum of penalty. While the SIS displays the range of penalties imposed and the frequency with which any particular penalty is imposed in a manner which is fairly sensitive to the nature of the offence and of the offender, the factors which it builds into the sentencing equation do not exhaust the large number of factors that are relevant when sentencing an offender.¹⁸ For example, the motive for the crime, the range of aggravating and mitigating circumstances, and the health of the offender are not taken into account by the SIS. The assumption is that the exercise of judicial discretion necessarily remains important to the task of sentencing. This accords with the Commission's premise in evaluating techniques designed to assist judicial officers in sentencing.¹⁹

6.23 The ability of the SIS to improve sentencing consistency is limited by:

- the accessibility of SIS to judicial officers;
- the availability of empirical evidence;
- the extent to which judicial officers use it; and
- the extent to which judicial officers choose to follow the guidance offered by the system.

6.24 **Accessibility of SIS.** The overwhelming majority (at least 95%) of judges and magistrates sitting in criminal jurisdiction have access to the SIS from court locations throughout New South Wales. The Attorney General's Department has provided all judges of the Supreme and District Courts with the necessary hardware and software to access the SIS. The Judicial Commission has provided the same equipment to 109 magistrates (95% of the total magistracy in New South Wales). The remaining 5% of magistrates will be similarly equipped by the middle of 1996. Judicial officers can access the SIS in a number of ways. These include direct connection (Ethernet and X25) from some court buildings in metropolitan Sydney or modem access from home or chambers where a direct connection is not available.²⁰

6.25 The SIS is easy to use even for those without much experience of computers. It will become even easier to use when the next generation of SIS comes on line in the middle of 1996. This generation moves from the current keyboard-driven menu system to a Windows format, utilising internet technology to allow users to retrieve information in a more intuitive manner using hypertext links. The graphical user interface will allow users to view cases and text material simultaneously with statistics, bench books or other relevant material.

6.26 **Availability of empirical evidence.** SIS is driven by the data which is fed into it. Inevitably, this means that for less common offences, or for less common offender characteristics in relation to common offences, the information-base will be small. In no way does the Commission regard this as the "fatal flaw" of SIS.²¹ First, the database retains, in principle, its value for common offences for which data do exist. Secondly, the enterprise is ongoing and data regarding the less common offences and offender characteristics will, inevitably, be forthcoming.

6.27 **Usage of SIS.** References to SIS in judgments make it clear that judicial officers and lawyers are making use of the system.²² However, it is difficult to draw any conclusions from usage statistics (which are not limited to judicial officers) except that, at present, far greater use is made of the sentencing law component of SIS than of sentencing statistics. Between July 1994 and November 1995, on-line enquiries to the sentencing law component of the SIS tended to average slightly less than 1,000 per month (though monthly usage is uneven), while enquiries to the statistical component tended to be less than a couple of hundred per month.²³ The Commission is in no doubt that as the database expands and becomes more comprehensive, usage of the SIS will increase correspondingly.

6.28 **Usefulness of SIS.** References to the SIS in judgments sometimes comment on the usefulness of the system. Thus, in *Maguire*, Justice Grove said:

[I]nformation of the kind contained in the sentencing information data base ... can often be useful in determining whether a particular sentence should be characterised as manifestly excessive or indeed manifestly inadequate.²⁴

More generally, Justice Carruthers has pointed to the likely greater use of statistical evidence in sentencing hearings in the future. His Honour said:

I daresay that the Court will hear, in the future, a good deal more about the Sentencing Information System and the Sentencing Information Service and about statistical graphs and other statistical material of the kind now before this court.²⁵

6.29 **Review of SIS and other matters.** The Judicial Commission has commenced a formal evaluation of SIS at two levels - first, its effect on sentencing practice and, secondly, its benefits as expressed by its users. That

evaluation will be completed in late 1996. Meanwhile, the Commission is of the view that any serious consideration of mandatory or presumptive sentencing schemes should be suspended until the impact of the SIS on sentencing decisions has been evaluated.²⁶

6.30 More generally, the Commission is in no doubt that the SIS is a valuable addition to the tools available to a judicial officer in arriving at sentence in the instant case. At one level, the system provides the officer with easy access to information which is difficult to find or which is easily overlooked. At a more sophisticated level, SIS serves as a guide to the exercise of judicial discretion without in any way acting as an unacceptable fetter on that discretion. The Commission believes that every effort should be made to maintain and improve what will no doubt eventually become an indispensable aid to sentencing in New South Wales.

Judicial education

6.31 Another technique which may be used to encourage greater consistency in sentencing is judicial education. Judicial education may use a variety of techniques, such as examinations of recent statutory and case law developments; case studies and sentencing exercises; and analysis of the philosophical principles of sentencing.²⁷

6.32 The *Judicial Officers Act 1986* (NSW) provides for the Judicial Commission of New South Wales to "organise and supervise an appropriate scheme for the continuing education and training of judicial officers."²⁸ In organising the scheme of judicial education, the Judicial Commission must:

- (a) endeavour to ensure that the scheme is appropriate for the judicial system of the State, having regard to the status and experience of judicial officers;
- (b) invite suggestions from and consult with judicial officers as to the nature and extent of an appropriate scheme;
- (c) have regard to the differing needs of differing classes of judicial officers and give particular attention to the training of newly appointed judicial officers; and
- (d) have regard to other matters as appear to the Commission to be relevant.²⁹

The guiding principle of the Judicial Commission's education policy is the provision of assistance to judicial officers "by enhancing professional expertise, facilitating development of judicial knowledge and skills and promoting the pursuit of juristic excellence."³⁰

6.33 The Judicial Commission discharges these functions by providing conferences and seminars, producing a range of publications, and conducting computer training for judicial officers. Sentencing has been one of the most popular topics in the judicial education programmes of many jurisdictions.³¹ During the 1994-95 financial year, the Judicial Commission provided one specialist seminar on sentencing, although sentencing issues were considered in many of the general conferences made available to judicial officers during this period.³² As part of its computer training programme, the Judicial Commission provides both introductory and advanced instruction on the use of the Sentencing Information System (SIS).³³ In addition, the Judicial Commission has recently revised the sentencing law chapters of the Bench Books of both the Criminal Trial Courts and Local Courts in New South Wales.³⁴

6.34 While sentencing issues feature in the educative function of the Judicial Commission, sentencing is only one of many issues that the Judicial Commission must address. If a sentencing education programme designed to improve sentencing consistency were introduced as one of the Judicial Commission's functions, it would possibly require specialist consideration by a discrete section of the Commission. This is implicit in the suggestion of the Attorney General's Sentencing Review that a "Sentencing Policy Advisory Council" might become part of the Judicial Commission, if the establishment of such a council were warranted.³⁵ It has been suggested that nothing less than a "permanent infrastructure" is required to support judicial officers in the complex task of sentencing.³⁶

6.35 The belief that sentencing skills may be taught is implicit to judicial education programmes.³⁷ Although the fundamental values which underpin common law principles of sentencing may be effectively taught, it is not certain that this will produce improved consistency in sentencing. Fox has identified three major weaknesses in judicial education as a strategy for addressing sentencing inconsistency. First, the lack of formal assessment makes it difficult to assess how much is learnt, and how long it endures. Secondly, education is unlikely to encourage a fundamental re-assessment of sentencing values or the system as a whole. Thirdly, judicial education lacks the means of ensuring compliance.³⁸

OTHER METHODS FOR REGULATING JUDICIAL DISCRETION

Guideline judgments

6.36 Guideline judgments are judgments of courts of criminal appeal which go beyond the point specifically raised for consideration in the appeal. Their purpose is to suggest the principles (and, possibly, a scale) which ought to apply to sentences for various categories of crime. Such judgments represent a consolidation of advice upon a particular sentencing point.

6.37 Several guideline judgments are issued each year by the English, New Zealand and Canadian courts of appeal. Section 143 of the *Sentencing Act 1995* (WA) makes specific provision for guideline judgments to be issued by the Court of Criminal Appeal, which are “to be taken into account by courts sentencing offenders.” Guideline judgments may be given regardless of whether it is necessary for the current proceedings. No mention is made of the principles guiding the content of the judgment, although provision is made for their review, variation or revocation.³⁹

6.38 The Victorian Sentencing Committee made comprehensive recommendations for the adoption of a statutory guideline judgments procedure, accompanying the qualitative and quantitative assistance of a Judicial Studies Board.⁴⁰ The *Sentencing Bill 1990* (Vic) contained a provision for guideline judgments, which would have permitted the Full Court to consider statistical material, evidence of relevant public attitudes, and the efficient use of correctional facilities.⁴¹ However, the provision was not enacted. A majority of Supreme Court judges, while not denying their “possible utility”, thought that guideline judgments were unnecessary in the closely knit Victorian legal community, and that the way in which judgments were delivered by the Court of Criminal Appeal should be studied before the fetters on the discretion of the sentencing judge implied in guideline judgments were entertained.⁴²

6.39 These criticisms point to the fact that the innumerable factors which may be taken into account in sentencing any particular offender will necessarily limit the efficacy of a guideline judgments procedure. Guideline sentencing ranges might become so broad so as to provide no useful guidance at all. Alternatively, the sentencing range might remain usefully narrow, though at the expense of excessively refined criteria for determination of the range.

6.40 Guideline judgments will be also be restricted to a fairly narrow cross-section of offences because they also rely upon the standard appeal process. They were criticised as an ineffective means of promoting consistency by the Canadian Sentencing Commission.⁴³ In this respect, they are subject to the same limitations as the current appellate structure, because the Court of Criminal Appeal tends to review sentences for serious crimes, or sentences which are argued to be extremely harsh or lenient. Guideline judgments do not permit a systematic appraisal of the sentencing system, and are unsuitable for debating the overall objectives of that system.⁴⁴ Nor do they permit critical evaluation of penalty severity for one offence relative to other offences.⁴⁵ On the whole, submissions to the Attorney General’s Sentencing Review tended not to favour the introduction of guideline judgments either for unstated reasons or for reasons which have been outlined above.⁴⁶

6.41 The advantage of guideline judgments is that they represent a reform consistent with the nature of the existing appellate process. Judicial officers and counsel could adapt to the changes relatively easily, and the process could be grafted onto existing sentencing appeals processes. The Attorney General’s Sentencing Review suggested that it might be possible for the DPP specifically to request a guideline judgment in a sentencing appeal, and the court should be free to accept or decline such a request.⁴⁷ The *Review* referred to

the need to protect the accused from any additional financial burden that might result from his or her case being made a "test case".⁴⁸

Sentencing councils

6.42 The prospect of introducing a sentencing council to improve sentencing decisions has been addressed in a variety of forums. Different inquiries and jurisdictions have had quite different understandings of the appropriate functions a sentencing council might exercise. The Victorian Sentencing Committee regarded sentencing councils as a model involving:

More than one judge imposing a sentence

A judge with a number of lay assessors determining the sentence for an offender.⁴⁹

This model involves formal consultation between the members of the council or panel, although the ultimate power to impose sentence may reside in one (judicial) member. The rationale for this approach is that a consultative process - even though it may not be binding - will produce consensus increasing the uniformity of sentences.⁵⁰ The major problem with this model is the substantial increase in resources which must be allocated to sentencing decisions made at first instance.⁵¹ The Victorian Sentencing Committee did not recommend the introduction of a sentencing council along these lines.

6.43 Other proposals envisage a less radical function for sentencing councils, combining several of the methods which have been dealt with above.⁵² For example, the Australian Law Reform Commission recommended the establishment of a council whose major function would be the provision of "detailed, comprehensive information to promote consistency in sentencing...".⁵³ The Victorian Sentencing Committee recommended the establishment of a "judicial studies board" whose aim would be structured education and keeping judicial officers aware of changes in sentencing law.⁵⁴ This recommendation was acted upon by the government with the passing of the *Judicial Studies Board Act* in 1990.⁵⁵ However, the Board has never appointed any executive officers, and no progress has been made to achieving the functions prescribed by the enabling legislation.⁵⁶ The Judicial Commission of New South Wales largely fulfils the role envisaged for a sentencing council in this paragraph through the maintenance of the Sentencing Information System and the provision of judicial education.

6.44 The introduction of a "Sentencing Policy Advisory Council" whose purpose would be to develop sentencing policy was canvassed by the Attorney General's Sentencing Review in 1994.⁵⁷ The possibility that the Judicial Commission could incorporate such a council for the purpose of developing sentencing policy was raised. However, it was argued that greater time should be allowed to evaluate the Judicial Commission's Sentencing Information System before a sentencing council was contemplated.

6.45 Submissions to the Attorney General's Sentencing Review were divided on the value of introducing a sentencing council in New South Wales. Several agreed with the suggestion made in the Review's Issues Paper that more time was needed for a proper evaluation of the SIS.⁵⁸ Of those submissions in favour of a council, several were happy for the Judicial Commission to provide the infrastructure for the Council.⁵⁹ The Council of Social Service of New South Wales (NCOSS) submitted that any sentencing council should not be part of the Judicial Commission.⁶⁰ Others were simply opposed to the concept of a sentencing council.⁶¹

Statutory minimum penalties

6.46 Specifying in legislation the minimum penalties that may be imposed for particular offences is one method of providing limits upon judicial discretion in sentencing. As a general rule (as in other common law jurisdictions) the Parliament has not traditionally provided sentencing guidance to judges by imposing minimum penalties in legislation.

6.47 The guidance given by statutory minima is very blunt. No guidance is given for choosing any punishment which would fall within the range established by the minimum and maximum sentence. Sentence disparity might

remain, although over a narrower range of sentence. Logically, the extent of this disparity would vary according to the extent of the range of sentence which was available between the two extremes.

6.48 A further criticism of statutory minimum penalties is that they provide little scope for addressing the subjective features of a particular case or offender. Some offenders may be deserving of lesser punishment than other offenders for a number of reasons.⁶² If the sentencing judge would have imposed a sentence of lesser severity than the minimum prescribed penalty, the resulting sentence is unjust.

6.49 A modification to this method of guiding discretion is to provide a "special circumstances" exception.⁶³ This allows the sentencer to impose a sentence below that prescribed by the legislation where special circumstances (which may or may not be specified in the legislation) exist. Whether greater sentencing consistency results from such a system depends largely on how the judiciary interprets the special circumstances requirement. If a broad interpretation evolves, the objective of sentence uniformity is hardly advanced.⁶⁴

6.50 The Australian Law Reform Commission recommended the elimination of all prescribed minimum penalties from Commonwealth law. It was argued that mandatory minimum penalties undermine consistent consideration of offences, since different circumstances are artificially considered in the same way, encourage technical defences and may result in perverse verdicts by juries.⁶⁵ The Commission agrees.

Grid sentencing

6.51 The introduction of statutory grids for determining sentence has been one of the most significant (and controversial) aspects of sentencing reform. They have been used most extensively in United States jurisdictions, where fifteen States have guidelines produced by a standing sentencing commission.⁶⁶ The Minnesota and Federal models are the most widely known, and the following discussion will be largely confined to these two examples of sentencing grid systems. However, it should be remembered that the grids contain differences for a number of important variables. Sentencing grids may be voluntary or mandatory, may or may not abolish discretionary release on parole, and use different formulae for determining criminal history scores. The type of offence to which the grid applies varies across the jurisdictions.⁶⁷ Finally, the grids produced in the various States enshrine different objectives and philosophies of punishment.⁶⁸

6.52 The possibility of introducing a sentencing grid was raised by the Attorney General's Sentencing Review, but it was argued that serious consideration of such a system should be delayed until the effect of the SIS could be properly evaluated.⁶⁹ There is a vast literature on the American sentencing grids, and much controversy surrounding their value as a sentencing tool. What follows is merely a brief introduction to the concept of sentencing grids. An account of their basic features, and a summary of the main arguments for and against them, is provided.

The Minnesota system

6.53 The basic features of the grid are as follows. The vertical axis of the grid displays the severity levels of the various offences in descending order. Along the horizontal axis, the possible "criminal history scores" are displayed, which refers to the number of the offender's previous convictions. These two features were selected after preliminary research indicated that the two most important influences upon sentencing were the seriousness of the instant offence and the extent of the offender's criminal record.⁷⁰ The presumptive sentence lies at the intersection of the points selected on each axis. Where the cell selected is above the "dispositional line" (a heavy black line), the presumptive sentence is a non-custodial order for the number of months indicated by the cell. For all cases appearing below the dispositional line, a sentence of imprisonment is presumed.

6.54 A small range of sentence also appears in each cell falling below the dispositional line (that is, for sentences of imprisonment), which allows for aggravation or mitigation of the guideline sentence. A judge may impose a sentence either above or below this range only if "substantial and compelling" circumstances exist, and reasons are given for the departure from the range.

6.55 Thus, to take an example, an offender convicted of a residential robbery with three previous convictions for a similar offence will presumptively be sentenced to thirty months imprisonment. If the sentencing judge is of the view that mitigating circumstances apply, the offender may be sentenced to twenty-nine months. If the

offence is aggravated for some reason, a sentence of thirty-one months may be imposed. A sentence less than twenty-nine months, or longer than thirty-one months, can be imposed only in substantial and compelling circumstances.

6.56 Both the Australian Law Reform Commission and the Victorian Sentencing Committee rejected the introduction of sentencing grids along the lines of the Minnesota model.⁷¹ Both reports indicated considerable concern about the rigidity that would be introduced into the sentencing system if judicial discretion was removed in such a manner.

6.57 The main advantages of a grid system are consistency and certainty of outcome. Apparently, the Minnesota guidelines have resulted in less disparity between offenders on the basis of race and social class.⁷² In 1991, the specified sentencing ranges were departed from in 16% of all cases, three-quarters mitigated and one-quarter aggravated.⁷³ Desirable secondary criteria, such as efficient utilisation of prison space, can be factored into the sentencing formula. Minnesota has been largely successful (especially in relation to other US jurisdictions) in retarding the growth of the prison population.⁷⁴ Authoritative alterations can be made relatively easily where the meeting of policy goals requires the adjustment of sentencing regime.

6.58 However, it has been argued that the improved consistency brought by the grid system is a somewhat artificial advantage. Two elements of sentence information- offence seriousness and criminal record - become the privileged features of the sentencing regime. It has been noted that the offender's criminal record has played a role of greater importance than originally intended for the system.⁷⁵ Consistency may be increased at the expense of dispassionate consideration of a range of other factors which might be relevant when deciding upon the appropriate punishment.

6.59 Attempts to reduce prison population have had mixed success. While the availability of prison space was factored into the sentencing guidelines, alterations in exercise of prosecutorial discretion (for example, multiple charging) have mitigated the attempts to reduce the prison population. Prosecutors apparently "run-up" criminal history scores by this practice, thereby achieving higher sentences. The grid system has also caused an increase in charge and fact bargaining, as the decision to prosecute (and the choice of charges) becomes more important to sentence outcome.⁷⁶ The most important point to make about this is that the exercise of discretion in the sentencing process is retained, at least to some extent. While the discretion of judges is restricted, discretion now resides with prosecutors, whose role is, of course, less visible and less subject to control.

United States federal guidelines

6.60 The Federal guidelines, introduced by the *Sentencing Reform Act 1984*, include the same basic concepts as those which apply in Minnesota. Like the Minnesota Sentencing Commission, the federal Sentencing Commission produces guidelines which rely on a sentencing grid. The grid operates by measuring the offence levels and the criminal history of the offender, and a sentencing range is provided at the intersection of each row and column.⁷⁷ Apart from differences in the severity of punishments between the two sets of guidelines, the greater complexity of the federal guidelines distinguishes them from those which operate in Minnesota and other American States. The federal sentencing grid has forty three offence levels, and six categories for the offenders criminal history. To the "base level" of the particular offence, is added additional levels according to the existence of any "special offence characteristics". To take an example, if an offender is convicted of robbery, the offence level is enhanced by three points if a gun was brandished, and further enhanced on a points scale depending upon the value of money or goods taken in the robbery.⁷⁸ It should be noted that relevant conduct for this purpose extends to activity which is not part of the offence charged, or which constitutes multiple offences charged only as a single offence.⁷⁹ The need for "adjustment" of the offence level is then determined. The fact that the victim is to be regarded as vulnerable would increase the offence level, while remorse (for example) would decrease the level.

6.61 The offender's criminal history score (which is sensitive to the seriousness, as well as the number of, convictions) is calculated, and the guideline sentence then calculated. In the absence of unusual factors, the guideline sentence must be imposed.⁸⁰ Guidelines and additional "policy statements" are provided as to what may or may not justify departures from the guideline sentence.⁸¹

6.62 Much of the complexity of the federal guidelines is apparently due to efforts to curtail tightly the exercise of judicial discretion, which was previously much less guided by developed case law than other common law jurisdictions.⁸² However, it appears that this complexity has largely nullified the qualified advantages that the Minnesota grid has brought to sentencing in that State. It also appears that the disadvantages brought by the sentencing grid in Minnesota also apply in the federal jurisdiction, and are more severe.

6.63 One ramification of the guidelines' rigidity is that disparity becomes hidden by the less visible practices which occur at other points of the criminal justice system. For example, prosecutorial discretion in the selection of charges, and negotiation about particular facts to be brought to judicial notice, are practices which appear to be widespread. Such conduct leads to disparities between cases which should (according to the guidelines) be treated in the same way. "Informal non-compliance" is particularly important because the resulting disparities tend to be hidden, and disparity was the particular problem which the guidelines were supposed to address.⁸³

6.64 Not surprisingly, the response to the federal sentencing guidelines has been overwhelmingly negative. Michael Tonry, a leading American sentencing scholar, has written:

The Guidelines ... are the most controversial and reviled sentencing reform initiative in United States history. They are commonly criticised on policy grounds (that they unduly narrowly limit judicial discretion and unduly shift discretion to prosecutors), on process grounds (that they foreseeably cause judges and prosecutors to circumvent them), on technocratic grounds (that they are too complex and hard to apply accurately), on fairness grounds (that by taking only offence elements and prior convictions into account, they require that very different defendants receive the same sentence), and on normative grounds (that they greatly increased the proportion of offenders receiving prison sentences and are generally too harsh).⁸⁴

Canadian Sentencing Commission guidelines

6.65 The Canadian Sentencing Commission rejected the type of detailed numerical guidance available in the sentencing grids detailed above. The Commission was in favour of increasing guidance in sentence, and recommended *presumptive* sentences, of four sentence *types* only:

1. in custody;
2. out of custody (community sanction);
3. qualified custody (custody presumed unless a minor offence and offender has no record); and
4. qualified out of custody (community sanction unless it is a serious instance of the offence and the offender has a relevant criminal record).⁸⁵

Further, a presumptive range of sentence for each offence normally requiring incarceration would also be set. In all cases, the presumption could be departed from where the judge gives reasons for doing so.

6.66 Such a proposal retains a very wide discretion as compared to other grid approaches to sentencing guidance. The Victorian Sentencing Committee regarded the Canadian model as providing only "limited and imprecise guidance" for the tasks of classifying and combining the variety of information relevant to the task of sentencing.⁸⁶ The Commission's tentative view is that such limited guidance does not justify departure from the present sentencing model.

QUESTIONS ARISING IN CHAPTER 6

1. Should any changes be made to the Sentencing Information System in New South Wales? If so, what will the benefits of those changes be either in terms of sentence consistency or more generally?

2. Sentencers in Victoria are expressly required to have regard to "current sentencing practices" when sentencing an offender (see *Sentencing Act 1991 (Vic) s 5(2)(b)*). Should

sentencers in New South Wales be *required* to take current sentencing practice into account by use of the SIS?

3. Is judicial education in sentencing law likely to promote greater consistency in sentencing? If so, how ought that training to be structured to promote this goal?

4. Ought guideline judgments to be introduced in New South Wales?

5. Is there any role for a Sentencing Council in New South Wales?

6. Ought the Legislature ever to prescribe mandatory minimum penalties?

7. Ought consideration to be given to the development of a sentencing grid in New South Wales? If so, how far should the grid be allowed to confine judicial discretion?

Footnotes

1. See paras 3.38-3.40.

2. See paras 2.13-2.21.

3. See Chapter 5.

4. *Lowe v The Queen* (1984) 154 CLR 606 at 608-09.

5. *Crump v The Queen* (1995) 69 ALJR 570 at 570 per Brennan CJ, Dawson and Gummow JJ.

6. *DPP v El Karhani* (1990) 21 NSWLR 370 at 380.

7. A Ashworth, "Criminal Justice, Rights and Sentencing: A Review of Sentencing Policy and Problems" in I Potas (ed), *Sentencing in Australia* (Australian Institute of Criminology, Seminar Proceedings No 13, 1987) at 36.

8. *R v Allpass* (1993) 72 A Crim R 561 at 562.

9. R Fox, "Controlling Sentencers" (1987) 20 *Australia and New Zealand Journal of Criminology* 218 at 226.

10. A Ashworth, "Three Techniques for Reducing Sentence Disparity" in A von Hirsch and A Ashworth (eds), *Principled Sentencing* (Edinburgh University Press, Edinburgh, 1992) at 283.

11. Ashworth (1987) at 36.

12. Preamble to the *Judicial Officers Act 1986* (NSW).

13. Figures used in this paragraph provided by the Judicial Commission of NSW, 20 December 1995.

14. Offender characteristics have deliberately been limited to more "objective" features: see J Chan, "A Computerised Sentencing Information System for New South Wales Courts" (1991) 7(6) *Computer Law and Practice* 137 at 139-140. Thus no allowance is made for the offender's sex because the Judicial Commission has been advised that many judicial officers take the view that this is not a factor relevant to the exercise of sentencing discretion: see paras 5.46-5.49.

15. *Sentencing Act 1989* (NSW) s 8.

16. *Sentencing Act 1989* (NSW) s 5(2). See paras 4.24-4.33.

17. I Potas and S Cumines, "The Sentencing Information System of New South Wales: Using Computers to Inform the Courts" paper presented at the *Eighth Conference for Librarians in the Criminal Justice System* (Sydney, 2 April 1992) at 1.
18. See Chapter 5.
19. See para 6.3.
20. Information provided by the Judicial Commission of New South Wales, 20 December 1995.
21. See A Lovegrove, "Structuring the Judicial Sentencing Discretion: Some Empirical Considerations on Reforms" in A Kapardis (ed), *Sentencing: Some Key Issues* (Special issue, Volume 13 No 2 of *Law in Context*) (La Trobe University Press, 1995) at 150.
22. See *R v Baker* (NSW CCA, No 60242/92, 26 November 1992, unreported) at 10; *R v Mackenzie* (NSW CCA, No 60448/93, 15 December 1993, unreported) at 5-6 per Carruthers J; *R v Thomson* (NSW CCA, No 60307/93, 21 June 1994, unreported) at 5 per Finlay J; *R v Jones* (NSW CCA, No 60555/93, 30 June 1994, unreported) at 4; *R v H* (NSW CCA, No 60329/93, 25 July 1994, unreported) at 3; *R v Garlick* (NSW CCA, No 60038/94, 29 July 1994, unreported) at 11; *R v McDonald* (NSW CCA, No 60179/93, 18 August 1994, unreported) at 10; *R v Alexander* (1994) 78 A Crim R 141 at 146; *R v Allen* (NSW CCA, No 60458/94, 17 February 1995, unreported) at 7-8; *R v Gudge* (NSW CCA, 60489/94, 3 April 1995, unreported) at 13 per Finlay J; *R v K* (NSW CCA, No 60401/94, 5 April 1995, unreported) at 7 per Finlay J; *R v Yavuz* (NSW CCA, No 60102/94, 20 April 1995, unreported) at 9 per James J; *R v Lego* (NSW CCA, No 60511/94, 24 April 1995, unreported) at 4 per Newman J; *R v Griffiths* (NSW CCA, No 60723/94, 26 June 1995, unreported) at 14; *R v Maguire* (NSW CCA, No 60609/94, 30 August 1994, unreported) at 9-10 per Grove J.
23. Information provided by the Judicial Commission of New South Wales, 20 December 1995.
24. NSW CCA, No 60609/94, 30 August 1994, unreported, at 9-10.
25. *R v Mackenzie* (NSW CCA, No 60448/93, 15 December 1993, unreported) at 5-6.
26. New South Wales, *Attorney General's Sentencing Review 1994* (June 1994) at 59; Weatherburn (1994) at 17.
27. P Sallmann, "In Search of the Holy Grail of Sentencing: An Overview of Some Recent Trends and Developments" (1991) 1 *Journal of Judicial Administration* 125 at 129.
28. *Judicial Officers Act 1989* (NSW) s 9. The Australian Law Reform Commission recommended that the provision of sentencing knowledge and skills programs for judicial officers be developed as one of the functions of the proposed sentencing council: *Sentencing* (ALRC 44, 1988) at paras 278-282.
29. *Judicial Officers Act 1989* (NSW) s 9(2).
30. Judicial Commission of New South Wales, *Annual Report 1994-1995* (September 1995) at 62.
31. Sallmann at 129.
32. Judicial Commission of New South Wales, *Annual Report 1994-1995* (September 1995) at 9-11.
33. See paras 6.10-6.30.
34. Judicial Commission of New South Wales, *Annual Report 1994-1995* (September 1995) at 12.
35. New South Wales, *Attorney General's Sentencing Review 1994* at 59.
36. A Freiberg, "Sentencing and Judicial Administration" (1993) 2 *Journal of Judicial Administration* 171 at 177.

37. R Fox, "Controlling Sentencers" (1987) 20 *Australia and New Zealand Journal of Criminology* 218 at 229.
38. Fox (1987) at 230.
39. *Sentencing Act 1995* (WA) s 143(3).
40. Victoria, Attorney-General's Department, *Sentencing: Report of the Victorian Sentencing Committee* (Melbourne, 1988) Volume 1 at paras 4.20.8-4.20.14.
41. A Freiberg, "Sentencing and Judicial Administration" (1993) 2 *Journal of Judicial Administration* 171 at 175.
42. *Sentencing: Report of the Victorian Sentencing Committee* Volume 3 at A9-A10.
43. Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987) at 294-96.
44. Fox at 227; P Sallmann, "In Search of the Holy Grail of Sentencing: An Overview of Some Recent Developments" (1991) 1 *Journal of Judicial Administration* 125 at 128-29.
45. A Ashworth, "Three Techniques for Reducing Sentence Disparity" in A von Hirsch and A Ashworth (eds), *Principled Sentencing* (Edinburgh University Press, Edinburgh, 1992) at 284.
46. See Mr Barry Newport QC, Crown Prosecutor, *Submission to the Attorney General's Sentencing Review* (22 July 1994); Legal Aid Commission of New South Wales, *Submission to the Attorney General's Sentencing Review* (25 July 1994); Law Society of New South Wales, *Submission to the Attorney General's Sentencing Review* (25 July 1994); Office of the Director of Public Prosecutions, *Submission to the Attorney General's Sentencing Review* (27 July 1994); Bar Association of New South Wales, *Submission to the Attorney General's Sentencing Review* (2 August 1994); Public Defenders Chambers, *Submission to the Attorney General's Sentencing Review* (12 August 1994).
47. *Attorney General's Sentencing Review* at 59.
48. *Attorney General's Sentencing Review* at 59.
49. *Sentencing: Report of the Victorian Sentencing Committee* Volume 1 at 14.15.1.
50. Fox (1987) at 228.
51. *Sentencing: Report of the Victorian Sentencing Committee* Volume 1 at 14.15.5.; Fox (1987) at 228.
52. Sentencing *councils* should be distinguished from the North American sentencing *commissions* which develop sentencing policy and guidelines to be used in conjunction with statutory sentencing grids or presumptive dispositions.
53. *Sentencing* (ALRC 44, 1988) at para 275.
54. *Sentencing: Report of the Victorian Sentencing Committee* Volume 1 at para 4.21.5
55. Section 5 of the Act gives the Board fairly detailed functions (exclusively related to sentencing) to: (a) conduct seminars for judges and magistrates on sentencing matters; (b) conduct research into sentencing matters; (c) prepare sentencing guidelines and circulate them among judges and others; (d) develop and maintain a computerised statistical sentencing database for use by the courts; (e) provide sentencing statistics to judges, magistrates and lawyers; (f) monitor present trends, and initiate future developments, in sentencing; (g) assist the courts to give effect to the principles contained in the legislation; (h) consult with the public, government departments and other interested people, bodies or associations on sentencing matters; (i) advise the Attorney-General on sentencing matters. The Board is to consist of seven members, comprising: the Chief Justice of the Supreme Court (or nominee); a Supreme Court judge nominated by the Chief Justice; the Chief Judge of the County Court (or nominee); a County Court judge;

the Chief Magistrate (or nominee); two appointees of the Attorney-General, at least one of whom must be an academic: *Judicial Studies Board Act 1990* (Vic) s 7.

56. A Freiberg, "Sentencing and Judicial Administration" (1993) 2 *Journal of Judicial Administration* 171 at 179.
57. *Attorney General's Sentencing Review* at 58.
58. See for example Public Defenders Chambers, *Submission to the Attorney General's Sentencing Review* (12 August 1994) at 6; Law Society of New South Wales, *Submission to the Attorney General's Sentencing Review 1994* (25 July 1994).
59. See for example Ivan Potas, *Submission to the Attorney General's Sentencing Review* (11 August 1994) at 5; Probation and Parole Officers Association of NSW, *Submission to the Attorney General's Sentencing Review* (20 June 1994) at 11-12. See also Ministry for the Status and Advancement of Women NSW, *Submission to the Attorney General's Sentencing Review* (26 July 1994).
60. Council of Social Service of New South Wales, *Submission to the Attorney General's Sentencing Review* (9 August 1994) at 8.
61. See for example Legal Aid Commission of New South Wales, *Submission to the Attorney General's Sentencing Review* (25 July 1994) at 4; Office of the Director of Public Prosecutions, *Submission to the Attorney General's Sentencing Review* (29 July 1994) at 5.
62. See Chapter 5.
63. See A Ashworth, *Sentencing and Penal Policy* (Weidenfeld and Nicolson, London, 1983) at 74.
64. Consider, by analogy, the use of "special circumstances" in the *Sentencing Act 1989* (NSW) s 5(2): see paras 4.24-4.33.
65. *Sentencing* (ALRC 44, 1988) at para 58.
66. R Frase, "Sentencing Guidelines in Minnesota and Other American States: A Progress Report" in C Clarkson and R Morgan (eds), *The Politics of Sentencing Reform* (Clarendon Press, Oxford, 1995) at 171.
67. Frase at 173-74.
68. Frase at 175-76.
69. *Attorney General's Sentencing Review* at 46-47.
70. R Fox, "Controlling Sentencers" (1987) 20 *Australian and New Zealand Journal of Criminology* 218 at 235.
71. *Sentencing* (ALRC 44, 1988) at para 183; *Sentencing: Report of the Victorian Sentencing Committee* Volume 2 at 573.
72. Frase at 185.
73. Frase at 186.
74. Frase at 195.
75. A von Hirsch, "Proportionality and Parsimony in American Sentencing Guidelines: The Minnesota and Oregon Standards" in C Clarkson and R Morgan (eds), *The Politics of Sentencing Reform* (Clarendon Press, Oxford, 1995) at 157.

76. Frase at 188. See also M Tonry and J Coffee, "Enforcing Sentencing Guidelines: Plea Bargaining and Review Mechanisms" in A von Hirsch, K Knapp and M Tonry (eds), *The Sentencing Commission and Its Guidelines* (Northeastern University Press, Boston, 1987).
77. P Sallmann, "In Search of the Holy Grail of Sentencing: An Overview of Some Recent Trends and Developments" (1991) 1 *Journal of Judicial Administration* 125 at 133.
78. A Ashworth, "Three Techniques for Reducing Sentence Disparity" in A von Hirsch and A Ashworth (eds), *Principled Sentencing* (Edinburgh University Press, Edinburgh, 1992) at 288.
79. A Doob, "The United States Sentencing Commission Guidelines: If you Don't Know Where you are Going, you Might not get There" in C Clarkson and R Morgan (eds), *The Politics of Sentencing Reform* (Clarendon Press, Oxford, 1995) at 219.
80. S Breyer, "The Key Compromises of the Federal Sentencing Guidelines" in C Munro and M Wasik (eds), *Sentencing, Judicial Discretion and Training* (Sweet & Maxwell, London, 1992) at 108.
81. Ashworth (1992) at 289.
82. Doob at 203.
83. D Freed, "Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers" (1992) 101 *Yale Law Journal* 1681 at 1754.
84. M Tonry, "Judges and Sentencing Policy - The American Experience" in C Munro and M Wasik (eds), *Sentencing, Judicial Discretion and Training* (Sweet & Maxwell, London, 1992) at 139-40. For a sustained criticism of sentencing grids by an American judge who felt compelled to resign rather than apply them, see L G Forer, *A Rage to Punish* (Norton & Co, New York, 1994).
85. Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987) at 296.
86. *Sentencing: Report of the Victorian Sentencing Committee* Volume 2 at para 14.2.58.

7. Parole

7.1 Release from custody prior to the completion of the full term of a prison sentence is a very common feature of criminal justice systems. Various methods can be used, including parole, release on licence, remission and pardon. Release may be conditional or absolute. Legislation in New South Wales has abolished remissions¹ and release on licence,² although the Royal prerogative is maintained.³ The Sentencing Act 1989 now provides parole as the only mechanism for release from custody prior to completion of the full sentence.

7.2 This chapter examines the law relating to parole, the procedures of the Offenders Review Board and considers whether any reform is necessary. The Commission's terms of reference specifically require us to consider whether the decisions of the Offenders Review Board should be reviewable, and if so, how.⁴

MEANING OF PAROLE

7.3 Parole is the discharge of prisoners from custody prior to the expiry of the maximum period of custody imposed by the sentencing court, provided they agree to abide by certain conditions, with the intention that they serve some portion of their sentence under supervision in the community, subject to recall for misconduct.⁵ Under the *Sentencing Act 1989* the court may specify a minimum term and an additional term for any sentence of imprisonment greater than six months.⁶ After serving the minimum term, the offender is eligible for release on parole. In the case of offenders with a sentence of three years or less which has a minimum term, release is automatic on the expiry of that term. For all other offenders who have a minimum term, release occurs on the order of the Offenders Review Board. Release is subject to terms and conditions imposed either by the sentencing court when imposing the sentence or the Board, tailored to the needs of the particular offender. Supervision is carried out by officers of the NSW Probation and Parole Service. All paroled offenders remain under the jurisdiction of the Offenders Review Board and subject to recall or other discipline for breach of the conditions of parole release during the balance of the additional term.

