



Law Council  
OF AUSTRALIA

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# **ALRC Discussion Paper 70, Sentencing of Federal Offenders**

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Australian Law Reform Commission

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## 1. Introduction

- 1.1. The Australian Law Reform Commission (“ALRC”) released Discussion Paper 70: Sentencing of Federal Offenders (“Discussion Paper”) which has been the culmination of work commenced in July 2004.
- 1.2. The Law Council of Australia (“Law Council”) applauds the work of the ALRC in its review of the federal sentencing regime and is grateful for the opportunity to provide comment on the issues and recommendations contained in the Discussion Paper.
- 1.3. The ALRC has undertaken a review of Part IB of the *Crimes Act 1914*(Cth) (“Crimes Act”) pursuant to its terms of reference to determine “whether it is an appropriate, effective and efficient mechanism for the sentencing, imprisonment, administration and release of federal offenders and what if any changes are desirable”<sup>1</sup>.
- 1.4. Pursuant to the terms of reference, the ALRC review includes a consideration of:
  - Whether equality in sentencing of federal offenders should be maintained between federal offenders serving sentences in different states and territories, or between offenders within the same state and territory, regardless of whether they are state, territory or federal offenders;
  - The characteristics of an efficient, effective and appropriate regime for the administration of federal offenders, and whether this could or should vary according to the place of trial or detention; and
  - Whether there are effective sentencing and administrative regimes in Australia or overseas, including alternative sentencing options, that would be appropriate for adoption or adaptation by the Commonwealth.
- 1.5. The Law Council has reviewed the Discussion Paper and provides its views on issues and recommendations made in two parts. This is Part 1 of the Law Council submission and covers chapters 2-16 of the Discussion Paper. Part 2 will contain a review of the remaining chapters of the Discussion Paper.
- 1.6. The Law Council submission (Parts 1 and 2) is not intended to exhaustively address every issue raised in the Discussion Paper. Instead, the submission is intended to provide a considered view on important issues.

## 2. A Federal Sentencing Act

- 2.1. The Law Council supports the Australian Law Reform Commission’s major reform proposal (Proposal 2-1) for the consolidation of legislative provisions under Commonwealth law dealing with sentencing, administration and release of federal offenders within a new and separate federal sentencing Act. In particular, this would enable those

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<sup>1</sup> ALRC, *Sentencing of Federal Offenders*, Discussion Paper 70 (2005), p.7

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- parts of the *Crimes Act* dealing with sentencing and custodial matters (identified as Parts I, IA, IB, III and VIIC) to be updated and re-located within a single dedicated sentencing Act.
- 2.2. The Law Council largely agrees with the assessment of current provisions, particularly in relation to Part 1B of the *Crimes Act*, as needing significant amendment to achieve greater clarity, transparency, and uniformity of language. The identification of legislative purpose, in an 'objects clause' or similar provision, is also helpful in the interpretation and application of other provisions. The proposals directed at these aspects of federal sentencing legislation (Proposals 2-2, 2-3 and 2-4) are therefore also supported.
  - 2.3. There has been great progress in shifting provisions from the *Crimes Act* and other Commonwealth Acts including the *Customs Act 1901* into the *Criminal Code Act 1995* (Cth). This process has enabled a more systematic framework for general principles and specific rules of criminal law to be largely codified within a single statutory instrument, along with the main Commonwealth offences relating to national security, terrorism, federal property offences, bribery, offences against humanity and war crimes, trafficking and sexual servitude, and computer and telecommunications offences.
  - 2.4. Importantly, the Criminal Code project has also provided a mechanism, facilitated by the co-operative approach of the Model Criminal Code Officers' Committee (MCCOC) of the Standing Committee of Attorneys-General (SCAG), whereby States and Territories have been encouraged to reform their own criminal laws in line with the Commonwealth Code's approach. Examples include recent State and Territory computer offences based on the Commonwealth Code's provisions as added by *Cybercrime Act 2001* (Cth). Moreover, the Australian Capital Territory has largely replicated the general Code provisions relating to criminal responsibility in its *Criminal Code 2002* (ACT), as well as major drug offences revised in harmony with recent Commonwealth amendments.
  - 2.5. The enactment of the *Evidence Act 1995* (Cth) has continued this approach of codifying (or nearly so) evidentiary aspects of federal criminal procedure into a central statute, and it is noted that mirror legislation exists in the form of the *Evidence Act 1995* (NSW) and the *Evidence Act 2001* (Tas). The Commonwealth *Evidence Act* operates in ACT courts as well as Federal courts. As has emerged from the Commission's recent review of these "uniform" Evidence Acts, there is now a considerable movement towards harmonisation in Australia, with the Victorian Law Reform Commission joining in reviewing its own evidentiary provisions within the context of this inquiry.<sup>2</sup>
  - 2.6. The Law Council suggests that consolidation of federal sentencing legislation within a single federal sentencing Act will have a similarly

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<sup>2</sup> The Law Council has made two submission to the ALRC's Inquiry into the Uniform Evidence Acts, dated 4 March 2005 and 4 December 2005.

