PROPOSALS FOR SENTENCING REFORM IN THE NORTHERN TERRITORY

[The Hon Justice Dean Mildren]

Introduction

No subject is likely to arouse more public controversy than sentencing reform. It is an area which attracts media attention, often at an asinine level. The Australian Law Reform Commission's Interim Report Nº 15,[1] published in 1980 observed, p23:

> "Such data as does exist about public attitudes to crime and punishment suggest that the public is ill-informed about most aspects of the administration of criminal justice. The primary source of their information about criminal justice matters is the news media. But newspapers and broadcasting are heavily biased in their reporting towards dramatic and sensational events. Although particularly atrocious crimes, or so called 'crime waves,' may arouse momentary punitiveness, in general disinterest and apathy prevail."[2]

Similarly, there is a public perception that judges are too lenient in sentencing people convicted of serious crimes.[3] There is evidence that there is growing public support for more severe penalties. Despite the virtual abolition of the death penalty in all Australian jurisdictions, in a poll conducted by the ALRC in April 1979, only 24 per cent of Australians nationally considered that the death penalty should not be imposed in any circumstances.[4] Professor Duncan Chappell has observed that there is both public and political pressure in Australia to increase the severity of punishment, under the guise of 'truth in sentencing.'[5] In New South Wales, which

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1 "Sentencing of Federal Offenders."

2 A recent example is the reported march of more than 20,000 demonstrators on the Western Australian Parliament in August 1991 demanding tougher sanctions for juvenile offenders following extensive media interest in limited aspects of the problem of juvenile crime in Western Australia.

3 In 1977, a poll showed that ⅔ of respondents thought judges were too lenient in sentencing people convicted of serious crime: see ALRC Report Nº 15, para 54.

4 ALRC Report Nº 15, para 53.

5 *Sentencing of Offenders: A Consideration of the Issues of Severity, Consistency and Cost* (1992) 66 ALJ 423 at 432.

introduced truth in sentencing policies in 1989, incarceration rates have increased from a daily average of 4,000 in April 1989 to over 5,500 by late 1990.[7] In terms of the rate per 100,000 persons, NSW's incarceration rate has steadily increased from 68.8 to 96.0 from January 1988 to December 1990.[8] Similarly, Australia's incarceration rate per 100,000 persons has steadily climbed from a rate of 67.3 in 1980 to 78.0 in 1990, with the most significant increases occurring since 1986.[9] However more long term statistics do not necessarily indicate that there is reason, as yet, for great concern. In fact rates lower than 78 have been relatively unusual in the latter half of this century. The rate between 1955 and 1975 was never below 78, and topped 100 in the years 1967-1971, the highest rates since prior to 1910.[10] Compared with other countries, a rate of 78 is at an acceptable level, being roughly consistent with countries such as France, Austria, Portugal, Spain, Switzerland and Denmark, and considerably less than the United States which has the world's highest incarceration rate, presently well in excess of 400, and expected to top 500 this year.[11] However, the Northern Territory is in a different position, as appears from the following table over the page:[12]

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[6] *Sentencing Act 1989 (NSW)*

[7] See Prof D Chappell, *supra,* (footnote 5) at pp427, 429.

[8] *Ibid*, p428.

[9] *Ibid*, p425.

[10] *Crimes Trends in Twentieth-Century Australia*, Satyanshu K Mukherjee, Appendix G, pp190-1.

[11] See Chappell, *op. cit.*, pp430-1.

[12] Department of Correctional Services (NT) Annual Report for year ending 30 June 1992, p44.

Year	Imprisonment Rate per 100,000 people		
	Northern Territory	Australia	Ratio NT:Aust
1989	230	74	3.1
1990	258	78	3.3
1991	299	81	3.7
1992	286	82 (est)	3.5

Since Federation, only Western Australia in the period before 1910 has had incarceration rates exceeding 230, which probably reflected severe sentences then imposed on Aborigines.[13] Similar, or worse, imprisonment rates overseas have been experienced recently in the former Soviet Union (268) South Africa (333) and the United States.[14] Undoubtedly the Territory's high rate is attributed in large measure to excessive incarceration rates for Aborigines. In the years 1989/90 to 1991/92, Aboriginals (including Torres Strait Islanders) represented about 78 per cent of the total prison population, whereas Aboriginals represented only about 22 per cent of the total population.[15] Yet there is no evidence that Aboriginals receive longer prison sentences for the same offences than non-Aboriginals,[16] and, if sentences for Aboriginals truly reflected the policy of the courts to treat

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[13] S K Mukerjee, *op. cit.*, p98.

[14] See footnote 11.

[15] Department of Correctional Services (NT) Annual Report for the year ending 30 June 1992, p51.

[16] See Royal Commission Into Aboriginal Deaths in Custody, National Report, Vol 1, para 8.2.4.

Aboriginality as a mitigating factor in many instances, there ought to be overall shorter sentences for the same offences committed by Aboriginals than for non-Aboriginal offenders. Because the Territory's statistical methodology changed in 1991 it is difficult to correlate figures prior to 1991 from the published data, but it seems likely that imprisonment rates for Aboriginals in the Territory has been 70 per cent or higher of the total prison population at least since 1985, and probably for much longer.[18] Figures released in the Department of Correctional Services' 1992 Annual Report show that Aboriginals in custody represent a consistently higher proportion of offenders in most offence categories. Also of significance is the fact that 72 per cent of all prisoners held in that period spent less than twelve months in prison. It is apparent that most prisoners, including Aboriginals, were sentenced by courts of Summary Jurisdiction for relatively minor offences. Some of the larger groups include the following:

Offence	Aboriginals	Non Aboriginals	Combined Total	Combined Total as % of Total Offenders
Assault	173	20	193	14.44%
Break, enter and steal	129	33	162	12.11%
DUI/Exceed .08	161	21	182	13.61%
Drive Disqualified	115	6	121	9.05 %
Justice Procedures	157	36	193	14.44%

On the other hand, convictions for serious offences resulting in sentences of imprisonment in the same period remained relatively low (see table page 5):

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[17] See for example, *R v Minor* (1991-92) 79 NTR 1.

[18] See Department of Correctional Services Annual Report for year ending 30 June 1986, p37; see also Bill Tyler *Penology on an Australian Frontier*, published in (1993) 4 Journal of Northern Territory History, 23 at 34, footnote 17.