7.4 Parole mitigates the harshness of the sentence by reducing the time a prisoner spends in custody but it is not an act of clemency, compassion, or, necessarily, a reward for good conduct. It is part of the continuum of punishment of the offender, and the sentence continues even though the offender is free from custody. Liberty is conditional, and compliance with conditions can be onerous. Some offenders regard the need to comply as a greater punishment and do not, in fact, seek release to parole even though they are eligible for consideration.⁷

THE RATIONALE FOR PAROLE

7.5 When the current parole procedures were introduced by the *Sentencing Act 1989*, the rationale for parole in the sentencing regime was largely assumed.⁸ When the *Parole of Prisoners Act 1966* established the modern parole system in New South Wales, it embodied the prevailing correctional philosophy of rehabilitation.⁹ The conditional freedom of parole would allow an offender guided and supervised transition from custody to the community in circumstances conducive to reform. The underlying purpose of the parole system was the community benefit flowing from the rehabilitative effects of supervised, conditional early release:

[P]arole is a concession to the offender, but a concession which it is expected will benefit the community by bringing the life of the offender under the guidance and control of a skilled officer with the intention of assisting resettlement in the community and so providing the environmental influences which will militate against the offender committing further criminal activity.¹⁰

7.6 Undoubtedly, though not necessarily expressed at the time, other factors influencing the introduction of parole in 1966 were economic and humanitarian.¹¹ The costs to government and the community of incarceration of offenders are obvious, and the inhumanity of imprisonment in brutalising and oppressive institutions was highlighted by the then emerging "decarceration movement".¹²

7.7 The element of risk inherent in a parole system was recognised by the legislature, but balanced against the risks present when any offender is released from prison at the end of the sentence.¹³ Parole seeks to limit

the risks to the community by promoting rehabilitation of offenders, thereby saving the community from the consequences of recidivism and the costs of punishing it.

7.8 When the courts are determining how a sentence is allocated between the minimum and additional terms in accordance with s 5(2) of the *Sentencing Act 1989*,¹⁴ “special circumstances” which will make an offender eligible for parole consideration earlier than the three quarter point of the full sentence include, among other factors, aspects and prospects of rehabilitation.¹⁵

Resting on these decisions can only be the recognition, shared by penologists and judges experienced in the criminal law, of the desirability of certain offenders being subjected to an extended period of conditional release subject to supervision on parole. This is particularly the case for offenders convicted of very serious crime, and recidivists with cumulative sentences, who may have spent long periods in imprisonment and may require lengthy supervision while they adjust to their release and adapt to a world which may have significantly changed. It is also appropriate for young offenders, with clear prior records and above average prospects of rehabilitation, who would benefit from more supervision on parole than from incarceration, which may even be counter-productive.¹⁶

Criticisms of parole

7.9 The manner in which early release processes, particularly parole, affect a prisoner’s sentence is at times subject to criticism in the media, and by others, who claim either that these processes operate too leniently, or that they should not be in use at all, because they needlessly expose the public to harm, usurp the court’s sentencing authority and unduly lessen the effectiveness of the sentence.¹⁷ Calls for the abolition of parole are also associated with the rise of retributivist philosophy in sentencing, which holds up parole as a symbol of the charade in sentencing.¹⁸

7.10 During the 1970s and 1980s, particularly in the United States, there was a very strong anti-parole movement,¹⁹ and several States abolished discretionary parole and indeterminate sentencing. Inquiries in Australia at the same time put the system of early release under very critical review.²⁰ In New South Wales the Muir Committee’s Report contained a minority report recommending the abolition of parole and its replacement by determinate sentences and after-care recognizances.²¹ The Australian Law Reform Commission initially recommended abolition of parole for federal prisoners in 1979 in its Interim Report *Sentencing of Federal Offenders*,²² but by 1988, it had retreated from this position to one favouring reform of parole procedures and automatic release.²³ The 1979 proposal had attracted much criticism and the Commission itself cited the North American experience in the intervening years which showed that the abolition of parole there led to greater prosecutorial discretion, and longer prison sentences, resulting in unmanageable prison populations and enormous costs.²⁴

7.11 The Canadian Sentencing Commission also recommended abolition of parole arguing that it conflicted with the principle of proportionality which had been assigned the highest priority in its sentencing rationale. Further, the lack of equity, clarity and predictability of discretionary parole as then practised created unacceptable uncertainties and disparities in the sentencing process, and undermined the role of the sentencing judge.²⁵ This recommendation attracted neither public²⁶ nor Government support.²⁷ The Government’s response has been to attempt reform of the parole process, rather than to pursue abolition.²⁸

7.12 Criticisms of parole can be found on three main issues. First, various reports have highlighted procedural deficiencies in the operation of discretionary parole systems, and revealed a lack of predictability, openness and accountability.²⁹ Problems included delay, secrecy, uncertainty and breaches of natural justice, with prisoners having no right to be heard or represented, no access to the information used by, or reasons for the decision of, parole authorities, or knowledge of the criteria on which decisions were made. Secondly, public disquiet about parole is said to focus on subversion of judicial sentencing, insufficient punishment for offenders and weakening the deterrent effect of imprisonment.³⁰ Thirdly, discretionary parole is “premised on theoretically and empirically faulty notions of rehabilitation and on non-existent behavioral expertise of parole board members”.³¹ The basis for parole decision making is flawed: it is not possible to predict human behaviour, that is whether, when, and in what way a person may re-offend; nor is there evidence of the effectiveness of rehabilitative measures.

Empirical studies

7.13 Empirical evidence evaluating parole is scarce and problematic. Measuring the effectiveness of parole, or indeed any penal policy, must be inexact. Comparative analysis is unhelpful because of differing definitions of failure, dissimilar follow-up periods and varied offender populations, data collection and record keeping practices.³² Additionally, qualitative differences in legislative structures, correctional policies, release eligibility criteria, the nature of supervision and support, parole conditions and approaches to revocation, all militate against drawing reliable conclusions from such limited research as is available. Recidivism is the accepted measure, but the causal link to parole is far less certain. Further, parole should be expected to show some success, as those positively selected for parole release are assumed to be more likely to succeed.

7.14 Research on early release in New South Wales, including a recent study of re-offenders, has only considered the role of parole in recidivism in very limited ways.³³ The Commission understands that a project on recidivism of parolees is currently awaiting funding.³⁴ Other Australian studies have examined recidivism in Western Australia³⁵ and South Australia.³⁶ Reviews of international research evaluating early release indicate a wide range of effectiveness.³⁷ The research that is available perhaps shows lower levels of recidivism for offenders who have been released to parole, but the Commission does not consider it appropriate to draw more meaningful conclusions in support of parole from it.

The Commission's position

7.15 Many of the calls for abolition of parole have relied on procedural faults in the process of parole which are not evident in the current system in New South Wales.³⁸ They are also a product of circumstances peculiar to the time and place, as well as prevailing sentencing and penal philosophies which are not necessarily compatible with the current New South Wales position.

7.16 Apart from the relatively short-lived and narrowly-based opposition to parole noted above, there has not been serious challenge to the value of parole in comparable criminal justice systems. Recent inquiries considering parole in Victoria,³⁹ Western Australia⁴⁰ and England and Wales⁴¹ have reaffirmed its place in those jurisdictions.

7.17 Public perceptions of parole are likely to focus on its dramatic failures - the serious crimes committed by offenders who would, other than for parole, have been in custody at the time. Inevitably, some who are released to parole, and the proportion is not known, will re-offend. Their identity, as well as the timing and nature of their offences, cannot be predicted with any certainty. Parole does not prevent the commission of further crimes. Neither, it must be recognised, does imprisonment (except, of course, during the custodial period).

7.18 On balance, the Commission does not consider that there is a case for the abandonment of parole. In view of the incontrovertible fact that the vast majority of prisoners will be released into the community, the Commission believes that it is preferable that there is an opportunity for release of offenders with support and supervision, conditional on their good behaviour prior to the expiry of the full term of their sentence, than for all release to be unconditional and unguided. However, offenders should only be released when assessed to meet criteria which place the public interest as the paramount consideration, and in the acknowledgement that complete success will be unattainable.

RESPONSIBILITY FOR DETERMINING RELEASE TO PAROLE

7.19 There is usually a division of function between the judiciary and the executive in the total sentencing regime, although the roles can be allocated in various ways. The model currently used in New South Wales is a dual system. The judiciary determines whether parole can be granted by setting a minimum term. Offenders with shorter sentences (between six months and three years), are released to parole automatically when it has been served. For all other sentences, when the minimum term has been served, the Offenders Review Board has the discretion to order release, if satisfied that parole is in the public interest and that the offender will be able to adapt to normal lawful community life. The Offenders Review Board, although part of the executive, is a statutory body independent of Ministerial or departmental authority, and exercises functions that are judicial in character. Presided over by a judicial officer, who has an effective power of veto, the process has a significant level of judicial participation in built. In practice, the veto is seldom used.

7.20 The Commission's terms of reference require us to consider whether this level of judicial involvement in parole is sufficient.⁴² An alternative parole model would redefine parole as solely a judicial function.⁴³ This was the view of the Mitchell Committee, which reported on various aspects of the criminal law in South Australia.⁴⁴ The Committee argued that release to parole was an integral aspect of sentencing discretion, and that the decision to grant parole involves assessment of evidence in a judicial manner, best undertaken by persons with judicial experience.⁴⁵ Moreover, the Mitchell Committee argued, the trial judge with experience of the case is in a distinctly better position to make the parole decision than a parole board, though it recognised that requiring the presiding trial judge to consider an offender's parole application would not always be practicable.⁴⁶ Other justifications for such an approach lay in the courts' achieving a greater level of understanding of correctional practices, and the more likely acceptance by the offender of a decision to deny parole.

7.21 The Commission does not consider that a judicial officer from the original sentencing court should necessarily be responsible for deciding to release an offender to parole, or to review the decision of the Offenders Review Board. There are serious practical problems in a system which is based on the expectation that the original trial judge is available, and in possession of the best information to make the discretionary decision, as required by statute "in the public interest", about release to parole. Nor is the original judge a better arbiter of the decision he or she may have made many years earlier and can hardly be expected to remember. Further, the use of any judge, not necessarily the trial judge, would create demands on limited court resources, and open the area up to more formal procedures.

7.22 There are also more fundamental issues regarding the nature of parole and its relationship to the whole of sentencing. The current legislation requires the Offenders Review Board to make a parole order "having regard to the principle that the public interest is of primary importance" and if "it has sufficient reason to believe ... that the prisoner would be able to adapt to normal lawful community life".⁴⁷ The public interest must be evaluated when the decision to grant parole is made. It follows that the decision can only be made when release is imminent and by an authority in which the public interest is clearly represented. A judicial officer is not in any special position of knowledge about the offender. Nor would trial judges have special expertise in dealing with parole matters or the specific issues of public interest which must be addressed. The principles applicable to a paroling decision are not the same as, although similar to, those governing the sentencing decision.⁴⁸ The Commission believes that a specialist independent and experienced body, with judicial leadership and broad representation from the community and relevant institutions and professions is better placed to make parole decisions where the public interest and public safety are paramount issues.

7.23 A qualification applies for offenders with shorter sentences, whose release on parole occurs automatically by administrative action at a time determined by the sentencing court. This procedure was instituted following recommendations in the Nagle Report, as developed by the Muir Report.⁴⁹ Undoubtedly administrative convenience and the resources consumed by even the brief and routine manner in which the Parole Board considered such cases prompted such a proposal. It is argued that those serving short sentences are less likely to be a threat to the community's safety and so the risks of automatic release are far less than for prisoners serving longer sentences. During a limited time in custody, it is unlikely that the offender has undergone significant changes in behaviour, attitudes, or had opportunities for participation in remedial programs which could produce such changes. Nor has there been time in which to assess the impact of imprisonment, participation in remedial programs and the prospects for future conduct.⁵⁰ As parole supervision is far less costly than custodial care, there are also benefits for more effective use of corrections resources which is in the community's interest. The Commission considers that, generally, release to parole for prisoners with relatively short sentences should be automatic. Although the three year limit has worked well, it is inevitably an arbitrary cut-off point. The Commission is interested in receiving submissions as to the length of prison terms to which such automatic release should apply.

THE INSTITUTIONAL STRUCTURE OF PAROLE

Offenders Review Board

7.24 The Offenders Review Board is an independent statutory body constituted in accordance with Part 5 of the *Sentencing Act 1989*. It is composed of a maximum of nine members, seven appointed by the Governor and two ex-officio, one of these a police officer nominated by the Commissioner of Police, the other from the NSW Probation and Parole Service nominated by the Commissioner of Corrective Services.⁵¹ Of the appointed

members, three are judicial members,⁵² and four are to reflect as closely as possible the composition of the community at large.⁵³ The maximum term for all members is three years. Currently, there are four serving community members.⁵⁴ The judicial members are appointed as Chairperson, Alternate Chairperson and Deputy Chairperson of the Board. One of the judicial members presides, with a veto and a casting vote, at all meetings and Review Hearings of the Board,⁵⁵ and they have specific powers to require attendance before the Board, production of documents, the giving of evidence under oath and the examination of any person in relation to proceedings before the Board.⁵⁶ The Board is supported by a Secretariat, comprising a Secretary and an establishment of seventeen administrative staff.

7.25 The major function of the Offenders Review Board is to consider whether an offender should be released on parole. It is also responsible for considering whether a parolee has breached any of the terms and conditions of the parole order and directing what action should be taken, including revocation.⁵⁷

7.26 The name of the Offenders Review Board is a matter of some concern. Created by the *Sentencing Act 1989*, the "Offenders Review Board" replaced the Parole Board. The name change was intended more accurately to reflect the function of the Board,⁵⁸ but it is clear instead that confusion has been created and perpetuated, particularly with the Serious Offenders Review Council and its name changes. "Parole Board" is generally used for such authorities, and popularly understood. The *Sentencing Legislation (Amendment) Bill 1994* (NSW) proposed to return to the name "Parole Board", recognising that confusion exists.⁵⁹ The Offenders Review Board itself urges this course.⁶⁰ The Commission proposes that the Offenders Review Board be renamed the Parole Board.

Proposal 16

The Offenders Review Board be renamed the Parole Board.

Serious Offenders Review Council

7.27 The Serious Offenders Review Council (SORC) has only a limited role in the determination of whether to grant a prisoner a parole order.⁶¹ It is a statutory authority within the Ministry of Corrective Services, constituted under the *Prisons (Amendment) Act 1993*. Its core function is the management of certain categories of prisoners, principally serious offenders, and reporting on them to the Minister, the Commissioner of Corrective Services, the Supreme Court (for redetermination of life sentences under s 13A of the *Sentencing Act 1989*) and the Offenders Review Board (concerning release on parole).⁶² It has recently acquired additional responsibilities for assessing the suitability of prisoners for pre-release leave programs prior to parole or release from custody,⁶³ as well as for reviewing decisions to segregate prisoners.⁶⁴ The SORC Secretariat, which supports the work of the Council, administers the Victims' Register⁶⁵ within the Department of Corrective Services.

Serious offenders

7.28 Serious offenders are prescribed in s 59 of the *Prisons Act 1952* (NSW) as prisoners who are:

- sentenced to penal servitude for life;
- convicted of murder;
- sentenced to a term of imprisonment prior to the introduction of truth in sentencing, whose sentence has been redetermined under s 13A of the *Sentencing Act 1989*;
- sentenced to a minimum term of twelve years or more; or
- managed as serious offenders in accordance with decisions made by:
 - a sentencing court;
 - the Offenders Review Board;

- the Commissioner of Corrective Services.

There are at present approximately 380 serious offenders in the New South Wales prison system out of a total prison population of 6,400.⁶⁶

7.29 The Serious Offenders Review Council comprises five appointed members, two judicial members and three representing the community or any significant portion of the community,⁶⁷ appointed for terms of up to three years,⁶⁸ and two official members, who are departmental officers appointed by the Commissioner of Corrective Services.⁶⁹ The Council meets approximately twice monthly and a committee of three (a judicial, official and community member) constitute Visiting Committees which visit every prison establishment twice a year to interview serious offenders and report on their progress. Information gathered from gaol authorities in conjunction with these visits is used to make recommendations to the Commissioner of Corrective Services concerning each prisoner's classification, placement and involvement in programs. The purpose of the visits and the system of management of serious offenders is to "encourage them to address issues which otherwise might inhibit their progress towards ultimate return into the community as law abiding citizens, or [to adjust to] a lifetime in custody".⁷⁰

7.30 SORC has established a Serious Offenders Management Committee, with members from within the Department of Corrective Services,⁷¹ which is responsible for managing prisoners whose offences are less likely to attract serious public condemnation, or whose management is likely to be less complex. When a serious offender is approaching the end of the minimum term, the full Council takes over responsibility for management to monitor more closely the prisoner's preparation to be considered eligible for parole. The Management Committee currently manages about 200 prisoners, the Council 180.

Advice to the Offenders Review Board

7.31 SORC's management involves constant monitoring of a prisoner's progress in behaviour, attitude, work, participation in education, counselling and other programs. When SORC is required to provide a report to the Offenders Review Board for the determination of a prisoner's suitability for release on parole, the advice can be compiled from a comprehensive record of the manner in which the prisoner has served the sentence, and from the personal contact of SORC members with the inmate during the prison visits. SORC's advice is given from a perspective independent of that held by those who have day-to-day control of the prisoner. It reflects judicial experience and input from community representatives. The quality of the advice SORC can provide is also a reflection of the management procedures it adopts.

PROCEDURES FOR GRANTING PAROLE

Offenders subject to the Offenders Review Board

7.32 The Offenders Review Board follows the procedures set down in s 16-23 of the *Sentencing Act 1989*. Offenders with at least one term of imprisonment greater than three years are released on parole only when the Offenders Review Board makes a parole order in their favour. The Board must consider whether to make a parole order at least 60 days prior to the day when a prisoner becomes eligible for release on parole. If parole is refused, the Board must reconsider the prisoner's suitability for parole within one year of the date on which the prisoner became eligible for release on parole.⁷²

7.33 Prior to the appropriate time to determine a grant of parole, the Board requests information from prison authorities, primarily the Parole Officer,⁷³ but also from other gaol personnel (including Superintendent, Education Officer, Drug and Alcohol Counsellor, Psychologist) concerning the offender's behaviour, work, attitudes and post-release plans, from which members can make an assessment of whether the offender can establish eligibility for parole. Members also have access to the relevant comments of the sentencing court;⁷⁴ the prisoner's antecedents and special circumstances of the case;⁷⁵ reports made to the Board in previous dealings concerning the offender; material requested by the Board from external authorities or persons;⁷⁶ and, in some circumstances, submissions from victims or their representatives.⁷⁷ In the case of a serious offender, a report from SORC must also be put to the Board.⁷⁸ The Board may consider "any other relevant matter".⁷⁹ This information is provided to each member of the Board in advance of the meeting at which the offender's

application will be considered. All the information put before the Board is made available to the prisoner, with the exception of documents made subject to s 49, which gives a judicial member the power to withhold any document if its provision may adversely affect the security, discipline or good order of a prison, or endanger the prisoner or any other person. The prisoner has no right to be told whether any documents have been withheld under s 49.⁸⁰

7.34 The Board meets in private to make an initial consideration of each application. If the members are agreed that on the information before them it is appropriate to make a parole order, this is done administratively, with the prisoner being informed within seven days. The Regulation specifies the standard terms and conditions of a parole order, although the Board can amend or add to these. Commonly, conditions will be tailored to the individual offender, for example to require residence in a nominated location, or entry into a drug or alcohol rehabilitation program.

7.35 The parole order takes effect on the day on which the minimum term expires, or, if that time has passed, not later than seven days after the order is made. The parole order is in force for the balance of the additional term of the offender's sentence. During that time (up to a current maximum of three years) the offender may be subject to the supervision, and given the support, of officers of the NSW Probation and Parole Service. Any conduct which breaches a term or condition of the parole order will be reported to the Offenders Review Board, which will determine the appropriate action. The ultimate sanction is revocation.⁸¹

Review hearings

7.36 If the Board forms an initial intention to refuse parole, a review hearing is scheduled as soon as practicable and notice is given to the offender. The review hearing is a quasi-curial procedure. Proceedings are conducted in public, in court premises, and though evidence is given on oath, the Board is not bound by the rules of evidence and may inform itself on any matter as it thinks fit.⁸² A judicial member of the Board chairs the hearing, but it proceeds as far as possible in a non-adversarial manner and with less formality than a court. At the review hearing the offender is entitled to legal representation⁸³ and may call and examine witnesses, give evidence under oath and address the Board as relevant to the proceedings.⁸⁴ Board members are entitled to question the offender and all witnesses. A hearing usually takes up to an hour, but may take up to two days. The decision of the Board is delivered at the conclusion of the hearing by the Chairperson. This may be a brief statement of the reasons for refusing the order, or a longer analysis of the offender's application, the evidence relied on by the Board, and its reasons for refusal. The Board may grant parole after a review hearing. In 1995, it did so in approximately one-third of cases in which prisoners appeared at the hearing, and in eight per cent of cases in which prisoners did not appear.

7.37 Where parole is refused, the Board must reconsider the offender's suitability for parole within one year of the date on which the prisoner became eligible for parole,⁸⁵ when the procedure follows that outlined above.

Serious offenders

7.38 Serious offenders are subject to the same general procedures of the Offenders Review Board when making an application for parole. In addition, the Serious Offenders Review Council is required to provide a report and advice concerning the offender to the Offenders Review Board for its consideration.⁸⁶ Further, should the Offenders Review Board reject the advice of SORC, the Board must state its reasons in writing, and refer them to the Council. The Review Council may make submissions concerning the rejection to the Board within 21 days, and the Board is precluded from making a final decision on the release of the serious offender during that period.⁸⁷ A member of the Serious Offenders Review Council is entitled to attend any meeting and Review Hearing at which release of a serious offender is being considered and advise Board members, but does not have any right to vote on the parole decision.

7.39 In the Board's experience, notwithstanding the care and caution taken by SORC in preparing offenders for release, most serious offenders fail, at the time of their first parole consideration, to satisfy the Board that release is appropriate, having regard to the principle that the public interest is of primary importance.⁸⁸

Offenders with sentences three years or less⁸⁹

7.40 For offenders eligible for parole whose sentence is greater than six months, but does not exceed three years, the grant of parole is automatic at the expiry of the minimum term of their sentence, with the period of parole running for the duration of the additional term. Release occurs by administrative action, and the terms and conditions of the parole order are established by reference to the regulations and any directions given by the sentencing court. Offenders released in this manner nevertheless are brought under the Offenders Review Board's authority while on parole. Any conduct which breaches a term or condition of their parole order will be brought to the attention of the Offenders Review Board by the Probation Service, and they will be subject to the Board's powers to warn or vary or revoke the parole order.

CRITERIA FOR GRANTING PAROLE

Generally

7.41 In determining whether to make a parole order, the Board must assess the application and may not make a parole order unless it has:

- (a) determined that the release of the prisoner is appropriate, having regard to the principle that the public interest is of primary importance; and
- (b) considered relevant comments (if any) made by the court when sentencing the prisoner; and
- (c) considered any reports required by regulations to be furnished to it; and
- (d) taken into account the antecedents of the prisoner and any special circumstances of the case; and
- (e) determined that it has sufficient reason to believe that the prisoner, if released from custody, would be able to adapt to normal lawful community life; and
- (f) considered any other relevant matter.⁹⁰

7.42 The onus is on the prisoner to convince the Board that, having regard to the public interest, it is appropriate to make an order for supervised and conditional release to the community because there is sufficient evidence to demonstrate that the offender will be able to adapt to normal lawful community life. This reflects a change in attitude to parole, reversing a presumption in favour of parole which applied before truth in sentencing legislation.⁹¹

7.43 The Board's refusal to grant a parole is recorded on the Board's file and communicated to the prisoner in accordance with the following formula:

Reasons:

- Unable to adapt to normal community life
- Risk of Reoffending
- Past failure/s on conditional liberty/parole
- Need for further drug and alcohol counselling
- Need for further psychological/psychiatric counselling
- Need for structured post release plan
- Unsatisfactory post release plan

Inappropriate in the public interest

This list is not exclusive and other reasons may be given, such as the need for a pre-release program.

7.44 These reasons exemplify the way in which the Board interprets the statutory criteria on which they must base a decision to make or refuse to make a parole order. The Board's decision balances the public interest with the interest of the individual parolee.⁹²

Release under exceptional circumstances

7.45 The *Sentencing Act 1989* makes provision for release of an offender before the expiry of his or her minimum term in very restricted situations. Under s 25A, the Offenders Review Board may grant parole to prisoners, other than those serving life sentences, prior to the time when he or she may otherwise be eligible for release, only if they are dying or release is *necessary* because there are "exceptional extenuating circumstances".⁹³ The circumstances envisaged by the legislature that would be acted upon by the Board were those where the prisoner was suffering a terminal illness or serious disability such as quadriplegia or brain damage.⁹⁴ If parole is granted, the offender serves a longer period on parole, and the length of the full sentence is unchanged. The Board has complete independence in considering applications for release under s 25A, and the Commission is advised that it has granted parole under this section in five instances in 1994.⁹⁵ The Royal Prerogative of mercy remains a means for the executive to release offenders, not necessarily to parole.⁹⁶

7.46 The Attorney General's Sentencing Review raised the issue of whether this was too restrictive a test for release on compassionate grounds and whether the Board's powers under s 25A be enlarged.⁹⁷ It could be replaced by a less stringent test such as it being "highly desirable" or "in the interests of justice" and retaining "exceptional extenuating circumstances". Alternatively, the "exceptional" could be removed from the latter phrase. The Commission seeks comments on the desirability of, and methods for, amending the Board's powers under s 25A for releasing offenders on compassionate grounds.

Evaluation of parole procedures

7.47 In the following discussion of issues relating to the procedures for the release of offenders to parole, the Commission draws on preliminary submissions received and our observations of the operations of the Offenders Review Board, both in its private meetings and at public Review Hearings. The Commission acknowledges the co-operation of the Chairman and members of the Offenders Review Board, and the Board's Secretariat in undertaking these inquiries. Assistance has also been given to the Commission by the Serious Offenders Review Council and its Secretariat.

Independence of the Offenders Review Board

7.48 In carrying out its mandate, the Offenders Review Board should be independent of undue influence from any outside sources. The Commission is satisfied that the Board does, in practice, operate with autonomy. The Commission's observation is that the composition and professionalism of Board members reflects the independence with which they undertake their obligations.

7.49 The only question which the Commission addresses in this context is whether the Board is free from the potential for political interference or control. This is not an academic issue, as the Commission is aware of at least one occasion when a Minister sought to pressure the Board to alter a decision it had made concerning the parole of an offender with a very high public profile.⁹⁸ This attempt was unsuccessful.

7.50 The Commission recognises the importance for the Board of having as Chair a serving or retired judge. Such a person will be familiar with the concept and practice of independence, and will have had experience of making sensitive decisions concerning criminal offenders and having those decisions subject to public comment without the opportunity to engage in debate on the issues. The method of appointment of members which relies on ministerial selection for a limited time makes them potentially vulnerable. It would be possible to give members tenure until retirement, but the Commission does not see that this is a practical step. Our tentative view is that members should be appointed for a fixed term of three years and that cl 4 of Schedule 1 of the *Sentencing Act*

1989 should be amended accordingly. The Commission invites submissions on ensuring the independence of the Offenders Review Board.

Proposal 17

Members of the Offenders Review Board should be appointed for a fixed term of three years.

Composition of the Offenders Review Board

7.51 The composition of the Board reflects the various groups in society which have an interest in the decision to release offenders from custody. It is similar to parole board membership in other jurisdictions,⁹⁹ though there is a relatively strong community participation.

7.52 Judicial oversight provides a direct link to the sentencing role of the judiciary and allows for proper consideration being given to questions of law which inevitably arise in the context of parole decision-making and a check on unfettered administrative action. It is also argued that it promotes public confidence in the decisions reached by a Board.¹⁰⁰ The Commission considers that this judicial role is an important element in the Board's operation and should continue. It is possible, however, that other than retired District Court judges could be appointed. Subject to resources, the Commission sees that benefits could flow from the appointment of serving District Court judges. This could perhaps be achieved with one or two judges appointed on a secondment basis for a term of two or three years, which would allow specialist experience to develop, and to link more closely the work of the Board with the sentencing courts.

7.53 The perspectives of ex-officio correctional and police authorities inform the Board's deliberations. The Offenders Review Board submitted that experience has shown that these are the two most appropriate official members.¹⁰¹ The Commission accepts that these officers contribute the necessary expertise to informed parole decision-making by the Board.

7.54 The public interest in community protection is recognised by the preponderance of community representatives on the Offenders Review Board. This, the Commission considers, is most valuable and is consistent with the legislative principle that the public interest is of primary importance in making a parole order.¹⁰² The Commission notes that the ethnic diversity of the community, and the nature of the prison population are reflected in the current appointments of community representatives, with one member from the Aboriginal community and another from a non-English speaking background. In the Commission's observation of the Board's deliberations, the participation of the community representatives is effective. It directly serves the objective of the parole system in highlighting the community's interest in release decisions and community responsibility for the re-integration of offenders into community life.

7.55 The *Sentencing Act 1989* requires only that the four community representatives "are to reflect as closely as possible the composition of the community at large".¹⁰³ There are no other guidelines as to the appropriate qualifications of such members, or as to what components of the community should be represented. There may be benefits from selecting more members with expertise in relevant professions or disciplines, such as psychiatrists, criminologists, penologists, or lawyers, or perhaps from appointing lay persons with an interest in corrections or rehabilitation. Such persons are required to be on the parole authorities elsewhere.¹⁰⁴ The Commission considers that the addition of a private sector lawyer, in particular, would assist the Board in its deliberations. The Commission also raises the option of including among the community members a victim of crime who can bring this particular perspective of community thinking to the parole decision-making process.¹⁰⁵

7.56 The Commission notes the difficulties in obtaining a representative range of community members for the Offenders Review Board. The duties of members demand full-time commitment, although remuneration is on a sessional basis. This necessarily reduces the pool of members of the community who are available for appointment. The Board expects this year that appointments will be made of community members who will not participate in the Board's deliberations every week, but in a similar manner to the judicial members, sit less frequently in rotation.

7.57 The Commission's view is that the existing composition of the Offenders Review Board, including the members reflecting the community at large, functions extremely well and efficiently in achieving the legislative objectives. We invite suggestions as to any improvements which could be made to the membership of the Board to strengthen the position.

Procedures of the Offenders Review Board

7.58 The procedure adopted by the Offenders Review Board to determine the eligibility of an offender for parole is essentially administrative, although incorporating features of the judicial process. The Board is under an obligation to observe the rules of natural justice and procedural fairness in all its decisions, both in the making and revocation of parole orders.¹⁰⁶ The Court of Appeal has held that the procedures its predecessor, the Parole Board, had to follow were, subject to the exigencies of the particular case, to notify the offender of its intention to consider a decision, and of any material to be considered by it (save for any material which may be lawfully withheld), to permit the offender to make any relevant written submissions; and, to afford the offender an opportunity to be heard orally. A balance between the duty to observe procedural fairness and the practical difficulties (including economic costs) of proceeding in accordance with the dictates of the obligation has been struck. Principally, the Board achieves this by holding a review hearing in any instance where it intends to refuse parole, but where parole is granted, doing so by purely administrative action without the need for a hearing and its attendant costs. Subject to our comments on s 49 certificates, the Commission regards the current parole procedures in New South Wales as satisfying the requirements of natural justice.

Section 49 certificates withholding information

7.59 The absence of notification to the prisoner that documents available to the Board have been withheld under s 49¹⁰⁷ represents one procedure which may limit procedural fairness for the offender. The Commission understands that a s 49 certificate is issued not infrequently. The Board's practice is to inform the prisoner's legal representative of the existence of a s 49 certificate and to give a brief indication of its nature.

7.60 The original proposals of the Muir Committee Report on this matter recommended that where information was withheld, the prisoner be informed of the general purport of the material relevant to consideration of release. Further, the Ombudsman should be empowered to investigate the completeness and accuracy of the information in the material.¹⁰⁸

7.61 The Commission considers that a provision such as s 49 is a necessary precaution and that various competing interests will have to be balanced in determining whether to grant a certificate in any case. There are, however, potential problems with the operation of the provision. The major one relates to the offender's right under s 23 (as to refusal) and s 41 (as to revocation) to apply to the Court of Criminal Appeal for a direction that the Board made a decision based on information that was false, misleading or irrelevant. In order to invoke this right, it is necessary for the offender, or at least his or her legal representative, to know the information before the Board. How this can occur if a s 49 certificate has been issued is a conundrum. The difficulty remains if, as the Commission proposes, the offender is entitled to a full administrative review of the Board's decision.¹⁰⁹ There being no review of the grant of a certificate, it is also difficult to determine whether it is being used unnecessarily on some occasions. The implementation of the suggestions in the Muir Committee Report¹¹⁰ may supplement the Board's practice in this respect. The Commission invites comments on how the difficulty may be resolved.

Factors relevant to the parole decision

7.62 The Board is empowered to make a parole order, having regard to the public interest, only after it has considered "any ... relevant matter".¹¹¹ Clearly, this could include submissions from those potentially affected by the release of the prisoner - for example, those from the offender's immediate community or those whom the offender has threatened. As a matter of policy, the Board considers written submissions from the victim or the victim's family, and it is the practice to permit the victim to make a statement from the floor of the review hearing should this be desired. The Commission considers this is appropriate provided the prisoner has the opportunity of challenging such statements.¹¹²

DECISIONS GIVEN BY THE OFFENDERS REVIEW BOARD

7.63 When the Offenders Review Board refuses an application for parole, the presiding judicial member of the Review Hearing delivers an extemporaneous decision, usually brief, in which he or she adverts to the reasons on which the Board's decision is based. A transcript of those remarks can be made and provided to the offender if required for an appeal under s 23 or as the basis for further applications. The written record of the refusal is recorded on the file and communicated to the prisoner in the manner reproduced at para 7.43.

7.64 The giving of reasons, or other than standard form reasons, has long been seen as a necessary feature of a fair and just parole procedure.¹¹³ The form in which reasons are officially communicated to the offender by the Offenders Review Board does not meet this criterion. It is vague, superficial and fails to address the individual offender's situation. No doubt the notation indicates the aspects of the offender's circumstances which give the Board reason to doubt his or her ability to serve the remainder of the additional term in the community without putting the community at risk, but in no way does it indicate specifically how the offender should change, or what would satisfy the Board so that it would grant parole. In practice, the categories of reasons gives the Board common ground for assessing the individual offender against others, and gives members a measure for reaching a collegiate decision about each offender. Administratively, too, there are advantages in relying on such an approach.

7.65 The Commission believes that the offender is entitled to full and proper reasons for refusal of parole. The Commission therefore proposes that the Board's practice be amended so as to present in a more extensive manner the reasons for which its decision to refuse parole is made. The Commission proposes that in every case the oral decision containing the reasons for the Board's refusal to grant parole should be transcribed and made available to the prisoner as a matter of course.

Proposal 18

The Offenders Review Board should provide the offender with a full statement of the reasons on which an order for parole is refused.

Review of the parole decision

7.66 The terms of reference require the Commission to consider whether there should be any review of the decisions of the Offenders Review Board by judicial officers.

Sections 23 and 41 of the Sentencing Act 1989

7.67 Currently there are extremely limited rights of review of a decision of the Offenders Review Board. Section 23 (1) of the *Sentencing Act 1989* provides:¹¹⁴

If:

- (a) the Board has decided ... that a prisoner should not be released on parole; and
- (b) the prisoner alleges that the decision of the Board was made on information which was false, misleading or irrelevant,

the prisoner may, in accordance with rules of court, apply to the Court of Criminal Appeal for a direction to be given to the Board as to whether the information was false, misleading or irrelevant and the Court of Criminal Appeal may give such direction with respect to the information as it thinks fit.

Similar rights are given under s 41 where the Board has revoked a parole order.

7.68 The Court of Criminal Appeal has very limited powers under s 23 and 41.¹¹⁵ The section does not authorise an appeal on the merits of the decision.¹¹⁶ When an application is made under s 23, the Court is concerned only with the information which is before the Board and upon which the Board made its decision. The

Court is not concerned with whether the Board's procedures complied with the Act. The Court is not concerned with whether the Board's decision is right or wrong, or whether the Board correctly interpreted or construed the information before it or gave the correct weight to it, or drew the correct inferences from the information. The Court may only direct the Board as to whether the information was false, misleading or irrelevant, and give further directions with respect to that information as it thinks fit.¹¹⁷ The practical limitations of s 23 and 41 were highlighted in *McCamley v Offenders Review Board*:

So far as the falsity of the information is concerned, the purpose of the two sections in question is to provide to prisoners the opportunity to obtain a ruling where further evidence becomes available which was not available to put before the Board. The Court will not - except perhaps in unusual circumstances - undertake a rehearing upon the material which was before the Board.¹¹⁸

7.69 There are relatively few cases in which an offender has applied to the Court for relief under s 23 or 41. It has been said "that the absence of any real utility in the present procedure has demonstrated that it is a failure".¹¹⁹ The Commission proposes, therefore, that s 23 and 41 be repealed.

Proposal 19

Sections 23 and 41 of the Sentencing Act 1989 should be repealed.

Appeal on the merits

7.70 The question of an appeal against the decision of a tribunal such as the Offenders Review Board involves different considerations from those associated generally with appeals against criminal or civil court judgments. The differences relate to the nature of the decision, the criteria on which it is based, and the strong element of community interest involved.

7.71 To provide full rights of appeal on the merits of a decision of the Offenders Review Board is, in the Commission's view, not desirable. Should the potential for appeal in every case where parole is refused (or revoked) be realised, the system would rapidly become paralysed. In the absence of a provision such as s 23(2) discouraging frivolous applications being rigorously enforced, most offenders would be expected to take up such a right if afforded them. Extension of appeal to the Crown as proposed recently¹²⁰ would make potentially greater demands on court resources.

7.72 More fundamentally, it must be remembered that the function of the Board is to assess whether, on the evidence available to them, the offender can demonstrate that he or she meets the criteria in the statute. Making that decision requires assessing risks, predicting future behaviour, balancing competing interests. Even though decisions directly affect the liberty of the subject, the public interest must have paramount consideration. The community-dominated Board is the appropriate final arbiter of the public interest.¹²¹

Administrative review

7.73 The Board must comply with the rules of natural justice in making its decisions.¹²² An allegation that the Board failed to comply with the rules of natural justice does not constitute a challenge to the decision on the merits, but solely on the procedural fairness of how the decision is made. The Commission considers that the possibility of administrative review of the Board's decisions should be retained.¹²³ It is likely, however, that given the exhaustive and rigorous procedures required by legislation and followed in the practices of the Board, the occasion for administrative review will be rare.