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beneficial effect in encouraging reform and harmonisation of sentencing laws around Australia. While differences in substantive and procedural criminal laws will continue between the Commonwealth, State and Territory jurisdictions, any moves towards harmonisation based on common principles is to be commended. In this regard, it is important to make clear in legislation what the purposes of sentencing and relevant factors to be taken into account are, based on these principles. The matters of sentencing purposes, factors and options are considered separately below.

### **3. Equality in the Treatment of Federal Offenders**

- 3.1. Fundamental to the rule of law is that like offenders convicted of like offences should be treated alike.
- 3.2. The Law Council submits that there are practical difficulties in achieving this objective particularly in the federal context. As noted by the Commission, ***intra-jurisdictional equality*** (treating offenders sentenced within a State or Territory equally, regardless whether their offences are against State / Territory or Commonwealth law) may conflict with the desire for ***inter-jurisdictional equality*** (treating comparable federal offenders equally, regardless of the State / Territory jurisdiction in which they are serving their sentences).
- 3.3. Further complications arise in the constitutional restraints upon differential treatment of federal offenders under the laws of the States and Territories, which require that differences be justifiable in a way which is consistent generally with the exercise of federal judicial power.<sup>3</sup> As against this, however, intra-jurisdictional inequality in sentencing can contribute to the workload of State and Territory criminal appellate courts, as inconsistency in sentencing is a frequently argued ground in appeals against severity of sentences.
- 3.4. The Law Council's general view is that, while it is difficult to formulate any completely satisfactory solution within the current distribution of responsibility for federal offenders among State and Territory courts, corrections institutions and parole boards, a federal sentencing regime with the enactment of a stand alone Sentencing Act with greater federal administrative machinery including a federal parole board will itself provide an impetus towards harmonisation and therefore reduce the likely extent and significance of regional variation over time.
- 3.5. In particular, a common understanding of the principles and purposes underlying sentencing should serve to produce more comparable court outcomes, while the development of corrections and parole policies in line with these principles will help to ensure, within the constraints of practical and resource-dependent variations, that similar sentencing options are available in relation to federal offenders around Australia.

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<sup>3</sup> See *Leeth v Commonwealth* (1991) 174 CLR 455; *Kruger v Commonwealth* (1997) 190 CLR 1.

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3.6. More particularly, the Law Council supports the Commission's recognition of the aims of broad inter-jurisdictional equality and adherence to federal minimum standards in sentencing, imprisonment, administration and release of federal offenders (Proposal 3-1). The establishment of an Office for the Management of Federal Offenders (OFMO), if properly resourced, will contribute to providing greater consistency of sentencing options among jurisdictions.

#### 4. Purposes of Sentencing

4.1. The recognised purposes of sentencing include:

- **punishment** (to an adequate degree and in proportion to the gravity of the offence and its effect on the victim);
- **deterrence** (both specific to the offender and generally in helping to deter other persons from committing similar crimes);
- **rehabilitation** (which depends critically on the availability of suitable programs within correctional facilities or other supervised sentencing administration regimes); and
- **denunciation** (which necessarily reflects community attitudes to particular types of offending or categories of victim).

4.2. To this traditional list may be added the more positive goal of **restoration** (both of the offender and the community), most notably reflected in the range of "restorative justice" or other "therapeutic" sentencing regimes that have been developed over recent decades.<sup>4</sup> Some of these have found expression in legislation, both in terms of restorative justice and diversionary conferencing, and the various types of Drug Courts that have been established in some jurisdictions.<sup>5</sup>

4.3. There is now considerable research into the effectiveness of such therapeutic sentencing options. While it is noted that drug-dependent offenders who are considered for Drug Court programs are usually charged with State or Territory offences, the recent significant expansion of federal drug offences under the *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005* (Cth) may result in more federal offenders falling within this category.<sup>6</sup> The eligibility of federal offenders for Drug Court and other therapeutic sentencing options needs to be carefully studied, and where appropriate, Commonwealth funding contribution to State and/or Territory programs should be considered.

