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SENTENCING OF FEDERAL OFFENDERS

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Introduction

A large part of this conference has been devoted to developments in sentencing law in the Australian states and territories. These developments reflect substantial changes in the legal and social understanding of sentencing in the past few decades. This paper, by contrast, concerns the sentencing of federal offenders—those who have committed crimes against a law of the Commonwealth. The context for the paper is an Inquiry that the Australian Law Reform Commission (ALRC) is currently conducting, and which is now nearing its conclusion. In July 2004, the Attorney-General of Australia asked the ALRC to conduct a review of Part IB of the *Crimes Act 1914* (Cth). In a Discussion Paper released in November 2005, the ALRC made 140 proposals for reform of this area, involving a roots and branch review of federal sentencing law.

There are several reasons for the review. First, there has been dissatisfaction with the sentencing regime contained in Part IB. Judges have criticised it as ‘internally

inconsistent',¹ 'convoluted' and 'confusing',² 'opaque' and 'unnecessarily time consuming',³ 'complicated' and 'unnecessarily detailed',⁴ 'a legislative jungle' and 'labyrinthine'.⁵ Many of the criticisms were made soon after the provisions came into force, and no doubt reflected the lack of familiarity with the new laws, but some concerns have remained.

Secondly, there have been important changes to our understanding of sentencing since Part IB was enacted in 1989. These changes include: the proliferation of sentencing options; greater restrictions on judicial discretion in sentencing; the rising voice of victims of crime; experimentation with specialist courts; and recurrent 'law and order' debates.⁶ With the exception of South Australia, the federal sentencing law is the oldest in the country. It needs to be modernised.

Thirdly, some federal practices are now out of step with modern demands for transparency and accountability in the criminal justice system. An example of this is parole decisions for federal offenders, which are made solely on the papers—usually by a government officer on delegation from the relevant Minister. This stands in marked contrast with the procedures in most states and territories, where parole decisions are made by a board that has broad community representation. In the best state and territory models, the principles of natural justice apply, the offender has an opportunity to appear and to be legally represented, and the board is required to publish its reasons for decision.

Each of these issues deserves discussion in its own right, but this paper will focus instead on what makes federal sentencing special. To answer that question, I propose to examine:

- the nature of federal crime;
- the characteristics of federal offenders;
- the implications of both of these for sentencing; and
- the constitutional constraints that have limited the reform options.

Federal offences and federal crime

The subject matter of federal criminal law is quite different to that of the states and territories. State and territory laws cover the vast majority of conduct that requires the censure of the criminal law. Those laws are generally concerned with offences involving personal violence or violation of property (such as murder, assault and

¹ *R v Ng Yun Choi* (Unreported, Supreme Court of New South Wales, Sully J, 4 September 1990), 2–3.

² *R v Bibaoui* (1997) 2 VR 600, 600.

³ *R v Muanchukingkan* (1990) 52 A Crim R 354, 358.

⁴ *Edwards v Pregnell* (1994) 74 A Crim R 509, 513.

⁵ *R v Carroll* [1991] 2 VR 509, 514.

⁶ For a detailed exposition of changes to the sentencing landscape, see Australian Law Reform Commission, *Sentencing of Federal Offenders*, Issues Paper 29 (2005), [1.14]–[1.32].

robbery), public order offences, regulatory offences in areas such as environmental protection and occupational health and safety, and traffic offences.

Federal offences correspond with the Commonwealth's areas of legislative responsibility, and on the whole tend to have a national or international focus. There are no readily available data on the number of federal offences on the statute book, but a survey undertaken by the ALRC in 2001 revealed approximately 1,500 offence provisions,⁷ and this number has been growing apace.

The traditional subject matter of federal offences includes fraud and dishonesty offences relating to social security and tax; customs offences such as illegal drug importation; illegal fishing; and migration offences. In the past decade, the focus of new offence provisions has changed to include national security (terrorism, sedition); international sex offences (child-sex tourism, sexual slavery); international financial crime (money laundering); and cybercrime.