7.74 Currently administrative appeals from decisions of the Offenders Review Board would be a matter for an administrative appeal to the Supreme Court which would be heard by the Court of Appeal.¹²⁴ It is understood that an Administrative Appeals Tribunal will probably be established in New South Wales in the near future. It may then be open to take such appeals to the tribunal, although, as a matter of policy, decisions by tribunals in the criminal justice system¹²⁵ may well be excluded from its jurisdiction. The Commission considers that the most appropriate forum to hear an appeal from the Offenders Review Board is the Administrative Law Division of the Supreme Court. Amendments to the Supreme Court Act and Rules will be necessary to achieve this result.

Proposal 20**Administrative review of decisions of the Offenders Review Board should be available in the Administrative Law Division of the Supreme Court.****Reconsideration after refusal of parole**

7.75 When the Offenders Review Board refuses to make a parole order, the Act currently requires it to reconsider the matter within each successive year following the day on which the offender becomes eligible for release on parole.¹²⁶ Further, a similar requirement seems to apply when parole has been revoked even though the offender has not been apprehended and returned to custody.¹²⁷ The first of these provisions has been criticised as unnecessarily burdensome in certain cases; the second is patently unnecessary, or at least an unnecessary administrative procedure.¹²⁸ The Commission suggests that the Board be able to defer consideration of parole for a period longer than twelve months in appropriate circumstances.¹²⁹ Such circumstances should not include lack of resources.

7.76 As to offenders who have had parole revoked but who remain at large, the suggested change is incontestable. As for the other aspect of the proposal, there are good reasons for making such a change. For the majority of prisoners, who have a relatively short additional term during which their eligibility for parole will be assessed, this period is considered appropriate by the Board, and the Commission is not aware of any need to alter it. However, there are some, albeit a limited number of, serious offenders for whom this requirement may need to be changed. Some prisoners will demonstrate by conduct during the course of their incarceration, the lack of progress toward a lower security classification and access to day leave, or other subjective factors, that their circumstances are not likely to be significantly different within twelve months. In these cases, it is argued that the Board should have the power to defer consideration of whether to grant parole for a longer period. Such a power would relieve the Board of the need to conduct a review hearing in circumstances in which a decision that it would be in the public interest to grant parole would be extremely unlikely. The review requirement has also been criticised for provoking continual anxiety and apprehension for victims and their families who must annually anticipate the offender's possible release into the community.

7.77 In the *Sentencing Legislation (Amendment) Bill 1994* amendments to s 18 would have provided for the Board to decline to consider parole for up to three years or until an offender had returned to the prison system.¹³⁰ This measure was denounced as harsh, unfair and unjustified, and one which would remove incentive for rehabilitation.¹³¹ The Commission considers that, on balance, it is desirable to confer on the Board the discretion to delay consideration of parole under s 18 of the Act. We consider that two years is, generally, an appropriate period or, in the case of revocation, 12 months after return to custody.

Proposal 21**The Offenders Review Board should be empowered to defer consideration of parole for up to two years after a refusal to make a parole order or, where a parole order has been revoked, 12 months after return to custody.****Length of parole supervision**

7.78 A major concern for the Offenders Review Board is found in the Regulation which limits the supervision of an offender to three years.¹³² Where an offender has an additional term of greater than three years,¹³³ the Offenders Review Board faces a dilemma should it wish to require supervision for a longer period than the Regulations permit. Indeed, it is not uncommon for judges specifying additional terms, especially redeterminations of life sentences under s 13A, to impose additional terms longer than three years because they consider a lengthy term of parole supervision is necessary. It could well be that the Board's decision in such cases must be to refuse parole if the Board cannot be satisfied that the primary interest of the public cannot be served by release with a maximum period of supervision of just three years. The Board seeks removal of this restriction.¹³⁴

7.79 It is argued, however, that in most cases, the efficacy of supervision is exhausted relatively quickly. Either the person re-offends, or settles into normal community life, and supervision becomes unnecessary. This would

require that the term of supervision on parole should be limited, as it tends to be self-defeating and ineffective if it continues for too lengthy a period. In Western Australia the period of parole is set at a minimum of 6 months and a maximum two years¹³⁵ to reflect the time within which the greatest benefits in terms of resocialisation and adjustment were likely to occur, and that longer periods may be counter-productive.¹³⁶ The Commission recognises that there will be occasions in which a longer period of parole supervision than three years will be desirable. We are tentatively of the view that the Regulation should permit this by prohibiting the termination of a specified period of parole supervision in excess of three years without the approval of the Offenders Review Board. However, we seek submissions as to the results which would be likely to flow from amending the Regulation to allow for longer periods of parole supervision.

Proposal 22

Parole supervision for periods in excess of three years should not be terminated without the consent of the Offenders Review Board.

QUESTIONS ARISING IN CHAPTER 7

1. Should parole be retained?
2. Who should determine parole?
3. Should parole continue to be granted automatically in the case of offenders who are sentenced to three years or less? Or should the relevant sentence length be altered?
4. Should the Offenders review Board be renamed the Parole Board?
5. Should the criteria for granting parole in extenuating circumstances be amended?
6. Should there be changes to the way in which members of the Offenders Review Board are appointed to ensure their independence?
7. Is it appropriate to alter the composition of the Offenders Review Board to reflect relevant professional expertise, or victims' representation?
8. Should the prisoner continue to bear the onus of persuading the Offenders Review Board that parole should be granted?
9. Are the criteria for granting parole adequate?
10. Generally, should any of the procedures of the Offenders Review Board be amended?
11. Is s 49 (withholding information from an offender) procedurally fair? How can it be successfully redrafted?
12. Should the Board make available to the offender a full statement of the reasons on which an application for parole is refused?
13. Should s 23 and 41 be repealed?
14. Should there be any review of a decision of the Offenders Review Board, on the merits or on administrative grounds? What forum should hear any appeal?
15. Should the Offenders Review Board be able to defer consideration of parole for more than twelve months? If so, in what circumstances?
16. Should parole supervision for longer than three years be possible?

Footnotes

1. *Sentencing Act 1989* (NSW) Sch 3 cl 8 repealing *Prisons Act 1952* Part 11. See para 4.13.
2. Section 463 *Crimes Act 1900* (NSW) repealed by the *Prisons (Serious Offenders Review Board) Amendment Act 1989* (NSW). See para 4.66.
3. *Sentencing Act 1989* (NSW) s 53. Clause IX of the current Letters Patent Constituting the Office of Governor of New South Wales, dated 29 October 1900, provides that the Governor may grant to any offender convicted in any Court of the State a pardon, whether free or subject to lawful conditions, or any remission of the sentence passed on such offender, or any respite of the execution of such sentence for such periods as the Governor thinks fit, and may remit any fines, penalties or forfeitures due or accrued to the Crown: see *Smith v Corrective Services Commission* [1980] 2 NSWLR 171 at 180 per Hope J; see also *Kelleher v Parole Board* (1984) 156 CLR 364.
4. The terms of reference are set out at p xiii.
5. S Mackey, "Parole - Background, Machinery and Statistics" in NACRO, *Parole - The Case for Change*, (London, 1979) at 8, quoted in *The Report of the Royal Commission into New South Wales Prisons* (NSW Govt Printer, Sydney, 1978) (the "Nagle Report") at 602.
6. *Sentencing Act 1989* (NSW) s 5-7.
7. G Egan, "Out But Not About: A Parole Board Perspective on Community Corrections", Paper presented at the Conference on Community Corrections in the 21st Century, Brisbane, 3-4 July, 1995 at 2. The Commission saw examples of this in its observation of the Offenders Review Board.
8. New South Wales, *Parliamentary Debates (Hansard)*, Legislative Assembly, 10 May 1989, the Hon M R Yabsley, Minister for Corrective Services, Second Reading Speech, at 7905-7910.
9. See generally New South Wales, *Parliamentary Debates (Hansard)*, Parole of Prisoners Bill Second Reading, Legislative Assembly 20 September 1966 at 972-993; Legislative Council 22 September 1966 at 1083-1099, 27 September 1966 at 1141-1159.
10. New South Wales, *Parliamentary Debates (Hansard)*, Legislative Assembly, 20 September 1966, The Hon J Maddison, Minister of Justice, Second Reading Speech, at 975.
11. The motivations for the introduction of parole in England at the same time were similarly mixed and not made clear: see Great Britain, Parliament, House of Commons, *The Parole System in England and Wales: Report of the Review Committee* (November 1988) (the "Carlisle Report") paras 18-22; N Morgan, "The Shaping of Parole in England and Wales" [1983] *Criminal Law Review* 137.
12. See J B L Chan, *Doing Less Time: Penal Reform in Crisis* (Institute of Criminology, Sydney, 1992) at Ch 1. The brutality of prisons in New South Wales became a political issue in the 1970s: see generally the *Nagle Report*; G Zdenkowski and D Brown, *The Prison Struggle: Changing Australia's Penal System* (Penguin, Ringwood, 1982).
13. *Hansard*, Legislative Assembly, 20 September 1966, at 975.
14. As to the methodology of this allocation and the Commission's proposal concerning repeal of s 5(2) and (3) see paras 4.18-4.41.
15. See *R v Moffitt* (1990) 20 NSWLR 114 at 120 per Wood J.
16. *Moffitt* at 121 per Wood J.
17. Canada, *The Criminal Law in Canadian Society* (Ottawa, August 1982) at 34.

18. R Broadhurst, "Evaluating Imprisonment and Parole: Survival Rates or Failure Rates" in S McKillop (ed) *Keeping People out of Prison*, proceedings of a conference held 27-29 March 1990 (Australian Institute of Criminology, Canberra, 1991) at 25.
19. See R Martinson, "What Works?: Questions and Answers about Prison Reform" (1974) 10 *The Public Interest* 22, and the lesser known subsequent article in which the author admitted that he had oversimplified his views on the subject, "New Findings, New Visions" (1979) 7 *Hofstra Law Review* 43. See also A von Hirsch, *Doing Justice: The Choice of Punishments* (Hill & Wang, New York, 1976); A von Hirsch and K J Hanrahan, *The Question of Parole: Retention, Reform or Abolition?* (Ballinger, Cambridge, Mass, 1979).
20. South Australia, Criminal Law and Penal Methods Reform Committee of South Australia, *First Report: Sentencing and Corrections* (Adelaide, 1973) (the "Mitchell Report"); *Nagle Report*; A G Muir, *The Report of the Committee Appointed to Review the Parole of Prisoners Act 1966*, (NSW Government Printer, Sydney, 1979) (the "Muir Report"); K H Parker, *Report on Parole, Prison Accommodation and Leave from Prison in Western Australia* (February, 1979) (the "Parker Report") and the Australian Law Reform Commission *Sentencing of Federal Offenders* (ALRC 15, 1980).
21. *Muir Report*, A Minority Report by Mr Kenneth Lukes, at 61-66.
22. ALRC 15 at para 344.
23. Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988) at paras 72, 97-98, and Australian Law Reform Commission, *The Commonwealth Prisoners Act* (ALRC 43, 1987).
24. Australian Law Reform Commission, *Sentencing: Penalties* (DP 30, 1987) at para 220.
25. See Canada, Report of the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Canadian Government Publishing Centre, 1987) at 233-245.
26. See S Benzvy-Miller, "Integrating Sentencing and Parole" (1990) 32 *Canadian Journal of Criminology* 493 at 494; Canada, *Directions for Reform: Sentencing* (1990) at 9.
27. See D Daubney, *Taking Responsibility - Report of the Standing Committee on Justice and Solicitor General on its Review of Sentencing, Conditional Release and Related Aspects of Corrections* (Ottawa, 1988).
28. See Canada, Department of Justice, *Directions for Reform: Sentencing* (Ottawa, 1990) at 9-11; Canada, *Directions for Reform: A Framework for Sentencing, Corrections and Conditional Release* (Ottawa, 1990).
29. See *Nagle Report* at Chapter 30; *Muir Report*; Australian Law Reform Commission, *Sentencing of Federal Offenders* (ALRC 15, 1980) Chapter 9; Australian Law Reform Commission, *Sentencing: Penalties* (DP 30) at paras 202-241; Canada, Report of the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Canadian Government Publishing Centre, 1987) at Chapter 10; *Carlisle Report*; Victoria, Attorney-General's Department, *Sentencing: Report of the Victorian Sentencing Committee* (Melbourne, 1988) Vol 2 at 662; *Parker Report*.
30. *Parker Report* at 3-4.
31. M R Gottfredson and K Adams, "Prison Behavior and Release Performance: Empirical Reality and Public Policy" (1982) 4 *Law & Policy Quarterly* 373 at 374.
32. M R Geerken and H D Hayes, "Probation and Parole: Public Risk and the Future of Incarceration Alternatives" (1993) 31 *Criminology* 549.
33. See P Ward, *Sentencing, Parole & Recidivism*, (Department of Corrective Services, Research Publication 1, 1982); A Gorta, G Cooney, L George, and S West, *250 Parolees: Characteristics and Performance* (Department of Corrective Services, Research Publication No 3, 1982); A Gorta and G Cooney, "What Makes a Good Parolee?" (1983) 16 *Australia and New Zealand Journal of Criminology* 106; B Thompson, "Comparison of Recidivism Rates for Prisoners Released to Licence, Parole or Remission in NSW 1981 to 1983", paper

presented at the 5th Annual Criminology Conference of the Australian and New Zealand Society of Criminology, Sydney, June 1989; B Thompson, *Recidivism in NSW: General Study* (NSW Department of Corrective Services, Research Publication No 31, May 1995).

34. Advice to the Commission from the Department of Corrective Services, Research & Statistics Unit, November 1995.

35. R Broadhurst and R Maller, "The Recidivism of Prisoners Released for the First Time: Reconsidering the Effectiveness Question" (1990) 23 *Australia and New Zealand Journal of Criminology* 88.

36. South Australia, Department of Correctional Services & Office of Crime Statistics, *The Impact of Parole Legislation Change in South Australia*, (Social Issues No 2, August 1989).

37. See, eg, R G Hann, W G Harman and K Pease, "Does Parole Reduce the Risk of Reconviction?" (1991) 30 *The Howard Journal* 66; M Geerken and H D Hayes, "Probation and Parole: Public Risk and Future Incarceration Alternatives" (1993) 31 *Criminology* 549.

38. See paras 7.32-7.40.

39. Victoria, Attorney-General's Department, *Sentencing: Report of the Victorian Sentencing Committee* (Melbourne, 1988). The Report did recommend that the guidelines of the Parole Board be published. See also Victoria, Sentencing Alternatives Committee, *Parole and Remissions: Second Report* (1982).

40. Western Australia, Parliament, *Report of the Joint Select Committee on Parole* (Perth, August, 1991) (the "Halden Report"). See also, the *Parker Report* dealing with administration of parole, and the Western Australia, Report of the Committee of Inquiry into the Rate of Imprisonment, (Perth, May 1981), (the "Dixon Report").

41. *Carlisle Report*.

42. See paras 1.3, 1.9.

43. The judge could be assisted in this role by a parole board whose recommendations the judge would reconsider or review.

44. South Australia, Criminal Law and Penal Methods Reform Committee, *First Report: Sentencing and Corrections* (Government Printer, Adelaide, 1973) (the "Mitchell Report") para 7.4ff. See ALRC DP 30 para 226. Sir Richard Blackburn, a former Chief Justice of the ACT Supreme Court, has also suggested that the original sentencing Judge should later decide whether to release the offender conditionally: see ALRC *Sentencing: Penalties* (DP 30, 1987) para 226.

45. Judicial officers are usually required to head parole authorities in recognition of this situation.

46. See *Mitchell Report* para 7.4.4.

47. *Sentencing Act 1989* (NSW) s 17(1).

48. Offenders Review Board *Submission* (11 October 1995) at 3.

49. See *Nagle Report* Chapter 30, 608-618, Recommendation 210; *Muir Report* Chapter 5, Recommendations 12-25. As to where to set the threshold, see *Carlisle Report* paras 254-298.

50. See *Carlisle Report* para 186.

51. *Sentencing Act 1989* (NSW) s 45(1).

52. Either a District Court judge or a retired Supreme or the District Court judge: *Sentencing Act 1989* (NSW) s 45(2)(a). It has been the practice to appoint retired District Court Judges to the Offenders Review Board.

53. *Sentencing Act 1989* (NSW) s 45(2)(b).
54. As at February 1996.
55. *Sentencing Act 1989* (NSW) Sch 1 cl 2, cl 13, cl 15. The provision providing for a casting vote is rarely used in practice, as the Board strives to reach decisions by consensus.
56. *Sentencing Act 1989* (NSW) Sch 1 cl 16, 17. Only one judicial member is scheduled to attend Board meetings and Hearings each week.
57. *Sentencing Act 1989* (NSW) see generally s 26-41.
58. And also to constitute a break with the previous system: New South Wales, *Parliamentary Debates (Hansard)*, Legislative Assembly, 10 May 1989 at 7909.
59. *Sentencing Legislation (Amendment) Bill* (NSW) Sch 1 cl 13, 14; *Hansard*, Legislative Assembly, 27 October 1994.
60. Offenders Review Board, *Submission* (11 October, 1995) at 7.
61. See G Egan, "Independent and Intimate: the Serious Offenders' Review Board" in S-A Gerull and W Lucas (eds), *Serious Violent Offenders: Sentencing, Psychiatry and Law Reform* Proceedings of AIC Conference, Canberra, 29-31 October 1991 (1993) at 159.
62. *Prisons Act 1952* (NSW) s 62. It inherited its core functions from a series of bodies which can be traced through the Indeterminate Sentence Committee (within the Department of Corrective Services), the Release on Licence Board (1983-1989) and the Serious Offenders Review Board (1990-1993).
63. The Community Protection Committee established in late 1994 advises the Council about release of nominated prisoners: Serious Offenders Review Council, *Annual Report 1994* at 13.
64. See *Prisons Act 1952* (NSW) s 22C-22F.
65. See para 11.10.
66. Serious Offenders Review Council, *Submission* (9 October) 1995 at 6.
67. *Prisons Act 1952* (NSW) s 61. As with the Offenders Review Board, the judicial members may be either a Judge of the District Court or a retired Judge of the Supreme Court or the District Court. In practice, retired District Court Judges have been appointed.
68. *Prisons Act 1952* (NSW) Sch 5 cl 5.
69. The Director of Inmate Classification and Placement, and the Superintendent, Prison Operations.
70. Serious Offenders Review Council, *Annual Report 1994* at 13.
71. *Prisons Act 1952* (NSW) s 63. Members are the two SORC official members and the Head of Psychological Services, the Principal of Inmate Education, the Head of Drug and Alcohol Services and the Manager of Prisoner Classification and Placement.
72. *Sentencing Act 1989* (NSW) s 18(1).
73. *Sentencing Regulation 1989* (NSW) cl 8(5)(a).
74. *Sentencing Act 1989* (NSW) s 17(1)(b).
75. *Sentencing Act 1989* (NSW) s 17(1)(d).

76. For example, reports about the offender's potential residential location.
77. See Chapter 11.
78. See below para 7.38.
79. *Sentencing Act 1989* (NSW) s 17(1)(f).
80. See paras 7.59-7.61.
81. The Board may otherwise note the breach, note and request a progress report, warn, or monitor the parolee.
82. *Sentencing Act 1989* (NSW) Sch 1 cl 11(3).
83. Provided by the Prisoners' Legal Service of the Legal Aid Commission in most cases, or by the Aboriginal Legal Service or counsel privately engaged.
84. *Sentencing Act 1989* (NSW) Sch 1 cl 19.
85. *Sentencing Act 1989* (NSW) s 18(1)(b).
86. *Prisons Act 1952* (NSW) s 63(b).
87. *Sentencing Act 1989* (NSW) s 19A.
88. Offenders Review Board, *Submission* (11 October 1995) at 3.
89. See *Sentencing Act 1989* (NSW) s 24.
90. *Sentencing Act 1989* (NSW) s 17(1).
91. The *Nagle Report* postulated the fundamental principle that, wherever possible, it is preferable to have a prisoner in the community than in gaol, and formulated the question to be asked by the Parole Board to be 'are there any reasons why this prisoner should not be able to adapt to a normal community life?' (at 609); *Probation and Parole Act 1983* (NSW) s 26, although the Act was amended in 1987 to reverse the presumption in the case of serious offences, s 26A.
92. But see paras 7.64-7.65 for the recommendations of the Commission.
93. *Sentencing Act 1989* (NSW) s 25A.
94. New South Wales, *Parliamentary Debates (Hansard)*, Legislative Assembly, 30 November 1989, the Hon J Dowd, Attorney General, at 14056.
95. Offenders Review Board, *Annual Report 1994* at 10.
96. *Sentencing Act 1989* (NSW) s 53 and s 50(2). See *Kelleher v Parole Board* (1984) 156 CLR 364.
97. New South Wales, Attorney General's Department, *Sentencing Review* (Sydney, June 1994) at 15.
98. See "Minister Accused of Parole Board Interference", *Sydney Morning Herald* 12 June 1992 at 4. The Minister for Justice confirmed that he was concerned and disappointed at a decision, and that the four community representatives would not be reappointed for a second term: "Minister Slams More Parole Board Decisions", *Sydney Morning Herald* 13 June 1992 at 5.
99. For example, Canada, England.

100. See the view expressed in A Nicholson, "The Future of Parole" in D Biles (ed), *Current Trends in Corrections* (Federation Press and AIC, Sydney, 1988) 45 at 46.
101. Offenders Review Board, *Submission* (11 October 1995) at 1.
102. *Sentencing Act 1989* (NSW) s 17(1)(a).
103. *Sentencing Act 1989* (NSW) s 45(2)(b).
104. United Kingdom, Canada, South Australia.
105. Some appointments to the Serious Offenders Review Council have drawn from this section of the community.
106. See *Baba v Parole Board of New South Wales* (1985) 5 NSWLR 338; *Todd v Parole Board of New South Wales* (1986) 6 NSWLR 71. See also *Johns v Release on Licence Board* (1979) 9 NSWLR 103.
107. See para 7.34.
108. *Muir Report* Recommendations 39, 40.
109. See paras 7.73-7.74.
110. See para 7.60.
111. *Sentencing Act 1989* (NSW) s 17(1)(f). See para 7.41.
112. See para 11.69.
113. See for example, *Muir Report* Chapter 9.
114. Recently, extension of a similar right of review to the Crown over Board decisions relating to serious offenders was proposed. The *Sentencing Legislation (Amendment) Bill 1994* provided, in terms identical with s 23, that an application could be made to the Court of Criminal Appeal by the Attorney General or the Director of Public Prosecutions should either allege that the Board made a decision based on information that was false, misleading or irrelevant. The Attorney General or the Director of Public Prosecutions would also have been given a right first to request the Board to revoke the Parole order of a serious offender on the grounds that it was made on false, misleading or irrelevant information, and then to approach the Court of Criminal Appeal if the Board refuses the initial application: *Sentencing Legislation (Amendment) Bill 1994* (NSW) Sch 1 cl 10 inserting s 34A into the *Sentencing Act 1989* (NSW); and cl 11 inserting s 41A. The Bill, which passed the Upper House, lapsed with the dissolution of Parliament before the election in March 1995.
115. See *McCamley v the Offenders Review Board* (NSW CCA, No 60703/93, 9 February 1994, unreported).
116. *McPherson v Offenders Review Board* (1991) 23 NSWLR 61.
117. Examples of directions may be to require the Board to reconsider the information in the light of the evidence adduced to the (appeal) Court; to direct the Board to make certain specific enquiries and to reconsider the information in the light of the results of those inquiries: *McCamley v Offenders Review Board* at 12 per Allen J.
118. *McCamley v Offenders Review Board* at 3 per Hunt CJ at CL.
119. *McCamley v Offenders Review Board* at 10 per Hunt CJ at CL.
120. *Sentencing Legislation (Amendment) Bill 1994* (NSW) Sch 1 cl 9.
121. See also the determination of parole by a judge: see paras 7.19-7.23.

122. See para 7.58 and the cases cited there.
123. See also *Attorney General's Sentencing Review* at 42-43.
124. *Supreme Court Act 1970* (NSW) s 48(1)(a)(vii), *Sentencing Act 1989* (NSW) Sch 1 cl 11(5): see *McCamley v Offenders Review Board* at 2 per Hunt CJ at CL.
125. The Offenders Review Board and the Mental Health Review Tribunal.
126. *Sentencing Act 1989* (NSW) s 18(1)(b).
127. *Sentencing Act 1989* (NSW) s 18(1)(c).
128. Offenders Review Board, *Submission* 11 October 1995 at 7.
129. Offenders Review Board, *Submission* 11 October 1995 at 7. See *Sentencing Legislation (Amendment) Bill 1994* (NSW) Sch 1 cl 5, inserting s 18(3), (4).
130. *Sentencing Legislation (Amendment) Bill 1994* (NSW) Sch 1 cl 5.
131. New South Wales, *Parliamentary Debates (Hansard)*, Legislative Council 17 November 1994, the Hon I M Macdonald, quoting from a letter from David Fairlie, President, Law Society of NSW at 5209.
132. *Sentencing Regulation 1989* (NSW) cl 8(4).
133. There are approximately 400 such prisoners in custody at present: Offenders Review Board, *Submission* 11 October 1995 at 6.
134. Offenders Review Board, *Submission* 11 October 1995 at 6-7.
135. *Sentence Administration Act 1995* (WA) s 22.
136. Halden Report at 83.

8. Periodic Detention

DEFINITION AND OPERATION

8.1 A court may impose a sentence of imprisonment of not less than three months and not more than three years and order that the sentence be served by way of periodic detention.¹ Periodic detention of less than three months may be ordered for certain offences.² Periodic detention requires an offender to remain in custody for two days of each week for the duration of the sentence. The detainee reports to a detention centre by 7 pm on a specified day of the week (usually a Friday) and remains under the legal custody of the centre until 4.30 pm two days later. Some centres also run midweek programs where attendance is required from Wednesday evening to Friday afternoon. There are currently 11 periodic detention centres in New South Wales, of which only one operates solely for women.³

8.2 Periodic detention has been available in New South Wales since 1971, but is not currently used in other any Australian jurisdiction.⁴ Periodic detention schemes also operate, for example, in New Zealand, Belgium, West Germany and Holland.⁵

PURPOSE

8.3 Periodic detention is designed to meet the community's demand for custodial punishment which provides a deterrent not only to the offender but to others who might be tempted to offend.⁶ It provides the court with a sentencing option which, while rigorous, is not as drastic as full time imprisonment.⁷ The advantages of periodic detention are that:

- it registers disapproval of the offender's activities without all of the negative effects of full-time imprisonment;
- the offender's debt to the community can still be paid without having to give up employment;⁸
- domestic relations can largely be maintained; and
- it is less costly to the community than full time imprisonment.⁹

8.4 There is also a benefit to the community through periodic detainees performing community projects, such as roadside rubbish removal, the clean up and maintenance of schools and other public buildings and facilities. The Department of Corrective Services estimates this value of this work at \$2 million each year.¹⁰ These figures would seem to allay previous concerns that the periodic detention scheme did not provide any meaningful work for offenders.¹¹

LENIENCY

8.5 This type of sentence involves an element of leniency on the part of the sentencing judge. The sentencer must therefore be careful to avoid handing down an order for periodic detention where the seriousness of the crime demands a more punitive order. In this respect periodic detention has not been considered appropriate for sex offences,¹² but is suitable for driving offences,¹³ assault,¹⁴ and some drug related offences.¹⁵ The Court of Appeal has been careful to distinguish between the eligibility of a particular person for periodic detention, and the suitability of periodic detention as a punishment for the particular crime committed by that person.¹⁶

8.6 It is a misconception, however, to regard periodic detention as a "soft option", despite occasional media criticism to that effect.¹⁷ It is a sentence that represents a significant dislocation of ordinary life of the typical working person. The offender is deprived of his or her liberty by having to reside in prison, and is forced to undertake work in the community.¹⁸

EVALUATION

8.7 Overall the Commission considers periodic detention to be a valuable sentencing option, and there is no reason why it should not continue in some form. Some aspects of the operation of periodic detention have proved problematic and various amendments have been made to the legislation from time to time to improve its operation.¹⁹ In the Commission's view, there remain several entrenched problems with periodic detention.

Non-attendance

8.8 There are genuine reasons why detainees fail to attend periodic detention centres, for example illness.²⁰ There are, however, also those detainees who choose simply not to attend and even, in some cases, have someone attend in their place. Since the inception of the scheme many attempts have been made to reduce absentee rates.

8.9 Refining the screening process for suitable offenders is the first step in reducing these rates. The *Periodic Detention of Prisoners Act 1981* requires that the court must be satisfied that the offender is suitable to serve the term of the imprisonment in this way on the basis of a report about that offender from the Department of Corrective Services.²¹ The report should reveal that there is accommodation at a prison for the offender to serve the sentence by way of periodic detention; and travel to and from that centre will not impose hardship or undue inconvenience. The intention behind this requirement is apparent. However, a 1994 Department of Corrective Services study into attendance patterns indicated that screening only had a small effect on the proportion of periodic detainees who attended as required.²²

8.10 Further, in order to ensure that the person turning up to the periodic detention centre is in fact the person who was actually sentenced to the order, a Bill introduced into Parliament in 1995 (the "1995 Bill") proposed that identifying particulars such as photographs and fingerprints be taken before the court makes an order for periodic detention.²³

8.11 Non-attendance can be dealt with in several ways under the *Periodic Detention of Prisoners Act 1981*. Section 21 of the Act provides that a sentence can be extended by one week for each detention period that a detainee fails to attend. In addition the sentence can be extended by one additional week (up to a maximum of two extra weeks) for each detention period where a detainee has failed to report without leave of absence.²⁴ The 1995 Bill proposes to increase this maximum period from two to six weeks.²⁵ The 1994 Department of Corrective Services Report into attendance patterns found that dealing more strictly with non-attendance did not necessarily increase the proportion of detainees who attended as required. Thus the threat of extended detention may not increase the level of attendance of most detainees.²⁶

8.12 Non-attendance can also result in orders for periodic detention being cancelled.²⁷ Orders can also be cancelled in other circumstances. These include where a periodic detainee is subsequently convicted of an offence,²⁸ where cancellation is requested on the application of a detainee or the Commissioner,²⁹ or where it appears to the court that there is good reason for cancelling an order.³⁰ The cancellation powers of the court pursuant to s 25 are, however, somewhat ambiguous and need to be clarified.³¹ In particular, it is not clear whether an application by the Commissioner or the detainee to cancel the order can be granted because "it appears to the court that there is good reason for doing so." The Commission suggests that s 25 of the Act be amended to make it clear that the power of the court extends to this situation.

Proposal 23

Section 25 of the *Periodic Detention of Prisoners Act 1981* (NSW) should be amended to make clear that, on application by the Commissioner or detainee, the court has power to cancel the order "if it appears to the court that there is good reason for doing so".

8.13 The effect of cancellation in any of these circumstances is that the unexpired portion of the sentence is required to be served by way of full-time imprisonment.³² The court may also make directions as to the minimum and additional term of the sentence to which the order related or make a parole order in respect of the person

concerned. The 1995 Bill enables the court to make such other orders (for example community service orders) as it considers appropriate in the circumstances.³³

Stage II detention

8.14 Attendance required pursuant to an order for periodic detention can be varied to what is known as "Stage II" periodic detention, a non residential phase of the sentence. The offender is allowed to sleep at home but is required to attend at the designated work site on the two days from 8 am to 4 pm. To be eligible for Stage II, a detainee must have completed a significant portion of the sentence (usually a minimum of three months or a third of the sentence, whichever is greater), have a good attendance record and have demonstrated acceptable behaviour during that time. Entry into this stage is seen as an incentive to offenders to comply with the periodic detention order. It also frees up accommodation resources for new detainees.

8.15 Stage II was first introduced as a pilot program at Malabar Periodic Detention Centre in mid-1978. The decision to place an offender on Stage II is an administrative one over which judicial officers have no control. In the Commission's view, Stage II has no statutory base. In particular, it cannot generally be supported by s 11 of the *Periodic Detention of Prisoners Act 1981* (NSW).

8.16 Once Stage II is reached, a periodic detention order essentially changes into a community service order as the offender is no longer required to remain overnight at the detention centre. This position has been criticised on the basis that the sentence becomes less punitive and is not what was intended by the sentencer.³⁴ Justice Dunford³⁵ has suggested to the Commission that this is why many judges are reluctant to impose sentences of periodic detention. He believes that periodic detention should remain as such for its whole term.

8.17 The Attorney General's Sentencing Review conducted in 1994 suggested the possibility that periodic detention should be subject to a court determination of minimum and additional terms in the same way as for other sentences of imprisonment. The Review suggested that it was more appropriate for the sentencing court to specify when the detainee should be eligible for Stage II.³⁶ The Department of Corrective Services is opposed to this proposal.³⁷ The existing administrative arrangements for detainees to progress from Stage I to Stage II periodic detention allow for such progression to be based on behaviour and performance, whereas experience has shown that court orders tend to be viewed as a right.

8.18 The Commission is not convinced that Stage II is necessary for the success of the periodic detention scheme. Persons are sentenced to periodic detention on the basis that it curtails their liberty by detaining them for part of the week as well as making them perform community service work. If a court wanted to impose a community service order it would do so at the sentencing hearing. Without the detention component there is little point in making an order for periodic detention, and further, it is not consistent with the concept of truth in sentencing. The Commission's view is that Stage II should be abolished. A sentence of periodic detention should require the offender to serve the sentence in a detention centre for the necessary days per week.

Proposal 24

Stage II of the Periodic Detention scheme should be discontinued.

Periodic detention sentences of three months or less

8.19 Currently a court may impose a sentence of imprisonment of not less than 3 months and not more than 3 years and order that the sentence be served by way of periodic detention.³⁸ Periodic detention may be ordered for less than 3 months for certain offences.³⁹ The Commission is not persuaded that the availability of periodic detention for a short period should be limited to defined offences, but considers that periodic detention should be generally available. A restriction on short sentences could be accommodated by a provision that a sentencer must provide reasons justifying a periodic detention order of less than a stated duration.⁴⁰ This will allow sentencers the ability to impose periodic detention for a short period in any case in which it is clearly appropriate to do so, notwithstanding the administrative awkwardness of short sentences.

Proposal 25

Periodic detention should be generally available for periods of less than three months.

QUESTIONS ARISING IN CHAPTER 8

- 1. Should periodic detention be retained as a sentencing option in New South Wales?**
- 2. What strategies should be adopted to deal with non-attendance?**
- 3. When should breach of a periodic detention order result in full-time imprisonment?**
- 4. Should Stage II of the Periodic Detention scheme be abolished?**
- 5. Should periodic detention be generally available for periods of less than three months?**

Footnotes

1. *Periodic Detention of Prisoners Act 1981* s 5.

2. For example, an offence against the *Summary Offences Act 1988* and a domestic violence offence within the meaning of the *Crimes Act 1900*.

3. The first sentencing of a woman to periodic detention occurred in 1978. Research into women periodic detainees reveals that transportation problems are the key factor in women's poor attendance rates at the only female detention centre at Merinda. Further, many female detainees are wholly responsible for young children, and if no alternative care arrangements can be made, this precludes them from being suitable for a periodic detention order: D Harvey, *Women in Periodic Detention in New South Wales*, unpublished paper dated 28 November 1991, held at the Judicial Commission of New South Wales.

4. Queensland is the only other Australian State or Territory to have attempted a periodic detention scheme. The main reason for the failure of the scheme was the drunkenness of offenders, who would use the weekend detention period as a sobering up time. This created risks and problems for administrators, and offered those offenders on the program no real possibility of rehabilitation. The Commission has found no evidence suggesting this problem occurs to the same degree in New South Wales.

5. In New Zealand periodic detention caters for adults and youths. In Holland weekend imprisonment is available only for sentences of two weeks or less, the majority of which are for drunken driving. In Belgium weekend imprisonment is an option for any offender who has a job and receives a sentence of two months or less. In West Germany courts can order the detention of young offenders aged 14-20 for between one and four weekends. See A Gorta, *Periodic Detention in NSW: Trends and Issues 1971-1991*, Department of Corrective Services Research Bulletin No 16, August 1991.

6. *R v Anderson* (1987) 32 A Crim R 146 at 154.

7. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 22 November 1995 at 3753.

8. Employment is an objective of periodic detention, no doubt arising from the notion that if offenders are employed they are less likely to return to crime. See *A Critical Review of Periodic Detention in New South Wales*, Monograph Series No 5 (1992), Judicial Commission of New South Wales, at 15.

9. For the period 1 July 1991 to 30 June 1992 the cost of full-time imprisonment per inmate per day by security classification was: maximum-\$120.47; medium-\$112.23; minimum-\$95.90; and of periodic detention-\$31.51. Separate costings for periodic detention from 1 July 1992 are unavailable, as the program is now integrated with

the correctional centres concerned and no longer separately funded. See New South Wales, Department of Corrective Services, *Annual Report 1993-94*.

10. New South Wales, Department of Corrective Services, *Annual Report 1993-94* at 6.

11. R Bray and J Chan, *Community Service Orders and Periodic Detention as Sentencing Options: A Survey of Judicial Officers in New South Wales* (Monograph Series No 3, Judicial Commission of New South Wales, April 1991) at 56.

12. *R v Burchell* (1987) 34 A Crim R. 148 at 151.

13. R Bray and J Chan, *Community Service Orders and Periodic Detention as Sentencing Options: A Survey of Judicial Officers in New South Wales*, at 42-48.

14. *R v Sayin* (NSW CCA, No 60360/94, 6 December 1994, unreported).

15. *R v Niga* (NSW CCA, No 60845/93, 13 April 1994, unreported).

16. See *R v Dodd* (1991) 57 A Crim R 349.

17. For example, see "200 Weekend Jail Shirkers Go Scot Free" *Sydney Morning Herald*, 13 August 1990, at 3; "Moment of tragedy" *Daily Telegraph Mirror*, 20 September 1995, at 24.

18. See comments of Kirby P in *R v Niga* (NSW CCA, No 60845/93, 13 April 1994, unreported) at 8.

19. The *Periodic Detention of Prisoners Amendment Bill 1995* (NSW) (the "1995 Bill") is the most recent proposed change.