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<sup>4</sup> See Australian Institute of Criminology (AIC): <http://www.aic.gov.au/rjustice/>

<sup>5</sup> See Australian Institute of Criminology (AIC): [http://www.aic.gov.au/research/drugs/responses/drug\\_courts.html](http://www.aic.gov.au/research/drugs/responses/drug_courts.html)

<sup>6</sup> The Law Council's submission to the Senate Legal and Constitutional Committee's inquiry into the Bill is available at: [http://www.aph.gov.au/senate/committee/legcon\\_ctte/drug\\_offences/index.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/drug_offences/index.htm)

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4.4. The Law Council recognises the importance of each of the purposes of sentencing identified by the Commission, and does not seek to argue that any of these is paramount. However, the Law Council does stress the need for continued research and evaluation of rehabilitative and restorative sentencing options, and urges that every effort be made to ensure that successful programs are available to federal offenders. Proposal 4-1 is supported.

## **5. Principles of Sentencing**

5.1. The fundamental principles that guide sentencing courts in Australia have been developed as much through common law as any legislative prescriptions. In particular, the importance of proportionality and consistency has been repeatedly stressed by the High Court.<sup>7</sup> Some jurisdictions have sought to enhance the consistency of sentencing by enabling superior courts to issue “guideline judgements”, though constitutional difficulties with the application of State guidelines to the sentencing of federal offenders have emerged.<sup>8</sup> It is arguable that the explicit incorporation of principles of sentencing including proportionality and consistency (Proposal 5-1) into federal sentencing legislation will contribute towards the same goals, and this proposal is therefore broadly supported.

5.2. The Law Council cautions, however, that there are some difficulties in taking account of the individualities of each case where those factors relate not only to the particular characteristics of offenders but also of victims. Courts do properly take into account the particular experience of the victim in assessing the gravity of an offence<sup>9</sup>, but this can only be achieved if adequate means exist for courts to receive evidence of impact on victims (whether by means of victim impact statements or otherwise). Thus, the implementation of the principle of individualised justice requires careful consideration of the interests of both offenders and victim. The particular issue of victim impact statements is discussed further below.

## **6. Sentencing Factors**

6.1. The Law Council is aware of the diversity of legislative approaches to the listing of mandatory and discretionary factors to be taken into account in sentencing, and notes the peculiar absence of general deterrence alongside specific deterrence as a factor in s16A(2) of the *Crimes Act 1914* (Cth). This type of consideration, however, may well be more appropriately categorised as a purpose of sentencing than as a factor specifically to be taken into account by a court in imposing a

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<sup>7</sup> See, for example, *Veen v The Queen [No.2]* (1988) 164 CLR 465.

<sup>8</sup> See *Wong v The Queen; Leung v The Queen* [2001] HCA 64 (15 November 2001).

<sup>9</sup> See *R v Fernando* [1999] NSWCCA 66 (14 April 1999).

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sentence, and in any case, s16A does not purport to be an exhaustive listing of relevant factors.

- 6.2. The Law Council broadly supports the Commission's identification of the key factors to be taken into account in sentencing federal offenders (Proposal 6-1), as well as the flexible approach adopted in describing these particular factors as among those which 'may' be relevant. Of course, where there is evidence before a court that relates to any of these factors (e.g. the nature, seriousness and circumstances of the offence), it would be difficult to envisage a circumstance where a court would dismiss the evidence as irrelevant. It may, however, be useful to clarify that the definition of 'relevant evidence' in s55 of the *Evidence Act 1995* (Cth), according to which evidence is relevant if it is capable of "rationally" affecting the assessment of a fact in issue may also apply (subject to s4(2) of that Act) to sentencing proceedings in federal courts and those exercising federal jurisdiction.<sup>10</sup>
- 6.3. Of the factors listed in Proposal 6-1, a few warrant further comment. The current reference in s16A(2)(d) to 'the personal circumstances of the victim of the offence' is clearly inadequate to address the particular effect or impact of the offence on the victim, and so the Law Council supports the expansion of this wording to include 'and the impact of the offence on any victim'. Of course, effective consideration of victim impact requires mechanisms for the provision of relevant information to sentencing courts, and it is therefore important to ensure proper regulation of the use of victim impact statements and similar procedures in courts sentencing federal offenders.<sup>11</sup>
- 6.4. A further issue of interest is the role of contrition in sentencing. The current wording of s16A(2)(f) indicates that it is the existence of contrition *prior* to the sentencing hearing, particularly if expressed practically through "action to make reparation for any injury, loss or damage resulting from the offence" that is of most significance to sentencing courts, as opposed to mere statements of remorse or contrition in defence counsels' sentencing submissions. The removal of this wording in Proposal 6-1 may render this factor somewhat colourless, and indeed may invite the sort of response embodied in some of the views expressed on the place of remorse in sentencing.<sup>12</sup>

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<sup>10</sup> The Dictionary to the *Evidence Act* defines 'criminal proceeding' as including 'a proceeding for the committal of a person for trial or sentence for an offence'.