Offence	Aboriginals	Non Aboriginals	Combined Total	Combined Total as % of all prisoners
Murder	0	5	5	0.56%
Manslaughter	5	0	5	0.56%
Dangerous Act	8	4	12	1.34%
Sex Offences	20	3	23	2.56%
Armed Robbery	0	1	1	0.11%
Robbery	2	5	7	0.78%
Drugs	7	28	35	3.9%

Great care has to be taken before reaching conclusions based solely on this kind of statistical information. High imprisonment rates do not necessarily mean high crime rates. Nor is it possible to deduce the causes of crime from statistical information with any degree of confidence. Statistics of this kind may be useful to test conclusions reached as a result of knowledge gained as a result of considerable personal involvement in or study of numerous individual cases; alternatively, they may give rise to further enquiry if the statistics do not conform to national trends or otherwise give rise to unexpected results. Experience suggests that the causes of crime are multi-faceted. On the one hand there may be direct causes, more often referred to by lawyers as 'motives,' such as greed, jealousy, and revenge. In other cases, there may be no motive, such as the careless driver whose inattention results in a conviction under 154 of the *Code*. Then there are indirect causes, such as socio-economic factors: for example, poverty, unemployment, and lack of education. Sometimes these factors are present throughout the whole community. The motor car, for instance, has become the usual means of transport throughout Australia. This has meant a whole raft of new laws dealing with road safety. As the number of motor cars on the roads have increased, so have the number of offences directly involving the use of the motor car. Most of these offences would be called 'traffic offences,' but the motor car can also be used to facilitate other offences, e.g. drug dealing and armed robbery. Other factors may be more localised, for example, petrol sniffing. Usually several different factors are involved. A not untypical homicide of an Aboriginal woman by an Aboriginal man may involve

direct causes such as jealousy, anger, and over-consumption of alcohol, indirect causes, such as poverty, unemployment, lack of education, and increased mobility; and also cultural factors, such as attitudes by males towards chastisement of females by the infliction of physical punishment for perceived wrongs. Nor can one rely too heavily on published statistics concerning so-called 'crime rates.' Such statistics can be distorted by factors such as over-policing or under-policing, the level of victim complaint, and prosecution policies. Nevertheless, so far as the Northern Territory is concerned, some conclusions seem to be obvious. The vast majority of persons in the Northern Territory who are charged with serious offences warranting imprisonment are male single unemployed Aboriginals between the ages of 17-35 with a drink problem of varying degrees of severity, and it is therefore this group most likely to be affected by any proposed changes to sentencing policies. For this reason, any changes made must bear this group firmly in mind.

Another observation that should be made is that the conclusions and recommendations made by bodies such as the Australian Law Reform Commission on the laws and policies relating to sentencing options are based mainly on jurisprudence, economics and philosophy, rather than on hard data aimed at crime prevention. The rejection of the more severe forms of sentencing options, such as the death penalty and corporal punishment is justifiable on philosophical grounds, although other reasons are offered. In its interim report, the ALRC said at para 62:

> "In those jurisdictions which have abolished the death penalty, including Australia, there is no evidence of any significant increase in the number of formerly capital crimes. Comparisons or crime rates in countries which have retained or abolished the death penalty also provide no basis for the belief that the threat of mortal punishment is an effective deterrent to serious crimes."[19]

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[19] The same type of argument is advanced in relation to corporal punishment: see ALRC Interim Report Nº 15, para 63. The death penalty still exists in Australia for treason: see *Crimes Act 1914 (Cth)*,s24.

There are difficulties with this line of argument. In the first place, the same can also be said about imprisonment as a deterrent.[20] In the second place, there is equally no satisfactory data to show that the death penalty is not an effective deterrent. In the end result, the more convincing arguments rest on philosophical, moral, and historical considerations, as well as reliance upon international pressure. The consequence of this more humane approach to punishment is that imprisonment remains, and is likely to continue to remain, the ultimate sanction for serious breaches of the criminal law.

This realisation has lead the ALRC to the recommendation that imprisonment as a sanction should be reserved only for the most serious cases:[21]

> "The need to retain a sanction of sufficient severity for the most serious crime is the basis for the Commission's acceptance of the continuation of imprisonment as a punishment option. Imprisonment should therefore be a sanction applied only in cases of the most serious crimes. The value of imprisonment as a punishment option will be enhanced by its being used more sparingly. If imprisonment continues to be used as frequently as it presently is for a broad range of crimes, a community perception will tend to arise that serious cases of serious offences are not being punished appropriately even by the imposition of a custodial order. Pressure will arise for unacceptable punishments to be re-introduced. An overuse of imprisonment will reinforce this pressure."

This argument, it is submitted, is not soundly based. It treats all custodial orders equally, when plainly they are not. There is simply no comparison between a sentence of three months, and sentence of ten years. Moreover, it assumes that the majority of the public are incapable of being sufficiently informed as to why a court may impose what might appear to be a lenient, non-custodial sentence for a serious offence on the one hand, yet impose a sentence of imprisonment for a serious case of a relatively minor offence on the other. Also, it apparently provides for no sanction for default of court orders, unless, of course, default of court orders are, by definition, "cases of the most serious crimes." Similarly, is the repeat offender

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[20] In fact, the ALRC said so itself in its final report: see *Sentencing*, ALRC Report Nº 44, para 48. See also Chappell, *op. cit.*, at 432.

[21] See ALRC Report Nº 44, para 52.

if ever, does it become one?

The 'Just Deserts' argument

In 1953, Prof Norval Morris, in a paper presented at the 8th Australian Legal Convention,[22] argued that:

> "... there were gross and unjust variations in sentences imposed on convicted criminals, variations explicable neither by the severity of the crime nor by the personality of the criminal ... that the judiciary had failed to develop a coherent theory of sentencing and that if judges did not do so sentencing discretion would steadily be removed from their hands."[23]

Notwithstanding that the courts have, both before and since then, developed theories of sentencing which cover a wide variety of topics, Prof Morris' warning is as pertinent today as it was forty years ago.