Neither the number nor type of offences on the statute book tells us much about the level of federal criminal activity. We do know, however, that the Commonwealth Director of Public Prosecutions (CDPP) prosecutes most federal crime,⁸ and that the number of convictions resulting from those prosecutions has risen slowly but steadily for the past 15 years. For example, in 2004–05 5,069 people were convicted as a result of prosecutions by the CDPP.⁹ The four largest referring agencies are Centrelink, the Australian Federal Police (AFP), the Australian Taxation Office (ATO), and the Australian Fisheries Management Authority (AFMA).

Characteristics of federal offenders

Very little is known about the characteristics of federal offenders. Not much data is collected, even less is published, and what is published seldom distinguishes between federal offenders, state offenders and joint offenders. For example, most of the data on corrections published by the Australian Bureau of Statistics—Australia's national statistical agency—makes no distinction between federal and state offenders.¹⁰

The most invisible category of federal offenders is those who receive non-custodial sentences, such as community service orders or fines. Very little can be said about them because they are absorbed into the state and territory systems in which they have been sentenced.

Slightly more visible are federal prisoners. More information is known about this group because the Commonwealth Attorney-General's Department (AGD) collects basic data

⁷ The survey was 'far from exhaustive': Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, DP 65 (2002), [1.10].

⁸ A small amount is also prosecuted by state prosecuting agencies, and by federal regulators such as the Australian Taxation Office and the Australian Securities and Investments Commission.

⁹ Commonwealth Director of Public Prosecutions, *Annual Report 2004–05* (2005), 27.

¹⁰ Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), [22.87]–[22.97].

so that it can administer aspects of their sentences. In particular, the AGD maintains a case management database of federal prisoners so that it can determine when they are eligible for release into the community on parole, or when their sentences are completed.

The AGD made anonymised data from this database available to the ALRC for the purposes of its Inquiry. The ALRC, in turn, sought the assistance of the Australian Institute of Criminology (AIC) in analysing the data. The results are published in Appendix 1 to the ALRC's Discussion Paper. The data, although simple, has provided valuable insights into the sentences of federal prisoners, and has informed several proposals for reform. Much of the data in this conference paper is based on that analysis.

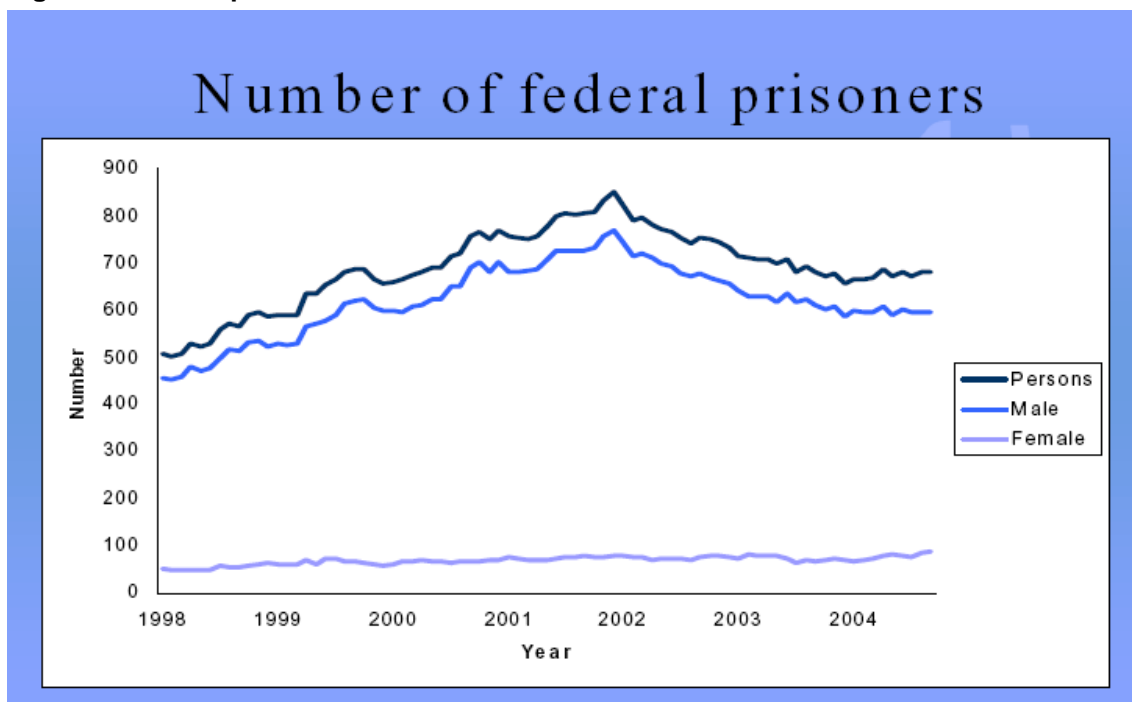
The ALRC will soon have access to a second source of data on federal offenders. The CDPP has provided the ALRC with anonymised data on approximately 25,000 federal fraud and drug cases over the five-year period from 2000–2004. That data is also being analysed by the AIC and will be published in the ALRC's final report, which is due to be given to the Attorney-General by 28 April 2006.