<sup>11</sup> The Law Council notes that the Meeting of Commonwealth Law Ministers and Senior Officials in Accra, Ghana on 17-20 October 2005 affirmed the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* and finalised its own *Commonwealth Statement of Basic Principles of Justice for Victims of Crime*, which explicitly identifies the need "to allow, to the extent possible and taking into account all of the relevant fair trial interests, the views, if any, of victims to be made known to the court at bail hearings, postponements, sentencing, restitution or any compensation hearings".

<sup>12</sup> For example, the *Howard Law Journal* article by Bagaric and Amarasekara cited on p.122, note 37.

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A sharper focus on remorse for the effect on the victim, as opposed to remorse about getting caught, may allow offender participation in restorative justice and other diversionary measures (even if not entirely successful in obviating the need for a sentence to be imposed) to be more clearly considered as being relevant.

- 6.5. While the Commission has considered the special circumstances of young federal offenders, women and those with particular cultural backgrounds, there is no significant discussion of aged offenders. The issue has arisen in relation to long custodial sentences imposed on aged offenders convicted in relation to serious offences, which can constitute a *de facto* sentence of life imprisonment. While this is a very difficult issue, which must be assessed in individual cases, it may be useful to include such characteristics as offender age and health status as contributing to the 'probable effect on the offender of a particular sentencing option' (Proposal 6-1, para (m)).
- 6.6. Proposals 6-2, 6-3 and 6-4 together attempt to ensure that there be no prescribed generally aggravating or mitigating factors in federal sentencing legislation, but that certain specified matters are *not* to be taken as aggravating or mitigating. This is a difficult balance to maintain, and the effect may well be to cause confusion. For example, the fact that the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character is identified as a possibly relevant factor (Proposal 6-1 para (e)) but this is not to be taken as an aggravating factor where it exists (Proposal 6-3 para (d)). The result is that isolated, singular criminality is potentially mitigating, but sustained, repeated criminality (where admitted or otherwise proved) is not aggravating – but it can be used to offset any leniency that might otherwise be extended.<sup>13</sup> It is difficult to see judicial officers in State and Territory courts being able easily to come to terms with this proposal.
- 6.7. Similar considerations affect the factor expressed in terms of the “mere fact” of antecedent criminal history (proposal 6-3 para (b)). It may be quite difficult to distinguish between the *fact* of antecedent criminal history that does relate to other factors such as injury, loss or damage to victims and beyond any immediate victim (Proposal 6-1 para (g)) and the *mere fact* of antecedent criminal history that does not so relate.
- 6.8. It may be that problems arise from differing uses or understandings of the term 'aggravating'. This terminology is arguably more clear in the context of aggravated forms of offences (e.g. sexual assault on a child or a person to whom the offender owes a special responsibility), which normally carry higher maximum penalties than their non-aggravated counterparts.<sup>14</sup> Other recurring aggravating factors are the presence of

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<sup>13</sup> Compare *Weininger v The Queen* [2003] HCA 14 (2 April 2003).

<sup>14</sup> For example, sexual assault offences in Division 10 of the *Crimes Act 1900* (NSW).

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a weapon or the fact that an offence is committed in company.<sup>15</sup> Similarly, higher maximum penalties attach according to the amount of drugs imported or trafficked.<sup>16</sup>

- 6.9. Where such aggravated offences are under consideration, a sentencing court must necessarily take these matters into account as part of the offence charged and proved, having regard to the maximum penalty applicable to the offence. Any federal sentencing Act will have to distinguish between this situation and the general situation in which a factor (such as remorse or the prospect of rehabilitation) may be taken into account in a way that leads the court to impose a higher sentence than might be imposed in the absence of the factor. Use of the term 'aggravating' in the latter situation is perhaps unhelpful and productive of confusion. The Law Council broadly supports the intentions behind Proposals 6-2, 6-3 and 6-4 but urges further consideration as to the best way of expressing them in legislation.
- 6.10. Proposals 6-5, 6-6, 6-7 and 6-8 are largely clarifications of the existing legal position, and the Law Council does not express a view, except to point out that any list of irrelevant factors in sentencing (Proposal 6-8) will necessarily be incomplete. One factor not mentioned that should generally be regarded as irrelevant to sentence is the degree of media attention that a particular prosecution or offender has attracted.