The rationale of legislative interference in the sentencing process is not necessarily consistent. Reform has been justified, not so much by empirical data, but on whatever theoretical position has found acceptance at the time. In the United States, the 'just deserts' theory propounded by von Hirsch has been translated into practice by legislation designed to limit discretion and produce more determinate sentences.[24] The Australian Law Reform Commission Report Nº 44 described this theory succinctly thus:

> "The philosophy of retribution is enjoying a renaissance under the 'fresh guise' of the concept of 'just deserts.' This is a view that convicted criminals deserve to be punished."[25]

> "The notion of just deserts, as envisaged by von Hirsch, includes not only the belief that sentences should be more determinate but also that punishment should be proportional to the gravity of the crime. Fairness in sentencing

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[22] (1953) 27 ALJ 186.

[23] See Norval Morris *Sentencing and Parole* (1977) 51 ALJ 523.

[24] See ALRC Interim Report Nº 15, para 43.

[25] *Ibid*, para 41.

includes both certainty and proportionality: the sentence should fit the crime. However, those who favour the 'just deserts' approach are not in agreement about the amount of punishment which should be inflicted upon offenders. There is no doubt that a significant number of those urging that offenders 'be punished' also believe that they should be punished more severely than at present."[26]

The Australian Law Reform Commission concluded in its interim report,[27] (a position it maintained in its final report[28]):

"66. ***The Principles of Desert and Economy***. While recognising the substantial disillusionment in contemporary Australian society about rehabilitation as a chief aim of criminal punishment, and the renaissance of support for 'just deserts' and retribution, we are not persuaded that any single rationale of punishment can or should predominate in guiding reforms of Commonwealth law. Punishment may, in varying degrees, take into account elements such as deterrence, the denunciation of abhorrent behaviour, the reinforcement of community moral and ethical values and, perhaps with less confidence than in the past and within the limits required by 'just deserts', reformation of the offender and his restoration to society. The importance of the concept of 'just deserts' is that it draws attention to the need for fairness in the imposition of punishment. Punishment for persons convicted of Federal offences should, as far as possible, be certain, consistent and proportional to the gravity of the crime for which an offender is being sentenced. The principle of economy in the imposition of punishment limits the amount of punishment that may be imposed to the minimum necessary to achieve community objectives. The community objective of curbing crime is not achieved simply through the imposition of severe penalties. The use of imprisonment is especially ineffective for this purpose. Such evidence as is available does not support the popular assumption that severe penalties diminish crime. Evaluative studies which have been carried out in this century do not provide any support for the idea that a return to the severe penological principles and practice of the past will provide more effective protection for the public."

It is interesting to compare these conclusions with the dictum of Napier CJ in *Webb v O'Sullivan* [1952] SASR 65 at 66:

"The courts should endeavour to make the punishment fit the crime, and the

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[26] *Ibid*, para 44.

[27] *Ibid*, para 66.

[28] ALRC Report Nº 44, paras 27, 28 and 29.

circumstances of the offence as fully as may be. Our first concern is the protection of the public, but, subject to that, the court should lean towards mercy. We ought not to award the maximum which the offence will warrant, but rather the minimum which is consistent with a due regard for the public interest."[29]

Similar views are not hard to find in the literature on sentencing, although the precise words used may not be the same.[30] In truth, sentencing is not, and cannot have any mathematical precision. It is an art, not a science. As the High Court observed in *Veen v The Queen (№ 2)* [1987-8] 164 CLR 465 at 476 per Mason CJ, and Brennan and Toohey JJ:

> "However, sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions."

Arguments can be, and have been, advanced criticising each of these elements. For example, the Australian Law Reform Commission has rejected general deterrence as a goal in sentencing, because, so it is said, "it is unjust to impose a sentence on one person as an example or to deter others from committing crimes."[31] Whilst not rejecting the other goals, the Commission observed:

> "The accumulated evidence of nearly two centuries, however, shows that prison fails to achieve any of these objectives, on a widespread and consistent basis. In practice, the function of prison today is largely

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[29] Cited with approval by King CJ, Mitchell J concurring in *Yardley v Betts* [1979] 1 A Crim R 329 at 333; (1979) 22 SASR 108 at 113.

[30] See for example, Ruby *Sentencing*, 2nd Ed, pp283-5; Fox & Frieberg *Sentencing, State and Federal Law in Victoria*, pp352-3; Hines *Judicial Discretion in Sentencing by Judges and Magistrates*, para 5.9; George P Fletcher *Rethinking Criminal Law*, pp414-20; *R v Bibi* [1980] Crim L R 732-3; [1980] 1 WLR 1193.

[31] ALRC Report № 44, para 37 and 51.

punishment."[32]

Nevertheless, general deterrence as a sentencing goal has many adherents[33] and in my view a sound argument exists for maintaining the existing goals, if for no other reason, than nothing better has emerged despite the criticisms that are made of them. To say that the purpose of imprisonment is punishment is to say nothing of value. As King CJ observed in *Yardley v Betts* [1979] 1 A Crim R 329 at 333 "the courts must assume, although evidence is wanting, that the sentences which they impose have the effect of deterring at least some people from committing crime" and of course, this will be so only if those minded to commit crime believe that there is a high degree of probability that they will be caught. Similarly, the other goals of punishment may have varying degrees of effectiveness depending upon the circumstances.

There are two other factors that emerge in the current debate about sentencing reform. The first is a perceived lack of consistency in the standards of punishment applied by the courts. The second is the cost of keeping an individual in prison compared with the cost of non-custodial dispositions. As to the inconsistency argument, like rape, it is an allegation easily made and difficult to refute. Of course parity in sentencing is a well established sentencing principle, but like all principles, there are recognised exceptions. The danger is, as Prof Duncan Chappell observes:[34]

> "Under our system of sentencing, inherited from the British Common Law a determination of what sentence is 'necessary in the circumstances' remains largely a matter for judicial discretion, guided by whatever legislative

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[32] *Ibid*, para 48.

[33] See for example Lord Parker LCJ, quoted by Hines, *supra*, para 5.13. It is interesting to observe the ALRC's Offender Survey at para 60 of its interim report Nº 15. Whilst 76 per cent of offenders thought others would not be deterred by the sentences they were serving, 60 per cent of them agreed that they would "think twice about doing a job (committing an offence) when I'm released."

[34] (1992) 66 ALJ at 430.

> tariffs set by the precedent of judicial peers or superiors. This system permits great individualisation of punishment, but also produces ... troubling disparities in the sentencing decision-making process.
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> Confronted by such disparities, and driven by the principles of 'just deserts', legislatures throughout the United States have opted in recent years for prescriptive rather than discretionary sentencing. Using techniques ranging from mandatory sentences to prescriptive sentencing grids these legislatures have made dramatic inroads into the discretionary havens judicial officers have occupied for so long. At the same time, maximum penalties have been increased substantially for many categories of crime whilst executions have resumed for those sentenced to death."