At a high level of generality, the AGD's data reveals at least this about federal prisoners: they are small in number; a relatively high proportion are females; they are geographically dispersed throughout Australia; and a high proportion are foreign nationals. Let me say a few things about each of these attributes.

Number of federal prisoners

There are relatively few federal prisoners. On 1 December 2005 there were 674 of them, which is less than three per cent of Australia's total prison population. Figure 1 shows the number of federal prisoners over time. There was a steady rise in the number of federal prisoners from 1998 (when there were about 500 prisoners) to a peak in 2002, and a subsequent fall. This peak was almost entirely due to people smuggling offences committed in the Northern Territory in a discrete time period.

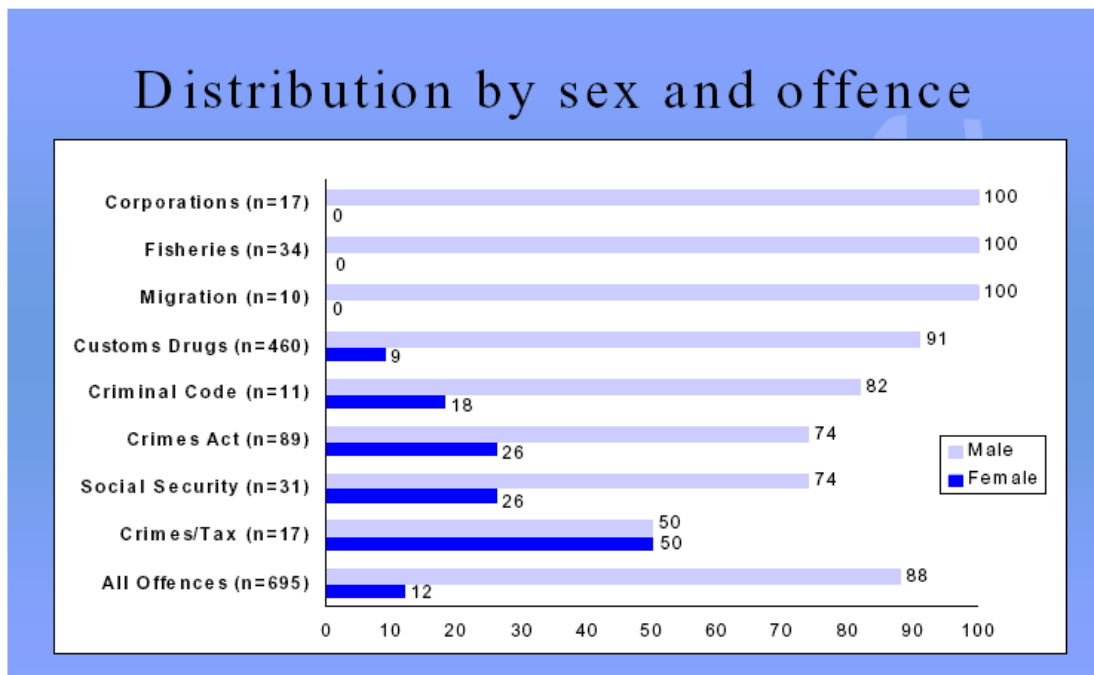
Figure 1: Federal prisoners 1998–2004



Composition by sex

About 13 per cent of federal prisoners are females, and this percentage has been stable over a long period. This is substantially higher than the percentage of females in the Australian prison population, which is about seven per cent. However, given the size of the total federal prisoner population, one should bear in mind that the absolute number of female federal prisoners is very small—less than 90 in total. A clue about the higher proportion of females in the federal cohort can be found in the breakdown by offence category. Many Commonwealth offences involve fraud or dishonesty (for example, in relation to social security) and, as Figure 2 shows, females are more highly represented in these types of offences.