## **7. Sentencing Options**

- 7.1. Proposals 7-1 to 7-7 are largely concerned with clarifying the existing range of sentencing options that may be applied by State and Territory courts to federal offenders, including dismissal without recording a conviction, release on common law and Griffiths bonds, recognisance and deferred sentencing orders, and short sentences of imprisonment. The Law Council offers no comment on these proposals except to support in general terms the simplification and consistency across jurisdictions of available sentencing options.
- 7.2. In relation to Proposal 7-8, it is clear that this would allow courts dealing with federal offenders to require enrolment in rehabilitation programs, such as those offered to drug-dependent offenders through the various Drug Court schemes in operation in several Australian States. However, for this to be workable as a sentencing option, it needs to be established whether there are suitable rehabilitation and similar programs available to federal offenders. In particular, State and Territory legislation governing the use of these programs must be analysed to determine whether any amendments are required in order to allow federal offenders to be eligible.

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<sup>15</sup> For example, aggravated sexual assault in company in s61JA of the *Crimes Act 1900* (NSW).

<sup>16</sup> For example, importation of border controlled drugs under Division 307 of the *Criminal Code Act 1995* (Cth).

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- 7.3. Proposals 7-9 to 7-13 are largely technical simplifications and the Law Council offers no comment. The Law Council strongly supports the prohibitions in Proposal 7-14 on capital and corporal punishment, imprisonment with hard labour, and any other form of cruel, inhuman or degrading treatment. This is, of course, consistent with Australia's obligations under international instruments such as the International Covenant on Civil and Political Rights (ICCPR).
- 7.4. The Commission's discussion of sentencing hierarchies and penalty conversions raises no issues for the Law Council. The enactment of a dedicated federal sentencing Act should make it somewhat easier for those liable to fines expressed in penalty units to understand what this actually means (the current provision stating that a penalty unit under Commonwealth law equals \$110 is tucked away in s4AA of the *Crimes Act*, while the conversion formula from terms of imprisonment to pecuniary penalties for natural persons and bodies corporate is in s4B).
- 7.5. Proposal 7-15, calling for the facilitation of access by federal offenders to restorative justice programs, is supported. Again, State and Territory legislation governing the use of these programs must be analysed to determine whether any amendments are required in order to allow federal offenders to be eligible.

## **8. Ancillary Orders**

- 8.1. The use of ancillary orders such as those requiring restitution, forfeiture or costs may be appropriate in relation to some federal offences, and there is of course an existing array of civil penalty, forfeiture and confiscation provisions under other Commonwealth Acts, such as the *Proceeds of Crime Act 2002* (Cth). The interaction of a new federal sentencing Act with these existing provisions would need to be considered. The proposal to amend existing statutory language is supported (Proposal 8-1).
- 8.2. The other recommendations proposed in this section are to clarify that a court may order a federal offender to pay compensation for non-economic as well as economic loss (Proposal 8-2) and to preserve rights to institute civil proceedings (Proposal 8-3). Apart from noting that some definitional problems may arise, the Law Council reserves further comment. The call for a federal victim compensation scheme, or at least national co-ordination of State and Territory schemes in relation to federal offences, is supported.

## **9. Determining the Non-Parole Period**

- 9.1. The purpose of setting a non-parole period is not usually made explicit in sentencing legislation, including the *Crimes Act 1914* (Cth). The rationale behind Proposal 9-1, which sees the setting of a non-parole period as part of the sentencing process and thus governed by the same factors that apply to other sentencing tasks, is basically sound. This proposal is supported, subject to the qualification that a court's decision *not* to set a non-parole period raises special considerations, which may require consideration of factors somewhat different from

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those involved in the quantitative determination of a non-parole period where this is being set.

- 9.2. Although perhaps not frequently used in federal sentencing cases<sup>17</sup>, the discretion of a court to decline to set a non-parole period can play an important role in expressing denunciation of particularly serious or heinous crimes. The Law Council notes that Proposal 9-2 retains the discretion to decline to set a non-parole period but requires that the court must expressly decline to do so. Additionally, the court must not set a non-parole period where the term of imprisonment is less than 12 months or the sentence is being suspended. Both of these aspects of the proposal are supported.
- 9.3. An additional requirement that might be considered is that, where a court declines to set a non-parole period, it be required to put on record its reasons for so doing. In some cases in State courts, subsequent legislation has attempted to give force to a sentencing judge's recommendation that a prisoner not be granted parole, as expressed in sentencing remarks.<sup>18</sup> If such recommendations are to be given legal status, they should be accompanied by a clear statement of reasons at the time they are made.
- 9.4. The relationship between non-parole period and head sentence is often a contentious issue, and prescriptive rules for particular offences or generally are not supported by the Law Council. The better approach is to allow sentencing courts wide discretion in setting non-parole periods, in accordance with the principles of sentencing discussed above. While the setting of a "benchmark" of two-thirds of the head sentence may sound like a reasonable aim, the Law Council is not convinced that this should (or even could) be done in federal sentencing legislation – indeed it is unclear what form of statutory words would give expression to such a benchmark, and how if at all sentencing courts would take such a legislative sentencing guideline into account. The Law Council reserves its judgement on this issue until a more detailed proposal is formulated.