20. See the reasons provided by the appellant in *R v Mikas* (NSW CCA, No 60479/95, 15 December 1995, unreported). This case also reveals some of the administrative problems that can arise within the Department of Corrective Services in respect of recording absences.

21. *Periodic Detention of Prisoners Act 1981*, s 5.

22. B Thompson, *Attendance Patterns of Periodic Detainees* (New South Wales Department of Corrective Services, Research Publication No 28, May 1994) at 28.

23. *Periodic Detention of Prisoners Amendment Bill 1995* (NSW) Sch 1[1].

24. See *Periodic Detention of Prisoners Act 1981* s 20.

25. *Periodic Detention of Prisoners Amendment Bill 1995* Sch 1[12].

26. B Thompson, *Attendance Patterns of Periodic Detainees* at 28.

27. *Periodic Detention of Prisoners Act 1981* s 25(3A).

28. *Periodic Detention of Prisoners Act 1981* s 24.

29. *Periodic Detention of Prisoners Act 1981* s 25(1)(a).

30. *Periodic Detention of Prisoners Act 1981* s 25(1)(b).

31. *R v Roome* (NSW CCA, No 60636/95, 15 December 1995, unreported) at 3-4 per Hunt CJ at CL.

32. *Periodic Detention of Prisoners Act 1981* s 26(2) and (3).

33. *Periodic Detention of Prisoners Amendment Bill 1995* Sch 1[21].

34. For example see *R v Hallocoglu* (1992) 29 NSWLR 67 at 74.
35. Justice J R Dunford, *Submission* (7 August 1995).
36. *Attorney General's Sentencing Review* at 25.
37. Department of Corrective Services, *Submission* (4 September 1995) at 23.
38. *Periodic Detention of Prisoners Act 1981* s 5.
39. For example, an offence against the *Summary Offences Act 1988*, or a domestic violence offence within the meaning of the *Crimes Act 1900*.
40. See para 3.26-3.34.

9. Community-Based Sentences

TYPES OF COMMUNITY-BASED SENTENCES

9.1 Community-based alternatives to imprisonment, which have become widespread in many countries in recent years, represent one of the most important developments in sentencing in the last few decades. Their development reflects the prison system's failure to rehabilitate offenders, the costs associated with building and maintaining prisons and changing community attitudes to sanctions. Community-based sentences are distinguishable according to:

- the degree of State intervention which they involve;¹ and
- the extent to which they envisage community participation.

9.2 State intervention is at its lowest where sentences involve the offender's unconditional release into the community, with or without the recording of a conviction.² Because of the possibility of the offender's non-compliance with the sentence, a threat of greater intervention is present where a fine is imposed,³ or where an offender is released into the community subject to his or her compliance with specified conditions. The conditions themselves may be more or less burdensome, both from the point of view of the State and of the offender. At one extreme, they may do no more than require the offender to be of good behaviour for a specified period; at the other, they may require the State to monitor the behaviour of the offender or provide facilities for the punishment and rehabilitation of the offender in the community. Intervention implies some restriction on the liberty of the offender for the period that he or she is undergoing punishment or rehabilitation in the community. Indeed, one form of community-based sanction, home detention,⁴ goes further than this and expressly restricts the liberty of the offender by confining him or her to the home (rather than to a gaol) for the duration of the sentence.

9.3 The sentences described in the last paragraph are traditional in the sense that they operate within the framework of established court structures. They serve the objectives of punishment and are subject to the general principles which apply to sentencing.⁵ More recently, attempts have been made at resolving conflicts which have their origin in criminal activity by involving the community in the criminal justice system, including sentencing. Commonly known as "conferencing", such alternative methods of community-based sentencing have their origin in approaches to criminal justice found in indigenous communities. They involve the use of mediation, community aid panels and family conferencing as diversions from, or adjuncts to, the court-based sentencing process.⁶

A MORE SEVERE SENTENCING REGIME?

9.4 The greater availability of non-custodial sentencing options is often thought to carry the danger of an increasingly severe sentencing regime by reason of:

- "net-widening";
- sanction stacking; and
- longer sentences of imprisonment.

Net-widening

9.5 A frequent criticism of the use of alternatives to custodial sentences is that they progressively intrude into civil life and widen the net of penal control.⁷ This is because the new sanction tends to draw more from those previously treated with less severity than from those previously treated with more severity. An example would be if community service orders came to be used in place of fines or probation, instead of in place of imprisonment. The danger of net-widening is increased by the ease with which non-custodial sentencing options can be combined with one another or with custodial sentences into a "cocktail sentence".⁸ Evidence supporting the

net-widening theory is said to be found in prison population statistics which have neither decreased with the rise of alternative penalties nor demonstrated a decline in the use of lesser penalties.⁹

9.6 The Commission does not regard the perceived dangers of net-widening as preventing the development and use of non-custodial options in appropriate cases, either on their own or in conjunction with other non-custodial sentencing options. First, it is important to note that net-widening is a theory which probably cannot be empirically established.¹⁰ Secondly, it would be ironic if the theory could be used to prevent the development of non-custodial sanctions and their application in clearly appropriate cases. To the extent that there is always a danger of net-widening, the Commission agrees with the Attorney General's Sentencing Review that it should be met by judicial education.¹¹

Sanction stacking

9.7 It has been suggested that the possibility of combining non-custodial options with one another and with custodial sentences raises a real danger that sentences will in practice become more severe.¹² In the Commission's view, the principle of proportionality - that is, that punishment must not exceed the gravity of the offence¹³ - avoids this result. The decisions of the High Court in *Veen (No 1)*¹⁴ and *Veen (No 2)*¹⁵ develop proportionality in the context of sentences of imprisonment. These decisions are not restricted in their terms to sentences of imprisonment and there is no reason to suspect that they do not apply to sentences generally. They therefore place limits on any sanction stacking which may occur, even if, in practice, there is not a great likelihood of appellate challenge to a cocktail of non-custodial sentences.

Longer sentences of imprisonment

9.8 An intended consequence of the development of non-custodial sentences is that imprisonment will come to be used less frequently than in the past. If it is, there is a danger that those offenders who will now come to be imprisoned will be treated more severely than before on the basis that they "really deserve it".¹⁶ Again, the Commission's view is that the principle of proportionality overcomes this danger.

THE COMMISSION'S GENERAL VIEW OF NON-CUSTODIAL SENTENCING OPTIONS

9.9 The Commission welcomes the broadening of sentencing options. We regard non-custodial sentencing options as sanctions in their own right, not as alternatives to imprisonment.¹⁷ Non-custodial sentences ought to be applied in appropriate cases to enhance the effectiveness of punishment. We hope our proposal that sentencing officers must expressly justify a custodial sentence of less than six months duration¹⁸ will lead to the greater use, where appropriate, of non-custodial sentencing options in cases which might otherwise attract a custodial sentence of six months duration or less.

9.10 The Commission's tentative view is that we should not attempt to establish a legislative hierarchy of non-custodial sentences, such as exists in Victoria,¹⁹ to determine the cases in which particular non-custodial sentences constitute appropriate punishments. The Commission is of the view that sanction hierarchies constitute unacceptable fetters on judicial discretion in sentencing.²⁰ In addition, the ranking of non-custodial sentences in terms of their seriousness is extraordinarily difficult.²¹ Unlike custodial sentences (where length of sentence is the touchstone of seriousness), there are no obvious or agreed criteria of sentence severity.²² While it is possible to develop a ranking of seriousness within the boundaries of each non-custodial sanction,²³ it is impossible to determine equivalence between financial and non-financial non-custodial sentences. For example, is a substantial fine more punitive than community service? What if the offender is rich?²⁴

HOME DETENTION²⁵

9.11 A home detention order, also known as an intensive community supervision order or intensive supervision order, confines offenders to their homes during specified times for the duration of the sentence. Normally, persons on home detention will continue in employment. Confinement is combined with specified supervision to assist in the offender's rehabilitation. Such supervision may involve counselling and assistance by a correctional officer. Particular problems suffered by the offender, for example drug or alcohol dependence, are also

addressed and a specialised program may be attached to the order. The program may involve a number of hours per week at an attendance centre where group therapy can take place.

9.12 Persons on home detention are also subject to regular monitoring, both at home and in the workplace. This involves regular visits from correctional officers to enforce the detention, as well as random telephone surveillance to ensure that the offender is complying with the order.²⁶ In some home detention schemes electronic surveillance is also used, but in many cases it has not proved cost effective, and in some cases practical problems have arisen.²⁷ The Commission's discussions with departments which run home detention schemes indicate that the supervision provided by correctional officers is the most valuable and effective aspect of the scheme.²⁸

9.13 The element of supervision and monitoring in home detention orders is intrusive and demanding. For example, the offender may be required to submit regularly to a urine analysis test. In the United States, some offenders have turned down the opportunity to take part in these types of programs, preferring prison instead. This is because offenders do as they are told in prison, whereas in intensive supervision programs they have to take responsibility for themselves.²⁹

9.14 The objectives of home detention include depriving the offender of liberty by confinement in the home within specified periods; providing a cheaper alternative to full time imprisonment;³⁰ and sparing the offender, particularly the minor offender, the ordeal and contamination of prison. In this way, home detention is a real alternative to imprisonment and has distinct advantages over it. Its disadvantages include turning the home into a prison, and the impact that home confinement has on family or those living in the home with the offender.³¹

9.15 Notwithstanding its advantages, home detention cannot apply in all cases. In particular, it is not an appropriate sentencing option where:

by reason of the gravity of the offence, the offender poses an unacceptable threat to public safety; and

the offender lives in accommodation not suitable for home detention - for example in a halfway house or caravan park or where the offender does not have access to a telephone.³²

Use of home detention in Australia

9.16 In Australia home imprisonment takes two forms:

"front-end", where an offender is specifically sentenced to an intensive supervision or correction order;³³ and

"back-end", where home detention follows a period of full time imprisonment.³⁴

Although both forms of home detention involve supervision and surveillance by correctional officers, surveillance tends to be the major focus of back-end programs, where supervision is, generally, less interventionist.³⁵

9.17 Both front-end and back-end detention have been authorised in a number of ways. Sometimes an order is based on a condition attached to existing mechanisms: for example, a probation order in the case of front-end schemes, or a parole order in the case of back-end schemes. In other cases, the home detention orders have an independent statutory footing.

The New South Wales scheme

9.18 In New South Wales a home detention scheme has been piloted by the Probation Service as an Intensive Community Supervision program.³⁶ The program has been operating since June 1992 and has allowed courts to impose a form of home detention as an alternative to custodial sentences of up to 18 months. There is no independent legislative base to the program. It was approved by Cabinet on 14 April 1992 and came into effect some months later. Offenders are placed on the program pursuant to a s 558 bond with specified conditions.³⁷

9.19 Offenders have to consent to participation in the program. It has been used in cases involving property and drunk driving. Some cases have involved repeat offenders. In 1994 there were 43 offenders in the Intensive Community Supervision scheme; currently there are 14. There are only four staff working on this program, which has given rise to obvious logistical problems.

9.20 The scheme makes use of surveillance bracelets, in conjunction with supervision by correctional officers. The most common form of monitoring is the making of random telephone calls to the offender's residence. Usually three calls a day are placed to verify that the offender is in the house at times that he or she is supposed to be there. The offender is not allowed to take any alcohol or drugs while on the program, so random urine samples are also taken.

Breach procedures

9.21 A breach of a home detention order is dealt with as a breach of a s 558 bond. The Probation Service writes a report and applies to a Magistrate to issue a call up notice to the offender who must then appear before the court and be dealt with as the circumstances warrant. No separate offence is constituted for breach of the order itself. If home detention were available in country areas breach proceedings might not be easily prosecuted given that court sittings do not take place regularly.

9.22 The Probation Service has suggested that, if the pilot scheme is expanded, breaches should be dealt with by the Offenders Review Board and follow a similar pattern to breach of parole proceedings. The Offenders Review Board is an accessible forum which meets twice weekly to consider applications for parole from prisoners state-wide.³⁸ The Offenders Review Board would be able to issue a warrant of apprehension if necessary. The Board's existing caseload is, however, already high. Its ability to absorb this new jurisdiction is, necessarily, subject to existing commitments and resources.

"Front-end" or "back-end"?

9.23 The current program in New South Wales is a "front-end" option. The Department of Corrective Services has suggested that it should be extended to include a "back-end" program. This would allow an offender to serve a proportion (usually the latter part) of a custodial sentence in the home or another approved residence. For example, in Western Australia the first third of a sentence can be served in prison, the second third as home detention, while the remainder is remitted if the home detention period is completed successfully. The decision to allow home detention is an administrative one.³⁹

9.24 To preserve the concept of truth in sentencing, the Commission's tentative view is that any order for back-end home detention should initially be determined by the sentencing court. When a minimum period of a custodial sentence is about to expire, application should then be made to a quasi-judicial body, such as the Offenders Review Board, to decide whether the offender should be permitted to serve the latter part of the sentence in home detention. The time served in home detention could, but need not necessarily, be quite separate from any time later served on parole. The Commission invites submissions on the desirability of the introduction of back-end detention and on the relationship between such detention and parole.

Proposal 26

Sentencing legislation should provide for home detention as a sentencing option.

COMMUNITY SERVICE

9.25 Where a person has committed an offence punishable by imprisonment (whether or not it is also punishable by fine) the court may, instead of sentencing the offender to imprisonment, make an order requiring the person to perform community service work.⁴⁰ Up to 500 hours of work can be ordered. The court can only make a community service order ("CSO") subject to the following conditions:⁴¹

- the consent of the offender must be obtained;

- the court must be notified by a probation officer that suitable arrangements for community service work can be made in the person's local area; and
- the person must be assessed as a suitable person to perform community service work.

9.26 The requirement for an offender suitability report is mandatory in all cases where a CSO is considered, regardless of the number of hours that may be involved. In terms of resources, these reports are expensive and time-consuming. The Probation Service has suggested that an assessment should not be mandatory where the CSO is for 50 hours or less and where the offender concerned is capable of undertaking some form of work and is available to do so on a regular basis.⁴² Another possible way to reduce the cost to the Probation Service of preparing reports is for the legislation to provide clearer guidelines as to who is eligible for a CSO. This may, however, unnecessarily limit the court's discretion to award CSOs in circumstances where they would otherwise have been considered appropriate.

9.27 The type of work undertaken by an offender on a CSO can include garden and household maintenance for pensioners, maintaining school grounds, bush regeneration projects, and driving for Meals-on-Wheels, to name a few.⁴³ As part of the order the court can also require the offender to go to an attendance centre and participate in development programs. The court must be satisfied (on advice from a probation officer) that there is an attendance centre near the offender's abode, and that the offender is suited to participation in a development program.⁴⁴ The programs operating at these attendance centres feature a structured group work approach designed to encourage offenders to accept responsibility for their actions. They also attempt to resolve educational or attitudinal deficits of offenders which may have contributed to offending.

An alternative to imprisonment?

9.28 Community service orders were introduced primarily as a substitute for imprisonment.⁴⁵ The government of the day saw distinct benefits in introducing this sanction specifically as an alternative to prison, rather than as a sentence in its own right. First, there was the possibility of a reduction in economic cost through the decreasing use of prisons.⁴⁶ Secondly the new options provided a more humane form of punishment while still maintaining a punitive element seen as essential for public approval. Thirdly, the offender would be better off because, by avoiding full time imprisonment, he or she could, to an extent, remain in employment and maintain a normal home life.⁴⁷ Finally, there is the opportunity to make some reparation to the community.

9.29 One danger in making CSOs sanctions in their own right (rather than only alternatives to imprisonment) is net widening.⁴⁸ Yet recent legislation treats CSOs as sanctions in their own right for fine default and offensive language.⁴⁹ Further, notwithstanding the wording of the Act, it is doubtful that CSOs have always been used solely as an alternative to imprisonment.⁵⁰ The Commission is of the tentative view that CSOs should be available as sentences in their own right, rather than simply as alternatives to imprisonment. This view was generally supported in submissions to the Attorney General's Sentencing Review.⁵¹

Proposal 27

Community Service Orders should be available as a sentencing option for all offences.

9.30 The Attorney General's Sentencing Review recommended that the risk of net-widening and over extension of resources, that may arise if CSOs were made a general sentencing option, could be adequately dealt with by the introduction of two distinct types of CSO - the first being a "community work order" which is a penalty in its own right and limited to a fairly short duration; the second being a CSO as traditionally understood and utilised only as an alternative to imprisonment. It was considered that this suggestion would provide courts with a useful additional sentencing option appropriate to cases where fines or other non custodial penalties are unsuitable, without placing the burden of lengthy CSOs on minor offenders and the Probation Service.⁵² The Commission invites submissions on these suggestions.

Breach procedure

9.31 A CSO is breached where the person in respect of whom the order is made, fails, without reasonable cause or excuse, to comply with the order.⁵³ Breach of the order constitutes an offence.⁵⁴ The court supervising the CSO is then asked by the Probation Service to issue a warrant for the arrest of the offender directing that he or she be brought before the supervising court as soon as possible.⁵⁵ There are a variety of penalties a court can impose for breach of the order. The offender can be fined for the actual breach of the order (up to \$250), resentenced for the original offence, or the court may take no action at all.⁵⁶

9.32 The Probation Service, which is responsible for the prosecution of breaches of CSOs, has made a number of suggestions for changing the breach procedure. First, the Service suggests that it is not necessary for the supervising court to be the court where the breach proceedings are heard. Any court of equal jurisdiction should be able to hear these proceedings. The Commission agrees with this suggestion. Secondly, the Service believes that proving the breach to the criminal standard of proof is too onerous and should be reduced to the civil standard. The Commission cannot think of any pressing reason why, contrary to normal principle, the ingredients of this offence should be established on the civil standard.

9.33 Equally the Commission can think of no compelling reason why breach of a CSO, unlike breach of an intensive supervision order or a probation order, should itself be an offence. The Commission is of the view that breach of a CSO should, in appropriate cases, result in revocation of the order and a resentencing for the offence. The discretion of the court to take no action at all should, however, be preserved.

Proposal 28

A breach of a CSO should not itself constitute an offence.

PROBATION

9.34 In a general sense, probation is conditional release - that is, release of offenders conditional upon their being of good behaviour. In a more restrictive sense, the term is used for release conditional on an offender being placed under personal supervision by a probation officer, and undergoing some form of rehabilitation.⁵⁷ The usual mechanism for the release of offenders on probation is upon their entering a recognizance or "bond", which will incorporate the conditions upon which the offender is set at liberty.⁵⁸

9.35 Probation is a commonly used non-custodial sentencing option, particularly in Local Courts.⁵⁹ However, it is not recognised in legislation,⁶⁰ and its administration does not have a statutory basis.⁶¹ Supervised probation is administered by the Probation and Parole Service.⁶² In 1994, out of a total 88,142 persons found guilty at trial,⁶³ 4,112 (4.7%) were released on a bond subject to supervised probation, and 8,293 (9.4%) subject to probation without supervision.⁶⁴ Of those released under s 556A of the *Crimes Act 1900* (NSW),⁶⁵ that is, having the offence proved but no conviction recorded, 5,545 (6.3%) were subject to a bond (only 200 with supervision), and 5,016 (5.7%) were dismissed without further penalty. Approximately 9,200 persons are being supervised under probation orders, and approximately 6,900 persons became clients of the Service in 1994.⁶⁶

9.36 Supervised probation has the advantages of minimising the harmful effects of imprisonment both on offenders and their dependants, promoting rehabilitation by maintaining community contacts and allowing for remedial intervention in a cost-effective way. It is not a soft option. A person on probation must maintain his or her family and employment obligations, make any agreed restitution and accept the supervision of a probation officer, all with the threat of further sanction. A probation period is almost always longer than the period of imprisonment which may have been imposed for the same offence.⁶⁷

Bonds or recognizances

9.37 Sentencing courts may release offenders upon their entering a recognizance,⁶⁸ commonly known as a "bond" or a "good behaviour bond". The offender voluntarily undertakes to be of good behaviour, and to appear when called upon for sentence. As a condition, the court may fix a sum of money as a surety, which indicates the amount the offender will be liable to pay in the event of the breach of any conditions of the recognizance.⁶⁹ In the

event that conditions of the bond are breached, the offender can be required to appear before the court to be dealt with for the original offence,⁷⁰ and, if the breach constitutes an offence, that will be dealt with in accordance with the law.

9.38 Legislation generally uses the archaic term “recognizance” for this form of conditional release. The Commission considers that understanding of the nature of this sentencing option would be improved if the term “bond” were used instead.

Proposal 29

The term “bond” should replace “recognizance” in legislation.

9.39 The usual conditions which may attach to a bond are:⁷¹

- Supervision by the NSW Probation and Parole Service, for the period of the bond, a fixed term, or “as long as it is deemed necessary by the supervision officer”. In the last case, the Probation officer has the discretion to dispense with reporting conditions and supervision.
- Attending drug or alcohol abuse counselling.
- Residence at a nominated rehabilitation centre.
- Payment of compensation to the victim.
- Directions as to employment and place of residence.
- Restrictions on associates, contact with nominated persons and movement.

9.40 Additional penalties may be imposed, depending on the power under which the bond is made. The Court may direct the offender to pay compensation to the victim, and order restitution.⁷² An order for costs can be imposed.⁷³ A fine may be imposed under s 558(4), but not with a s 556A recognizance.⁷⁴ It is not possible to combine a Community Service Order with a recognizance under s 558.⁷⁵ A recognizance under the *Crimes Act 1900* (NSW) s 554 may, and under s 432(2) must, follow a sentence of imprisonment.

Sources of conditional release

Section 556A

9.41 Where it thinks that a charge brought against a person has been proved, the court may, “having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, or to any other matter which the court thinks it proper to consider”, either dismiss the charge,⁷⁶ or conditionally discharge the offender who enters a bond for a maximum of three years to be of good behaviour and to appear for conviction and sentence when called upon.⁷⁷ The latter course is taken when the sentencer considers that, even though no conviction will be recorded, it is desirable to address a specific social problem which led to the commission of the offence. Approximately 200 offenders are released on this basis every year.⁷⁸

Section 558

9.42 Under s 558 of the *Crimes Act 1900* (NSW), a court may convict a person, but defer imposing a sentence, and order the offender’s release on a bond. This provision may be used for any offence. There is no maximum limit on the time the bond may be in force, although courts will always nominate a time period. The offender accepts conditions set by the court, and must appear before the court for sentence if called upon.

Crimes Act s 432(2) and 554(2)

9.43 Two other sections of the *Crimes Act 1900* provide for an offender to be released on a bond. Section 554(2) allows a court of summary jurisdiction to order an offender to enter a bond (for between one and three years), in addition to, or instead of, a fine or imprisonment of up to 12 months. Section 432(2) enables a court, when imposing a sentence of imprisonment for a misdemeanour, to require the offender to enter a bond for a maximum of three years. Neither of these provisions is commonly used.

Common law

9.44 The courts have long had the power to bind over a person to keep the peace and be of good behaviour, with or without conviction for an offence.⁷⁹ This includes the power to release an offender pending sentence.⁸⁰ Whether or not a conviction is recorded, an offender may be remanded for sentence for a lengthy period and released on conditions, known, in this context, as a “Griffiths Bond” or “Griffiths Remand”,⁸¹ which may include any of the usual probation conditions. A court will take this action to allow an assessment of the offender’s behaviour and capacity to be rehabilitated over a period of time before the appropriate sentence is passed.⁸²

Restructuring probation orders

9.45 It is apparent from paragraphs 9.41-9.44 that courts have very wide discretionary powers in relation to the orders available for placing an offender on probation. A range of flexible options can be tailored to suit the circumstances of the offender and the offence. The Commission has considered whether there is a need to rationalise and put into a consolidated form the range of statutory provisions for imposing bonds and probation. Such an approach has been adopted recently in other jurisdictions. In Victoria, a community-based order was created in 1986, amalgamating the formerly discrete orders of probation, community service orders and attendance centre orders.⁸³ The *Sentencing Act 1995* (WA) contains a structure which provides for release without sentence, a “conditional release order” (replacing the good behaviour bond, with no supervision necessary), and a “community based order” which has components requiring supervision, participation in rehabilitation programs and performance of community service.

9.46 The Department of Corrective Services has proposed that sentencing legislation should abolish all the existing orders bringing offenders under the Probation and Parole Service’s supervision,⁸⁴ and replace them with a new structure of orders which reflects the activities of the Service.⁸⁵ The legislation envisaged would also incorporate consistent procedures for offender assessment, variation of an order and action upon breach.

9.47 The Department proposes that a “Supervised Probation Order” should be the sole means by which an offender is placed on probation.⁸⁶ It would replace all those sentencing orders in the nature of probation and would impose, with the offender’s consent, an order for conditional liberty, requiring the offender to be of good behaviour and to submit to the supervision of the Probation and Parole Service for a period of up to three years. A breach of the order would not constitute a fresh offence, but would result in the sentencing court having power to revoke the order and re-sentence for the original offence, having regard to anything done in compliance with the order.

9.48 The order would have three types of conditions: core, additional and program. Core conditions would relate to accepting supervision and guidance, reporting to the Service and being of good behaviour. Additional conditions would include those commonly attached to bonds to address particular aspects of offender behaviour or rehabilitation, such as accepting directions as to residence, associates and treatment. Their purpose is to address factors causally related to commission of the offence. Program conditions would relate to specific Probation and Parole Service offender programs, which include the existing Attendance Centre Program, the piloted Drug and Alcohol Intervention Program and the planned specialised program for sex offenders.⁸⁷

9.49 In addition to the Supervised Probation Order, the Department proposes that there be an “Order for Supervision without Conviction” to replace supervised probation attached to bonds now given under s 556A.⁸⁸ It would follow that other orders, to cover conditional release without supervision, with or without a conviction would be necessary to complete an order structure complying with this proposal.

9.50 The proposal for restructuring probationary orders by the Department of Corrective Services has the advantages of simplifying sentence options and highlighting the element of probation which is incorporated in bonds currently given in a variety of orders. It would seem, however, that the Department's proposal is directly related to the administration of probation and the overall legislative structure for non-custodial sentences it proposes.⁸⁹ Further, it is possible that the supervised probation order is attempting to cover a very wide a variety of sentencing options. It is intended to include release on bail,⁹⁰ which could be for relatively serious offences, release to Attendance Centre Programs, and release without any other form of penalty being applied. When Victoria introduced the community-based order the move was criticised because of its wide span and ambiguity, and its capacity to exacerbate sentencing disparities.⁹¹ The Department itself is aware of the potential net-widening dangers of having a range of possible conditions specified in legislation. Retaining the flexibility for sentencers in the present situation may be preferable.

9.51 At this stage the Commission is not persuaded that undertaking a restructuring of non-custodial sentencing options, such as has occurred in other jurisdictions, is desirable. It is not our intention to create, as other States have, a sentence hierarchy, into which the orders fit. In our view, the current scheme provides a flexible range of orders, which sentencing courts have the discretion to impose in view of the needs of the individual offender and the circumstances of the offence. It is one with which courts are familiar and which, with the exception of the matters raised below, appears to provide a satisfactorily range of options.

9.52 The Commission's preliminary view is that three aspects of probation are in need of clarification or review:

- the source of the power to order bonds;
- certain conditions which may be attached to bonds; and
- the desirability of reintroducing the suspended sentence.

The power to order bonds

9.53 We have seen that the power to order conditional release on bond derives both from the common law and from statute.⁹² In the Commission's view, the circumstances in which the common law remains relevant, as well as the relationship between common law and statutory power, create unnecessary complexity and uncertainty in the law.⁹³ In the context of sentencing, we propose, tentatively, that the power to release conditionally on bond should be solely a statutory one. A bond would, therefore, be a conditional release granted under the statutory provisions discussed above, or a bond attached to the suspended sentence which we propose in paragraphs 9.61-9.64.

Proposal 30

In the context of sentencing an offender, a bond for conditional release should be issued only pursuant to a statutory power.

Amendments to conditions in bonds

Time limits on bonds

9.54 Bonds ordered pursuant to s 556A are confined to a maximum of three years, whereas common law bonds and those ordered under s 558 do not have any limit. The Commission considers that there should be a consistent maximum period during which a bond may operate. There are circumstances in which three years will be insufficient, and it is unlikely that putting a person on probation for more than five years will be effective. Therefore, the Commission proposes that the *Crimes Act 1900* (NSW) should be amended to provide that bonds under s 556A and 558, and other statutory provisions, should be issued for a maximum period of five years. We do not suggest that the power of magistrates to issue bonds should be confined to some lesser period.

Proposal 31

The maximum period of a bond should be five years.

Restitution and compensation

9.55 Currently it is possible for the court to include as a condition of a bond, the payment of compensation to the victim.⁹⁴ The Attorney General's Sentencing Review suggested that compensation payments be treated exclusively, and not made conditions of release on a bond.⁹⁵ The principal reason for this is that offenders who fail to comply with such a condition would be liable to return to a court, which would have no realistic sanction at its disposal. Failure to pay compensation ordered under the Act is treated as a minor offence,⁹⁶ with consequences different from those which the offender could be liable to for breach of the condition of a bond.

9.56 The Commission considers that any order for compensation or restitution to which the offender is subject should be freely accepted. It is possible that consent to such a condition, as one of several conditions attached to a bond will not necessarily be freely given. The Commission proposes that compensation not be permitted to be a condition of a bond, but that it must be made as a separate order, distinct from the bond. The purpose of this proposal is to prevent failure to comply with the order for compensation constituting a breach of a condition of a bond, thereby placing the offender in the position of being brought before the court and sentenced on the original offence. The proposal will also avoid any stay of the call up proceedings in the event of the offender's bankruptcy.⁹⁷ The Commission considers the current arrangement is both unworkable and unfair.

Proposal 32

Compensation and restitution should not be conditions attaching to a bond.

Suspended sentences

9.57 As commonly understood, a suspended sentence is one where a specific sentence of imprisonment is imposed, but not put into immediate effect. The offender is released on specified conditions and is liable to serve the term of imprisonment in the event of breach of those conditions.⁹⁸ The preconditions for, and operation of, suspended sentences vary according to the applicable legislation.⁹⁹

Suspended sentences before 1974

9.58 Prior to 1974 in New South Wales, courts had the power under s 558-562 of the *Crimes Act 1900* to suspend punishment on first conviction. Section 558 (as it then read) applied to a person not previously convicted of an indictable offence (in any jurisdiction), convicted of a minor offence and sentenced to a term of imprisonment. The court would pass sentence in the usual manner, but could suspend execution of the sentence if the offender entered a recognizance to be of good behaviour for a period of not less than 12 months. The bond could contain other conditions relating to matters such as probation supervision, associates, abstinence from intoxicating liquors, and generally "for securing that the offender shall lead an honest and industrious life".

9.59 An offender who, during the period of the recognizance, failed to comply with a condition, or was convicted of an indictable offence or any offence for which a term of imprisonment of more than one month could be imposed, would forfeit the bond and could be committed to prison to perform the sentence (s 561).¹⁰⁰ If no breach occurred during the period, the offender was discharged from the sentence and the conviction could not be relied upon where a penalty depended on previous convictions (s 562).

Abolition of suspended sentences

9.60 In 1973, a *Report of the Criminal Law Committee*¹⁰¹ recommended, amongst other matters, repeal of the section of the *Crimes Act* dealing with suspended sentences. An amended s 558 was to give effect to their conclusion that the "common law bond" system was superior to the "suspended sentence" in dealing with convicted first offenders. Apparently the provisions had proved far too restricted as to circumstances in which they could be applied and the action that could be taken on breach. Section 558, which is still current, was intended to be a statutory form of the common law bond.¹⁰²

Reintroduction of suspended sentences

9.61 Currently without restriction as to court or offence, the sentencing officer may, having found the offence proved, release the offender without recording a conviction,¹⁰³ or record a conviction but defer imposition of a sentence.¹⁰⁴ In each case the offender is released on a recognizance, with a wide discretion as to the conditions attached, including supervised probation. There is currently no power for the officer to determine and impose what he or she considers to be the appropriate sentence, including a custodial sentence, and then defer or suspend its operation for a period of time. To have such an option would add to the range of dispositions available to the courts.

9.62 There are situations, conceivably limited in number and scope, where a suspended sentence of imprisonment would be the preferred sentencing option. A precondition of its use would be that the offence is so serious that it requires a custodial sentence to be imposed, particularly for reasons of denunciation. It would also have to be clear that the threat of imprisonment would be a sufficient specific deterrent for the individual offender, and that considerations of general deterrence are not paramount. Further, a suspended sentence would be appropriate when rehabilitation would thereby be promoted and there was no question of need to incapacitate the offender.

9.63 As with the introduction of any alternative sentencing option, there is a potential for unintended consequences. Introduction of the suspended sentence in Victoria and England has been criticised for causing penalty escalation (offenders received suspended sentences when they might otherwise have received fines) and sentence inflation (suspended sentences tend to be longer than a sentence to be served immediately). It appears that some reduction in the prison population was achieved, although the entry of some offenders was delayed rather than diverted.¹⁰⁵ The rate at which the custodial sentence is activated depends on the length of the period of suspension, and the discretion with which breaches can be dealt. The British government, despite admitting it was perceived as a “let-off”, recently retained the suspended sentence, on the basis that the courts clearly found it useful, and that it seemed to be effective.¹⁰⁶

9.64 Legislation in several jurisdictions, including Victoria, Queensland, and the Northern Territory, provides for suspended sentences, but the Commission considers that each of these models is very elaborate and dependent on the total range of options. If suspended sentences were to be reintroduced in New South Wales, the Commission would propose to use the model in s 558 of the *Crimes Act 1900*. This is a model with which courts are familiar, which is consistent with other forms of conditional release, and which gives maximum flexibility as to conditions which can be imposed, and the action to be taken on breach. Conditions relating to supervision and treatment would, in the Commission’s view, be integral to the desired rehabilitation of the offender.

Proposal 33

Suspended sentences should be reintroduced as a sentencing option in New South Wales.

CONFERENCING

9.65 “Conferencing” describes schemes whereby members of the community become involved in dealing with offenders beyond the normal confines of the criminal justice system. Groups formed from the community can take part in conferencing at three stages of the processing of an offender:

- Before trial, often as part of a diversion scheme or alternative to prosecution.
- Before sentencing, as an assistance to the court in determining an appropriate sentence.
- After sentencing, on occasions when victims and offenders desire reconciliation, compensation or some form of future contact.

9.66 Participation can involve any number of community members ranging from a handful of selected individuals to a large number of experts, community members, and families and friends of both offenders and victims. At different points the emphasis may vary, focusing on the community’s interest in restitution, reparation and restoration as well as the role and importance of both the offender and the victim. It is important to

distinguish between the aim of diverting offenders from the criminal justice system and reintegrating them into the community and the aim of involving victims in the resolution of cases as a means of empowering them and acknowledging their need for recognition. The most successful of these schemes rely on maintaining a balance between these two aims, and research in both the United Kingdom and New Zealand has shown that where reparation and diversion are sought within one forum, care must be taken to guard against promoting the needs of offenders at the expense of the victims.¹⁰⁷ Local experience shows that the aim of re-connecting offenders with their offences and their community can be reconciled with raising the participation of victims in the criminal justice system.

9.67 Increasingly, conferencing schemes have been used not only as a means of reintegrating the victim and the community into the criminal justice system, but also as a legitimate and efficient alternative to the criminal justice system, for example, in cases involving disputes between persons in on-going relationships.

9.68 Two general variants of conferencing models are family group conferences and schemes involving mediation between victims and offenders. These variants, however, are by no means mutually exclusive.

Mediation between victims and offenders

9.69 Schemes involving mediation between victims and offenders ensure wider victim participation in the justice system by allowing victims to take part in the resolution of a case. This is in addition to their traditional pre-conviction role of reporting offences and providing evidence.

9.70 Mediation may be organised without face to face contact between the parties and one of its main aims is to address the concerns of the victim. Mediation is considered appropriate when the offender and the victim wish to come to an agreement about the offender's future contact with the victim or where the parties desire some form of compensation or reconciliation. It has received some support in Australia because of its potential to address victim needs and to promote the restoration of victim losses.

Family group conferences

9.71 A family group conference is a meeting of the offender, the victim (if the victim agrees), the supporters of each and a mediator where a plan for dealing with the offender is formulated. Such conferences are most often used to deal with juvenile offenders. They may operate instead of prosecution or prior to sentence. They are not simply a matter of private mediation between two individuals, but are also a means of establishing a greater degree of community control.

9.72 Family group conferences or community accountability conferences¹⁰⁸ aim for reparation rather than retribution and operate to reconnect the community with crime control at a practical level. However, there is a danger that without this community input, such "top-down" schemes may represent "an extension of state power into civil society".¹⁰⁹

Specific schemes

Family group conferencing in New Zealand

9.73 The system of family group conferencing set up under the *Children, Young Persons, and Their Families Act 1989* (NZ) is seen as a pioneering effort and is often taken as the touchstone for comparison with other such schemes. It has its origins in features of traditional Maori dispute resolution.