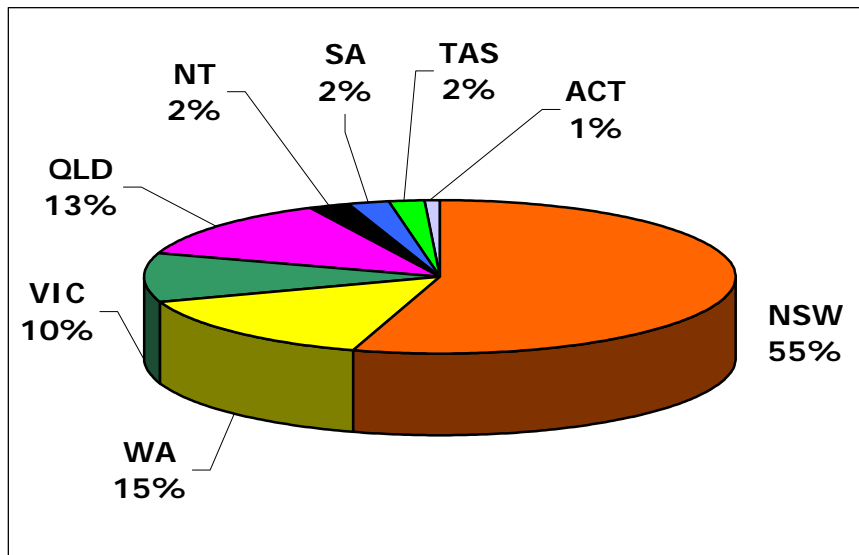
Figure 2: Distribution of federal prisoners by sex and offence



Geographic distribution

Federal prisoners are held in every state and territory in Australia, most of them in New South Wales. Yet the distribution of federal prisoners differs significantly from the distribution of the general population. For example, New South Wales holds 55 per cent of federal prisoners (most of them for drug importation offences), even though it has only 34 per cent of Australia's general population and 39 per cent of all Australian prisoners. One explanation for this concentration is Sydney's role as a major hub for international passenger traffic and drug importation. In addition, some types of federal crimes are much more prevalent in particular jurisdictions; for example, migration and fisheries offences in Western Australian and the Northern Territory, and social security fraud in Queensland.

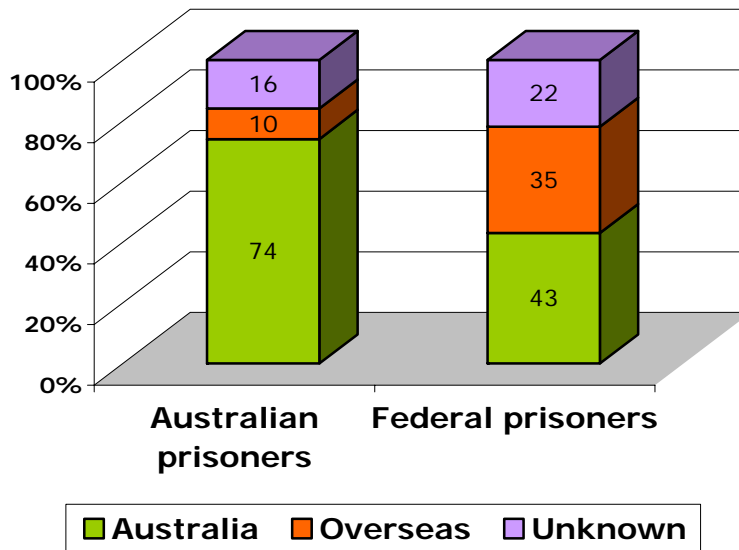
Figure 3: Geographic distribution of federal prisoners



Composition by nationality

A further characteristic is that federal prisoners are more likely to be foreign nationals than is the case with the general prison population. This is shown in Figure 4. Comparison of the orange portion on each column shows that 35 per cent of federal prisoners are foreign nationals, but this is true of only 10 per cent of the Australian prisoner population as a whole. There is also a great deal more variety in the overseas origin of federal prisoners than in the general prison population, although this is not illustrated in this graph.