There is, with respect, much common sense in the view of Murphy J in *Griffiths v The Queen* [1976-77] 137 CLR 293 at 330:

> "The massive failure and enormous cost of traditional sentencing approaches has aroused worldwide concern and this has been reflected in numerous conferences, inquiries and learned articles. Uniformity in sentencing has some virtue in avoiding apparent injustice of unequal treatment. But, as the operation of criminal justice is characterised by gross inconsistencies and inequalities, the disadvantages of maintaining uniformity as a primary objective should be realised. Emphasis on and adherence more or less to a scale of penalties for various offences (the tariff system) exerts pressure on the primary judges to impose more severe sentences than they would sometimes wish and in practice inhibits desirable experimentation and exploration of alternative courses contemplated by the legislature."

Nevertheless, lack of uniformity is a persistent theme of reformers and critics, and is not limited to punishments for crimes of a like nature whether committed by co-offenders or not, and whether committed in the same or in different jurisdictions. A common type of complaint is the comparison made between someone sent to prison for a drink-driving offence, whilst a sex-offender is released on a bond, the implication being that the drink-driver's sentence was too severe, and the sex-offender's too lenient. The fact is that the two such cases often cannot be compared in this simplistic way, but there remains a nagging concern that perhaps the criticism might be just. Even so, neither minimum sentences nor prescriptive sentencing grids are the answer. Such solutions are likely to produce their own example of massive disparity and, in any event, as the ALRC observed "tend to

undermine consistency in the consideration by sentencers of aspects of offences, or particular characteristics of the offender. They may also tend to result in perverse jury verdicts or encourage technical defences. They may well result in unduly harsh sentences being imposed."[35]

The cost argument, on the other hand, points in the direction of leniency. The cost to the Northern Territory of keeping a prisoner in gaol was in 1991-92 $111 per day on average, excluding capital costs.[36] No reliable data is presently available for costing community based orders, but daily rates are thought to range from $5 to $20 depending on the type of order.[37] The average per capita cost per prisoner in 1987 was $32,580 per annum, whereas the cost per capita for non-custodial orders was then $3,650.[38] Without doubt, cost alone provides a compelling reason to find alternative solutions to imprisonment, and for reducing the length of time a person should spend in prison before being released.

Proposals for the Future — The "Five Year Plan"

In March 1993 the Northern Territory Department of Correctional Services released its "5 Year Plan." The Minister's statement refers to providing community protection by a philosophy consisting of four main elements:

1. "the diversion of offenders from the criminal justice system and in particular the custodial sanction";
2. the reduction of the cost of the system by community service orders aimed at community restitution and enhancement of community property;

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[35] ALRC Report №44, para 58.

[36] Department of Correctional Services Annual Report year ending 30 June 1992, p48.

[37] *Ibid,* p50.

[38] Figures taken from Chappell, *op. cit.*, pp434-5. It is not clear whether these figures include capital costs or not; nor is it clear if revenue raised by prisoners is brought into account.

and the overall requirements of a rapidly changing multi-cultural society";

4. on-going consultation with employees of the Department to tap the "deep reservoirs of knowledge and experience [which] exist throughout the Correctional Services work-force."

Other important points made by the Minister were:

> "The Government believes future efforts must be concentrated on using prison as a sanction of last resort, maintaining offenders in the community and seeking alternatives to imprisonment.
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> Offenders who commit violent offences, who are a danger to the community, or who continue to have disregard for the rights and property of others, will go to prison."

Amongst the "major initiatives" being undertake, with a target date of 1993, is the following statement (p.6):

> "... in conjunction with the Review of Sentencing Legislation, being undertaken by the Department of Law, examine the introduction of legislation to provide — longer non-parole periods for serious sexual offenders; early release schemes for less serious offenders; imprisonment and detention as sanctions of last resort; abolition of remissions for prisoners and the ability to link Home Detention with Parole in certain cases."

Under the heading "Programme: Aboriginal Initiatives" is the following:

> "Primary Objective: Reduce the over-representation of Aboriginal people in the criminal justice system."

So far as sentencing options are concerned (and quite properly other strategies are also considered) the main strategy offered is to "provide Community Service Order assessment capability to all Northern Territory Police Stations to reduce further the number of Aboriginal people imprisoned for fine default." (p.8).

Under the heading "Programme: Adult Conditional Liberty" the primary objective is stated to be to "maximise the use of community-based sentencing alternatives to

significantly reduce Northern Territory imprisonment rates." (p.14). Amongst the strategies being developed are the following:

1. "sponsor legislation to reduce the number of offenders placed on probation by requiring sentencing authorities to obtain an assessment in all cases where probation is being considered"; (p.14)
2. "expand [home detention] to Aboriginal offenders through the wider involvement of remote Aboriginal communities"; (p.15)
3. "introduce Home Detention as a 'back end' sentencing option." (p.15).

Strategies 1 and 2 above are also strategies being considered in relation to juvenile offenders (pp15-16).

The "5 Year Plan" also addresses a number of other strategies aimed at reducing the number of persons held on remand, ensuring compliance with parole conditions, providing detainee work, education and recreation (with emphasis on physical fitness, self-discipline etc) as well as a host of other broad initiatives, not relevant to sentencing reform, and which I will not therefore mention. The importance of this document is that it provides, so far as I am aware, the first hint as to what is the likely agenda for sentencing reform in the Territory. The only other information available is that in the last couple of years the then Attorney-General indicated in his public statements to the media an interest in "truth in sentencing." The only "new" sentencing initiative discussed in the Attorney-General's "Sexual Abuse Discussion Paper" issued in July 1992 is a proposal for legislation limiting the power of the courts to impose a sentence involving participation in a "treatment program" (see pp193-194). As yet, the Department of Law's review of sentencing legislation has not resulted in any published recommendations.

Some Comments and Suggestions

1. "Review of sentencing legislation": longer prison terms?