9.74 The scheme can operate either as a diversionary or a pre-sentence scheme. It operates as a diversionary scheme at two stages of criminal procedure. The first is at the point of detection, before charges are laid. In such cases no information with respect to an offence shall be laid unless the informant believes the institution of criminal proceedings is in the public interest, the informant has consulted a Youth Justice Co-ordinator and the matter has been considered by a family group conference.¹¹⁰ The second point is where the offender has been arrested in relation to an offence (other than murder, manslaughter or a traffic offence not punishable by imprisonment), and having appeared before the Youth Court, has not denied the offence. In such a case the Court does not enter a plea but refers the matter to a Youth Justice Co-ordinator to convene a family conference

and adjourns the proceedings pending the outcome of the conference.¹¹¹ There are certain instances where a family group conference will not be required.¹¹² The scheme is used as a pre-sentence measure in that when a charge is proved in the Youth Court, the Court cannot make any orders “unless a family group conference has had an opportunity to consider ways in which the Court might deal with the young person.”¹¹³

9.75 The Act provides that a family group conference may, on ascertaining (or at least assuming) that the offender committed the offence, “make such decisions and recommendations and formulate such plans as it considers necessary or desirable in relation to the child.”¹¹⁴ Such recommendations could include: to proceed with or discontinue proceedings; to issue a formal police caution; to declare that the child is in need of care or protection; to impose appropriate penalties; and to make reparation to any victim.¹¹⁵

9.76 Persons entitled to attend a family group conference include the young offender, the family group, the Youth Justice Co-ordinator, the informant, any victim of the offence or a representative of that victim, a legal representative or lay advocate of the offender, and various representatives of agencies depending on the social welfare requirements of the offender.¹¹⁶ The “family group” is widely defined in the New Zealand provisions and can include at the very least an adult with whom a young offender has a “significant psychological attachment.” The Act also extends recognition to culturally appropriate family groups, including those associated with Maori culture.¹¹⁷

9.77 No provision is, however, made for support persons to attend with the victim. This failure may have a negative effect. Evaluations have shown that only around half of the family group conferences had victims or their representatives present. Only about half of the victims who participated were reported as being satisfied with the results of the process.¹¹⁸ It has been suggested that the aim of diversion has been given prominence over the interests of victims.¹¹⁹

The Wagga Wagga juvenile cautioning program

9.78 Family conferencing was introduced in Wagga Wagga in August 1991 as an Australian variation of the New Zealand family group conference model. It has no legislative base but is operated by the police as part of their discretionary power to caution or prosecute within the guidelines of the Police Commissioner's Instructions.¹²⁰ The Wagga Scheme is directed to juvenile offenders, but, in comparison with its New Zealand counterpart, it places more emphasis on the role of the victim.¹²¹ Like most family conferencing models, the Wagga model is a community process, not simply a matter of mediation between two individuals. It operates primarily as a diversion from court proceedings and, unlike its New Zealand counterpart, there is a tendency to use it as a means of first resort.¹²² The scheme also differs from New Zealand in granting key roles to police officers and traditional criminal justice agencies, as opposed to social welfare agencies.¹²³ The Wagga scheme has had an enormous influence on the development of conferencing in many parts of Australia.

9.79 When a young offender is apprehended for an offence and is not warned or formally cautioned, the case is referred to the Juvenile Review Panel.¹²⁴ This panel determines whether the matter will be dealt with by way of warning, family group conference or by a court appearance. If the offence is admitted, the young offender is not automatically charged unless either the offence is a serious indictable offence that requires the offender be kept in custody, or bail has been refused or onerous conditions attached to it. Instead a family group conference is organised.

9.80 The conference is held at the police station with the offender, the offender's family, any other person who is significant to the offender, the victim and the victim's supporters. A police officer acts as co-ordinator. The cautioning process is finalised when some agreement is reached between the victim and the offender after input from all present. The role of the police co-ordinator is limited to resolving any difficulties that might arise during the conference and witnessing any arrangements for material restitution. At the completion of the cautioning conference, juvenile offenders are handed an activity booklet dealing with the crime and its consequences and the offenders are asked to work through this with their families prior to the follow-up session.

9.81 All offenders and their families are required to be involved in a review within four to six weeks. This review involves a group of young offenders and their families being invited to attend a basic two hour session conducted

by community members. This session places strong emphasis on offering remedial skills for offenders and their parents or other relatives. Further sessions are available on request.

9.82 One evaluation of the Wagga Scheme has shown that since its introduction there has been a significant decrease in the number of formal police interventions as well as the number of juveniles charged and placed before the court. There was also strong evidence of a reduction in reported juvenile crime in Wagga Wagga. High levels of victim participation and satisfaction were also reported, with 93% of all compensation sought being paid.¹²⁵

South Australia

9.83 In South Australia, where conferencing was introduced under the *Young Offenders Act 1993* (SA), the system operates more like the New Zealand model. Greater provision is made for informal treatment of young offenders by police officers with respect to what the police officers believe to be "minor offences."¹²⁶ Options available to an officer, when an offence is admitted, include informally cautioning the offender,¹²⁷ laying a charge before the court, referring the matter to a Youth Justice Co-ordinator for a family conference, or choosing from a range of further sanctions.¹²⁸ Further options include the issue of a formal caution together with a requirement that the youth undertake to pay compensation, carry out up to 75 hours of community service or undertake to apologise and do anything else appropriate in the circumstances.¹²⁹ The only fetters on the police officer's discretion are that the officer must have regard to sentences imposed by the courts for similar offences and guidelines issued by the police commissioner.¹³⁰ Failure to comply with an undertaking can lead to a formal charge or to a reference to a Youth Justice Co-ordinator for a family conference.¹³¹ A family conference may consist of the Youth Justice Co-ordinator, the offender, such relatives, guardians, and close associates of the offender as are invited, the victim and a supporter, and a representative of the Commissioner of Police,¹³² and may impose the same further sanctions which a police officer may impose except that community service of up to 300 hours can be ordered.¹³³ If a family conference cannot reach a decision the Court may exercise the conference's powers. In addition the Youth Court may refer to a Youth Justice Co-ordinator for a family conference prior to sentence. In the latter case the conference formulates a plan or makes a recommendation which is referred to the court. It could be argued that this South Australian model, despite some procedural safeguards, places too much discretion in the hands of individual police officers.¹³⁴

Community Youth Conferences

9.84 Another type of family conferencing, Community Youth Conferences ("CYC"), was introduced as a pilot scheme in six areas of New South Wales following recommendations in a government white paper on juvenile justice in August 1994.¹³⁵ These were to be run in conjunction with a Cautioning Conference Scheme piloted by the Police Service as part of the formal cautioning process.¹³⁶ A government appointed CYC Council issues guidelines and monitors the scheme. Community Justice Centres train co-ordinators who organise and run the conferences. Matters may be referred to CYCs by the police or the Children's Court. Victims may participate and outcomes can involve apology, reparation to the victim or reparation to the community in the form of community work.¹³⁷

Community Aid Panels

9.85 Community Aid Panels (CAPs) are an example, currently operational in New South Wales, of a mediation program for adult offenders, although they are also an option for dealing with juvenile offenders. The first CAP was introduced in the Wyong Local Court in 1987 and a unit to co-ordinate the development of the CAP program was set up in 1991. As at July 1992, 56 panels were operating at various centres throughout New South Wales.¹³⁸ The panels are used after a plea of guilty has been entered but before sentencing by the Court and are not used as a means of trial diversion. The Court will normally adjourn for a period of three months to allow the offence and related matters to be discussed before a panel. A panel consists of a police officer, a lawyer and two members of the community who will discuss with the offender (and the offender's family where the offender is a juvenile) the circumstances of the offence and any underlying problems. The panel will then recommend a course of action which may involve voluntary community work, skills training or counselling.¹³⁹ The matter is then returned to the Court for final determination.¹⁴⁰ It has been suggested that it would be desirable if offenders who have complied with recommendations of a panel were not required to return to Court.

9.86 While CAPs focus primarily on the offender and victims are not required to participate, the outcomes can have a restorative orientation and offenders may agree to compensate the victim or to perform community service. Occasionally the offender may be required to apologise to the victim.

9.87 Criticisms can be made of the approach of community aid panels. It has been said that the panels “remain within the traditional paradigm of criminal justice” and in some respects are more likely to promote than reduce crime.¹⁴¹ It is argued that the focus of “officialdom” on the offender can have a negative effect:

Officials are stepping in to offer some form of state control in cases where community control is seen to have failed. However, this new, more visible form of control is unable to deal with two problems that encouraged or made possible the initial offence. The system of state control cannot successfully acknowledge the offender’s emotions of shame and anger. Secondly, it cannot successfully encourage the offender to feel empathy for the victim of the offence and for potential future victims.¹⁴²

This approach can be contrasted with the Wagga Scheme of juvenile cautioning which deals with the concerns above by involving victims and their supporters in addition to offenders and their supporters.¹⁴³

Aboriginal communities

9.88 A number of approaches which involve the community in the sentencing process have been in operation in Aboriginal communities in Australia. Some of these are described in detail in the Australian Law Reform Commission’s report on the recognition of Aboriginal customary laws.¹⁴⁴ The Commission regards these matters as important but has deferred consideration of them to the second phase of the sentencing reference.¹⁴⁵

Circle sentencing in Canada

9.89 By way of contrast, the judges of the Territorial Court of Yukon in Canada have devised a community conferencing scheme which operates as a pre-sentence option for more serious adult offenders. The “Circle Sentencing” scheme was first conducted in Canada in 1992 and has been applied particularly in the case of Aboriginal offenders. The term “circle sentencing” derives from the fact that the conferences are conducted with all participants arranged in a circle, as opposed to more traditional seating arrangements. Circle sentencing sessions are conducted within the context of the court proceedings and have no independent legislative base.

9.90 Matters are referred to a sentencing circle at the request of an offender or the offender’s legal representative. Eligibility was originally determined by the Judges, but such decisions are increasingly made by Community Justice Committees which consist mostly of lay members of the community. An offender must normally plead guilty and accept responsibility for the offence to be able to take part in a sentencing circle.

9.91 Sentencing circles are open to the public and steps are generally taken by the Community Justice Committee to involve persons affected by the crime as well as those who can contribute resources to resolving the issues raised. The creation of support groups for both victims and offenders, usually consisting of a number of relatives, neighbours, and friends, is encouraged from an early stage. A sentencing plan is devised, often involving traditional sentencing outcomes. The offender’s support group becomes responsible for the monitoring, implementation and review of the plan.¹⁴⁶ Obviously, the success of the scheme depends on an identifiable and interested community which has some relevance to the offender.

Advantages of conferencing

9.92 The advantages of conferencing schemes - in particular, but not exclusively, those involving victim offender mediation - can be grouped into four broad categories, that is, advantages for victims, for offenders, for the community and for the criminal justice system:

Victims are empowered by enhanced possibilities of compensation and by having the opportunity to confront the offender with their account of the impact of the crime and to have an input into the outcome. Restitution, reparation and reconciliation for victims are promoted, expanding upon the criminal justice system’s former single focus on punishment and the offender. Victim anger and trauma may also be reduced.

Offenders take an active role in a process which is non-stigmatising and re-integrative. Rehabilitation may, therefore, be facilitated. Reconciliation between victim and offender may also result.

The community is involved in the resolution of its own conflicts rather than abdicating responsibility to the State. Crime is taken seriously as community-based and localised solutions are found. The net of community control is widened and that of the State is narrowed.¹⁴⁷

The most important benefit is that conferencing schemes may be used to divert offenders from the court system. Procedures are flexible and may take different forms depending on the wishes of participants. This is especially important where an imbalance of power exists between the offender and victim, where the victim and offender know each other, or where the victim is young. The parties control the content and outcome of the conference and compliance is more likely than where court ordered outcomes are imposed.

Disadvantages of conferencing

9.93 Conferencing schemes can operate effectively only where there is a “community”. They will then depend for their success upon the motivation of participants, including members of the community, and consequently aspects of their operation including compliance with, and enforcement of, agreements may prove difficult. The flexibility of mediation schemes may threaten the predictability, equity and procedural justice attributed to the formal justice system. Further, the rights of the offenders may be threatened by disproportionate and inconsistent outcomes. In particular:

- Conference strategies may be limited to individual cases and fail to tackle underlying social injustices.
- There may be a net-widening effect. Conferencing, while diverting offenders from the courts, nevertheless draws more offenders into the criminal justice system than would otherwise have been the case.¹⁴⁸ It may be that some offenders are charged, rather than cautioned, to make them eligible for some schemes.
- There is a danger that “agreements” can be coerced rather than negotiated.
- Conformity with principles of proportionality and consistency is more difficult to achieve where conference outcomes depend on agreement between diverse groups of families, offenders and victims.
- Conferencing may result in the imposition of more restrictive sanctions on offenders than the public interest may allow.
- Discrimination on the basis of race or gender may be more difficult to avoid, as a conference may not be able to deal appropriately with such issues.
- Due process and accountability may be threatened as conferences are conducted behind closed doors.
- Police may not always be the most appropriate personnel to run such schemes as they may not be able to distinguish between their policing and welfare roles.¹⁴⁹ They do not always enjoy the respect of the community they serve.¹⁵⁰
- The community, as opposed to victims, may not be satisfied with conference outcomes to the extent emphasis shifts from retribution to reparation.
- Problems can be caused by low referral rates, and inadequate feedback to interested parties.

9.94 The advantages and disadvantages of family group conferences are similar to those of conferencing schemes generally. Some additional considerations do apply in that families may benefit and be strengthened by a family centred approach which encourages their involvement and sharpens family responsibilities. However,

the family may not always be the most appropriate institution to deal with offenders, either because they have lost their place as the most important socialising influence on offenders or because they may have a malign influence upon them. 151

9.95 The Commission encourages the consideration of conferencing programs as an alternative to more traditional procedures within the criminal justice system. We invite submissions on how various conferencing schemes ought to be utilised and improved.

QUESTIONS ARISING IN CHAPTER 9

1. Should non-custodial sentences be recognised as penalties in their own right rather than as alternatives to imprisonment?
2. To what extent do net-widening, sanction stacking and the dangers of longer sentences of imprisonment stand in the way of the further development of non-custodial sentencing options?
3. Would it assist a sentencing court if non-custodial penalties were arranged in a guideline sanction hierarchy?
4. Should home detention orders be provided for in legislation?
5. When should home detention be a sentencing option?
6. How should breach of a home detention order be dealt with? In particular, ought it to be considered by the Local or District Court; or by the Offenders Review Board?
7. Should “back-end” home detention be introduced in New South Wales? If yes, should the home detention component be included in the original sentence? Or should the prisoner have to make application to serve the remainder of the sentence in home detention? Should this permission be granted by the original sentencing court or some other quasi judicial body, for example the Offenders Review Board?
8. Should the threshold requirement of imprisonment be removed from the *Community Service Orders Act 1979*, to enable community service orders to be imposed as a sentence in their own right?
9. Should offender suitability assessments be mandatory for CSOs of less than 50 hours duration?
10. Is it necessary for breach proceedings to be heard in the supervising court?
11. Should breach of a CSO itself constitute an offence?
12. Should breach of a CSO be provable on the civil standard?
13. Should the various probation orders be consolidated in a statutory order? If so, in what form?
14. What time limit (if any) should be placed on the life of bonds?
15. Should conditions of restitution or compensation ever be attached to bonds?
16. What should the aims of conferencing be? Should it be victim or offender centred, or both?
17. At what stages of criminal procedure should conferencing be made available?

18. What type of offenders and what type of offences should be eligible for a conferencing scheme?

19. On what other criteria are cases to be referred? Must an offender admit guilt before conferencing can proceed?

20. Who should be able to take part in conferences? How are participants to be selected?

21. What sentencing options should be available to conferences?

22. How should outcomes be monitored?

23. Should conferencing schemes have a legislative base, or should they be part of the police cautioning power or the courts' sentencing power?

24. Which agencies should administer conferencing schemes?

Footnotes

1. See, for example, *R v MacDonald* (NSW CCA, No 60700/95, 12 December 1995, unreported) at 8 per Gleeson CJ, Kirby P and Hunt CJ at CL (significant difference between serving a part of a sentence in the community on parole and being at liberty on a recognizance).

2. There is also little State intervention where an offender is convicted and sentenced to the rising of the court ("ROC") - that is to remain in the court until its adjournment. Technically, ROC is a form of imprisonment, even though the restraint on liberty may only operate for a few seconds. ROC is most commonly used in local courts for dealing with secondary offences: see I MacKinnell, "Sentenced to the Rising of the Court" (Sentencing Trends No 11, Judicial Commission of New South Wales, January 1996).

3. Fines are considered in Chapter 10.

4. See paras 9.11-9.24.

5. See Chapter 3.

6. See paras 9.65-9.95.

7. See, for example, N Morris and M Tonry, *Between Prison and Probation* (Oxford University Press, New York, 1990) at 225.

8. See, eg *Community Service Orders Act 1979* (NSW) s 4(1) (CSO can be combined with a fine).

9. See, for example, J Chan and G Zdenkowski, "Just Alternatives, Part 1" (1986) 19 *ANZ Journal of Criminology* at 67-90.

10. See R Bray, *The Use of Custodial Sentences as Alternatives to Custody by NSW Magistrates* (Judicial Commission of New South Wales, Monograph Series No 1, 1990) at 7. This study suggested that net-widening was occurring across sentence types both in respect of periodic detention (which was drawing on offences previously punished by community service orders) and community service orders (which were drawing on offences previously punished by fines): Bray at 7, 13-14. However, a later study challenges this conclusion, in the light of a statistical trend showing, in years subsequent to the 1990 study, an increased use in periodic detention and community service orders and a decrease in the level of imprisonment: I Potas, S Cumines and R Takach, *A Critical Review of the Periodic Detention in New South Wales* (Judicial Commission of New South Wales, 1992) at 1, 11-14.

11. *Attorney General's Sentencing Review* at 30.
12. See A Ashworth, A von Hirsch, A Bottoms and M Wasik, "Bespoke Tailoring Won't Suit Community Sentences" (1995) 145 *New Law Journal* 970.
13. See para 3.35.
14. (1979) 143 CLR 458.
15. (1988) 164 CLR 465.
16. See G Zdenkowski, "Contemporary Sentencing Issues" in D Chappell and P Wilson, *The Australian Criminal Justice System - the Mid 1990s* (Butterworths, Sydney, 1994) 171 at 189.
17. See paras 9.28-9.30 where we address the status of Community Service Orders. Viewed as sentences in their own right, it is obviously important that criteria used to measure the success of non-custodial options should not be oriented around imprisonment - such as the degree to which prison costs or offender populations are reduced. The Canadian Sentencing Commission argued that evaluation of non-custodial options should encompass criteria such as the degree to which penalties address the needs and interests of victims of crime or the extent to which they assist the offender in maintaining social and economic ties with the community: see Report of the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Canadian Government Publishing Centre, Ottawa, 1986) at 367.
18. See paras 3.33-3.34.
19. *Sentencing Act 1991 (Vic)* s 5(4)-(7).
20. See South Australia, Criminal Law and Penal Methods Reform Committee, First Report, *Sentencing and Corrections* (South Australian Government Printer, Adelaide, 1973) ("Mitchell Committee Report") at 17. Compare Chapter 6 where grid systems for determining sentences are, tentatively, rejected: paras 6.51-6.66.
21. See Australian Law Reform Commission, *Sentencing: Penalties* (DP 30, 1987) at paras 131-177.
22. See M Wasik and A von Hirsch, "Non-custodial Penalties and the Principles of Desert" [1988] *Criminal Law Review* 555 at 563-565.
23. For example, the degree of restraint or intervention in the case of probation or amount in the case of fines.
24. See paras 10.4-10.5.
25. See generally Australian Law Reform Commission, *Sentencing: Penalties* (DP 30, 1987) at paras 74-78. See also R Fox, "Dr Schwitzgebel's Machine Revisited: Electronic Monitoring of Offenders" (1987) *ANZ Journal of Criminology* 131.
26. Technical problems, such as the availability of call diversion, need to be addressed to ensure the integrity of any scheme.
27. For example, the Northern Territory abandoned electronic surveillance bracelets as they were frequently not placed in the receiver correctly, or were inadvertently knocked off offenders' wrists: oral advice from Department of Corrective Services (NT) 17 November 1995. In Queensland, where tin roofs interfered with the signals emitted by bracelets and receivers, electronic surveillance is no longer used.
28. Discussion with the Probation Service, August 1995. Oral advice from Northern Territory Department of Corrective Services, 17 November 1995.
29. J Petersilia and S Turner, "Comparing Intensive and Regular Supervision for High-Risk Probationers: Early Results From an Experiment in California" (1990) 36 *Crime and Delinquency* No 1.

30. The cost of the New South Wales program is estimated at \$25 per day with one third of that being spent on surveillance equipment. This figure is provided by the Probation Service.

31. Consider A Aungles, *The Prison and the Home: A Study of the Relationship Between Domesticity and Penalty* (Institute of Criminology, Monograph Series No 5, Sydney, 1994).

32. The Australian Law Reform Commission suggested that this has limited the usefulness of home detention orders: Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988) at para 131. Similar criticism has come from the United States where suggestions of class bias have been made: Tonry at 217.

33. For example, *Sentencing Act 1991* (Vic) s 19; *Sentencing Act* (NT) s 44; *Sentencing Act 1995* (WA) s 68-75. This type of sentence also exists in New South Wales (see paras 9.18-9.24) and has been available in Queensland since September 1994.

34. This type of scheme operates in Queensland.

35. There is no intervention in the Queensland home detention scheme. However, oral advice from the Queensland Community Services Commission indicates that this is changing as the supervision visits are now interspersed with intervention visits by trained community corrections officers.

36. There is provision under s 29(1) of the *Prisons Act 1952* (NSW) for the governor of a prison to release an offender to serve his or her term in the home in certain cases. This type of home detention is not conducted as a specific program, but is motivated by the facts of particular cases such as the terminal illness of a family member.

37. See para 9.42.

38. See paras 7.32-7.40.

39. In Western Australia the Director of Community Corrections decides who is eligible for the home detention program. In Queensland the Community Corrections Board decides who should be released to home detention: *Corrective Services Act 1988* (Qld) s 86. See also *Berry v The Queen* (1992) 2 NTLR 68, where the court held that the power to vary the residential provisions of a home detention order prescribed by the *Criminal Law (Conditional Release of Offenders) (Home Detention Orders) Regulations 1988* (NT) reg 3, rests with the Director of Correctional Services and not the Court.

40. *Community Service Orders Act 1979* (NSW) s 4. Figures recently released by the Bureau of Crime Research and Statistics for criminal cases finalised in Local Courts in 1994 show that 5076 community service orders were made as the principal penalty. They were given for offences against the person, justice procedures and good order, theft, property damage, and for drug related and driving offences. Orders for 51 to 100 hours made up the majority of orders given. In August 1995 the Probation Service advised they were administering 4829 community service orders.

41. *Community Service Orders Act 1979* (NSW) s 6.

42. Department of Corrective Services, *Submission*, 4 September 1995, at 10.

43. *Community Service Orders-Views of Organisers in NSW* (Judicial Commission of New South Wales, Monograph Series No 2, March 1991) Appendix 2 at 40.

44. *Community Service Orders Act 1979* s 6(3).

45. *Community Service Orders Act 1979* s 4(1); New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 29 November 1979 at 4258.

46. A community service order is estimated to cost \$4 per offender per day, compared with minimum security imprisonment which costs \$50 per day: advice from NSW Probation Service, August 1995.

47. Bray (1990) at 1-2.

48. See paras 9.5-9.6.
49. See *Summary Offences and Other Legislation (Graffiti) Amendment Act 1994* (NSW).
50. See Bray (1990).
51. Bar Association; Deputy DPP; Department of Courts Administration; Ministry for the Status and Advancement of Women; Professor Tony Vinson; Mr Ivan Potas. The proposal is opposed on net-widening grounds by the Legal Aid Commission and the Uniting Church.
52. *Attorney General's Sentencing Review* at 30.
53. *Community Service Orders Act 1979* s 23(1).
54. *Community Service Orders Act 1979* s 23(1).
55. *Community Service Orders Act 1979* s 24.
56. *Community Service Orders Act 1979* s 25.
57. United Nations, *Probation and Related Measures* (United Nations Department of Social Affairs, New York, 1951) at 4.
58. See paras 9.37-9.44.
59. See NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 1991, 1992, 1993, 1994*.
60. Section 556A (1) refers to "releas[ing] the offender on probation": cf the short-lived *First Offenders Probation Act 1894* (NSW) which introduced probation to sentencing in New South Wales.
61. NSW Department of Corrective Services, *Submission*, 4 September 1995, at 4: Probation and Parole Officers' Association of New South Wales, *Submission to Attorney General's Sentencing Review*, 23 June 1994 at 24.
62. In May 1995, the NSW Probation Service was removed from the Department of Courts Administration and amalgamated with the Parole Service to become a division of the Department of Corrective Services. It was formerly known as the Community Corrections Service, and had been part of the Department of Corrective Services prior to 1 November 1991.
63. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 1994* (Sydney, 1995).
64. *Crimes Act 1900* (NSW) s 558.
65. See para 9.41.
66. Advice to the Commission from the Probation and Parole Service, figures as at July 1995. These are "snapshot figures" of caseload numbers and include offenders whose orders are in suspense, that is, not presently under active supervision for some reason.
67. Probation and Parole Officers' Association of New South Wales, *Submission to Attorney General's Sentencing Review*, 23 June 1994 at 24.
68. A recognizance is a solemn undertaking to a court by a person, generally a defendant in a criminal case, with or without securities, to perform an obligation, for example, to be of good behaviour.
69. The money may, in some circumstances, need to be deposited with the court prior to the offender's release.

70. See *Crimes Act 1900* (NSW) s 556B, 558(6).

71. There are, no doubt, limits to conditions which ought properly to attach to bonds: see K Warner, "The Dam Blockade: Some Issues Relating to Organized Protest and Bail" in M Sornarajah (ed), *The South West Dam Dispute: The Legal and Political Issues* (University of Tasmania, 1983) at 132-144.

72. *Victims Compensation Act 1987* (NSW), Part 6; including where no conviction has been recorded: *Crimes Act 1900* (NSW) s 556A(2).

73. *Justices Act 1902* (NSW) s 81(1), (3).

74. The court cannot impose a fine, as there is no conviction, nor require a financial payment in lieu such as a donation to charity: see *Griffiths v Hutchinson* (NSW SC, No 14323/90, 1 February 1991, McInerney J, unreported) (see *Criminal Practice and Procedure NSW* (Butterworths) CN88).

75. *Community Service Orders Act 1979* (NSW) s 5(b).

76. *Crimes Act 1900* (NSW) s 556A(1)(a).

77. *Crimes Act 1900* (NSW) s 556A(1)(b). Section 556A is available for all offenders and all offences (except those specified under s 10(5) of the *Motor Traffic Act 1901* (NSW)).

78. NSW Department of Corrective Services, *Submission 4* September 1995 at 15. Statistics are not sufficiently specific to allow differentiation between absolute dismissal and dismissal on condition under s 556A and other statutory sources: see NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics 1994* at 4, 10, 14-15.

79. The historical development of the power is extremely complex. At common law, the power was, probably, originally restricted to cases where there was a conviction for a misdemeanour, but statute extended the power to felonies and to situations where there was no conviction: see *Griffiths v The Queen* (1977) 137 CLR 293 at 319-324 per Jacobs J.

80. *Griffiths v The Queen* (1977) 137 CLR 293 at 321-324 per Jacobs J. Section 558 of the *Crimes Act 1900* (NSW), as amended by s 13(b) of the *Crimes and Other Acts Amendment Act 1974* (NSW), was probably intended to codify this aspect of the common law, although the section does not specifically abolish the common law bond: I L Potas, *The Legal Basis of Probation* (Australian Institute of Criminology, Canberra, 1976) at 13.

81. *Griffiths v The Queen* (1977) 137 CLR 293. In practice, the conditions attaching to a Griffiths Remand generally form part of bail conditions. A Griffiths Remand is subject to appeal by the Crown: *Criminal Appeal Act 1912* (NSW) s 2(2)(c), inserted by the *Criminal Appeal (Crimes) Amendment Act 1979* (NSW).

82. It should only be granted when there is a real expectation that rehabilitation and reform are likely to be achieved: *R v Tindall* (1994) 74 A Crim R 275.

83. *Penalties and Sentences Act 1985* (Vic) s 29, now see *Sentencing Act 1991* (Vic) s 36-48.

84. That is, release on bail conditional upon supervision by the Service; recognizance under s 556A *Crimes Act 1900* (NSW); recognizance under s 558 *Crimes Act 1900* (NSW); intensive community supervision (at present a variety of the recognizance under s 558); recognizance under the common law requiring supervision; community service order; court-based parole orders; and parole orders made by the Offenders Review Board.

85. NSW Department of Corrective Services, *Submission*, 4 September 1995, at 5. A similar proposal was made by NSW Department of Courts Administration, *Submission to Attorney General's Sentencing Review*, 31 March 1994, at 3. The current form reflects the amalgamation of the Probation and Parole Services.

86. NSW Department of Corrective Services, *Submission*, 4 September 1995, at 5-9.

87. NSW Department of Corrective Services, *Submission*, 4 September 1995, at 7.

88. NSW Department of Corrective Services, *Submission*, 4 September 1995, at 15.
89. NSW Department of Courts Administration, *Submission to the Attorney General's Sentencing Review*, 29 July 1994, at 2.
90. The Attorney General's Sentencing Review asserted that conditional release on adjournment, whether before or after conviction, is a matter that should properly fall within the terms of the *Bail Act 1987*: see *Attorney General's Sentencing Review 1994* at 36.
91. *Sentencing Act 1991* (Vic) s 36-48. See A Freiberg, "Sentencing Reform in Victoria" in C Clarkson and R Morgan, *The Politics of Sentencing Reform* (Clarendon Press, Oxford, 1995) 51 at 68.
92. See paras 9.41-9.44.
93. See especially *Griffiths v The Queen* (1977) 137 CLR 293.
94. See *Victims Compensation Act 1987* (NSW), Part 6, applicable also to a bond under *Crimes Act 1900* (NSW) s 556A(2).
95. *Attorney General's Sentencing Review 1994* at 39.
96. *Victims Compensation Act 1987* (NSW) s 65.
97. See *Re Lattouf* (1994) 52 FCR 147 (FC); *Keogh v DPP* (1995) 133 ALR 681.
98. Australian Law Reform Commission, *Sentencing: Penalties* (DP 30, 1987) at para 36.
99. See *Penalties and Sentences Act 1992* (Qld) s 144(1); *Criminal Law (Sentencing) Act 1988* (SA) s 38; *Criminal Code 1924* (Tas) s 386(1)(d); *Sentencing Act 1995* (NT) s 40-43; *Crimes Act 1900* (ACT) s 556B(1)(b); *Sentencing Act 1991* (Vic) s 27-31; *Crimes Act 1914* (Cth) s 20(1). See also *Criminal Justice Act 1991* (Eng) s 5, 21A.
100. The limitation of the court's power to the imposition of the full penalty on call up operated as a restriction on the operation of this section. Compare the Commission's proposal in para 9.64.
101. New South Wales, Criminal Law Committee, *Report of the Criminal Law Committee on Proposed Amendments to the Criminal Law and Procedure*, (September 1973) at 15.
102. New South Wales, *Parliamentary Debates (Hansard)*, Legislative Assembly, 13 March 1974 at 1363. See para 9.42.
103. *Crimes Act 1900* (NSW) s 556A.
104. *Crimes Act 1900* (NSW) s 558.
105. See D Tait, "The Invisible Sanction: Suspended Sentences in Victoria 1985-1991" (1995) 28 *ANZ Journal of Criminology* 143; A E Bottoms, "The Suspended Sentence in England 1967-1978" (1981) 21 *British Journal of Criminology* 1.
106. Home Office, *Crime, Justice and Protecting the Public* (Cm 965, HMSO, 1990) (White Paper) at para 3.21.
107. These evaluations were of systems designed for juveniles: see J Braithwaite, "Juvenile Offending: New Theory and Practice" in L Atkinson & S Gerull (eds), *National Conference on Juvenile Justice* (Australian Institute of Criminology, Conference Proceedings 22, 1993) 35-42; G Maxwell and A Morris, "Juvenile Justice in New Zealand: A New Paradigm" (1993) 26 *ANZ Journal of Criminology* 72. See also T Marshall and S Merry, *Crime and Accountability: Victim/Offender Mediation in Practice* (London, 1990).

108. John Braithwaite's preferred term: "Thinking Harder about Democratising Social Control" in C Alder and J Wundersitz (eds), *Family Conferencing and Juvenile Justice* (Australian Institute of Criminology, Canberra, 1994) at 199.
109. R White, "Shame and Reintegration Strategies: Individuals, State Power and Social Interests" in Alder & Wundersitz (eds), *Family Conferencing and Juvenile Justice* (Australian Institute of Criminology, Canberra, 1994) 180 at 188.
110. *Children, Young Persons, and Their Families Act 1989* (NZ) s 245.
111. *Children, Young Persons, and Their Families Act 1989* (NZ) s 246.
112. *Children, Young Persons, and Their Families Act 1989* (NZ) s 248(1).
113. *Children, Young Persons, and Their Families Act 1989* (NZ) s 281.
114. *Children, Young Persons, and Their Families Act 1989* (NZ) s 260.
115. *Children, Young Persons, and Their Families Act 1989* (NZ) s 260(3).
116. *Children, Young Persons, and Their Families Act 1989* (NZ) s 251.
117. *Children, Young Persons, and Their Families Act 1989* (NZ) s 2(1).
118. G M Maxwell, "Family Decision-Making in Youth Justice: The New Zealand Model" in L Atkinson and S Gerull (eds), *National Conference on Juvenile Justice* (Australian Institute of Criminology, Conference Proceedings 22, 1993) 113 at 121.
119. G M Maxwell at 123.
120. Cunneen and White discuss the operation of the Wagga Scheme under the heading of "police cautions" and not "family group conferences": C Cunneen and R White, *Juvenile Justice: An Australian Perspective* (Oxford University Press, Melbourne, 1995) at 247-250.
121. J Braithwaite, "Juvenile Offending: New Theory and Practice" in L Atkinson and S Gerull (eds), *National Conference on Juvenile Justice* (Australian Institute of Criminology, Conference Proceedings 22, 1993) 35 at 38-39.
122. Cunneen and White at 252.
123. Cunneen and White at 252. These tendencies can also be seen to a greater extent in the *Young Offenders Act 1993* (SA), see para 9.83.
124. A panel of sergeants which reviews every alleged juvenile offence.
125. T O'Connell, "Wagga Wagga Juvenile Cautioning Program: 'It may be the way to go!'" in L Atkinson and S Gerull (eds), *National Conference on Juvenile Justice* (Australian Institute of Criminology Conference Proceedings 22) at 221-232. It should be noted, however, that other community policing initiatives within the same period ay also have had an effect.
126. Considerable latitude is given to the officer in charge: *Young Offenders Act 1993* (SA) s 4.
127. *Young Offenders Act 1993* (SA) s 6.
128. *Young Offenders Act 1993* (SA) s 7.
129. *Young Offenders Act 1993* (SA) s 8.

130. *Young Offenders Act 1993* (SA) s 8(4).
131. *Young Offenders Act 1993* (SA) s 8(7).
132. *Young Offenders Act 1993* (SA) s 11.
133. *Young Offenders Act 1993* (SA) s 12.
134. See Cunneen and White, at 249.
135. New South Wales, *Breaking the Crime Cycle: New Directions for Juvenile Justice in New South Wales* (White Paper, 1994) at 13.
136. This scheme involves victims, offenders and their families: T Goulding (ed), *The Law Handbook* (5th ed, Redfern Legal Centre Publishing, Sydney, 1995) at 234.
137. This description of CYC was obtained from *Rights Now!* (newsletter of the national children's and youth law centre) vol 3 no 4, November 1995 at 3.
138. About 50 were operational at the end of 1994: T Goulding (ed), *The Law Handbook* (5th ed, Redfern Legal Centre Publishing, Sydney, 1995) at 242.
139. Cunneen and White at 250.
140. With one of the options being not to record a conviction under s 556A *Crimes Act 1900* (NSW).
141. D Moore, "Facing the Consequences" in L Atkinson and S Gerull (eds), *National Conference on Juvenile Justice* (Australian Institute of Criminology Conference Proceedings 22, 1993) 203 at 207.
142. Moore at 207.
143. Moore at 206-207.
144. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (ALRC 31, 1986) ch 28. See also paras 833-834 where the ALRC discusses proposals for non-judicial dispute resolution.
145. See para 1.13.
146. This description is derived from a paper by H Lilles, *Circle Sentencing: A Canadian Approach to Community Justice* (Institute of Values Research, New College, UNSW, 15 June 1995).
147. J Braithwaite "Juvenile Offending: New Theory and Practice" in L Atkinson & S Gerull. (eds), *National Conference on Juvenile Justice* (Australian Institute of Criminology, Conference Proceedings 22, 1993) 35 at 39.
148. Moore at 208-210 who also provides counter arguments to this view.
149. Moore at 211-212
150. Moore at 215-216.
151. Moore at 212-214.

10. Monetary Penalties and Ancillary Orders

10.1 The fine is a sentence which aims to punish offenders by requiring them to pay money to the State. Two other orders considered in this Chapter, namely reparation and confiscation orders, are not sentences in themselves, but may be used as orders ancillary to sentencing. They require the offender to make compensation to the victim or to account for the victim's property or the proceeds of crime.

FINES

Use of the fine as a sentencing option

10.2 The fine is the most frequently used criminal sanction.¹ The vast majority of fines are imposed not by the courts, but through infringement notices. In 1994, 50,352 persons found guilty in the Local Court were fined,² but 1,632,869 infringement notices were issued for parking and traffic infringements in the financial year 1993/94, in addition to 106,333 infringement notices issued as a result of red light and speed cameras. In 1990/91, 65 local councils issued an estimated 91,650 notices, while 150 other organisations issued another 180,736.³

10.3 There are several reasons for the use of fines in preference to custodial penalties. They include:⁴

- fines can be adjusted to the offender's ability to pay. A court is required to consider the finances of an offender before imposing a fine,⁵ and so will impose a fine at a level that will, in theory, avoid non-payment and imprisonment in default;⁶
- as a sentencing option, fines are an effective deterrent without the stigma which attaches to a gaol term. From an offender's point of view the brutality of the prison environment is avoided;⁷ the risk of an introduction to more serious crime is thereby minimised.⁸

Lack of equity

10.4 Despite the many advantages of financial penalties, a notable disadvantage is the potentially discriminatory operation of such sanctions. A requirement that a convicted offender pay a particular sum, say \$500, could work great hardship or be met with relative ease depending on the financial standing of the offender. The response to the inequitable operation of fines in the Australian context has, broadly speaking, been twofold: to grant the sentencing court a discretion to take account of the means of the offender in assessing quantum;⁹ and to provide for reasonable time to pay the penalty.¹⁰

10.5 The courts have not embraced the idea that those with greater means should pay larger than normal fines. The Law Reform Commission of Tasmania, after noting this apparent anomaly, concluded:

[A]s a matter of principle, penalties should not be increased according to the individual offender's means. It would be impossible, in all cases, to accurately and easily determine a person's wealth. Further, it could be seen as a gross invasion of a person's privacy to require him to reveal his financial position, particularly in relation to minor offences.¹¹

The Australian Law Reform Commission was not persuaded by this reasoning:

It is not easy to discern the principle the Tasmanian Law Reform Commission had in mind in reaching its conclusion. The problem of determining a person's financial status, wealthy or otherwise, is a pragmatic rather than principled concern. The only apparent principle to which that Commission refers is that of privacy. A wealthy person's privacy does not deserve greater protection than that of a poor person. In other words, the rules as to disclosure of financial information should apply universally. If it is decided that privacy is a dominant concern then no person should be required to disclose his or her financial position for the purpose of assessing appropriate financial penalties.¹²

But the ALRC did not recommend higher penalties for affluent offenders.