Figure 4: National origin of federal prisoners and all Australian prisoners



Implications for federal sentencing

What are the implications of the nature of federal crime and the characteristics of federal offenders for the development of federal sentencing law and practice? Only a few of the implications can be explored in this paper.

No independent federal system

The first implication is structural: it is not practicable to devise a federal criminal justice system that is completely independent of the state and territory systems. As is well known, parts of the federal criminal justice system have been federalised over the years—criminal investigation by the AFP and prosecution by the CDPP being two examples.

However, there is still heavy reliance on the states and territories for adjudicating criminal matters, incarcerating federal prisoners, and administering aspects of federal sentences. This was true at federation in 1901, and is still true today. It is an idea encapsulated in s 77(iii) of the Australian Constitution, which allows the Parliament to

invest state courts with federal jurisdiction,¹¹ and in s 120, which requires every state to make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth.

In many ways, the impracticality of a wholly independent federal criminal justice system is simply a matter of numbers and economics. If you take 700 federal prisoners and divide them by sex, and by geographic location, and by security classification, there are simply too few individuals to justify the establishment of separate federal prison facilities.

The need to promote equality in sentencing

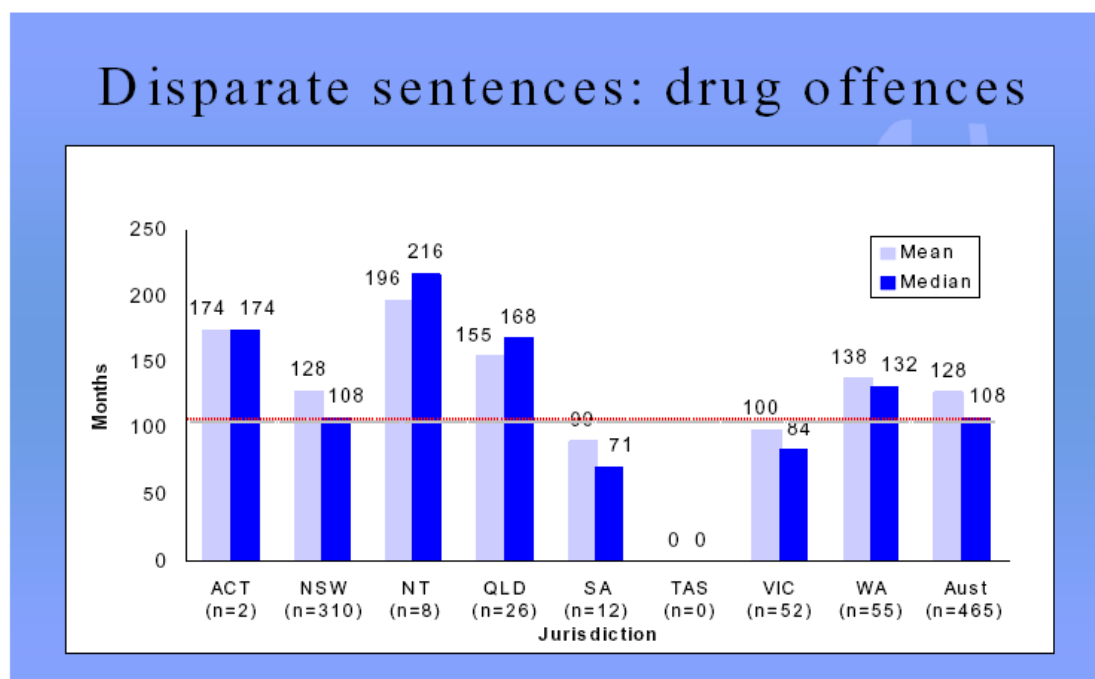
The downside of relying on state and territory systems is that it may lead to inequality: a federal offender in one state or territory may be dealt with differently from a similar offender in another state or territory.