   Whilst it is difficult to comment without knowing precisely what is proposed, if "truth in sentencing" is a desired aim, care must be taken to ensure that

this does not have the effect, as it apparently has had in NSW, of resulting in an average increase in the lengths of sentences generally. Such a result would be inconsistent with the overall aims of the "5 Year Plan." Whilst details are lacking, the proposal to abolish remissions for prisoners is a particularly curious one, and points towards a policy of longer effective sentences, not particularly aimed at serious crimes only. The present government is already of the record as stating that it will not consider release on licence for prisoners sentenced to life imprisonment before twenty years has been served. This is the longest period in Australia for such cases. The proposals suggest that in keeping with known policy in this area, that policies are likely to be developed aimed at longer periods of actual custody where the offences are serious; the danger is that these policies may well go beyond this. The proposal to abolish remissions altogether is not in keeping with the recommendations of the Australian Law Reform Commission's final report which recommended the abolition of general remissions, but the retention of earned remissions, provided that the maximum amount of earned remissions is limited to 20 per cent of the custodial order, and to maximise its value as an incentive, the amount of the non-parole period would also be reduced by the amount of remissions earned.[39] Under the Commission's scheme, the non-parole period is to be fixed at 70 per cent of the head sentence unless there are exceptional circumstances warranting a shorter period.[40] Presumably if the full amount of remissions is earned, the non-parole period would be reduced to 50 per cent of the head sentence. These recommendations were not accepted by the Commonwealth government.

It is clear that the effect of the Territory's proposals for abolition of remissions would be to encourage the fixing of longer non-parole periods. Whilst technically the reform of remissions, or the abolition of remissions, is more a matter of prison reform than sentencing reform, there is a well

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[39] ALRC Report Nº 44, para 86.

[40] *Ibid*, para 82.

known link under the existing Northern Territory legal system between remissions and non-parole periods,[41] and this must not be lost sight of if it not proposed to change the present law relating to the fixing of non-parole periods.

It is further submitted that, if it is the intention to bring about a general increase in sentences actually to be served for all crimes warranting imprisonment, and not just the more serious crimes, this should occur through the policy of the legislature being clearly stated in legislation and should not occur as a perhaps unintended consequence of sentencing or prison reform in other areas. It is only in this way that the objectives of the government can be subjected to proper public scrutiny and debate, and the will of the Parliament can be properly discerned by judges. There are obvious difficulties in drafting legislation to achieve such an aim in a clear fashion if injustice is to be avoided. Experiments in minimum terms and sentencing grids in the United States as means towards similar ends have been condemned in Australia because they do not avoid injustice. The Australian Law Reform Commission's criticisms have already been noted. Professor Norval Morris described this type of legislation as "unprincipled and morally insensible; it cannot encompass the moral distinctions between crimes essential to a just and rational sentencing policy. It is based on an absurd belief in the sentimental leniency of the judiciary, a belief fostered by some elements of the press ..."[42] The Territory government will also be aware of the resistance to s37 of the *Misuse of Drugs Act* which initially proposed, whilst in Bill form, a minimum term of twenty-eight days actual imprisonment for so-called more serious drug offences. This resistance lead to a redrafting of s37 to give the court some discretion. In its present form s37 has been interpreted to require a court to impose the penalty of

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[41] See, for example, *R v Mulholland* (1991) 1 NTLR 1 at 9. The effect the abolition of remissions in Queensland has had on non-parole periods is illustrated by *Leeth v The Queen* [1992] 67 ALJR 167.

[42] See Norval Morris *Sentencing and Parole* (1977) 51 ALJ 523 at 529.

imprisonment for the minimum term unless the court is satisfied that there are particular circumstances warranting a non-custodial disposition, i.e. the court starts with the proposition that gaol is warranted, and then looks to see if there are particular reasons why it is not.[43] This type of approach may work a reasonable compromise, and enable justice to be done by mitigating harsh penalties where appropriate.

The *Misuse of Drugs Act* experiment also shows the difficulty in defining what is a serious offence and what is not. In *R v Hume*[44] Kearney J observed that he would require clearer language than the wording of s37 to compel him to the conclusion that Parliament intended that the average Humpty Doo cannabis cultivator, growing a few seedlings for his own use, should be subjected to the minimum term of twenty-eight days actual imprisonment.

The only other minimum presently prescribed by Northern Territory law is life imprisonment for murder, for which no non-parole period is permitted to be set by a sentencing court. The consequence of this situation is that pleas of guilty to murder are exceptionally rare. Even if there is no defence, the Crown will be put to proof, adding to the work of the courts and the cost of litigation to legal aid agencies and the office of the DPP alike. Appeals against conviction are taken almost as of course even if the prospects of success are negligible. In the result, there is a strong tendency towards plea bargaining. It is particularly noticeable that the Aboriginals are usually offered manslaughter by prosecutors; the same is not so evident for non-Aboriginals. Of the convictions in 1991-92 for homicide, all five persons convicted of murder were non-Aboriginals. Minimum terms place undue power in the hands of prosecuting authorities. It is evident to me that

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[43] See *Fejo v Ilett* (1991) 1 NTLR 27; *Maynard v O'Brien* (1991) 78 NTR 16; *Duthie v Smith* (1992) 83 NTR 21.

[44] Unreported, Supreme Court of the Northern Territory, 7/2/92 per Kearney J.

manslaughter is sometimes offered to Aboriginal defendants by prosecutors on fairly flimsy grounds, e.g. because the accused was intoxicated, the Crown accepts that there is a reasonable doubt about the accused's intent. Similar leniency towards non-Aboriginals by prosecutors is not so evident. Whilst not wishing to appear critical of leniency towards Aboriginals by prosecutors, non-Aboriginals may feel aggrieved that they have not received the same treatment. If the means used to separate "serious" from "non-serious" offences depends upon a single criterion such as the maximum penalty fixed by statute, e.g. life, or twenty-five years imprisonment, similar problems are likely to emerge. It is not hard to envisage circumstances where this is likely to lead to injustice. For example, cultivating twenty or more cannabis plants carries a maximum of twenty-five years. Moreover, there are over twenty-five offences, apart from murder, which presently carry non-mandatory life imprisonment in the Territory.[45] These offences cover a wide variety of offences against the person, as well as some property offences. It is not unknown for offences carrying life to be dealt with by bonds sometimes involving immediate release, other times involving release after a short term of imprisonment. Examples may occasionally be found in cases of arson, manslaughter, rape, and certain aggravated assaults.