Day Fine

10.6 One possible response to the equity issue is to introduce the “day fine”. In essence, this involves the notion that the amount of the fine should be determined by reference to the daily income of the offender. It was first introduced in Finland in 1921 and subsequently in Sweden (1931), Denmark (1939) and then West Germany (1975).¹³ The court imposes a penalty involving a specified number of day-fine units, the amount of each unit being calculated by reference to the offender’s financial circumstances. The amount of each unit is multiplied by the number of units set by the court to determine the total fine payable.¹⁴

10.7 The major objection to day fines seems to be the practical problems associated with ascertaining the offender’s financial status accurately. This has led to a rejection of the system in the Netherlands, France and Britain.¹⁵ It also ultimately persuaded the Australian Law Reform Commission to reject the idea of day-fines. The Commission commented:

[T]he practical difficulties involved in the courts having to determine accurately an offender’s ability to pay are too great. Not only would the time involved be excessive, especially in magistrates courts, but possibly the only method of obtaining the necessary data with complete accuracy would involve access to the offender’s taxation records. This would raise privacy problems. The existence of artificial taxation schemes might lead to white collar offenders being able to conceal their financial position from the courts.¹⁶

The Commission is interested to learn whether there is support for the introduction of a day-fine system in NSW and invites comment.

Penalties for fine default

10.8 A major issue in relation to fines is what further punishment should be imposed on offenders who do not pay. Traditionally, imprisonment has been the automatic response. At first glance, this is at odds with the original decision of the sentencing court not to imprison the offender. The Australian Law Reform Commission criticised the use of imprisonment for fine default because it undermines the advantages of the fine as a sentencing measure and, in cases where the default is not wilful, is a harsh and inappropriate measure.¹⁷

10.9 Although imprisonment remains a penalty for fine default in New South Wales, there is now a myriad of options available to fine defaulters and courts before imprisonment needs be considered. These non-custodial sanctions for fine default were, however, introduced on the assumption that imprisonment remained the final sanction to encourage fine defaulters to take advantage of them.¹⁸

10.10 Options for fine defaulters other than full-time imprisonment include:¹⁹

- periodic detention;²⁰
- community service orders;
- civil enforcement of the debt;
- the cancellation of drivers’ licences or motor vehicle registrations for the non-payment of traffic and parking fines;²¹ and
- requesting further time to pay.

10.11 Notwithstanding these options, several thousand fine defaulters serve up to a maximum of three months in full-time imprisonment each year.²² For instance, 3,920 fine defaulters were taken into custody in 1993.²³ This figure represents an extremely small proportion of the total number of fine defaulters in the State at any one time.²⁴ The costs associated with administering imprisonment for fine defaulters are disproportionately high

compared with longer term prisoners. Not surprisingly, the State government has imposed moratoria which suspend any action pertaining to warrants of commitment issued in respect of fine default. The most recent of these were in December 1987 and March 1994.

Should imprisonment be removed as a penalty for fine default?

10.12 Ultimately, the only way to keep fine defaulters out of the prison population is to remove full-time imprisonment altogether as a sanction for fine default. If this were done, there would be no incentive for greater compliance with non-custodial sanctions, and those fine defaulters who escape the enforcement net, or are indifferent to complying with non-custodial sanctions, will potentially escape punishment altogether. The Commission believes that it is necessary to retain imprisonment as the final sanction in order to provide a sanction against wilful defaulters who choose not to take advantage of the non-custodial and other options available.

10.13 There are several ways of reducing the incidence of non-compliance. The first step is to improve the process of enforcement. A recent report by the New South Wales Bureau of Crime Research and Statistics considered the issue of enforcement processes in relation to fine payment.²⁵ Several possibilities were proposed to reduce delays and enhance compliance. These included raising the perceived risk of apprehension for fine default, incentives for prompt or early payment, greater use of civil enforcement at an early stage and the targeting of resources to those who are most likely to default.²⁶ The Commission endorses these proposals.

10.14 Secondly, increasing the use of options other than full-time imprisonment (such as community service orders, home detention and civil enforcement of the debt) may alleviate some of the problems that could arise from the removal of full-time imprisonment as a sanction. The State Government has recently announced that it plans to expand the home detention system to divert fine defaulters away from the gaol system.²⁷ Placing a greater burden on these non-custodial sanctions naturally has resource implications which must be resolved if these sanctions are to be effective alternatives to full-time imprisonment.

10.15 Civil enforcement is an alternative to issuing a warrant of commitment against a fine defaulter. The court must be satisfied that civil enforcement is reasonably likely to result in satisfaction of the amount owing.²⁸ In practice, the offender's ability to pay the fine may not arise as a real issue until an application is made either for time to pay or for the issue of a Community Service Order. A Statutory Declaration as to means and assets of the fine defaulter then has to be obtained. By the time the subsequent arrangement for payment or Community Service Order has been breached, the contents of the Statutory Declaration are no longer current and, at that stage, the courts prefer to issue warrants of commitment rather than pursue the civil enforcement option.²⁹

10.16 A survey in the Local Court of Statutory Declarations of means and assets reveal that the profile of the average fine defaulter is a person who is unemployed with little or no property.³⁰ In such circumstances, civil enforcement is not an option that can realistically be pursued, and garnisheeing of social security benefits is precluded by Commonwealth legislation. It is not, perhaps, surprising that no use has been made to date of the civil enforcement procedures that exist in relation to fine defaulters.

10.17 A further possibility might be to make all fine defaulters, in addition to traffic related ones, subject to cancellation of their drivers' or vehicle licences.³¹ The success rate of the system of enforcement of traffic infringements by the Roads and Traffic Authority certainly commends this approach. However, the Commission believes that the system of licence cancellation is too fragile to bear the weight of other types of fine defaulter. It may simply encourage the incidence of unregistered vehicles or drivers.³²

10.18 An alternative approach might be to make unpaid fines a charge on property. Such a charge could, for example, be imposed on a motor vehicle belonging to the fine defaulter and placed on the Register of Encumbered Vehicles³³ (REVS) or on land. The amount outstanding could be treated as a debt and accrue interest. Such charges could then be drawn to the attention of credit reporting agencies. Such schemes would, of course, delay, perhaps indefinitely, the requirement for payment and would postpone the final sanction of imprisonment.

Proposal 34

In appropriate cases, a charge should be placed on a fine defaulter's property rather than sending the defaulter to prison.

Infringement notices

10.19 One type of financial penalty which has been proliferating over recent years is the so-called "on the spot fine".³⁴ Such fines are never, in fact, paid on the spot. People alleged to have committed the offence are issued with an infringement notice and invited to discharge their liability by payment of a fixed monetary penalty. Failure to pay may result in court proceedings or direct enforcement of the penalty depending on the system adopted. The most familiar example is the parking fine but this technique has spread to the regulation of cyclists, commercial vehicles, dog owners, littering and registration and reporting requirements in business.³⁵ Since 1986, South Australian police have had a discretion to issue a Cannabis Expiation Notice instead of prosecuting people for possession of small amounts of cannabis.³⁶ In 1989, the Australian Law Reform Commission examined the possibility of converting minor criminal offences into "administrative illegalities" called "contraventions". This would have the effect of avoiding the "trauma, stigma and adverse consequences of a prosecution for a criminal offence".³⁷

Advantages

10.20 Infringement notices can prevent minor cases reaching court and save time and money both for the offender and the criminal justice system. The avoidance of a conviction results in reduced stigma. The system can be automated, is highly efficient and raises significant revenue. The penalty payable is considerably less than the maximum available were the matter to be dealt with in court.

Disadvantages

10.21 The penalty is fixed and does not allow for adjustment to the circumstances of the case. The offences invariably involve strict or absolute liability and dispense with the traditional criminal law requirement to prove *mens rea* (a guilty mind). Often, such offences involve a reversal of the traditional criminal onus of proof. There is a temptation for authorities to maximise the revenue potential of such measures rather than focus on regulatory objectives. The prospect of an infringement notice being challenged in court may not be great given the relatively small penalty, the lack of legal aid for such matters and the inconvenience factor. There may be a "net-widening" effect.³⁸ Finally, it is generally desirable that the imposition of penalties be subjected to impartial judicial scrutiny.

Model legislation?

10.22 Following the first major Australian study of infringement notices,³⁹ Professor Richard Fox concluded that the infringement notice system was now a permanent feature of criminal justice but that there were uncertainties as to offence classification and procedures. He concluded that there was a need for model infringement legislation to define infringement offences; stipulate procedures for the issue of notices and enforcement; outline the procedure for expiation by payment of a fixed amount and for court prosecutions at a full hearing; restrain the amount of punishment and collateral consequences; and provide that penalties should be proportionate to the wrongdoing.⁴⁰ Fox argues that the following features should be incorporated in a model statutory infringement scheme:

- It should apply only to offences triable summarily.
- The infringement must be completely expiated by payment of a legislatively fixed sum of money, but the issue of the notice may also lead to the suspension or withdrawal of a right or licence to undertake an activity to which the alleged offence relates.
- The maximum amount of any single infringement penalty should not exceed \$500 (or the equivalent in penalty units), or one-quarter of the maximum statutory penalty that applies if the offence is dealt with summarily by a court.

- Any right or licence withdrawn because of the infringement should be suspended rather than cancelled and, ordinarily, for a period of no longer than six months. Longer suspension, or outright cancellation, should occur only upon a court order.
- The scheme should be administered by the police or officers of the public authority ordinarily responsible for enforcing the particular legislation creating the offence.
- The officials empowered to enforce the legislation and to issue infringement notices must also retain and exercise a discretion to issue a warning or a caution in less serious cases, or a summons to court in more serious ones, instead of automatically issuing an infringement notice. Guidelines for exercising that prosecutorial discretion should be drawn up and disseminated to those making the enforcement decisions.
- Each infringement notice should be in plain English with foreign language warnings of its significance.
- The infringement notice must make it clear that the alleged offender has the right to elect to go to court to contest the accusation, but that the matter may be disposed of in court by way of a “hand-up-brief” procedure whereby both the informant and the defendant are compelled to state their case in writing prior to the hearing.
- A person against whom an infringement notice has been issued should not be treated as having been convicted of the alleged offence, except upon a court order. Expiation of the offence by payment should not lead to a conviction. Even if the matter is defended in court, and the grounds on which the notice was issued are established beyond reasonable doubt, the court should still have the right not to record a conviction. An alleged offender who contests the notice instead of expiating it by payment should not be penalised, other than in costs, for exercising that right.
- The infringement notice should give the alleged offender a formal opportunity in writing to advise the agency which issued the notice of any factual matters which the person considers ought to be taken into account in relation to the alleged offence. These matters should be taken into account in exercising a discretion to withdraw the notice either absolutely, or with warning.

The Commission’s view

10.23 The Commission has not reached a concluded view as to the desirability of regulating infringement offences with greater precision (either as to classification or procedure) or as to the appropriate criteria for doing so. We note that the Australian Law Reform Commission ultimately recommended that particular offences be designated infringements on an ad hoc basis because of the difficulty of deriving satisfactory criteria to distinguish between crimes and contraventions.⁴¹ However, we invite comment as to the desirability of infringement offences and as to suitable modes of regulation.

REPARATION ORDERS

10.24 “Reparation” covers both compensation and restitution. Restitution, in the narrowest sense, means the restoration of an item of property to its lawful owner. It is often used more broadly, to include compensation which is the making good, by an offender, of damage resulting from the commission of a crime.⁴²

10.25 Reparation can be brought into the criminal justice system at a number of stages:

- Before trial, as part of a diversionary scheme such as community-based victim/offender mediation⁴³ or as a condition to a police caution.⁴⁴
- At the time of sentencing, where prior reparation can be used as a mitigating factor in determining an appropriate sentence. Prior reparation can be seen as evidence of offenders’ contrition, or a willingness to make up for loss or injury caused and preparedness to face up to the consequences of their actions.⁴⁵

- At sentencing, as a sentencing option, either by itself, or as ancillary to, or in conjunction with other sanctions. As a sentencing option it could be one of the means of diverting offenders from the penal system.
- At sentencing, as a condition of sentencing; for example, as part of a bond or recognizance.⁴⁶
- As a matter to be considered at parole; for example, details of payment of compensation during imprisonment could be included in an application for parole, or an order for reparation could be made a condition of release on parole.

10.26 This section will examine the use of reparation orders at the stage of sentencing where legislation gives the courts power to direct the offender to make restitution or compensation to the victim. The provisions dealing with reparation were originally contained in s 437, 437A and 438 of the *Crimes Act 1900* (NSW). Section 438, which remains in the *Crimes Act 1900* (NSW), deals with restitution orders. Sections 437 and 437A of the *Crimes Act 1900* (NSW), which related to orders for direct compensation of victims by offenders, have been transferred, in greatly altered form, to Part 6 of the *Victims Compensation Act 1987* (NSW). These transferred provisions are quite separate to the rest of the *Victims Compensation Act 1987* (NSW) which deals with the State-sponsored criminal injuries compensation scheme.⁴⁷ The provisions in Part 6 were retained because of the belief that some cases would fall outside the ambit of Part 5. The most obvious example, according to the Attorney General of the time, was property crime.⁴⁸ The provisions of Part 6 can therefore be used as a means of compensating victims where the circumstances of the offence cannot be encompassed within the provisions of Part 5.⁴⁹

Position within traditional aims of sentencing

10.27 The Victorian Law Reform Committee considered that reparation was consistent with the traditional aims of sentencing in the following respects:

First in restoring the balance, reparation may accord with the just punishment for an offence.

Secondly, reparation may serve as a deterrent either by ensuring that offenders do not profit from their offences or by making the act of reparation so unpleasant that the offender will be dissuaded from repetition.

Thirdly, reparation may serve rehabilitative purposes in that the act of making reparation may be the first step in an offender's change of attitude and behaviour.

Finally, reparation may serve the denunciatory aims of sentencing by making it clear that conduct which damages property interests of others is unacceptable to the community.⁵⁰

10.28 The view of the Australian Law Reform Commission is that the provisions as they stand are "important ways of taking account of the interests of victims of crime" and should, therefore, continue to be available.⁵¹ This illustrates the difficulty of accommodating reparation within the traditional aims of punishment. Its elevation to a sentencing option⁵² would lead to a change in the relationships between offenders, victims and the State within the criminal justice system. At least in part, restitution shifts emphasis from the State's punishment of infractions of its laws to victim impact.⁵³

10.29 The Victorian Law Reform Committee, after initially considering that reparation should be an aim of the sentencing process, concluded that the predominant purpose of reparation orders should be to compensate victims of crime and that they should, therefore, be treated as orders ancillary to sentencing.⁵⁴ The Commission agrees. Reparation is not itself an aim of sentencing. Reparation orders are ancillary to the sentencing process.⁵⁵

10.30 This is clear at least with respect to orders for compensation. The relief provided for in the former s 437 of the *Crimes Act 1900* (NSW)⁵⁶ was held to be sui generis, being neither a civil claim nor replacing a civil claim.⁵⁷ Justice Jacobs noted with respect to the amount of compensation:

The amount determined is in no way a punishment of the convicted person. It is, as the section says, a compensation to the aggrieved person for the injury that the convicted person has done by reason of the felony.⁵⁸

Or, in the words of Justice O'Brien:

In all respects now relevant the jurisdiction to give a direction is a civil adjunct to a conviction for an offence in New South Wales occasioning injury. The sum (which excludes punitive damages) is to be assessed upon the principles applicable to the assessment of damages at law and the direction is enforceable only against the property of the offender.⁵⁹

Restitution

Current provisions

10.31 Section 438 of the *Crimes Act 1900* (NSW) provides for the restitution of property stolen, embezzled or received by an offender in contravention of the Act. A discretion resides in the Court under s 438(2) to order restitution even where an offender has been acquitted. A related set of provisions is in Part 11 of the *Criminal Procedure Act 1986* (NSW) which allows a court to order the return of property in police custody to its true owner.⁶⁰ Notwithstanding its presence in Part 12 of the *Crimes Act* (which relates to sentences), s 438 cannot be considered an integral part of the sentencing process. It is merely a means by which property is restored to its rightful owner.

Deficiencies

10.32 The Attorney General's Sentencing Review raised the question of consolidating the provisions of the *Crimes Act 1900* (NSW) and the *Criminal Procedure Act 1986* (NSW) in this area. An issue was also raised with respect to the powers of Local Courts in instances where an offender is acquitted. Section 438(2) provides that, where a person indicted for an offence is acquitted, the Court may still order restitution. The concern was that use of "indicted" might not extend powers to the Local Court. It was submitted that, despite the definition of "indictment" in the *Crimes Act 1900* (NSW) which includes "any information presented or filed as provided by law for the prosecution of offences,"⁶¹ the question of the powers of the Local Court should now be put beyond doubt.⁶² Further deficiencies were highlighted by the Law Society which submitted that s 438 is incomplete in circumstances where an accused is "acquitted, discharged or the charge against the defendant is dismissed."⁶³

Proposals for reform

10.33 One suggested reform is to redraft the provision as follows:

Where a person has been charged with an offence involving property and the court is satisfied on a balance of probabilities that the property has been acquired by an offence involving fraud or dishonesty, the court may order the restitution of that property to the person who appears to be entitled to possession of it.⁶⁴

This draft section removes the problem posed by the use of "indicted" and, by focusing on the commencement of the criminal procedure (charging) rather than the possible outcomes (for example, acquittal, discharge or dismissal), gives the Courts broader powers to order the return of property. The Commission invites comments on this proposal.

Compensation

10.34 Part 6 of the *Victims Compensation Act 1987* (NSW), which deals with compensation as an order ancillary to the sentencing process, divides offences causing injury into two categories, namely, major offences and minor offences. A major offence is an indictable offence, any offence under the *Crimes Act 1900* (NSW), or one where proceedings are taken in the Supreme Court in its summary jurisdiction.⁶⁵ A minor offence is an "offence (whether indictable or summary) for which proceedings are taken summarily, other than an offence for which proceedings are taken in the Supreme Court in its summary jurisdiction."⁶⁶ The provisions for dealing with each

are mostly the same except with regard to the prescribed sum payable by the offender and the means of enforcement.

Major offences

10.35 With respect to major offences, s 53 of the Act provides that, on conviction, the Court may, of its own motion or on an application by or on behalf of an aggrieved person,⁶⁷ direct that a sum not exceeding the prescribed amount be paid out of the property of the offender to any aggrieved person or persons by way of "compensation for any injury or loss sustained through, or by reason of, the offence" or any other offences taken into account at sentencing under s 447B of the *Crimes Act 1900* (NSW).

10.36 Under s 52 an aggrieved person is a person sustaining injury by reason of the offence (or an offence taken into account), or a close relative of a person whose death has been caused. The prescribed amount for a major offence is \$20,000 or \$10,000 if the Court is exercising summary jurisdiction (except for the Supreme Court). Although "injury" is generally defined for the purposes of the Act as personal injury excluding injury arising from loss or damage to property, Part 6 expressly covers "loss" in addition to injury. This covers economic loss, including damage to property.⁶⁸

10.37 Factors to be taken into account by a court in determining what sum is to be paid under a direction for compensation are listed in s 55:

- (a) any behaviour, condition, attitude or disposition of the aggrieved person which directly or indirectly contributed to the injury or loss sustained by the aggrieved person;
- (b) any amount which has been paid to the aggrieved person or which the aggrieved person is entitled to be paid by way of damages awarded in civil proceedings in respect of substantially the same facts as those on which the offender was convicted; and
- (c) such other matters as it considers relevant.

10.38 The procedure for enforcement of a direction is outlined in s 57. Any sum payable is essentially treated as a civil judgment. Imprisonment is not included as a sanction for failure to pay.

Minor offences

10.39 The provisions for minor offences⁶⁹ are essentially similar to those for major offences except that the prescribed amount is not greater than \$1,000.⁷⁰ Enforcement is covered by s 65 which provides:

A direction for compensation shall be deemed to be a conviction or order whereby a sum of money is adjudged to be paid within the meaning of the *Justices Act 1902*.

10.40 Under s 87(1) of the *Justices Act 1902* (NSW), when a person, against whom an order is made, does not pay in accordance with the terms of the order, that person may, by warrant, be committed to prison by an authorised justice for a term in accordance with s 87(2) of that Act.

10.41 An inconsistency exists in the area of enforcement under s 65 *Victims Compensation Act*. If the non-payment of compensation by an offender is treated in the same way as non payment of a fine under this section, then the result may be the return of the offender to the court to face what may ultimately be a custodial penalty.⁷¹ This is clearly inconsistent with the provisions for more serious offences which result only in a process akin to civil enforcement. There is a certain amount of perversity in the possibility that one who commits a minor offence may ultimately be imprisoned while one who commits a major offence may not. The Law Society argues that this section should be abolished.⁷² The Commission agrees.

Proposal 35

The current provisions for enforcement of compensation orders with respect to minor offences in s 65 of the *Victims Compensation Act 1987* (NSW) should be repealed. The

provisions for enforcement in respect of major offences in s 57 of the *Victims Compensation Act 1987* (NSW) should be extended to minor offences.

Offender's ability to pay

10.42 The consideration of an offender's ability to pay is usually not relevant to civil claims.⁷³ However, it is important with respect to orders for compensation both from the point of view of offenders and victims. It is clear that unless the ability of an offender to pay is considered, it becomes a completely random matter whether a victim is paid or not.⁷⁴ It is generally accepted that, in most cases, offenders will have limited ability to pay.⁷⁵ Lanham suggests that there are "strong policy arguments in favour of taking the offender's means into consideration":

In particular, compensation orders against those without means may impede their rehabilitation and may induce them to commit further crimes in order to pay the compensation.⁷⁶

It is thus possible that an approach ignoring an offender's ability to pay may not achieve full justice between offender and victim, with the possibility of an outcome detrimental to both sides.⁷⁷

10.43 A trend towards introducing consideration of the means of offenders and the likely effect of orders on their rehabilitation originated in England.⁷⁸ In Victoria, the *Sentencing Act 1991* (Vic) provides, in s 86(2), that a court may, in determining the amount and method of payment of compensation, take into account the ability of an offender to pay. This is, however, a step short of mandatory consideration of such factors.⁷⁹ In South Australia and Western Australia a payment of compensation must not be ordered if the court is satisfied that an offender is not able to comply or such an order would prejudice the welfare of the dependants of the offender.⁸⁰

10.44 Such considerations have not been expressly adopted in New South Wales legislation. However, the *Victims Compensation Act 1987* (NSW) now lists, in s 55, a further factor of "such other matters as [the court] considers relevant" in determining the sum to be paid in a direction for compensation. In the Commission's view, this provision is sufficient to encompass a consideration of the offender's ability to pay where relevant.

CONFISCATION ORDERS

10.45 The last decade has seen an influx of new legislation, at both Federal⁸¹ and State⁸² levels, aimed at confiscating the assets and proceeds of criminal activity. The aim of this legislation is to provide for forfeiture of proceeds of crime independently of the sentence imposed on the offender.

The rationale of confiscation orders

10.46 At base, the purpose of confiscation orders is to ensure that individuals or groups are not able to enjoy money or property acquired as a result of criminal activity. This is intended to strike at the profit motivation for crime. Introducing the New South Wales legislation, the then Attorney General, the Hon John Dowd, said its aim was to

strike at the heart of major organized crime by attacking the primary motive - profit - and preventing the re-investment of that profit in further criminal activity.⁸³

That this motive exists has been long recognised. Temby quotes Frank Costigan as saying:

The first thing to remember is that the organisation of crime is directed towards the accumulation of money and with that power. The possession of the power that flows with great wealth is to some people an important matter in itself, but this is secondary to the prime aim of accumulating money. Two conclusions flow from this fact. The first is that the most successful method of identifying and ultimately convicting major organised criminals is to follow their money trails. The second is that once you have identified and convicted them you take away their money; that is, the money which is the product of their criminal activities.⁸⁴

10.47 Unfortunately, the history of the legislation suggests that it has not made any significant difference to crime, and it is doubtful that legislation of this type can be made effective against large-scale organised crime.⁸⁵ Some commentators have suggested that the need for confiscation legislation could be obviated by a better use of fines and restraining orders.⁸⁶

The legislation in New South Wales

10.48 The *Confiscation of Proceeds of Crime Act 1989* (NSW) is designed to create a system which will enable the State to deprive criminals of the proceeds and benefits of criminal activity, as well as to provide law enforcement agencies with significant investigative powers.⁸⁷ The Act creates two forms of confiscation orders:

- A forfeiture order, which allows the court to forfeit tainted property to the State.⁸⁸ "Tainted property" is very broadly defined to include property used in connection with the offence and "any property derived ... directly or indirectly, from the commission of the offence."⁸⁹
- A pecuniary penalty order, which is a financial sanction distinguishable from a punitive fine by the fact that it is calculated by reference to the benefits derived from the criminal acts.⁹⁰

10.49 Both orders are enforced independently of the sentencing process. Confiscated property goes to the State.⁹¹ Provision exists in the *Victims Compensation Act 1987* to allow confiscated funds to be allocated to the victims' compensation scheme.⁹²

10.50 Proceedings for confiscation orders are most commonly instigated by the Director of Public Prosecutions.⁹³ The Act requires that the offender be convicted of a serious offence, defined expansively as any offence that may be prosecuted on indictment.⁹⁴ "Conviction" is also broadly defined,⁹⁵ extending to orders under s 556A of the *Crimes Act 1900* (NSW)⁹⁶ and abscondment.⁹⁷

The civil nature of confiscation

10.51 The law of forfeiture is derived from the old civil remedies of deodand and attainder.⁹⁸ The tendency in most Australian jurisdictions has been to keep confiscation actions civil in nature, even though they require a criminal conviction before they proceed.⁹⁹ The civil aspect of confiscation manifests itself in the application of the civil standard of proof to applications under the Act.¹⁰⁰ Indeed, in forfeiture cases, the legislation shifts the onus of proof to defendants to show that property in their possession at the time of or after the commission of an offence was *not* used in connection with the offence.¹⁰¹ The onus is also shifted to the defendant in cases of pecuniary penalty orders to show that an increase in the value of the property was attributable to causes unrelated to the commission of the offence.¹⁰²

The impact of the legislation

10.52 The *Confiscation of Proceeds of Crime Act* is a very powerful and wide-ranging piece of legislation, with the potential for excessively harsh effects not only for offenders, but also for third parties who may be innocently or indirectly involved with the proceeds of crime. Not surprisingly, the legislation has been described as draconian.¹⁰³

10.53 Two approaches may alleviate the potentially unacceptable consequences of the legislation. First, confiscation orders could be integrated into the sentencing process. Secondly, the Act could be amended to reduce the likelihood of potential injustices. The first approach touches directly on the law of sentencing and so requires comment by the Commission. Although the second approach is outside our terms of reference, we comment briefly on one aspect of the legislation which would render its application more just.

The integration of confiscation into the sentencing process

10.54 The argument in favour of integrating confiscation into the sentencing process is that what are said to be the unacceptably harsh consequences of confiscation will be reduced by reference to sentencing principles, especially proportionality and totality.¹⁰⁴ This approach finds support in the case law of other jurisdictions¹⁰⁵

and in s 5(2A) of the *Sentencing Act 1991* (Vic) which allows the court in sentencing an offender to have regard to:

- a forfeiture order made in respect of property used in the commission of the offence (but not property derived or realised as a result of the offence); and
- a pecuniary penalty order relating to benefits in excess of profits (but not profits themselves) derived from the commission of the offence.

10.55 The Commission does not favour the integration of confiscation into the sentencing process for the following reasons:

- It is by no means obvious how the imposition of either a forfeiture order or a pecuniary penalty order, both of which are aimed at the disgorgement of gains, is to be justified within the traditional objectives of punishment. For example, what is the relevance of rehabilitation to the making of such an order? Further, how is proportionality to apply to the imposition of such an order if it is clear that the legislature intends confiscation in addition to (other) punishment?
- Confiscation proceedings will, for practical reasons, generally have to be considered independently of the sentencing hearing, and usually after it. Procedurally, this will create difficulties for the sentencing process.¹⁰⁶ For example, how will the totality principle be applied at the sentencing hearing when the confiscation proceedings are still to be determined?

Amendment of the legislation

10.56 The Commission is of the view that what are said to be the potentially harsh and unjust consequences of the confiscation legislation can best be avoided by investing the courts with a wide discretionary power to refuse to order forfeiture in appropriate cases. Prima facie, this power exists in the Act which requires the court, in making a forfeiture order, to have regard to any hardship which the order may cause to the offender or a third person.¹⁰⁷ Hardship is not that which necessarily results from the deprivation of the property in question,¹⁰⁸ but that which is disproportionate in all the circumstances of the case.¹⁰⁹ The legislation specifies that, in determining any hardship that is likely to arise on the part of a person convicted of a serious offence, the court cannot take into account the sentence imposed for that offence.¹¹⁰

10.57 The Commission considers that the hardship provision is generally sufficient to enable the courts to avoid the potentially unjust consequences of the Act. There is, however, one respect in which the Act is too restricted. Forfeiture orders operate on an “all or nothing” basis.¹¹¹ This raises the possibility that a court would have to order the “forfeiture of a very valuable tract of bushland which was unused by the offender other than for the growing of a single cannabis plant”.¹¹² In practice, this consequence has been avoided by finding that such a result would produce a consequence of “horrendous hardship” which would be disproportionate to the nature of the offence which was committed.¹¹³ The problem with this approach is that it frustrates the intention of the legislature where, but for the manifest injustice of a full forfeiture order, the case is otherwise an appropriate one for confiscation. With partial orders, the harshness of “all or nothing” is taken away, and judges are more accurately able to modify their orders to take into account hardship and the incidental effects of these orders. The Commission is, therefore, of the view that the Act should be amended to allow partial forfeiture orders.

Proposal 36

The *Confiscation of Proceeds of Crime Act 1989* (NSW) should be amended to authorise partial forfeiture orders.

QUESTIONS ARISING IN CHAPTER 10

1. Ought imprisonment to be retained as a sanction of last resort for fine defaulters generally? Or in the case of wilful default only?

2. Whether or not imprisonment is retained as a sanction of last resort, what other sanctions or procedures should be put in place to encourage fine defaulters to pay?
3. Should a day-fine system be introduced in New South Wales? If so, should it be based on income or on the financial status of the offender?
4. What is the most appropriate mode of assessing the income or financial status of the offender?
5. Should the privacy of the offender's income be protected? If so, how might this best be achieved?
6. Should infringement notices be regulated with greater precision?
7. If so, should such regulation be via a general Infringements Act or on an ad hoc basis?
8. What criteria should govern the classification of offences as infringement offences and the procedures relating to them?
9. Should the provisions of s 438 of the *Crimes Act 1900* (NSW) be retained?
10. Should the provisions of s 438 of the *Crimes Act 1900* (NSW) be amended to clarify the position of the Local Court and widen the range of circumstances in which the court may order restitution?
11. What is the most appropriate means of enforcing restitution orders?
12. Should confiscation orders be integrated into the sentencing regime? If so, what changes should be made to the *Confiscation of Proceeds of Crime Act 1989* (NSW)?
13. Should the Act authorise partial forfeiture of property?

Footnotes

1. For example, for the period 1990-1994, over 50% of persons found guilty at trial in the Local Court and sentenced each year, were fined. In 1994, 59.6% (50,352) of persons found guilty were fined: New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 1994* at 16-17.
2. New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Court Statistics 1994* at 16-17. It is unclear whether these figures include contested infringement notices.
3. R Jochelson, *Fine Default: Enforcing Fine Payment* (NSW Bureau of Crime Statistics and Research, Sydney, 1995) at 3.
4. See Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988); G Zdenkowski, *Imprisoning fine defaulters in New South Wales* (1985) 10 *Legal Service Bulletin* 102; R Jochelson, *Fine Default: Enforcing Fine Payment* (NSW Bureau of Crime Statistics and Research, Sydney, 1995).
5. *Justices Act 1902* (NSW), s 80A.
6. See *Budget Nursery Pty Ltd v The Commissioner of Taxation* (1989) 42 A Crim R 81.
7. See Parliament of New South Wales, *Report of the Inquiry Into the Central Industrial Prison Dated August 1988 by His Honour A G Muir QC* (Government Printer, 1988) 3 Volumes (an inquiry into the assault of Jamie Partic while being detained as a fine defaulter in the CIP).

8. Australian Law Reform Commission, *Sentencing* (ALRC No 44, 1988) at para 108.
9. In some jurisdictions there is an obligation to conduct such an inquiry: see, eg, *Justices Act 1902* (NSW) s 80A. However, the form of the enquiry is not obligatory and no consequence flows from failure to conduct it. When such an enquiry is conducted it is a relatively informal process and is certainly not a rigorous examination of the offender's financial status.
10. Courts almost invariably allow time to pay, if requested, and usually make this option known to the offender. In the case of unrepresented offenders the courts always do so.
11. Law Reform Commission of Tasmania, *Report on Fines* (Tas LRC 41, 1985) at 9.
12. Australian Law Reform Commission, *Sentencing: Penalties* (DP 30, 1987) at para 23.
13. H Thornstedt, "The Day-Fine System in Sweden" [1975] *Criminal Law Review* 307.
14. For a more detailed description of this process see: ALRC, *Sentencing: Penalties* (DP 30, 1987) at para 25. For a discussion of the history and operation of the systems in Scandinavia and Germany, see Thornstedt (1975); G Grebing, *The Fine in Comparative Law: A Survey of 21 Countries* (University of Cambridge, Institute of Criminology, 1982).
15. ALRC *Sentencing: Penalties* (DP 30, 1987) at para 25.
16. Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988) at para 114. Compare Australian Law Reform Commission, *Sentencing of Federal Offenders* (ALRC 15, 1980) at 384; ALRC, *Sentencing: Penalties* (DP 30, 1987) at para 86.
17. Australian Law Reform Commission, *Sentencing* (ALRC No 44, 1988) at para 144.
18. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 4 May 1994 at 1861.
19. See generally *Justices Act 1902* (NSW) s 86A-95 as amended by *Justices (Fine Default) Amendment Act 1994* (NSW). See also A Freiberg and R Fox, *Enforcement of Fines and Monetary Penalties: Working Paper* (National Road Transport Commission, Melbourne, November 1994).
20. For the week ending 3 September 1995, there were two fine defaulters attending periodic detention centres in New South Wales (information provided by the Department of Corrective Services).
21. In 1994/95, there were 36,495 licences cancelled by the RTA. Between July 1994 and January 1995, 21,688 licences were suspended by the RTA.
22. Pursuant to *Justices Act 1902* s 87.
23. Jochelson (1995): 1993 figures are used because 1994 figures were affected by a moratorium. The figure does not take into account those already in custody or on remand who "called in" their warrants to serve them concurrently with other sentences. There are also no statistics for fine defaulters who have "cut out" their fines in police lock-ups.
24. Under the current enforcement system, unpaid fines or fines which are not expiated through a non-custodial sanction eventually result in a warrant being issued. As at 10 February 1995, there were 397,074 individuals with 744,160 warrants outstanding for unpaid or unexpiated fines. Again, the figures do not take into account the factors listed in the previous footnote: Jochelson (1995) at 4.
25. R Jochelson, *Fine Default: Enforcing Fine Payment* (New South Wales Bureau of Crime Statistics and Research, August 1995).
26. Jochelson at 41-43.

27. B Lagan, "Moves to Cut Jail Population" *Sydney Morning Herald* (14 September 1995) at 2.
28. *Justices Act 1902*, s 89E(2).
29. The *Justices (Fine Default) Amendment Act 1994* amended the *Justices Act* to provide civil enforcement as an alternative to a warrant of commitment. See now s 89E of the *Justices Act 1902*.
30. Information provided by the Director of Local Courts Administration, *Letter*, 28 November 1995.
31. Other jurisdictions have provision for the cancellation of licences in respect of certain offences: see *Crimes Act 1900* (ACT) s 432; *Sentencing Act 1995* (WA) s 105; *Sentencing Act 1991* (Vic) s 89.
32. In 1992, the proportion of unlicensed drivers was estimated at 5%, while the proportion of unregistered vehicles was estimated at 2%: see Parliament of NSW, *Report of the Roads and Traffic Authority for the Year Ended 10 June 1993* at 27. These figures were not revised in the 1994 Report: see Parliament of New South Wales, *Report of the Roads and Traffic Authority for the Year Ended 30 June 1994* at 22.
33. Set up under the *Registration of Interests in Goods Act 1986* (NSW).
34. For statistics, see para 10.2.
35. See R G Fox, "Infringement Notices: Time for Reform" (Trends and Issues in Crime and Criminal Justice No 50, Australian Institute of Criminology, Canberra, 1995) at 1.
36. Fox (1995) at 1.
37. Australian Law Reform Commission, *Multiculturalism and the Law*, (ALRC 57, 1992) at Ch 9.
38. For example, following the decriminalisation of possession of small quantities of marijuana in South Australia, the prosecution for marijuana related offences rose from 4000 in 1987 to 17,500 in 1993, an increase of 450%: D Brown, D Farrier and D Weisbrot, *Criminal Laws: Materials and Commentary on Criminal Law and the Criminal Process of New South Wales* (2nd ed, Federation Press, Sydney, 1996) Volume 1 at 245.
39. R G Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria* (Australian Studies in Law, Crime and Justice, Australian Institute of Criminology, Canberra, 1995). See also R Fox, "On Punishing Infringements" in A Kapardis (ed), *Sentencing: Some Key Issues* (La Trobe University Press, Bundoora, 1995) Chapter 2.
40. R G Fox, "Infringement Notices: Time for Reform?" (*Trends and Issues in Crime and Criminal Justice* No 50, 1995) at 5.
41. Australian Law Reform Commission, *Multiculturalism and the Law* (ALRC 57, 1992) at Ch 9.
42. Parliament of Victoria, Law Reform Committee, *Restitution for Victims of Crime: Interim Report* (PP 54, 1993) at xv and 13.
43. See paras 9.69-9.72.
44. As with young offenders in South Australia: see C Cunneen and R White, *Juvenile Justice: An Australian Perspective* (Oxford University Press, Melbourne, 1995) at 249.
45. See paras 5.86-5.92.
46. See paras 9.55-9.56.
47. Whereby the State pays victims on application but reserves the right to seek indemnity from offenders: *Victims Compensation Act 1987* (NSW) Part 5
48. New South Wales, *Parliamentary Debates (Hansard)*, Legislative Assembly, 18 November 1987 at 16272.