## **10. Commencement and Pre-Sentence Custody**

- 10.1. The Commission's proposal (Proposal 10-1) to specify in federal sentencing legislation that a term of imprisonment commences on the day the sentence is imposed, subject to orders dealing with consecutive sentences, is supported.
- 10.2. The practical issue of time spent in custody can be dealt with by declaring such time to be time already served, rather than creating an artificial back-dating of the sentence's commencement. This approach may also simplify more complex situations such as where an appellate court orders a re-trial or varies a sentence. Proposals 10-2 and 10-3

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<sup>17</sup> Though see *Somphon Lee Vanit v The Queen* [1997] HCA 51 (7 November 1997).

<sup>18</sup> See *Baker v The Queen* [2004] HCA 45 (1 October 2004).

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are also supported in principle, though it may be difficult in some cases to determine whether detention or pre-sentence custody is “in connection with” the offence.

## **11. Discounts and Remissions**

11.1. In relation to discounts for guilty pleas or co-operation with law enforcement authorities, the Law Council opposes a prescriptive approach that would increase the likelihood of suspects being placed under pressure to plead guilty or waive their right to silence in return for an expected sentencing discount. However, this is not an argument for abandoning the traditional approach of sentencing courts to take guilty pleas or co-operation into account. Rather, the Law Council supports the retention of judicial discretion to enable guilty pleas or co-operation with authorities to be considered in determining the appropriate sentencing option and the severity of the sentence. In this respect, proposal 11-1 is supported.

11.2. The Law Council supports the further suggestion in Proposal 11-1 that a court be required to specify the quantum of the discount. The Law Council believes that this makes sentencing more transparent as the offender has knowledge of the extent of the reduction. This proposal should it be adopted and executed by government is likely to minimize court delay and costs and serves public policy interests. This is a legitimate exception to the general principle of intuitive synthesis approach developed at common law. That said, in applying an intuitive synthesis approach the remorse aspect of a plea of guilty must still be taken into account.

11.3. The issue of remissions poses particular difficulties in relation to federal offenders as most State and Territory jurisdictions in which federal prisoners serve custodial sentences, no longer have a regime of automatic or earned remissions. It is difficult to see how special rules relating to remissions for federal offenders in State or Territory prisons could be made to work, and any attempt would be likely to exacerbate differences in treatment across jurisdictions. That said, the Law Council of Australia supports proposal 11-5 to allow remission of sentence on the basis of prison emergencies or unforeseen and special circumstances which will foster just outcomes in specific cases.

11.4. The Law Council further believes that there is merit in a system of non-automatic remissions which could be applied to both head sentence and the non-parole period. For instance, where an offender behaves particularly well in prison and demonstrates real rehabilitation, there should be a mechanism available to reduce the non-parole period.

## **12. Sentencing for Multiple Offences**

12.1. Sentencing for multiple offences is another area of considerable complexity in which courts have developed approaches that allow a fair degree of sentencing flexibility. State and Territory legislation tends to be more explicit than current s19 of the *Crimes Act 1914* (Cth) in allowing choice between concurrent and consecutive sentence orders.

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Proposal 12-1, which would remedy this drafting gap in new federal sentencing legislation, is therefore supported.

- 12.2. In relation to Proposal 12-2, whether there should be a presumption for concurrence in relation to multiple offences is more difficult. The strongest case for concurrence arises where the several counts on an indictment are merely technically separate but in substance overlapping, while in other cases, such as where the offences are in substance unrelated or of the same nature but relating to different incidents or episodes, the case for concurrence is far weaker. There is already a totality principle in play (see Proposal 5-1), so that excessive cumulation of sentences can be obviated on other grounds. The Law Council prefers a more discretionary approach,<sup>19</sup> recognising the long experience of courts in sentencing multiple offenders.
- 12.3. It is recognised that there are circumstances in which it is appropriate to aggregate sentences, so as to pronounce a single sentence in relation to the offences proved. This should be the case both for summary and indictable offences, which is currently inadequately provided for in s4K of the *Crimes Act*. Proposals 12-3, 12-4 and 12-5, which address this aspect of federal sentencing, are supported.