The suggestion that there be longer non-parole terms for serious sexual offenders is mystifying, particularly as the abolition of remissions will have this effect anyway. There is no suggestion of this in the Attorney-General's recently released Sexual Abuse Discussion Paper. To the extent that it is proposed to differentiate sexual offenders from other offenders the problem

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[45] Life imprisonment is provided by the *Misuse of Drugs Act*, for serious drug offences by ss5(2)(a)(i),5(2)(b)(i),8(2)(a), and attempts to commit those offences (s38). The *Criminal Code* fixes non-mandatory life in a wide ranging variety of cases involving offences against the person and against property: see ss54,97(2),110,111,165,167,168,170,175,176,177,178,179, 180,192(1),192(4),211(1),211(2),212(1),212(3)213(1),213(6),216(1),216(3), 239,242,244,251(1),251(4). Attempts carry a maximum of seven years (s278(1)) but accessories to the offences listed above also face life (s12(3)).

equivalent of rape (which includes non-consensual cunnilingus, sodomy, and fellatio) is the only sexual offence which carries life imprisonment.[46] Penalties for other sexual offences vary from two years,[47] 3 years,[48] 4 years,[49] 5 years,[50] 7 years,[51] 10 years,[52] and 14 years.[53] Further, the rationale for longer non-parole periods for such offenders is unexplained. There are currently provisions in the *Criminal Code* which provide a procedure for dealing with detention of persons unable to control their sexual instincts.[54] So far these provisions have never been used, despite an invitation by the Court of Criminal Appeal in two recent cases which went on Crown appeal,[55] probably because the only remedy available to the court is to impose detention for the Administrator's pleasure.[56] There is a natural reluctance to seek what is, in effect, an indeterminate sentence, and rightly so. If offends the principle that persons should be incarcerated only for the crimes he has committed, not for the crimes they might commit in the future. Prof Morris observes that stringent limits placed on sentencing discretions by legislatures have always met with non-enforcement or

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[46] *Criminal Code*,ss192(1) and (4).

[47] *Criminal Code*,ss131(1),133,137A(1).

[48] *Criminal Code*,ss131(1),139.

[49] *Criminal Code*,ss132(1) and (2).

[50] *Criminal Code*,ss131(1) and (2).

[51] *Criminal Code*,ss127(1),128(1),129(2),130(1),135(1),192(1),201.

[52] *Criminal Code*,s137(1).

[53] *Criminal Code*,ss127(1),127(2),128(1),128(2),129(1),129(2),134(1) 192(1),192(2),192(3).

[54] *Criminal Code*,ss401,402,403,404.

[55] *R v Mulholland* (1991) 1 NTLR 1; *R v Babui* (1991) 1 NTLR 139.

[56] *Criminal Code*,s401(3).

nullification:

> "This is neither surprising nor deplorable. It is not surprising because the pervasive influence of plea bargaining inevitably ensures the reduction of charges for offences carrying severe mandatory penalties. It is not deplorable because persistent confusion about the goals of criminal law enforcement and indefiniteness regarding the purposes of punishment make sentencing discretion essential. The enforcement of arbitrary penal equations is both irrational and inequitable."[57]

It is submitted that there is no point in setting out guidelines in sentencing legislation similar to s16 of the Commonwealth *Crimes Act*. This is only telling your grandmother how to suck eggs. Nor are legislative restrictions upon the sentencing discretion of judges likely to prove effective. Nor is "truth in sentencing" along the lines advocated by the ALRC or enacted in NSW a desirable model. There is in fact no evidence that Northern Territory judges regularly impose sentences which are too lenient. If this does occur in the odd case, the DPP has a right of appeal. If the range of sentences in a particular area, e.g. armed robbery, is too light, prosecutors can produce statistics to prove such a case.[58] Comparative sentencing ranges from other jurisdictions is available in published literature and is also sometimes referred to.[59] In my submission there are already sufficient safeguards against undue leniency in sentencing. In addition, the court keeps records of its own sentences. It is the practice for a sentencing judge to give reasons. These are transcribed and are often referred to by counsel in submissions.

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[57] Norval Morris, *supra*, p529.

[58] This recently occurred in *R v Lewfatt* (Mildren J) Reasons, unreported, 27/4/93.

[59] For example, in *R v Bird* (1988) 56 NTR 17, the Court of Criminal Appeal considered sentencing cases from other jurisdictions based on details obtained from Carter's *Sentencing Digest*. This practice has been recently approved by the High Court in *Leeth v The Queen* (1992) 67 ALJR 167. In *Miles v R* (Court of Criminal Appeal, 18/11/92 the sentencing judge had also referred extensively to interstate sentences. The court did not disapprove of this, but said the judge ought to have heard submissions from counsel before relying on that material.

sentence passed for the guidance of judges to ensure reasonable uniformity so far as that can be achieved. There are now sufficient cases to establish a range in most common offences dealt with by the Supreme Court. Ultimately that information should be computerised and made available to the profession. The office of the DPP and most legal aid agencies, in my experience, also keep their own statistics concerning sentencing ranges, both in the Supreme Court and the Court of Summary Jurisdiction. There is now usually a wealth of information available to the sentencer. Added to all of this is the fact that the role of the prosecutor in assisting the court in avoiding appellable error in sentencing has also changed.[60] Prosecutors are now expected to indicate if a particular disposition would involve sentencing error due to manifest inadequacy.

Of course it is still open to the legislature to attempt to prescribe heavier sentences. The difficulty is how to achieve this without unduly hampering sentencing discretion to the stage where either injustices occur or the legislative provisions are either ignored or circumvented. Experience teaches that this is really an unattainable goal. No matter what solutions are proposed, the criticisms of Morris and the ALRC will remain. In the end there is but one answer — trust the judges and counsel involved to do their jobs properly, and provide information and systems to ensure they do.

2. Home Detention

This is a sentencing option which has been pioneered in Australia by the Northern Territory. Despite rejection of it by the ALRC,[61] this option has proven to be successful. In its 1991-92 Annual Report, the Department of Correctional Services reported a 90 per cent success rate.[62] The

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[60] See *R v Tait & Bartley* (1979) 24 ALR 473.

[61] ALRC Report Nº 44, paras 130-131.

[62] p79.

Department's proposals to widen its use are, in my opinion, worthy of serious consideration. The existing legislation is too restrictive:

(a) Home detention is not currently used in combination with other sentencing options. For example, home detention should be available as part of an early release scheme or as an option by a sentencer wishing to structure a sentence involving a period in prison, followed by release for a period on home detention, as well as other options. Presumably this is what the Department has in mind when it refers to "back-end" sentencing options.