49. The Attorney General's Sentencing Review suggests that the "clear purpose" of the provision is to enable the victim to take proceedings for compensation in the one court action: *Attorney General's Sentencing Review* at 39. This observation appears misconceived given the limits on the amount recoverable and the availability of other avenues of compensation, at least with respect to personal injury.

50. Parliament of Victoria, Law Reform Committee, *Restitution for Victims of Crime: Final Report* (PP 96, 1994) at 6.

51. Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988) at para 142.

52. As has occurred in South Australia: *Criminal Law (Sentencing) Act 1988* (SA) s 53

53. These issues are canvassed in the consideration of problems with the admissibility of victim impact statements, below at paras 11.15-11.19. See also the discussion in D R Miers, *Compensation for Criminal Injuries* (Butterworths, 1990) at 294-295.

54. Parliament of Victoria, Law Reform Committee, *Restitution for Victims of Crime: Final Report* (PP 96, 1994) at xviii.

55. See para 3.21.

56. Now provided for in Part 6 of the *Victim's Compensation Act 1987* (NSW).

57. *R v Forsythe* [1972] 2 NSWLR 951 at 953. It should be noted, however, that the judges in this case also paid regard to the fact that the *Criminal Injuries Compensation Act 1967* (NSW) provided for payment from consolidated revenue of any sum not paid by an offender: s 5(2). Civil liability for wrongs has been formally preserved by *Victims Compensation Act 1987* (NSW) s 58(2).

58. *R v Forsythe* [1972] 2 NSWLR 951 at 953.

59. *R v C* [1982] 2 NSWLR 674 at 692.

60. It should be noted that property is, in most cases, returned to its rightful owner as a matter of course.

61. *Crimes Act 1900* (NSW) s 4(1).

62. *Attorney General's Sentencing Review* at 60.

63. Law Society of New South Wales, *Submission to Attorney General's Sentencing Review* (25 July 1994).

64. D Lanham "Restitution Orders" (1986) 10 *Criminal Law Journal* 394 at 408. This draft section was the result of a consideration of the provisions of all Australian jurisdictions at the time: *Criminal Law Consolidation Act 1935* (SA) s 201 (replaced by *Criminal Law (Sentencing) Act 1988* (SA) s 52); *Criminal Code* (Qld) s 685, 685A (replaced by *Penalties and Sentences Act 1992* (Qld) s 35(1)(a)); *Criminal Code* (WA) s 717-718 (replaced by *Sentencing Act 1995* (WA) s 120-122); *Criminal Code* (Tas) s 424; *Penalties and Sentences Act 1985* (Vic) s 90 (replaced by *Sentencing Act 1991* (Vic) s 84); and *Criminal Code* (NT) s 393 (replaced by *Sentencing Act 1995* (NT) s 87-88). The proposal appears to have been considered in framing *Criminal Law (Sentencing) Act 1988* (SA) s 52.

65. *Victims Compensation Act 1987* (NSW) s 52.

66. *Victims Compensation Act 1987* (NSW) s 60.

67. *Victims Compensation Act 1987* (NSW) s 53(2).

68. *Murphy v H F Trading Co Pty Ltd* (1973) 47 ALJR 198, a case involving the interpretation of s 21B *Crimes Act 1914* (Cth). See also the definition of "compensation for expenses": *Victims Compensation Act 1987* (NSW) s 10(1); and D Lanham "Criminal Fraud and Compensation Orders" (1986) 10 *Criminal Law Journal* 297 at 301.

69. *Victims Compensation Act 1987* (NSW) s 60-65.
70. *Victims Compensation Act 1987* (NSW) s 61.
71. *Attorney General's Sentencing Review* at 39.
72. Law Society of New South Wales, *Submission to Attorney General's Sentencing Review* (25 July 1994).
73. Except in a claim for exemplary damages: *Rookes v Barnard* [1964] AC 1129 at 1228; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448 at 472.
74. D R Miers, *Compensation for Criminal Injuries* (Butterworths, London, 1990) at 320.
75. D Brown, D Farrier and D Weisbrot, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (2nd ed, Federation Press, Sydney, 1996) Vol 2 at 1390.
76. D Lanham "Criminal Fraud and Compensation Orders" (1986) 10 *Criminal Law Journal* 297 1t 313.
77. Possible outcomes under such a regime are discussed by D R Miers, *Compensation for Criminal Injuries* (Butterworths, London, 1990) at 291-295.
78. D Lanham "Criminal Fraud and Compensation Orders" (1986) 10 *Criminal Law Journal* 297 at 312 draws attention to s 1 *Criminal Justice Act 1972* (Eng) and s 35 *Powers of Criminal Courts Act 1973* (Eng). See also D Thomas, *Principles of Sentencing* (2nd ed, Heinemann, London, 1979) at 328-331.
79. Parliament of Victoria, Law Reform Committee, *Restitution for Victims of Crime: Final Report* (PP 96, 1994) at 43.
80. *Criminal Law (Sentencing) Act 1988* (SA) s 13, *Sentencing Act 1995* (WA) s 112(3).
81. *Proceeds of Crime Act 1987* (Cth). The *Customs Act 1901* (Cth) also contains significant forfeiture provisions.
82. *Confiscation of Proceeds of Crime Act 1989* (NSW); *Crimes (Confiscation of Profits) Act 1986* (Vic); *Crimes (Confiscation of Profits) Act 1986* (SA); *Crimes (Confiscation) Act 1989* (Qld); *Crimes (Confiscation of Profits) Act 1988* (WA); *Crimes (Confiscation of Profits) Act 1993* (Tas); *Proceeds of Crime Act 1991* (ACT); *Crimes (Forfeiture of Proceeds) Act 1988* (NT). In NSW, civil forfeiture independent of criminal prosecution can also occur: see *Drug Trafficking (Civil Proceedings) Act 1990* (NSW).
83. New South Wales *Parliamentary Debates* (Hansard), Legislative Assembly, 3 May 1989 at 7325.
84. I Temby, "The Proceeds of Crime Act - One Year's Experience" (1989) 13 *Criminal Law Journal* 24 at 30.
85. While this question is of importance and is of significant interest, it is beyond the scope of this reference. For academic criticism of the Act's effect on organised crime, see D Fraser, "Lawyers, Guns and Money: Economics and Ideology on the Money Trail" in B Fisse, D Fraser, R Fox (eds), *The Money Trail* (Law Book Company, Sydney, 1992). Some statistical evidence can be found in National Crime Authority, *National Proceeds of Crime Conference - Working Party Paper* (1993), Attachment 4.
86. See B Fisse, "Confiscation of Proceeds of Crime: Discretionary Forfeiture or Proportionate Punishment?" (1992) 16 *Criminal Law Journal* 13.
87. *Confiscation of Proceeds of Crime Act 1989* (NSW) s 3.
88. Section 20 of the Act allows third parties who can show (on balance of probabilities) a legitimate interest in the property to make applications for their interest in "tainted property".
89. *Confiscation of Proceeds of Crime Act 1989* (NSW) s 4(1).

90. See *R v Fagher* (1989) 16 NSWLR 67 at 75-6
91. *Confiscation of Proceeds of Crime Act 1989* (NSW) s 18(1) (forfeiture orders).
92. *Victims Compensation Act 1987* (NSW) s 65(g).
93. *Confiscation of Proceeds of Crime Act 1989* (NSW) s 4(1) ("appropriate officer"). In drug trafficking cases, provisions exist for the Crime Commissioner to initiate proceedings. This is done for consistency and convenience purposes.
94. *Confiscation of Proceeds of Crime Act 1989* (NSW) s 7.
95. *Confiscation of Proceeds of Crime Act 1989* (NSW) s 5.
96. *Confiscation of Proceeds of Crime Act, 1989* (NSW) s 5(1)(b).
97. *Confiscation of Proceeds of Crime Act, 1989* (NSW) s 5(1)(d) and s 6.
98. Attainder was the automatic forfeiture due to a sentence of death, treason or outlawry, under which civil rights and capacities to hold property were extinguished. It included a notion of "corruption of the blood", which also limited the right of descendants to inherit. It was abolished in England in 1870, and the Australian colonies followed suit. Deodand allowed the Crown to confiscate the instruments of crime or damage in the case of a death. Its roots were religious, with its literal meaning being "that which is given to God". It also was abolished in the 19th Century.
99. Although Victorian judges have tended to apply sentencing principles to confiscation much more than other jurisdictions - see *R v Allen* (1989) 41 A Crim R 51 and *R v Winand* (1994) 73 A Crim R 497.
100. For example, *Confiscation of Proceeds of Crime Act 1989* (NSW) s 18(4)(b).
101. *Confiscation of Proceeds of Crime Act 1989* (NSW) s 18(4)(a).
102. *Confiscation of Proceeds of Crime Act 1989* (NSW) s 25(4).
103. *R v Galek* (1993) 70 A Crim R 252 at 258 per Allen J, 259 per Hunt CJ at CL.
104. See B Fisse, "Confiscation of Proceeds of Crime: Discretionary Forfeiture or Proportionate Punishment?" (1992) 16 *Criminal Law Journal* 13; A Freiberg, "Criminal Confiscation, Profit and Liberty" (1992) 25 *Australian and New Zealand Journal of Criminology* 44.
105. Consider *R v McDermott* (1990) 45 A Crim R 105; *R v Tapper* (1992) 111 ALR 347; *R v Allen* (1989) 41 A Crim R 51; *R v Winand* (1994) 73 A Crim R 497; *DPP v Kizon* (1992) 6 WAR 353.
106. See B Fisse, "Penal Justice Under Proceeds of Crime and Money Trail Legislation in Australia - Paradigms Lost? Paradigms Found?" *Proceedings of the 29th Annual Legal Convention* (Law Council of Australia, 1995) 63 at 69-71.
107. *Confiscation of Proceeds of Crime Act 1989* (NSW) s 18(1)(b)(ii).
108. See *R v Lake* (1989) 44 A Crim R 63 at 66 per Kirby P.
109. See generally *R v Hadad* (1989) 16 NSWLR 476; *R v Bolger* (1989) 16 NSWLR 115; *R v Galek* (1993) 70 A Crim R 252; *DPP v Milienu* (1991) 22 NSWLR 489. See also *Taylor v Attorney-General (SA)* (1991) 53 A Crim R 166.
110. *Confiscation of Proceeds of Crime Act 1989* (NSW) s 18(2), on which see *Bolger* at 126-127 per Allen J.
111. *R v Bolger* (1989) 16 NSWLR 115.

112. *Bolger* at 126 per Allen J.

113. *R v Galek* (1993) 70 A Crim R 252 especially at 259 per Hunt CJ at CL. But note the dissenting judgment of Allen J. See also *Bolger*; *Milienou*.

11. Victims of Crime

THE ROLE OF VICTIMS IN THE CRIMINAL JUSTICE SYSTEM

Victims as informers and witnesses

11.1 From early times, the State has prosecuted those accused of crimes in adversarial proceedings to which the victim of the crime is not a party.¹ In practice, the victim's involvement in the prosecution of offences has varied from time to time,² but, at least since the emergence of police forces and of State officers responsible for the enforcement of the criminal law, the management of prosecutions has been undertaken primarily by the State.³ Victims still retain a right to commence private prosecutions, but the Director of Public Prosecutions can at any time take over and discontinue such proceedings.⁴

11.2 The public interest is the paramount factor influencing the State in the management of criminal prosecutions.⁵ Generally, this means that, while victims' views are taken into account when decisions are made about prosecutions, their views are not determinative, since "[i]t is the public, not any private, interest that must be served".⁶ More specifically, however, the interests of victims form part of the public interest to the extent that the decision not to prosecute is informed, amongst other matters, by:

- the attitude of the victim of the alleged offence to a prosecution; and
- any entitlement of the victim to criminal compensation, reparation or forfeiture if prosecution action is taken.⁷

11.3 In practice, the role of victims in criminal prosecutions is usually limited to reporting the offence and to acting as a witness at the trial if required.

The victims' movement

11.4 Concern about the relegation of victims to an essentially passive role in the criminal justice system has its intellectual roots in the emergence of victimology as a discipline in the late 1940s.⁸ The development of a "victims' movement", advocating a "proper place" for victims in the criminal justice system, has been one manifestation of that concern. The victims' movement was clearly identifiable in the United States and England by the early 1970s, with victim support groups surfacing in England at the local level.⁹ The movement began to emerge in Australia in the early 1980s.¹⁰ The movement was fuelled by the attention given to domestic violence and sexual assault in feminist and other literature,¹¹ and by the emphasis given to the notion of retribution inherent in "just deserts", then increasingly becoming the dominant factor in sentencing theory and policy.¹² Since the 1980s, official inquiries have specifically considered the role of victims in the criminal justice system in many jurisdictions, including the USA,¹³ Canada,¹⁴ South Australia,¹⁵ New South Wales,¹⁶ Victoria,¹⁷ Tasmania¹⁸ and the Australian Capital Territory.¹⁹ The role of victims in sentencing has also been considered in the course of sentencing inquiries.²⁰

11.5 The activities of the 1980s have had practical results in two broad respects.²¹ First, recognition has been accorded to victims' needs for consideration and special services. Secondly, but less extensively, victims have been given procedural rights in the criminal justice system, including rights at the point of sentencing.

Responding to victims' needs

International norms

11.6 The General Assembly of the United Nations has adopted a *Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power*.²² The Declaration enumerates basic standards for the treatment of victims by attempting to guarantee and strengthen their position in four respects:

1. *Access to justice and fair treatment.*²³ The key provision is that victims should be treated with “compassion and respect for their dignity”. They are entitled to access to the mechanisms of justice (including being informed of their rights in seeking redress through such mechanisms) and to prompt redress (through formal and informal procedures) for the harm they have suffered. Judicial and administrative responses to victims should be facilitated by: informing victims of the progress of the proceedings and providing them with proper assistance through those proceedings; taking measures to minimise delays and inconvenience to them and protecting their safety and privacy; and, allowing their views and concerns “to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system”.
2. *Restitution.*²⁴ Here the key provision envisages that offenders or third parties responsible for their behaviour should, where appropriate, make “fair restitution” to victims, their families or dependants (including the return of property or payment for the harm suffered, reimbursement of expenses incurred as a result of the victimisation, the provision of services and the restoration of rights).
3. *Compensation.*²⁵ This endeavours to ensure State-funded compensation for victims who are unable to obtain it from the offender.
4. *Assistance.*²⁶ The object of this section is to ensure that victims “receive the necessary material, psychological and social assistance through governmental, voluntary, community-based and indigenous means”.

The position in New South Wales

11.7 International norms have influenced the position of victims in all Australian jurisdictions.²⁷ In New South Wales, they are reflected in a Charter of Victims’ Rights, which establishes administrative guidelines designed to secure “minimum standards for the fair treatment of victims by New South Wales Government Agencies involved with justice, health and community services”.²⁸ In addition, the Director of Public Prosecutions in New South Wales has implemented procedures and policies designed to give effect to those standards. They include:²⁹

the establishment of a Witness Assistance Service (staffed by officers with social welfare qualifications) to provide support and assistance for witnesses during the prosecution process;

the production of information pamphlets for victims and witnesses;

the establishment of a Sexual Assault Liaison officer who liaises with government departments and external agencies to develop co-operative efforts in relation to victims and witnesses and participates in training and educational programs;

the establishment of a Review Committee on Sexual Assault Prosecutions (with representation from other agencies and the public) which has produced, amongst other things, *Interagency Guidelines for Responding to Adult Victims of Sexual Assault*;

ongoing officer training and community education on issues relating to victims and witnesses.

11.8 The New South Wales Government established a Victims Advisory Council in 1991. The Council comprises representatives from Government agencies representing the portfolio areas of Attorney General, Health, Community Services, Police and Women, and community representatives appointed by the Attorney General. The role of the Council, which meets each month, is largely advisory.³⁰ The Council has already fulfilled a major term of reference by advising on the establishment of the community-based victims agency operated by the Sydney City Mission which the Council monitors, and which has been responsible for the production of a *Victims’ Rights* information brochure.

11.9 Victims of Crime is a 24 hour confidential telephone counselling and referral service conducted by the Sydney City Mission since 1993. Counselling is provided by telephone and face to face; legal advice is given; referrals are made to appropriate agencies which deal with particular types of victims (for example, domestic

violence and homicide); and support is offered to victims otherwise not catered for. Information booklets for victims about going to court and coping with the ordeal are made available by the Service.

11.10 The Secretariat of the Serious Offenders Review Council maintains the Victims Register for the Department of Corrective Services. Registration is voluntary for victims of serious, usually violent, offences. It contains confidential information necessary for the SORC Secretariat to provide registered victims with information, advice and referrals. People on the Register are told about the progress of offenders throughout the sentence, their classification and location, and are informed when the offender has escaped, or is being considered for re-determination of a life sentence or access to external leave programs. They are also advised when the Offenders Review Board will be considering the offender's eligibility for parole.³¹

11.11 Recently, the New South Wales Government has indicated that it is likely to introduce a package of initiatives to provide greater assistance to the victims of crime.³² The package may include the provision of a statutory Charter of Victims' Rights; the establishment of a Victims of Crime Bureau; an overhaul of the victims compensation system; and a consideration of the provision of a statutory base for the reception in court of victim impact statements.³³

11.12 While the Commission's concern is only with the role (if any) which ought to be played by victims in the sentencing process, we record our unequivocal support for all those measures listed above which are aimed at addressing the needs of victims - including those designed to provide support services to victims; to inform victims of the prosecution process and of the movement of the offender through the criminal justice system; and to ensure adequate rights to compensation. We welcome the Government's commitment to improve the position of victims in this respect by the establishment of a Victims of Crime Bureau.

Giving victims procedural rights in the criminal justice system

11.13 Some legal systems give victims procedural rights in the criminal justice system - for example, the right to be consulted on (or to veto) the decision to prosecute; the right to be consulted on the acceptance of a plea; the right to make submissions to sentencing or parole authorities; and the right to restitution from the offender.³⁴ Some of these rights are relevant to sentencing and require consideration by the Commission. We have already considered reparation as an order ancillary to sentencing.³⁵ At this point, it is necessary to consider whether or not victims should be accorded the right:

to have victim impact statements put in evidence at the point of sentencing; and

to make submissions to the Parole Board when consideration is given to an offender's release on parole.

VICTIM IMPACT STATEMENTS (VIS)

The meaning of VIS

11.14 The right usually accorded to victims at sentencing is the option of making a VIS to the sentencing court. Very broadly, "VIS" refers to "a statement containing particulars of any injury suffered by any victim as a result of an offence".³⁶ That injury may, conceivably, be physical, psychological, social or financial. This description of VIS, whose form and content vary enormously, begs a number of difficult questions; in particular, the question of who will qualify as a "victim" for the purpose of making such a statement. The Commission addresses these questions below in the context of attempting to define the proper boundaries of VIS.³⁷

The admissibility of VIS at common law

Problems with the admissibility of VIS

11.15 The prosecution may have to establish some injury or damage to the victim of a crime where that injury is an ingredient of the crime in issue. A clear example is assault causing actual bodily harm. More usually, the ingredients of the offence will not make their consequences relevant to the accused's culpability. For example, to obtain a conviction for sexual assault, the prosecution must prove penetration and the absence of consent, but not harm to the victim. The extent of the harm actually suffered by the victim may, of course, come out at the trial;

for example, in a sexual assault case the harm may emerge in the course of proving absence of consent. Or it may be put in evidence by the prosecutor where (as in cases of sexual assault or serious personal violence in New South Wales) the prosecutor is under a non-enforceable obligation to make known to the court the full effect of the crime upon the victim.³⁸

11.16 Generally, however, there remains the real possibility that the full impact of the crime on the victim may not be known either at the trial or otherwise at the sentencing hearing. This is particularly likely to occur where there is a plea of guilty and the information available to the sentencing court is less than it would have been if the accused's guilt had been put in issue at trial.³⁹ Its occurrence is facilitated by the former tradition that the prosecutor's role ceased once a conviction was obtained⁴⁰ and, obviously to a lesser extent, by the current practice that the prosecutor must not press for a vindictive sentence.⁴¹

11.17 Where the court is unaware of the actual impact of the crime on the victim, it will assume that the victim suffers the "normal" consequences of the crime in question.⁴² For example, the courts will assume, in cases of sexual assault, that psychological or emotional harm has been done to the victim even though its extent is not known,⁴³ especially where the victim is a child.⁴⁴ Such assumptions about the impact of a particular offence are justified because the ingredients of the offence and any statutory maximum penalties attaching to it will have been defined in such a way as to reflect the seriousness of the impact on the victim of the offence.⁴⁵ Therefore, viewing the crime solely by reference to its objective features, it follows that the more serious the crime, the greater the assumed harm and the greater the punishment. In this sense, it is true to say that courts have always taken into account the impact of criminal behaviour upon the victims of that behaviour.⁴⁶

11.18 In the current state of the law and in the Commission's view of what the law ought to be,⁴⁷ a sentencing court must, in appropriate cases, have regard to the impact of the crime on the victim.⁴⁸ Does this mean that where there is a clear divergence between the assumed and the actual impact of the crime on the victim, the court should receive a VIS to determine actual impact? Prima facie, assuming that the VIS is adequately drawn,⁴⁹ an affirmative response would seem to be appropriate on common sense grounds. For a VIS is, potentially at any rate, capable of providing the best evidence of the objective seriousness of the offence.

11.19 There are, however, powerful arguments against the admissibility of VIS. The view that the impact of the crime on the victim is already known from the ingredients of the offence reflects the law's policy of measuring an offender's culpability by reference to his or her intention at the time of committing the crime, not by reference to the consequences of that crime. After all, from the offender's point of view, those consequences may be unintended and not reasonably foreseeable. To the extent to which they are neither intended nor reasonably foreseeable, evidence of the actual impact of the crime on the victim at sentencing introduces an ingredient which is not relevant to the offender's culpability.⁵⁰ As the Victorian Sentencing Committee wrote:

The necessity for ... an objective assessment of impact on victims arises from the very nature of the criminal justice system itself, and in particular the underlying principles of what constitutes an act as criminal as opposed to a non-criminal act [I]t is the culpability of the offender as determined by his intent ... which determines the level of appropriate punishment, not simply the impact of the criminal act itself.⁵¹

The position in New South Wales

11.20 Notwithstanding both this argument and the existence of an unproclaimed section of the *Crimes Act 1900* which provides for the admissibility of VIS,⁵² VIS have been admitted in New South Wales in several sexual assault cases where they have been thought to provide assistance to the court in the form of information (which it did not otherwise have) of the extent of psychological injury to the victim and hence of the objective seriousness of the offence.⁵³ In some cases, they have proved of little value since they have not adequately addressed the impact of the crime on the victim.⁵⁴

11.21 By contrast, VIS (which were unsworn and to whose admissibility objection was taken) were recently held inadmissible by Justice Dunford after a considered judgment in a homicide case.⁵⁵ His Honour regarded a VIS as inappropriate in homicide cases because:

[I]t is ... difficult to see how such material could be relevant to the sentencing process. In particular it cannot be relevant to the objective seriousness of the offence. The primary victim is dead, a human life has been taken and each human life has an intrinsic value. The life of one homicide victim cannot, it seems to me, be of more intrinsic value than another because he or she comes from a close family with loving relatives.⁵⁶

Legislation governing VIS

11.22 The uncertain status, or assumed inadmissibility, of VIS at common law has prompted legislation to provide for their admissibility in several jurisdictions, including the USA,⁵⁷ Canada,⁵⁸ New Zealand,⁵⁹ South Australia,⁶⁰ Western Australia,⁶¹ Victoria⁶² and the Australian Capital Territory.⁶³ A section of the Northern Territory legislation which authorises a sentencing court to receive such information as it thinks fit to enable it to impose the proper sentence would clearly seem wide enough to encompass the receipt of VIS.⁶⁴

Legislation in other Australian jurisdictions

South Australia

11.23 South Australia was the first Australian jurisdiction to provide legislatively for the admissibility of VIS. Section 7 of the *Criminal Law (Sentencing) Act 1988* (SA) places an obligation on the prosecution, for the purpose of "assisting a court to determine sentence for an offence",⁶⁵ to provide the sentencing court with particulars of any injury, loss or damage resulting from the offence. That obligation arises where:

- the particulars are reasonably ascertainable;
- the particulars are not already before the court in evidence or a pre-sentence report; and
- the person suffering the injury, loss or damage has not requested the prosecutor to refrain from presenting the particulars.⁶⁶

Non compliance or insufficient compliance with the section does not affect the validity of any sentence.⁶⁷

11.24 An evaluation of the use of VIS in South Australia was undertaken in 1994.⁶⁸ The evaluation looked at three issues: the effect of VIS on the criminal justice system; the effect of VIS on victim satisfaction with the criminal justice system; and the effect of VIS on sentencing outcomes. As far as sentencing outcomes were concerned, an analysis of aggregate sentencing trends in the higher courts found no evidence that VIS had changed the proportion of offenders receiving a sentence of imprisonment. Nor did it find VIS had changed the length of sentences of imprisonment that offenders received. Nor were VIS identified as a significant variable for discriminating between those cases resulting in sentences of imprisonment and those receiving community-based sanctions.⁶⁹ The overall conclusion of the authors of the study is that its findings will provide support both for those who favour and for those who oppose the admissibility of VIS:

Opponents of VIS will point to the very minimal changes and improvements which have occurred as a result of the introduction of VIS. On the other hand, those in favour will argue that the evaluation dispels fears about their supposed detrimental effects and they will continue to maintain their belief in the presumed benefits of VIS if properly implemented.⁷⁰

Victoria

11.25 The purpose of the *Sentencing (Victim Impact Statement) Act 1994* (Vic) is to require courts in sentencing an offender to have regard to the impact of the crime upon the victim.⁷¹ The Act adds to the statutory list of items to which the *Sentencing Act 1991* (Vic) requires a court to have regard in sentencing an offender, the following two factors: the personal circumstances of any victim of the offence; and any injury, loss or damage resulting directly from the offence.⁷² That injury, loss or damage may be brought to the attention of the court in a VIS made in writing by statutory declaration (or by a combination of such declaration and orally by sworn evidence). The court can rule the whole or any part of the VIS inadmissible. The court may, at the request of the prosecutor

or offender, call a victim who has authored a VIS to give evidence, which will be subject to cross-examination and re-examination.⁷³

11.26 Significantly, the Act defines “victim” as “a person who, or body that, has suffered injury, loss or damage as a direct result of the offence, whether or not that injury, loss or damage was reasonably foreseeable by the offender”.⁷⁴ There are three important points to notice about this definition:

- VIS may be made by a “body” that is not a natural or a legal person.⁷⁵
- “Victim” is intended to cover not only those against whom the offence was committed but also, in principle, all those who have suffered directly from the commission of the offence.⁷⁶
- The inclusion of injury which was not reasonably foreseeable means that, for the purposes of sentencing, the actual consequences of the offence must be taken into account and, to this extent, the common law’s focus on the offender’s culpability is qualified.

Western Australia

11.27 The *Sentencing Act 1995* (WA) provides the legislative base for the admissibility of VIS in Western Australia. The legislation is not unlike the Victorian in effect and only two points need to be noted:

- as in Victoria, the court must have regard to loss, injury or damage even where that was not reasonably foreseeable by the offender;
- unlike Victoria, the definition of “victim” expressly includes the immediate family of the deceased where the offence in question results in a death.⁷⁷

Australian Capital Territory

11.28 The *Acts Revision (Victims of Crime) Act 1994* (ACT) amends the *Crimes Act 1900* by inserting a new Division 1 of Part XII which provides for the admissibility of VIS at sentencing. Three characteristics of the legislation are noteworthy:

- “victim” includes persons financially or psychologically dependent on the deceased where the offence in question results in a death;⁷⁸
- VIS are only to be taken into account where the offender is guilty of an indictable offence for which the maximum penalty is a term of imprisonment of at least 5 years (whether or not any other penalty, including a fine, may be imposed);⁷⁹
- a court is not permitted to draw any inference about the harm suffered by a victim from the failure of the victim to tender a VIS.⁸⁰

New South Wales

11.29 There is no legislative base for VIS in New South Wales. There is, however, an unproclaimed section (s 447C) of the *Crimes Act 1900* (NSW) which allows the District or Supreme Court, if it considers it appropriate to do so, to receive and consider a VIS prior to sentencing a convicted offender for an indictable offence involving an act of actual or threatened violence (including sexual assault).⁸¹ The VIS must be in writing and contain particulars of any injury suffered by any victim as a result of the offence. “Injury” is defined to mean bodily harm, including pregnancy, mental shock and nervous shock. “Victim” means a person against whom the offence was committed or who was a witness to the act of actual or threatened violence, and who has suffered injury.

11.30 The *Sentencing Legislation (Amendment) Bill 1994* (NSW), which lapsed with the dissolution of Parliament before the State election in March 1995, proposed to amend this section (prior to its proclamation) to enable VIS to be given by or on behalf of a family representative of the victim if the victim is dead or under any

incapacity. Another feature of the *Bill* was its provision that the absence of a VIS was not to give rise to an inference that an offence had little or no impact on a victim.

The Commission's tentative view of the general admissibility of VIS

11.31 In approaching the task of deciding whether or not VIS should be admissible in sentencing hearings in New South Wales, the Commission has borne in mind that:

- The developing international norms concerning the place of victims in the criminal justice system do not require the admissibility of VIS.⁸²
- The admissibility of VIS has not evoked a uniform response from other law reform bodies. The Community Law Reform Committee of the Australian Capital Territory has recently supported the admissibility of VIS,⁸³ as, tentatively, had the Australian Law Reform Commission in a Discussion Paper in 1987.⁸⁴ But the Australian Law Reform Commission finally reported against their admissibility in 1988,⁸⁵ as did the Victorian Sentencing Committee.⁸⁶ The Irish Law Reform Commission is divided on the issue.⁸⁷
- Several Australian jurisdictions nevertheless now provide legislatively for the admissibility of VIS.⁸⁸
- Victim support groups are not unanimous in their support of VIS, which formed one of the central debates at the 1994 eighth triennial symposium of the World Society of Victimology.⁸⁹ While two victim support groups in New South Wales have, in preliminary consultations with the Commission, strongly supported the admissibility of VIS at the point of sentencing (especially in homicide cases),⁹⁰ the opposite view has generally been taken by Victim Support, an organisation in the United Kingdom which provides advice and assistance to over 3 million victims of crime each year.⁹¹

11.32 The Commission's tentative view on the general admissibility of VIS has also been informed by arguments advanced in legal, criminological and other literature.⁹² These arguments tend to focus on "moral, penological, and practical concerns rather than legal considerations".⁹³ They fall into three principal groups.

11.33 The first group focuses on the purposes of punishment, particularly retribution.⁹⁴ The argument in favour of admissibility of VIS is that the court will be better able to give proper weight to retribution as a factor in sentencing when the level of harm to the victim is taken into account as an objective measure; an incidental result will be greater proportionality between sentences.⁹⁵ The contrary argument is that emphasis on retribution smacks of mere vengeance, and, as the Full Court of the Federal Court has recently reminded us, "[v]engeance is not to be equated with justice".⁹⁶ Further, sentence disparity is a likely result of concentration on the effect of the offence on the victim,⁹⁷ or of the inflation of the tariff ranges for those offences (eg sexual assault) in which VIS are given in practice.⁹⁸ The "mere vengeance" argument is not supported by empirical work which suggests that victims are more concerned with a wider range of sentencing options (such as greater use of restitution and compensation orders) than simply with more punitive sentences.⁹⁹

11.34 In the Commission's view, reformation is a purpose much more likely to be furthered by the tendering of a VIS which confronts the offender with the consequences of the offence and which could, as with conferencing,¹⁰⁰ prompt the offender to take responsibility for those consequences.¹⁰¹

11.35 The second group of arguments centres on supposed victim satisfaction which comes from participation in the sentencing process by making a VIS.¹⁰² The arguments here vary from appealing to the beneficial role which the making of a VIS can have on victims' healing processes,¹⁰³ to the assertion that the ability to make a VIS will lead to greater co-operation with the criminal justice system and hence lead to its greater efficiency.¹⁰⁴ But empirical evidence tends to demonstrate that victim satisfaction with the criminal justice system comes from contentment with the sentence, not from the ability to make a VIS.¹⁰⁵ Further, there is some empirical support for the argument that a failure to meet a victim's unrealistic expectation of the effect which a VIS will have on the sentence, may result in greater disappointment and disillusionment with the criminal justice system than would

have been the case if no VIS had been tendered.¹⁰⁶ Again, the offender's ability to cross-examine the victim on the VIS may have a deleterious effect on the victim's health and welfare, rather than promote his or her recovery.¹⁰⁷

11.36 The third group of arguments is procedural. The general admissibility of VIS, it is argued, would place intolerable pressure on an already overburdened system, resulting in increased delays and inefficiency. But the evidence from South Australia where (within the parameters of the legislation) VIS are mandatory, is that VIS are not tendered in the vast majority of cases, and, when they are, they do not tend to prolong trials.¹⁰⁸

11.37 The Commission has concluded that the above arguments for and against the admissibility of VIS are inconclusive. Further, in so far as they argue against the general admissibility of VIS, they can largely be met by careful definition of what is meant by a VIS and of the particular circumstances in which VIS should be received.¹⁰⁹

11.38 The Commission is, however, persuaded that, unless VIS are generally admissible, there is always a risk that the full impact of the crime on the victim may not be known to the court at the point of sentencing.¹¹⁰ The point has recently been stressed by Chief Justice Jeffrey Miles of the Supreme Court of the Australian Capital Territory who has written extra-curially:

The assumption may be too lightly made that the sentencing court will be in the possession of all relevant information about the effect on the victim, sufficient to enable the court to impose a just and appropriate sentence. This became particularly obvious to me over a number of years when I was required often to sentence on the basis that the offence had had little effect if any on the victim, only to be required later, sometimes years later, to hear an application for compensation by the victim which clearly established that the effect had been almost catastrophic.¹¹¹

This frustration is echoed in a study of Victorian magistrates in Mention Courts who expressed dissatisfaction with having to guess the precise details of crimes.¹¹² And the recent evaluation of the impact of VIS in South Australia has found that legal professionals are in agreement that the quantity (though not necessarily the quality) of information about victim harm has increased since the introduction of VIS in that State.¹¹³

11.39 Because the Commission believes that a sentencing court should have as much information as is available about the impact of the offence on the victim to assist the court in determining the objective seriousness of the offence, our tentative view is that, in principle, VIS should generally be admissible at sentencing.¹¹⁴

11.40 We have seen, in paragraph 11.19, that the objection to this conclusion is that it introduces an unwarrantable element into the sentencing process which appears to compromise the basis of the imposition of criminal responsibility on an offender. In the Commission's view, this argument is not decisive if the purpose of admitting the VIS in evidence is borne in mind.¹¹⁵ The Commission is only suggesting that VIS should be admissible for the purpose of providing evidence of the objective seriousness of the offence. We are not suggesting that the consequences of the offence should determine the offender's culpability.¹¹⁶ Nor are we suggesting that the consequences of the offence should be allowed to aggravate the sentence or to provide evidence of an aggravating circumstance.¹¹⁷ Further, we are not proposing any alteration in the principle that a sentencer cannot take into account in sentencing circumstances of aggravation which would have warranted conviction for a more serious offence.¹¹⁸ Thus, we do not support the extension of criminal responsibility in Victoria and Western Australia to include liability for injury which was not reasonably foreseeable.¹¹⁹

11.41 The Commission acknowledges the possibility that the purpose for which VIS are admissible could be misunderstood and that, by focusing on the victim's account of the impact of the offence on her or him, the rights of the accused could be unacceptably compromised and sentences increased.¹²⁰ It is important that this should not occur. As Justice Badgery-Parker has recently put it:

[T]he need which the criminal justice system exists to fulfil is the need to interpose between the victim and the criminal an objective instrumentality which, while recognising the seriousness of the crime from the victim's point of view and, in the case of murder, the magnitude of the loss which

the victim's family and friends have sustained, attempts to serve a range of community interests which include but go beyond notions merely of retribution.¹²¹

11.42 In the Commission's view, the dangers to which we have drawn attention in the last paragraph will be avoided if the purpose for which VIS are admissible are clearly spelled out and understood. In this respect, we are encouraged by the evidence from South Australia that the introduction of VIS has not had the effect of lengthening sentences.¹²² We are also encouraged by a Victorian study which suggests that greater information about the actual effects of an offence does not significantly affect sentence outcome, the key determinants remaining offence seriousness and prior record.¹²³

11.43 The Commission is, therefore, tentatively of the view that (in the light of the uncertainties surrounding their admissibility at common law) the admissibility of VIS should be provided for by statute and that such legislation should expressly provide that a VIS is only admissible to afford "some measure of the seriousness of the offence"¹²⁴ in order "to assist the court in deciding the proper sentence for the offender".¹²⁵

Proposal 37

In principle, victim impact statements ought to be generally admissible at sentencing hearings. The purpose of admitting such statements should be to afford a measure of the seriousness of the offence. This purpose should be spelled out in the relevant legislation.

Restrictions on the admissibility of VIS

11.44 The Commission has considered whether or not there should be any exceptions to the general admissibility of VIS. Such exceptions could, conceivably, be dictated either by considerations relating to the efficient management of the criminal justice system or by considerations of principle. Considerations of efficiency could require either that restrictions be placed on the types of cases in which VIS are admissible or that the range of victims who are able to make VIS should be limited. Considerations of principle raise the question of whether or not VIS should be mandatory and admissible in homicide cases.

Types of cases in which VIS ought to be admissible

11.45 Considerations of efficiency may require that the tendering of VIS should be limited to prevent unnecessary delays in sentencing hearings which potentially arise if courts are required to give consideration to VIS in all cases, even those in which VIS can be of little use. VIS could, for example, be restricted generally to "serious" crimes, for empirical evidence from professionals in South Australia suggests that it is for such crimes (rather than for minor offences) that VIS are important.¹²⁶ If so, the restriction could be drawn in three principal ways:

- "offence" could be limited by reference to a defined maximum penalty - the approach of the ACT legislation;¹²⁷
- "offence" could be limited to offences of actual or threatened physical violence, including sexual assault - the approach of the unproclaimed s 447C(6) of the *Crimes Act 1900* (NSW) and the context in which VIS have been admitted at common law in New South Wales;¹²⁸ or
- "injury" could be defined in such a way as to exclude those consequences of the offence which are otherwise already before the court in evidence or in a pre-sentence report - the approach in South Australia.¹²⁹

11.46 The Commission's provisional conclusion is to favour the approach in the South Australian legislation. This approach accords with the rationale of VIS, namely, that of providing the court with evidence of the objective seriousness of the offence. If that evidence is already before the court, a VIS is unnecessary.