### **13. The Sentencing Hearing**

- 13.1. The *right* of an offender to be present at sentencing proceedings is an aspect of natural justice that is reflected in most State and Territory procedural laws. The correlate *requirement* imposed on an offender to be present, subject to pragmatic and recognised exceptions, both promotes the participation of the offender in the sentencing process – e.g. in being able to understand and consent to conditions being imposed – and also safeguards some of the community and victim interests in deterrence and denunciation. There are some difficult issues not addressed by the Commission’s discussion of these points, such as whether an offender must be present during the reading out of a victim impact statement, but otherwise the Law Council is supportive of the measures in Proposal 13-1.
- 13.2. Legal representation is an issue on which the Law Council has consistently expressed firm views. A grave injustice is likely to occur in the absence of appropriate legal representation. This is particularly evident now with a greater incidence of self represented litigants in relation to civil and other matters. The Law Council submits that current research demonstrates the disparity in sentencing outcomes between self represented defendants and defendants with legal representation. Some defendants may make a choice not to have legal representation based on a misconceived belief that they are able to represent himself or herself.

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<sup>19</sup> See the submission on this point by the Criminal Bar Association of Victoria, cited on p.266, note 14.

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- 13.3. Courts must be vigilant to identify sources of unfairness and to take whatever action is necessary, including staying proceedings, in order to prevent abuse of process.<sup>20</sup>
  - 13.4. The intention behind Proposal 13-2 is to give effect to current practice in sentencing courts, whereby adjournment to seek legal representation is considered unnecessary where the defendant has refused or failed to seek representation or where a minor penalty such as a simple fine is being imposed. However, the Law Council's position is that legal representation is critical in ensuring fairness where serious penalties including deprivation of liberty are involved, conditions are being attached to the suspension of a sentence or similar, and where explanation of differing sentencing options and conditions attaching (e.g. home detention) are being considered. The Law Council believes that legal representation should be provided and opposes proposal 13.2.
  - 13.5. It is noted also that the Commission's discussion and Proposal 13-2 do not address the situation (as in the *Dietrich* case itself) where Legal Aid has been sought but refused, or offered only on the basis of a guilty plea. While the provision and adequate funding of Legal Aid services involve legal policy issues somewhat beyond the scope of the Commission's inquiry into federal sentencing, the situation described is one that does confront courts dealing with federal offenders and which requires a principled approach.
  - 13.6. The Law Council urges the Commission to revise Proposal 13-2 including, to take into account the unavailability of legal representation which does not constitute a refusal or failure of a defendant to "exercise the right to legal representation".
  - 13.7. Proposals 13-3 and 13-4, dealing with the explanation of a sentence imposed, along any conditions and relevant non-parole and other periods, are supported. Consideration might also be given to whether rights of appeal against sentence, which are provided for in various State, Territory and Commonwealth legislation, should similarly be the subject of explanation within the terms of Proposal 13-4.
  - 13.8. Proposal 13-5, requiring a copy of sentencing orders to be provided to a federal offender as soon as practicable after being made, is supported. In many cases, this will be at the conclusion of the sentencing proceeding. The Law Council notes that this is often the key opportunity for the lawyer representing the offender to explain to him or her in detail the meaning and effect of the sentence imposed.
  - 13.9. The application of the laws of evidence, particularly having regard to s 4 of the *Evidence Act* 1995 (Cth) and other "uniform" Evidence Acts, was noted above. The Law Council agrees that the current regime and practice of courts in fact-finding in federal sentencing matters is adequate in ensuring expeditious hearings. The *Evidence Act* also

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<sup>20</sup> See *Dietrich v The Queen* (1992) 177 CLR 292.

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allows certain matters to be formally admitted by the defendant at trial<sup>21</sup> and these will normally constitute part of the agreed statement of facts tendered at sentencing. Where factual matters are genuinely in dispute, becoming “facts in issue” in the sentencing proceeding, the definition of relevance to a fact in issue embodied in s 55 of the Act should be understood to apply to the admission of any evidence tendered to prove or disprove the matters.