(b) It is presently rarely available for Aboriginals. Long before home detention was available, the court had devised its own form of 'home detention' for Aboriginals living in communities, *viz,* exile as a condition of a bond. The proposal to expand home detention for Aboriginals is overdue. It would not be out of place for the legislature to provide that whenever a head sentence of imprisonment of twelve months or less is appropriate, the courts must consider and reject, home detention first.[63] Home detention should only be able to be rejected on specific grounds, such as non-compliance with the qualifying conditions for the imposition of such an order[64] or factors such as previous non-compliance with such an order. Sections 19F(6) and (9) of the *Criminal Law (Conditional Release of Offenders) Act* presently take away any discretion the court may have to impose concurrent or partly concurrent sentences where an order for committal is made in respect of a sentence suspended by a home detention order and where a

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[63] c.f. the solution adopted by s17B of the *Crimes Act 1914 (Cth)*: (court not to imprison in relation to specific offences unless there are exceptional circumstances).

[64] Presently contained in s19B of the *Criminal Law (Conditional Release of Offenders) Act*.

committed during the period of the order; nor is any time served under the order tc count. These provisions are unduly harsh and should be abolished.

3. Reduction of the number of offenders on probation

The thrust of this submission appears to be to discourage the use of suspended sentences under s5 of the *Criminal Law (Conditional Release of Offenders) Act* by requiring an assessment report to the sentencing authority first. I am not sure what purpose this is designed to achieve. It is not necessary, at present, for a court to obtain a report before ordering a supervised bond. If administrative obstacles are to be put into place to discourage supervised bonds, one consequence is that the courts may be tempted to simply order release on unsupervised bonds. This is hardly desirable. The other alternatives, home detention and community service orders presently require assessments which delay the sentencing process, provide temptation to ignore these possibilities, and add to costs and judicial irritation. Given the cost savings to the community in having fewer persons imprisoned, more funds should be made available to ensure prompt reporting on qualifying conditions. Unless this is done, I consider this proposal may well prove to be counter-productive, unworkable and inconsistent with the other stated policy aims.

On the other hand, what may be concerning the Department is the high level of prisoners incarcerated for what is called in the statistics "Justice Procedures." The present figures indicate that 14.44 per cent of all prisoners are held under that category, and Aboriginals outweigh non-Aboriginals by a ratio of in excess of 3:1. The statistics do not clarify what is meant precisely by 'justice procedures' but presumably they include committal orders for breaches of bonds, breaches of HDOs, and breaches of CSOs. As there is a high completion/observance rate with the latter type of order, presumably the

majority of cases relate to breaches of bonds.[65] The Department's objective may therefore not be as sinister as it appears at first blush. There is merit in the suggestion that the court should have available to it material from experts on the probability that an offender is likely to comply with the conditions of a bond, and that certain conditions are appropriate and others inappropriate. At the same time the attention of the court could be drawn to other options, such as CSOs or home detention, which might have a better chance of success. However, the main problem is to avoid the delay to which I have referred.

Another difficulty is that the court is not usually provided with all the material reports needed at the time when a matter is first dealt with as a plea. In the case of pre-sentence reports, these cannot be ordered until a conviction is recorded.[66] There is in fact no power for a court to order a report relating to community service or home detention; the legislation simply states that those orders cannot be made without a report from the Director or a Probation Officer. It is submitted that these provisions are all inappropriate in that the court's sentencing discretion is theoretically able to be circumscribed by the lack of cooperation from the executive. Moreover, there are concerns that, until an offender has pleaded guilty, any factual information given to a probation officer by the offender may be able to be used against him at his trial should he change his mind about his plea. In the Supreme Court, there may not be any formal indictment until just before the accused is called upon to plead. There may be negotiations in train as to the charge to be preferred. It ought to be possible for those representing an

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[65] The figures do not include fine defaulters and as only sentenced prisoners are dealt with in the figures, prisoners on remand are not included under the heading of "Justice Procedures."

[66] *Criminal Code*,s395. The *Criminal Law (Conditional Release of Offenders) Act* does not in fact provide for the court to make an order for a report under s19B or s21 of that Act. There is therefore no legal reason why reports under those sections cannot be obtained before a plea is entered, but that is not often done in practice.

the date set for the hearing of a plea without a court order and without risk that the information gained can be used at trial if the matter does not proceed by way of plea. There should be a power to order reports if it is necessary to do so.

In remote communities visited by magistrates there is very often no resident member of the Department available to prepare reports. The proposal seeks to address this by providing "Community Order Service assessment capability to all Northern Territory Police Stations." Presumably what is envisaged is that reports will be able to be prepared by the local constabulary. I consider that there is considerable merit in this proposal.

4. Other initiatives not discussed

I consider that there are a number of other initiatives, so far not apparently on the agenda, that need to be considered. The object should be to confer maximum flexibility in the availability of sentencing options.

4.1 S4 bonds

Presently only a magistrate has power to release a person on a bond without proceeding to a conviction under s4 of the *Criminal Law (Conditional Release of Offenders) Act*. A Supreme Court judge has no such power unless the offender is a juvenile.[67] In the case of young offenders jointly charged, some of whom are juveniles and some of whom are not, this gives rise to particular difficulty; but there are other circumstances which occasionally arise where such a disposition would be appropriate.

[67] *Juvenile Justice Act*,s53(1)(d) read with s39(1)(a). S392 of the *Criminal Code* only enables a discharge without punishment and without recording a conviction.

4.2 CSOs as conditions of bonds

In *Kurungaiyi v Garner* (1991) 1 NTLR 34, Asche CJ held that community service may be imposed as a condition of a bond. This meant that the provisions of the *Criminal Law (Conditional Release of Offenders) Act* did not apply to that service. The end result of *Kurungaiyi v Garner* is that the courts have more flexibility, but I do not think it is desirable that flexibility is achieved in this way. Section 20 should be amended to permit a CSO whether or not a conviction is recorded, and whether or not a sentence of imprisonment is also imposed but suspended, either wholly or partly, and whether or not a home detention order is also made. At present there is power to impose community service of up to 120 hours without passing sentence, by making an attendance order under Part IV of the *Criminal Law (Conditional Release of Offenders) Act*, but it is still necessary to record a conviction. These latter provisions would be unnecessary if this proposal were to be adopted and could be repealed.