11.47 No argument of principle suggests any other limitation on the types of cases in which VIS should be admissible. And the evidence from South Australia is that, in practice, advantage is seldom taken of the

opportunity to tender VIS in the superior courts except in the case of serious crimes, and hardly ever in the magistrates' courts.¹³⁰

Proposal 38

VIS should only be admissible where they furnish the court with particulars that are not already before the court in evidence or in a pre-sentence report.

The definition of "victim" for the purposes of VIS

11.48 For the purposes of VIS, "victim" may be, and has been, defined in a number of different ways. At its narrowest, the "victim" of an offence is the person against whom the offence was committed and who suffers injury as a result of the offence. More broadly, "victim" is expanded to include a person who was a witness to the act of actual or threatened violence and who has suffered, or is likely to suffer, injury as a result of the offence;¹³¹ or to include a person who suffers injury in the course of assisting a police officer in the exercise of the officer's power to arrest the accused person or to take action to prevent the commission of an offence of which the person is accused.¹³² Most expansively, "victim" includes any person who suffers loss or harm as a result of a criminal offence even where that offence was not committed directly against him or her;¹³³ or at least any person who is a member of the immediate family or a dependant of the direct victim.¹³⁴ This is particularly important in cases where the offence results in death.¹³⁵

11.49 In the Commission's view, the efficiency of the criminal justice system is potentially jeopardised if "victim" is widely defined for the purposes of the making of a VIS. Our tentative view is, therefore, that the definition of "victim" should be that in the unproclaimed s 447C(6) of the *Crimes Act 1900* (NSW), that is, the definition should include a person who suffers injury as a result of the offence and who is the person against whom the offence was committed or who was a witness to the act of actual or threatened violence. We would also make provision for a VIS to be made by on behalf of such a victim where the victim is under any incapacity.¹³⁶ This excludes, for reasons which we explain below,¹³⁷ persons who are members of the immediate family or a dependant of a victim in homicide cases.

Proposal 39

For the purpose of VIS, the "victim" of an offence should be the person against whom the offence was committed or who was a witness to the act of actual or threatened violence and who suffers injury as a result of the offence. Provision should be made for a VIS to be made on behalf of a victim who is under any incapacity.

VIS at the victim's option

11.50 The Commission is of the view that, however defined, the victim of a crime has the right, for reasons of privacy or otherwise, to refuse to make a VIS or to request the prosecutor to refrain from presenting the court with details of the injury which the victim has suffered.¹³⁸ For this reason we would not support a sentencing judge's unqualified right to demand VIS from the victim or the prosecution.¹³⁹ The court should not, in any case, draw any inference from the failure to provide a VIS.¹⁴⁰

Proposal 40

The victim should have the option to tender a VIS and the right to request the prosecutor to refrain from presenting the court with details of the injury. The court cannot draw any inference from a failure to provide a VIS.

Homicide cases

11.51 Reservations have been expressed about the admissibility at common law of VIS in homicide cases.¹⁴¹ The Commission shares these reservations. In homicide cases, the consequence of the offence is always known. So is the objective seriousness of the offence. To admit VIS in such cases is ultimately to ask the court to assign

differing values to the lives of homicide victims depending on their worth to their family, friends or community. In the Commission's view, no court can, or ought to, perform such an exercise.¹⁴² Our view is, therefore, that VIS ought to be inadmissible in homicide cases.

11.52 Our tentative conclusion means that VIS will not generally be admissible in cases concerning the redetermination of life sentences under s 13A of the *Sentencing Act 1989* (NSW), since most of the cases which arise under that section involve homicides. In those cases which do not, our tentative view is that the Supreme Court should receive VIS even though they are prepared after the court imposed the life sentence.¹⁴³

Proposal 41

VIS ought not to be admissible in homicide cases.

Some procedural considerations

The preparation of VIS

11.53 The Commission recognises that the quality of a VIS is likely to be improved (and that hence it is likely to be of greater use to the court) if it is prepared with professional assistance (perhaps from the Victims of Crime Bureau which the government is proposing to establish).¹⁴⁴ However, we recognise that there are resource and practical constraints on the professional preparation of VIS. Our preliminary view is that the legislation should not be prescriptive in this respect.

11.54 Regardless of who prepares the VIS, the Commission is of the view that it ought to be signed, or otherwise acknowledged as accurate, by the victim before it is received by the sentencing court.¹⁴⁵

Proposal 42

VIS ought to be signed, or otherwise acknowledged as accurate, by victims before they are received by the sentencing court.

Tendering VIS at sentencing

11.55 The information in a VIS may be presented in a number of forms. Commonly, it is contained in an unsworn written statement. It can also be in the form of an affidavit, perhaps sworn as part of a pre-sentence report.¹⁴⁶ In some United States jurisdictions, it can be an oral statement to the sentencing authority, sometimes referred to as a "right of allocution". The Commission's tentative view is that VIS should be sworn written statements.

11.56 The Commission is further of the view that, in our adversarial system, the only practical way in which VIS can be properly be put before the sentencing court is by the prosecution. We do not believe that this compromises the obligation of the prosecution to act in the public interest rather than be seen as the representative of a private client.¹⁴⁷ In any event, we do not support any suggestion that victims ought to be made parties to criminal proceedings. Research conducted by the Australian Law Reform Commission during its reference on sentencing found little support for such a proposal.¹⁴⁸

Proposal 43

VIS in sworn written form ought to be tendered by the prosecution at sentencing hearings.

The contents of VIS

11.57 The Commission is of the view that a VIS ought to address the actual physical, psychological, social and financial consequences of the offence on the victim. Where the VIS deals with consequences which would normally be addressed by expert evidence (for example, the evidence of doctors or psychiatrists) reports from such witnesses should be attached to the VIS.¹⁴⁹

11.58 The Commission is further of the view that it would be improper for VIS to address the question of the appropriate sentence which ought to be imposed on the offender.¹⁵⁰ This relates both to the type of sanction which ought to be imposed and to its quantum.

Proposal 44

VIS should address the actual physical, psychological, social and financial consequences of the offence on the victim. They should not address the question of the appropriate sentence which ought to be imposed on the offender.

The role of the court and of the defence in relation to VIS

11.59 Because the contents of a VIS may be exaggerated, irrelevant or simply prejudicial to the offender,¹⁵¹ the Commission is of the view that a court should have the right in all cases to rule VIS inadmissible.¹⁵²

11.60 The Commission is also of the view that the defence should always have the right to cross-examine the maker of a VIS on the statements made in it.¹⁵³ This seems to us an inevitable consequence of the adversary system.¹⁵⁴ Representatives of two victims groups have supported defence rights of cross-examination in preliminary consultations with the Commission.¹⁵⁵ We note that the right of cross-examination on VIS has been rarely used in South Australia.¹⁵⁶

Proposal 45

The court should have the discretion to rule VIS inadmissible in any case. The author of a VIS should always be subject to cross-examination on its contents.

VICTIMS AND THE PAROLE PROCESS

11.61 Since 1989 victims or their family representatives have had the opportunity to make submissions to the Offenders Review Board or the Serious Offenders Review Council. There is no statutory basis for this practice. It has been used in only a small number of cases.

11.62 The Serious Offenders Review Council will, in practice, receive written submissions from victims to inform its advice to:

the Commissioner of Corrective Services about classification and pre-release leave of serious offenders, public interest prisoners, and other nominated inmates;

the Offenders Review Board about parole of serious offenders; and

the Supreme Court for the redetermination of a life sentence.¹⁵⁷

While the practice of SORC is only indirectly relevant to sentencing and parole,¹⁵⁸ the Commission is concerned that its practice of receiving written victim submissions could prejudice the rights of offenders. We simply do not understand how the views of victims are generally relevant to the functions of the SORC on matters such as security classification.¹⁵⁹ Our concern is heightened by the fact that submissions made to SORC are not necessarily exposed to scrutiny or challenge by those affected.

11.63 The Offenders Review Board will receive written representations from victims at any time prior to its initial consideration of parole for any offender. Victims of serious offenders may be given leave to address the Board from the floor in a public Review Hearing held when the Board has formed an initial intention to refuse parole. They will not be permitted to give sworn evidence or cross-examine other witnesses. When the Board is aware that a victim or victim's representative wishes to make an oral submission, it is the practice to ensure a Review Hearing takes place so as to afford an opportunity for that submission to be made at a public forum, in the presence of the offender.

11.64 The *Sentencing Legislation (Amendment) Bill 1994* contained a series of proposals which would require the Offenders Review Board to consider submissions from the victim (or a family representative if the victim is dead or incapacitated) before a decision was made to release a "serious offender" on parole. The draft legislation proposed in detail the procedures by which victims or their representatives would be notified of the impending consideration of parole eligibility, and given a reasonable opportunity to make relevant written or oral submissions (or both) at a Review Hearing, whether or not the Board formed an initial intention to grant parole. Similar rights to make submissions to the Board irrespective of their initial intentions would be given to the offender under the proposed Bill. The effect of these procedures would be to ensure the necessity for only one hearing to consider parole eligibility. It was to be left to Regulations to prescribe in detail how victims entitled to benefit from the legislation would be identified; how they would be notified; and when no notice would need to be given to them.

The Commission's tentative view on victims' submission on release of offenders

11.65 The Offenders Review Board makes a parole order only when it has determined, after considering certain information and any relevant matter, that release of the prisoner is appropriate having due regard to the principle that the public interest is of primary importance.¹⁶⁰ The Commission considers that submissions from victims potentially constitute matter relevant to the parole decision and so should be considered by the parole authority.

11.66 The arguments on which this position rests are different from those supporting the admissibility of VIS to a sentencing court. The parole decision is not a matter of punishment, so that the victim's evidence of the harm suffered which better illuminates the objective seriousness of the offence is not relevant. Rather, the parole decision requires consideration of the public interest on the best available information. The victim is an integral part of the public interest and may have information relevant to it which is otherwise unavailable to the Board. The victim's perspective on the "antecedents of the prisoner and any special circumstances of the case" or "any other relevant matter", may not otherwise be available to the Board.¹⁶¹ Examples may be threats made to harm the victim, the victim's family, witnesses, or any other person; the victim's fears relating to the offender's behaviour on release; evidence of the circumstances of the offence which has come to light since, or was not revealed at, the trial; and evidence of the offender's behaviour during the time in custody.

11.67 As with VIS, there is a danger that the purpose of making a victim submission to the ORB could be misunderstood.¹⁶² The only purpose for which victims should be able to make submissions is to inform the statutory criteria on which the Board decides whether to make a parole order. Such submissions should not be an occasion for vengeance or for gratuitous attempts to extend the offender's term of imprisonment.

11.68 It follows that victims are in no different position to any other person who may be able to provide the Board with information relevant to the parole decision. The Commission is satisfied that the existing practice of the Board, outlined in paragraph 11.63, facilitates the reception of such information.

11.69 The Commission is also satisfied that offenders have the opportunity at a review hearing to dispute the contents of any written submission which victims or others have placed before the Board (except submissions withheld under s 49 of the *Sentencing Act 1989* (NSW)).¹⁶³ Offenders do not, however, have the opportunity of cross-examining a victim on an oral unsworn statement made at a review hearing. In practice, this probably does not matter since the Board limits the contents of such statements to the victims' feelings about the release of the offender - that is, to matter which is inherently not generally susceptible to challenge. There is, however, always the possibility that a victim may include matter in an oral statement which the offender may wish to challenge. If the Board continues to allow victims to make oral statements at a review hearing, such statements should, in the Commission's view, be given on oath and subject to cross-examination. We would prefer, however, that all submissions relevant to the parole decisions which are made to the Board, by victims or others, should be sworn, in writing and subject to cross-examination by the offender. We invite submissions on this issue.

Proposal 46

Submissions made to the Offenders Review Board addressing the statutory criteria on which a decision to grant parole is based should be sworn, in writing and subject to cross-examination.

QUESTIONS ARISING IN CHAPTER 11

1. Should VIS be admissible in sentencing hearings in New South Wales?
2. If so, for what purpose?
3. Who should be able to make VIS?
4. Should the decision whether or not to make a VIS always be the option of the person who has the capacity to make one?
5. Who should tender VIS at the sentencing hearing?
6. Should VIS always be in writing or should they be allowed to be presented orally?
7. What should VIS contain? In particular:
 - should they address particulars which are already before the court in evidence or in pre-sentence reports?
 - should they be allowed to address the question of what sentence should be imposed on the offender?
8. Should there be any restrictions on the types of cases in which VIS are admissible? In particular, should VIS be admissible in homicide cases?
9. Should the maker of a VIS always be subject to cross-examination on its contents?
10. Ought victims to be able to make submissions about parole decisions to the Offenders Review Board?
11. What issues should victim submissions on parole address?
12. To what extent ought victims to be subject to cross-examination or questioning, by the prisoner or the Board, about the contents of their submissions?
13. Are there any special rules which ought to apply to victim submissions to the Board, as opposed to submissions from persons generally?

Footnotes

1. On the origins of criminal procedure, see W S Holdsworth, *A History of English Law* (3rd ed, Methuen & Co, 1923) Volume 2 at 197-199, 257, 360; Volume 3 at 620-623.

2. For example, in the eighteenth century more than 80% of indictable offences were prosecuted by the victims of crime or their agents who had significant control over the proceedings: see D Hay, "Controlling the English Prosecutor" (1983) 21 *Osgoode Hall Law Journal* 165 at 167-172. The advantage of control was offset by the trouble and expense of prosecution (see Holdsworth, Volume 15 at 160) and by the danger of neighbourhood reprisal following an unpopular prosecution: see C Emsley, *Crime and Society in England 1750-1900* (Longman, 1987) at 139-140.

3. See Hay at 172-180; J LI J Edwards, *The Law Officers of the Crown* (Sweet & Maxwell, London, 1964) at Chapters 16 and 17. The outlines of the modern system of managing prosecutions were emerging by the end of the nineteenth century: see J F Stephen, *A History of the Criminal Law of England* (Macmillan & Co, 1883) Volume 1 at Chapter XIV. For a statement of the modern law, see R G Fox, *Victorian Criminal Procedure: State*

and *Federal* (Monash Law Book Co-operative, Clayton, 1995) at 27-31. See also G Williams, "The Power to Prosecute" [1955] *Criminal Law Review* 596 and 668.

4. New South Wales, Office of the Director of Public Prosecutions, *Prosecution Policy* (Sydney, December 1995) at 7.

5. Office of the Director of Public Prosecutions, *Prosecution Policy* at 4.

6. Office of the Director of Public Prosecutions, *Prosecution Policy* at 8.

7. Office of the Director of Public Prosecutions, *Prosecution Policy* at 5.

8. The leading foundational study is H von Hentig, *The Criminal and His Victim* (Yale UP, New Haven, 1948).

9. See L Zedner, "Victims" in M Maquire, R Morgan and R Reiner (eds), *The Oxford Handbook of Criminology* (Clarendon Press, Oxford, 1994) at 1227-1229.

10. See A Goodwin, *Services for Victims of Crime in Australia* (NSW Bureau of Crime Statistics and Research, February 1986); Australian Capital Territory, Community Law Reform Committee, *Victims of Crime* (CLRC 6, August 1993) at 22-23.

11. See New South Wales Task Force on Services for the Victims of Crime, *Report and Recommendations* (Sydney, February 1987) at 29.

12. See B L Smith, "Trends in the Victims Rights Movement and Implications for Future Research" (1985) 10 *Victimology* 34 at 35. On "just deserts", see paras 3.3-3.5.

13. USA, President's Task Force on Victims of Crime, *Final Report* (US Government Printing Office, Washington DC, 1982).

14. Canada, Federal-Provincial Task Force on Justice for the Victims of Crime, *Report* (Canadian Government Publishing Centre, Ottawa, 1983).

15. South Australia, Committee of Inquiry on Victims of Crime, *Report* (Attorney-General's Department, Adelaide, January 1981)

16. New South Wales Task Force on Services for the Victims of Crime, *Report and Recommendations* (Sydney, February 1987).

17. Parliament of Victoria, Legal and Constitutional Committee, *Report to Parliament Upon Support Services for Victims of Crime* (Government Printer, Melbourne, 1987).

18. Tasmania, Department of Justice, *Report of the Inter-Departmental Committee on Victims of Crime* (Hobart, December 1989).

19. Australian Capital Territory, Community Law Reform Committee, *Victims of Crime* (CLRC 6, August 1993).

20. Australian Law Reform Commission, *Sentencing of Federal Offenders* (ALRC 15, 1980) para 458; Australian Law Reform Commission, *Sentencing: Procedure* (DP 29, 1987) paras 68-74; Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988) paras 191-192; Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Canadian Government Publishing Centre, 1987) at 68-69, 114, 415-417; Victoria, Attorney-General's Department, *Sentencing: Report of the Victorian Sentencing Committee* (Melbourne, April 1988) Volume 2 at Ch 13; Ireland, Law Reform Commission, *Consultation Paper on Sentencing* (Dublin, March 1993) at 329-337.

21. Consider A Ashworth, "Victim Impact Statements and Sentencing" [1993] *Criminal Law Review* 498 at 499.

22. A/RES/40/34 (29 November 1985) (hereafter *UN Declaration*). The Declaration appears as Appendix H to New South Wales, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (Sydney, December 1995).

23. *UN Declaration* at paras 4-7.

24. *UN Declaration* at paras 8-11.

25. *UN Declaration* paras 12-13.

26. *UN Declaration* paras 14-17.

27. All State Governments have issued Declarations or Charters of Victims' Rights which enumerate administrative guidelines designed to secure the fair treatment of victims by government bureaucracies. The guidelines have legislative force in the ACT (*Victims of Crime Act 1994*) and Western Australia (*Victims of Crimes Act 1994* s 3(1) and Sch 1). The legislation in WA specifically provides that it does not create any legally enforceable rights: *Victims of Crimes Act 1994* s 3(3). See also *Victims of Offences Act 1987* (NZ) and *Sentencing Legislation (Amendment) Bill 1994* (NSW).

28. The Charter appears as Appendix G to New South Wales, Director of Public Prosecutions, *Prosecution Guidelines* (Sydney, December 1995).

29. See N Cowdrey, "The Role of Victims in the Sentencing Process", paper presented at the NSW Law Reform Commission's *Seminar on the Role of Victims in the Sentencing Process*, Parliament House, Sydney, 4 October 1995, at 9-12.

30. Terms of reference for the Council are to: assess all services provided to victims by government agencies and community organisations; co-ordinate services to ensure they are complementary; disseminate information about the services available for victims; identify inadequacies in victim assistance; and advise on establishment and funding of a community based victims agency.

31. SORC's role in this respect may, appropriately, be assumed by the Victims of Crime Bureau when established: see para 11.11.

32. See Hon J Shaw QC, "A Reformist Agenda for NSW" (1995) 33 *Law Society Journal* 64 at 64-65. These suggested reforms reflect the Government's pre-election platform: see para 1.7.

33. On victim impact statements, see paras 11.14-11.60.

34. See generally C J Sumner, "Victim Participation in the Criminal Justice System" (1987) 20 *ANZ Journal of Criminology* 195.

35. See paras 10.24-10.44.

36. *Crimes Act 1900* (NSW) s 447C(2). This section has not been proclaimed.

37. See 11.44-11.60.

38. See New South Wales Charter of Victims' Rights, Appendix G to Office of the Director of Public Prosecutions, *Prosecution Guidelines* (December 1995) under heading "What rights does the Charter confer?".

39. Consider E Erez, L Roeger and F Morgan, *Victim Impact Statements in South Australia: An Evaluation* (Office of Crime Statistics, South Australian Attorney-General's Department, Series C No 6, 1994) at 39 (legal professionals agreed that VIS critical in guilty plea cases).

40. "[I]t is no longer the case (if ever it was) that the Crown has no active role to play in the sentencing process": see New South Wales, Director of Public Prosecutions, *Prosecution Guidelines* (December 1995) at para 17. And

see J Miles, "The Role of the Victim in the Criminal Process: Fairness to the Victim and Fairness to the Accused" (1995) 19 *Criminal Law Journal* 193 at 203.

41. See New South Wales, *Barristers' and Solicitors' Rules* Rule 71, affirmed in New South Wales, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (December 1995) at para 17.

42. For example, *R v Muldoon* (NSW CCA, No 60513/90, 13 December 1990, unreported) at 2 (child victim's reluctance to discuss sexual abuse, anger at accused, shame at what had occurred, anxiety at having to give evidence and relief at having done so - all factors normally assumed without any formal assessment).

43. See *R v Myer* (1984) 35 SASR 137 at 139 per Wells J.

44. *Myer* at 139; *R v Bielaczek* (SC NSW, No CD70212/90, 19 March 1992, Badgery-Parker J, unreported) at 5-6.

45. See Victoria, Attorney-General's Department, *Sentencing: Report of the Victorian Committee* (Melbourne, 1988) Volume 2 at paras 13.3.13-13.3.15.

46. *R v RKB* (NSW CCA, No 60344/1990, 30 June 1992, unreported) per Badgery-Parker J at 5 (McInerney and Loveday JJ agreeing).

47. See paras 5.29-5.37.

48. Especially *R v RKB* (NSW CCA, No 60344/1990, 30 June 1992, Badgery-Parker J (McInerney and Loveday JJ agreeing), unreported) at 5.

49. See especially para 11.59.

50. Except where the consequences of the offence determines the level of its severity, as in the case of dangerous driving where distinctions are drawn between the consequences of "death", "grievous bodily harm" and "impact": see *Crimes Act 1900* (NSW) s 52A.

51. See Victoria, Attorney-General's Department, *Sentencing: Report of the Victorian Committee* (Melbourne, 1988) Volume 2 at para 13.3.9.

52. *Crimes Act 1900* (NSW) s 447C (discussed in paras 11.29-11.30). In *R v Church* (SC, NSW, No 70134/91, 16 July 1993, unreported) at 6-7, Wood J held that the existence of s 447C and the fact that it has not been proclaimed do not give rise to the conclusion that VIS are inadmissible at common law.

53. See esp *R v Church* (NSW, SC, No 70134/91, 16 July 1993, Wood J, unreported) at 5, and authorities there cited. See also *R v Bielaczek* (NSW SC, CD70212/90, 19 March 1992, Badgery-Parker J, unreported). And consider *R v Cowan* (NSW CCA, No 60363/1988, 15 February 1990, unreported); *R v Nichols* (NSW CCA, No 60457/91, 12 November 1991, unreported), *R v PJP* (NSW CCA, No 60025/92, 9 July 1992, unreported); *R v Jones* (1993) 70 A Crim R 449.

54. See *R v Muldoon* (NSW CCA, No 60513/1990, 13 December 1990, unreported). Justice Dunford has informed the Commission that, in sexual abuse cases, VIS prepared by psychologists or social workers are often unhelpful and irrelevant since they merely reproduce a collection of findings on the commonly experienced effects of such abuse: *Submission 7* August 1995.

55. *R v De Souza* (NSW SC, No 70105/94, 10 November 1995, Dunford J, unreported). To the same effect (and for similar reasons) is the decision of the Supreme Court of Victoria in *R v William Penn* (Vic CCA, 9 May 1994, Crockett, Southwell and Vincent JJ, unreported) at 6. Compare two earlier unreported NSW cases which Dunford J distinguishes in *De Souza* at 3. And compare the approach in a recent Queensland cases where the mother of a homicide victim was allowed to read a VIS approved by the judge (Justice de Jersey): see "Court Allows Mum to Confront Son's Killer" *Courier Mail*, 11 November 1995, at 3.

56. *De Souza* at 3.

57. See P A Talbert, "The Relevance of Victim Impact Statements to the Criminal Sentencing Decision" (1988) 36 *UCLA Law Review* 199.
58. See C C Ruby, *Sentencing* (4th ed, Butterworths, Toronto, 1994) at 399-401.
59. As a consequence of the *Victims of Offences Act 1987* s 8(1). See G Hall, "Victim Impact Statements: Sentencing on Thin Ice?" (1992) 15 *New Zealand Universities Law Review* 143.
60. *Criminal Law (Sentencing) Act 1988* (SA) s 7.
61. *Sentencing Act 1995* (WA) s 24-26, replacing *Victims of Crime Act 1994* (WA) s 4-5: see *Sentencing (Consequential Provisions) Bill 1995* (WA) Pt 78.
62. *Sentencing (Victim Impact Statement) Act 1994* (Vic).
63. *Acts Revision (Victims of Crime) Act 1994* (ACT).
64. *Sentencing Act 1995* (NT) s 104(1).
65. *Criminal Law (Sentencing Act) 1988* (SA) s 7(1).
66. *Criminal Law (Sentencing Act) 1988* (SA) s 7(1) and (2).
67. *Criminal Law (Sentencing Act) 1988* (SA) s 7(3).
68. E Erez, L Roeger and F Morgan, *Victim Impact Statements in South Australia: An Evaluation* (Office of Crime Statistics, South Australian Attorney-General's Department, Series C No 6, August 1994). For a discussion see M Hinton, "Expectations Dashed: Victim Impact Statements and the Common Law Approach to Sentencing in South Australia" (1995) 14 *University of Tasmania Law Review* 81.
69. Erez, Roeger and Morgan at Chapter 4.
70. Erez, Roeger and Morgan at viii.
71. *Sentencing (Victim Impact Statement) Act 1994* (Vic) s 1.
72. *Sentencing Act 1991* (Vic) s 5(2)(da) and (db).
73. See generally *Sentencing Act 1991* (Vic) Part 6 Division 1A; *Children and Young Persons Act 1989* (Vic) s 136A.
74. *Sentencing Act 1991* (Vic) s 3 ("victim").
75. The Explanatory Memorandum to the *Bill* stated that the inclusion of "bodies" is intended to cover "situations where the victim of a crime is not a legal person such as an unincorporated association or a government department".
76. The Explanatory Memorandum to the *Bill* reads: "It is intended that the definition of victim may include for example the parent of a child who has been sexually assaulted or the relatives of a murder victim and whether a person falls within the definition of a victim may be determined by the sentencing court on a case by case basis."
77. *Sentencing Act 1995* (WA) s 13.
78. *Crimes Act 1900* (ACT) s 428Y.
79. *Crimes Act 1900* (ACT) s 429AB(4) ("offence").
80. *Crimes Act 1900* (ACT) s 429AB(1)(b).

81. Section 447C was inserted into the *Crimes Act 1900* (NSW) by the *Crimes (Sentencing) Amendment Act 1987* (NSW).
82. Para 6(b) of the United Nations *Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power* requires that the responsiveness of judicial and administrative processes to the needs of victims should be facilitated by “[a]llowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system”. Even assuming that the “personal interests” of the victim are affected by the sentence imposed on the offender, VIS are still only required if they are consistent with the national criminal justice system and do not prejudice the accused.
83. Community Law Reform Committee of the Australian Capital Territory, *Victims of Crime* (CLRC 6, 1993) at paras 106-195.
84. Australian Law Reform Commission, *Sentencing: Procedure* (DP 29, 1987) paras 68-74.
85. Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988) paras 191-192.
86. Victoria, Attorney-General's Department, *Sentencing: Report of the Victorian Sentencing Committee* (Melbourne, April 1988) Volume 2 at Ch 13.
87. Ireland, Law Reform Commission, *Consultation Paper on Sentencing* (Dublin, March 1993) at 337.
88. See paras 11.23-11.28.
89. R Harding, “Equal Time for Victims” *The Bulletin*, 13 September 1995, at 37.
90. Consultation with representatives of Homicide Victims Support Group and Enough is Enough, Sydney, 13 November 1995.
91. See Helen Reeves, “The Growth of Policies and Services for the Victims of Crime in the UK 1974-1994”, Annual Oration 1994 for the South Australian Justice Administration Foundation Inc (Adelaide, 15 August 1994) at 12-13.
92. For a summary of these arguments see G Griffith, *Victim Impact Statements* (NSW Parliamentary Library, Briefing Note 007/95, March 1995) at 19-27.
93. E Erez, “Victim Participation in Sentencing: Rhetoric and Reality” (1990) 18 *Journal of Criminal Justice* 18 at 22.
94. See especially See P A Talbert, “The Relevance of Victim Impact Statements to the Criminal Sentencing Decision” (1988) 36 *UCLA Law Review* 199 at 211-219.
95. See, for example. C J Sumner and A C Sutton, “Implementing Victims’ Rights - An Australian Perspective” (1990) 1 *Journal of the Australasian Society of Victimology* 4 at 6.
96. *R v P* (1992) 39 FCR 276 at 281 per Burchett, Miles and O’Loughlin JJ.
97. Though this has not occurred in South Australia: E Erez, L Roeger and F Morgan, *Victim Impact Statements in South Australia: An Evaluation* (Office of Crime Statistics, South Australian Attorney-General’s Department, Series C No 6, 1994) at 40. But see A Willinge, “The Rights of Offenders and the Needs of Victims: The Challenge of Victim Impact Statements” paper delivered at the Fifth International Criminal Law Congress, Sydney, 26-30 September 1994, at 2-7.
98. See Willinge at 7-9.
99. Erez, Roeger and Morgan at 58.

100. See paras 9.65-9.95.
101. See P A Talbert, "The Relevance of Victim Impact Statements to the Criminal Sentencing Decision" (1988) 36 *UCLA Law Review* 199 at 217-219.
102. Erez, Roeger and Morgan at 3-4.
103. See, for example, E Erez, "Victim Participation in Sentencing: Rhetoric and Reality" (1990) 18 *Journal of Criminal Justice* 18 at 23-24.
104. See, for example, M McLeod, "Victim Participation at Sentencing" (1986) 22 *Criminal Law Bulletin* 501 at 505-507.
105. See E Erez and P Tontodonato, "Victim Participation in the Sentencing and Satisfaction with Justice" (1992) 9 *Justice Quarterly* 394; Erez, Roeger and Morgan at 54-56, 58-59. See also R C Davis and B E Smith "Victim Impact Statements and Victim Satisfaction: An Unfulfilled Promise" (1994) 22 *Journal of Criminal Justice* 1.
106. See Erez, Roeger and Morgan at 57. See also M L Sides QC, *Submission* (10 October 1995) at 3.
107. Consider Erez, Roeger and Morgan at 70 (victims whose input was challenged were angry or upset by the challenge).
108. Erez, Roeger and Morgan at 40-41.
109. See paras 11.44-11.60.
110. See para 11.16.
111. J Miles, "The Role of the Victim in the Criminal Process: Fairness to the Victim and Fairness to the Accused" (1995) 19 *Criminal Law Journal* 193 at 203.
112. See R Douglas and K Laster, *Reforming the Peoples' Court: Victorian Magistrates' Reaction to Change* (Australian Criminology Research Council, 1992) at 56. One reason for the lack of evidence of victim impact in Victorian Magistrates' Courts is that information tends to get "lost" between the time at which the offence is reported to the police and charge is laid: see R Douglas and K Laster, "Systematising Police Summaries in the Mention Court: Victim Impact Statements Through the Back-Door" (School of Law and Legal Studies, La Trobe University, unpublished paper, 1994) at 9-14. For a summary of the research, see "Victims of Efficiency? Restoring Lost Victim Information in the Summary Court" (1994) 6 *Quarterly Journal of the Australian Institute of Criminology* 18
113. E Erez, L Roeger and F Morgan, *Victim Impact Statements in South Australia: An Evaluation* (Office of Crime Statistics, South Australian Attorney-General's Department, Series C No 6, 1994) at Chapter 2.
114. We except homicide cases at paras 11.51-11.52.
115. This point is made in *R v Bielaczek* (SC, NSW, No CD70212/1990, 19 March 1992, unreported) at 8 per Badgery-Parker J.
116. Unless the offence definition specifically so provides, as in the case of dangerous driving: see *Crimes Act 1900* (NSW) s 52A.
117. As seems to be suggested in a note by A L Goodhart in (1964) 80 *Law Quarterly Review* at 18-21.
118. *R v De Simoni* (1981) 147 CLR 383 at 389 per Gibbs CJ, with whom Mason and Murphy JJ agreed. And see para 11.17.
119. See paras 11.25-11.27.

120. See Victoria, Attorney-General's Department, *Sentencing: Report of the Victorian Committee* (Melbourne, 1988) Volume 2 at paras 13.3.19. See also A Willinge, "The Rights of Offenders and the Needs of Victims: The Challenge of Victim Impact Statements" paper delivered at the Fifth International Criminal Law Congress, Sydney, 26-30 September 1994, at 1-16.
121. *R v Cribb* (NSW CCA, No 60892/93, 4 November 1994, unreported) at 26.
122. See para 11.24. See also D G Kilpatrick, R P Tidwell and E Walker, *Final Report on Victims Rights and Services in South Carolina: The Dream, the Law and the Reality* (Crime Victims Research and Treatment Centre, Medical University of South Carolina, 1989) at 24.
123. R Douglas and K Laster, "Systematising Police Summaries in the Mention Court: Victim Impact Statements Through the Back-Door" (School of Law and Legal Studies, La Trobe University, unpublished paper, 1994) at 14-18. The paper is summarised in "Victims of Efficiency? Restoring Lost Victim Information in the Summary Court" (1994) 6 *Quarterly Journal of the Australian Institute of Criminology* 18 at 19.
124. *R v Bielaczek* (NSW SC, CD70212/90, 19 March 1992, Badgery-Parker J, unreported) at 8.
125. See *Victims of Crime Act 1994* (WA) s 4(1).
126. Erez, Roeger and Morgan at 39.
127. *Crimes Act 1900* (ACT) s 429AB(4) ("'offence' means an indictable offence for which the maximum penalty is a term of imprisonment for a term of at least 5 years (whether or not any other penalty, including a fine, may be imposed)").
128. See para 11.20.
129. *Criminal Law (Sentencing) Act 1988* (SA) s 7(1).
130. Erez, Roeger and Morgan at vii, 40-41.
131. See *Crimes Act 1900* (NSW) s 447C(6) ("victim") (this section has not been proclaimed: see para 11.29); *Victims of Crimes Act 1994* (ACT) s 3 ("victim" (c)).
132. *Acts Revision (Victims of Crime) Act 1994* (ACT) s 4 ("victim" (a)(ii)); *Victims of Crimes Act 1994* (ACT) s 3 ("victim" (a)(ii)).
133. *UN Declaration* para 1; *Sentencing (Victim Impact Statement) Act 1994* (Vic) s 4 ("victim").
134. *UN Declaration* para 2; *Acts Revision (Victims of Crime) Act 1994* (ACT) s 4 ("victim" (b)); *Victims of Crimes Act 1994* (ACT) s 3 ("victim" (b)); *Sentencing Act 1995* (WA) s 13(b); *Victims of Offences Act 1987* (NZ) s 2. See also New South Wales, *Charter of Victims' Rights* ("Who is a victim?"); *Sentencing Legislation (Amendment) Bill 1994* (NSW) Sch 3 s 447C(2)A.
135. See 11.51.
136. Compare *Sentencing Legislation (Amendment) Bill 1994* (NSW) Sch 3 proposed s 447C(2A).
137. See 11.51.
138. *Crimes Act 1900* (ACT) s 429AB(2)(a); *Criminal Law (Sentencing) Act 1988* (SA) s 7(2).
139. The judge can demand a VIS from the prosecution in New Zealand: see *Victims of Offences Act 1987* (NZ) s 8(3) (inserted by s 2 of *Victims of Offences Amendment Act 1994*).
140. *Crimes Act 1900* (ACT) s 429AB(1)(b); *Sentencing Legislation (Amendment) Bill 1994* (NSW) Sch 3 s 447C(4A).

141. See para 11.21.

142. See *Booth v Maryland* (1987) 482 US 496 at 506 n 8 per Powell, Brennan, Marshall, Blackmun and Stevens JJ: "We are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions".

143. See *Sentencing Legislation (Amendment) Bill 1994* (NSW) Sch 3 s 447(1A).

144. See para 11.11.

145. See *R v Nicholls* (1991) A Crim R 455 at 458.

146. Tasmania, Department of Justice, *Report of the Inter-Departmental Committee on Victims of Crime* (Hobart, December 1989) at 33.

147. See New South Wales, Director of Public Prosecutions, *Prosecution Policy* (Sydney, December 1995) at 1 ("The Role of the Prosecutor").

148. Australian Law Reform Commission, *Sentencing* (ALRC 44, 1988) at para 191.

149. See *Sentencing Act 1995* (WA) s 25(3). Compare *Sentencing Act 1991* (Vic) s 95E.

150. See *Sentencing Act 1995* (WA) s 25(2). And consider D J Hall, "Victims' Voices in Criminal Court: The Need for Restraint" (1991) 28 *American Criminal Law Review* 233.

151. We note that, in South Australia, VIS are seldom inflammatory, prejudicial or otherwise objectionable: see Erez, Roeger and Morgan at 40.

152. See *Sentencing Act 1991* (Vic) s 95B(2).

153. See *Crimes Act 1900* (ACT) s 429AB(3); *Sentencing Act 1991* (Vic) s 95D(2).

154. Indeed, a "victim oriented" court probably assumes something other than the adversarial system: see N Christie, "Conflicts as Property" (1977) 17 *British Journal of Criminology* 1.

155. Consultation with representatives of Homicide Victims Support Group and Enough is Enough, Sydney, 13 November 1995.

156. Erez, Roeger and Morgan at 41, 70.

157. See *Sentencing Act 1989* (NSW) s 13A(9)(b).

158. See para 1.10.

159. It follows that the Commission has reservations about Schedule 2 of the *Sentencing Legislation (Amendment) Bill 1994* (NSW) which envisaged amendments to the *Prisons Act 1952* (NSW) which would require the Serious Offenders Review Council to consider the public interest when advising the Commissioner of Corrective Services about the classification, placement and programs for serious offenders. SORC would have to take into account, amongst other matters, "the position of and consequences to the victim, including the victim's family". The Review Council would also be required to provide an opportunity for victims or their representatives to make written submissions and consider those before recommending any change to the security classification of the offender which would make the offender eligible for consideration for temporary leave from prison.

160. *Sentencing Act 1989* s 17(1)(a). See paras 7.41-7.44.

161. *Sentencing Act 1989* s 17(1).

162. See para 11.42.

163. See paras 7.59-7.61.

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