- 13.10. The Law Council submits that Proposal 13-5 should provide a positive reference to s 4(2) and (3) of the Evidence Act 1995 (Cth). This approach has been adopted in NSW and is considered to work effectively.
- 13.11. Overall proposal 13-6 is a welcome reform intended to codify in federal legislation the common law position on standard of proof in sentencing proceedings. However, it is silent as to onus of proof. The Law Council recommends that the Commission review the provisions in ss 141 – 142 of the *Evidence Act 1995 (Cth)* and corresponding provisions in the *Criminal Code Act 1995 (Cth)* to clarify the extent to which these reflect the common law position described (p.299 of the Discussion Paper). In addition, it should also be made clear that paragraph (a) of Proposal 13-6 is not intended to prevent a court from taking into account facts adverse to the interests of the offender where those facts have been formally admitted at trial (e.g. under s184 of the *Evidence Act*) or by means of an agreed statement of facts tendered in the sentencing proceeding.
- 13.12. The Law Council has reservations in relation to proposal 13-6(b) in two respects. Firstly, the Law Council believes that a court must take into account a fact that is favorable to the interests of the offender if it is satisfied that the fact has been proved on the balance of probabilities.
- 13.13. The Law Council also believes that there may be circumstances which are favorable to an offender in respect of which the prosecution should bear the burden to prove beyond reasonable doubt. For example, if an offender asserts duress (in the non-technical sense) and meets an evidentiary onus, the onus should be on the Crown to rebut the claim of duress beyond reasonable doubt.
- 13.14. The Law Council also considers that the burden of proving beyond reasonable doubt in relation to determining guilt should also apply to fact determination for the purposes of sentencing. The situation may be different in respect of facts that do not relate to the offence (for example, provision of assistance) but the golden thread of the criminal law should apply to sentencing as it does to determination of guilt.
- 13.15. Proposal 13-7, dealing with the standard of proof applying to ancillary orders for restitution or compensation, is supported.

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<sup>21</sup> See s184 of the *Evidence Act 1995 (Cth)*.

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13.16. The Law Council does not here express a view on the suggestions, recently given prominence in the media and in legal circles, that a consultative role be considered for juries in relation to sentencing. In any case, it should be remembered that juries already have no role in the vast majority of criminal proceedings, as these are uncontested and/or heard in courts of summary jurisdiction.

#### **14. Victim Impact Statements and Pre-Sentence Reports**

14.1. The role of victim impact statements was discussed earlier in this submission (par 6.3). With proper safeguards, victim impact statements can inform the court of matters relevant to sentencing in a way consistent with the principles and purposes of the sentencing process. Benefits include the therapeutic effect on victims (and in some cases, offenders), enhanced understanding by courts of the consequences of offences, opportunity for restitutionary and restorative options to be raised, and to some extent, enhancement of the deterrent effect of the sentencing process. Dangers to be guarded against include the introduction of untested allegations of other criminality or misconduct, content which may be highly prejudicial, offensive, overly emotive or of low probative value, and added complexity and time required to deal with the presentation and consideration of such statements. On balance, the Law Council supports the use of victim impact statements in federal sentencing proceedings, subject to proper regulation and safeguards against abuse.<sup>22</sup> Proposal 14-1 is supported.

14.2. Pre-sentence reports serve an important function in informing the court, in an efficient and generally well-regulated manner, of important factual considerations which may be relevant to the likely effects and utility of any sentence imposed. They are often indispensable in assessing the suitability for offenders for particular sentencing options such as community-based corrections. The Law Council therefore supports Proposal 14-2, aimed at making comprehensive provision for the use of pre-sentence reports in the sentencing of federal offenders.

#### **15. A Sentence Indication Scheme**

15.1. The Law Council supports the recommendation to introduce a sentencing indication scheme to assist defendants. This scheme may produce additional benefit including reducing the length of cases and

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<sup>22</sup> As noted earlier, the Meeting of Commonwealth Law Ministers and Senior Officials in Accra, Ghana on 17-20 October 2005 affirmed the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* and finalised its own *Commonwealth Statement of Basic Principles of Justice for Victims of Crime*, which explicitly identifies the need “to allow, to the extent possible and taking into account all of the relevant fair trial interests, the views, if any, of victims to be made known to the court at bail hearings, postponements, sentencing, restitution or any compensation hearings”.

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the associated defence, prosecution and court costs and may relieve courts of some of the workload.

- 15.2. A properly regulated sentencing indication scheme can assist offenders in making informed choices without placing undue pressure on innocent defendants to plead guilty. The Law Council submits that there is merit in specifying the discount that is likely to accompany a guilty plea.
- 15.3. The Law Council agrees with the ALRC that a sentencing indication should be available at the request of the defendant. This facility should not be available to the prosecutor as permitting the prosecution to have access to a sentencing indication scheme defeats the purpose of the scheme.
- 15.4. The Law Council believes that proper cautioning should accompany any sentencing indication including that it is not binding on the court (which will normally hear all the evidence and submissions by both counsel before making its decision on sentence), may be rejected by the defendant, and does not preclude the prosecution from subsequently appealing against the sentence.