4.3 Fixing non-parole periods for life sentences

Presently a non-parole period may not be set whenever life imprisonment is imposed.[68] The result is an indeterminate sentence with release available only at the discretion of the executive.[69] The problems involved in providing for indeterminate sentences have already been noted. Without wishing to suggest that the prerogative of mercy should be abolished, the executive's role in determining release dates should be confined to the Parole Board.

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[68] *Parole of Prisoners Act*,s4(3)(b).

[69] *Criminal Code*,ss398 and 432.

At present, the decisions of the Parole Board are not reviewable, and the Board is not required to afford natural justice or fairness in exercising its powers.[70] The ALRC has recommended that release be automatic at the time when the non-parole period expires, except in the case of life sentences where the decision to release should remain discretionary.[71] Whilst not necessarily embracing the ALRC's solutions, which in any event were not accepted when the *Crimes Act 1914 (Cth)* was amended, it is hard to defend a system which permits some to be released and others not, at the absolute discretion of a Board, whose decisions are non-reviewable and do not have to be fair. This inevitably leads to a perception of unfairness in the system. Similarly, a parole order may be revoked by the Chairman without any system available for review. It is submitted that there ought to be, at the least, some machinery in place to ensure basic fairness to prisoners refused parole or whose parole is revoked. Given that there are cost implications as well as practical difficulties in having prisoners brought before the Board, at the very least a prisoner should know of the Board's reasons (or proposed reasons where a parole order may not be made) and be given some opportunity to put in a written submission, with a limited right to appeal to the Supreme Court if the Board's decision is unreasonable, fraudulently obtained, or wrong in law.[72] There should in other words, be a presumption in favour of parole. I do not consider that

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[70] *Parole of Prisoners Act*,s3HA.

[71] ALRC Report Nº 44 paras 83 and 84.

[72] Federal prisoners presently have rights of a hearing *de novo* on appeal to a Supreme Court from an order revoking a parole order: see s19AY of the *Crimes Act*. Appeals against a decision not to release a federal prisoner on parole lie to the Federal Court pursuant to s4 of the *Administrative Decisions (Judicial Review) Act*. The grounds available under s5 would appear to be appropriate.

conditions attached to a parole order should be reviewable on appeal.

4.5 Detention/Imprisonment for juveniles

At present it is not clear whether a court which intends to incarcerate a juvenile has the power to order both detention and imprisonment. There ought to be power to impose upon a juvenile a total sentence consisting of detention until aged eighteen followed by a term of imprisonment. At the moment, juveniles convicted of serious offences which call for lengthy head sentences probably must be sentenced to imprisonment. This is undesirable, not only because it means imprisoning children in an adults' prison whilst they are young, but because extreme difficulties are placed in the way of a sentencer considering a suspended sentence with conditional release after a short period in custody. In the UK, there are specific legislative provisions remedying this problem.[73]

4.6 Sentencing alternatives for the intellectually disabled and mentally ill

Following the ALRC's report, the Commonwealth passed legislation contained in Div 9 of Part 1B of the *Crimes Act* enabling the court to make "hospital orders", "psychiatric probation orders" and "program probation orders." Although detention in a hospital is the consequence of a hospital order, in no case is a sentence actually imposed. I suggest that these alternatives should be made available for Territory offences. It is particularly important that the courts have flexible powers to deal with serious offenders in need of psychiatric help. Often we are told that this is not possible whilst the offender is in prison. It would also be desirable to have a mechanism whereby prisoners can, by order, be released to a hospital or the Tamarind Centre or some similar institution for treatment without the necessity of having to impose a fully suspended sentence of imprisonment, or

[73] *Criminal Justice Act 1982 (UK)*,s13(1).

passing sentence. More flexibility than is presently available is highly desirable.

4.7 Victim impact statements

There are currently difficulties in obtaining information about the impact upon the victims of crime. Victims may not wish to release this information, perhaps in fear of retribution by the offender when released if the information is used to justify a long sentence. When the information is available, the offender is placed in a difficult position if he chooses to challenge it. Any discount available for not having caused the victim to give evidence may be lost. Current practice is to leave the decision whether or not to call evidence or present information to the court on the impact on victims to the prosecutor. The position in Victoria is that impact statements are to be encouraged.[74] The Federal Court has recently reviewed victim impact statements, the use to be made of them, and has made useful comment on the means to be adopted for presentation of the material relied upon to the court: see *R v P* (1993) 111 ALR 541 at 546-7. The court favoured the presentation of material through an independent third party, such as the person who prepares a pre-sentence report. In my view, it would be better if the information was obtained via a report from a legally qualified medical practitioner, with the prisoner having a right to have the victim medically examined by his own medical advisers.

Alternatively, consideration could be given to a solution outside the sentencing process. After the court has passed sentence, the victim's impact statement could be read to the prisoner. In this way the prisoner will know that the statement did not have any effect on his

[74] *R v Tahche* (1992) 62 A Crim R 75 at 79.

sentence, but at the same time, will be told what effect his actions had on his victim.

4.8 Court media officers

It is important that the media is given accurate information about what the court's decisions are and what they mean. The Supreme Court of NSW has recently employed a person to act as a media liaison officer. A suitable appointee should have experience and qualifications in both law and journalism. The officer would be expected to be able to explain the legal implications of the court's decisions to the media and provide any other relevant data reasonably required. One object of this exercise would be to limit uninformed criticism of the court's sentencing decisions.

Conclusions

Some of the proposals, particularly those aimed at reducing the number of persons sentenced to short terms of imprisonment by providing a wider range of non-custodial options, have considerable merit, and it is important to note that particular consideration is being given to Aboriginal offenders. These proposals need to be expanded and made as flexible as possible.

Proposals which are apparently designed to give effect to "truth in sentencing" principles, and are apparently designed to ensure longer prison sentences for serious offenders, will need to be carefully scrutinised to ensure that they do not cause injustice, longer prison sentences generally, or result in means being adopted to avoid, circumvent or ignore them.

There is considerable scope to remedy existing legislative provisions which unduly hamper the courts' options, which should be made more flexible, rather than less flexible.

executive action should be more stringently limited or abolished.

The court should have available to it victim impact statements prepared by an independent medical practitioner.