Is there evidence of such disparate treatment? During the consultation process the ALRC heard a good deal of anecdotal evidence about differences between state and territory practices in sentencing federal offenders. However, it is difficult to build sound policy on the back of anecdotes, even if they all point in a similar direction. The AIC's analysis of the AGD data aims to take the matter beyond this sort of casual empiricism.

¹¹ There is a general conferral of federal jurisdiction (including criminal jurisdiction) on state courts by s 39 of the *Judiciary Act 1903* (Cth).

Figure 5 shows data about the head sentences of the largest category of federal prisoners, namely, those who are sentenced for illegal drug importation. The last two columns of the graph show the mean and median head sentences for this offence category for the whole of Australia. Using data from the 465 federal offenders in prison for federal drug offences on 13 December 2004, the graph shows that the median (or middle) sentence is 108 months (i.e. nine years). However, there is wide variation by jurisdiction: in South Australia the median sentence is 71 months (34 per cent lower than the Australian average), and in the Northern Territory it is 216 months (100 per cent higher than the Australian average).

Figure 6: Mean and median head sentences in federal drug cases



This is just one snippet of the data but the fact of regional disparities (sometimes quite marked disparities) is a repeated theme. It is repeated when one looks at other attributes of federal sentences, such as the non-parole period; it is repeated when one looks at other offence categories, such as social security and tax fraud; and it is repeated when one looks at a much bigger dataset such as the 25,000 CDPP cases the AIC is currently analysing for the Inquiry.

This leads to the second implication: there should be effective mechanisms to promote equality in sentencing federal offenders. Consistency is not the only value the federal criminal justice system should pursue. Indeed, the ALRC has proposed that sentencing legislation should set out five core principles that are to be applied in sentencing a federal offender, of which consistency is but one.¹² However, consistency is a very important value, as Mason J explained in *Lowe v The Queen*:

Just as consistency in punishment—a reflection of the notion of equal justice—is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community.¹³

The ALRC has made a number of reform proposals to address sentencing disparities and promote the uniform application of federal sentencing law across Australia. These reforms include a new federal sentencing Act with simpler and clearer provisions, and better availability of data for judicial officers. An example of the latter is the sentencing tool currently provided to judges and magistrates in New South Wales through a database known as JIRS (the Judicial Information Research System).¹⁴ More controversially, the ALRC has proposed a change in the appellate arrangements by which the Federal Court of Australia would act as a court of criminal appeal from state and territory courts exercising jurisdiction in federal criminal matters. This proposal is currently the subject of further consultations.

Additional sentencing options

Another area in need of reform relates to the range of sentencing options available when sentencing a federal offender. Currently, the sentencing options derive from three sources.

- Federal offence provisions identify some sentencing options, but typically these are limited to a fine, imprisonment, or both. Where imprisonment alone is specified, a statutory formula allows this to be converted into a pecuniary penalty.¹⁵
- The Crimes Act 1914 specifies a few additional possibilities such as dismissal of a charge without conviction (s 19B); conditional release after conviction (s 20(1)(a)); and (in effect though not in name) a wholly or partially suspended sentence of imprisonment (s 20(1)(b)).

¹² The others are proportionality, parsimony, totality and individualised justice: See Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Ch 5.

¹³ *Lowe v The Queen* (1984) 154 CLR 606, 610–611.

¹⁴ The database is operated by the Judicial Commission of New South Wales.

¹⁵ *Crimes Act 1914* (Cth) s 4B. For individuals, the conversion is five penalty units (one penalty unit is currently \$110) for every month of the maximum term of imprisonment. Thus, an offence punishable by 12 months imprisonment could be converted to a penalty of \$6,600 (=12x5x\$110) For corporations, the pecuniary penalty is five times the rate for individuals (\$33,000 in the same example).

- And finally, s 20AB of the Crimes Act 1914 picks up and applies to federal offenders certain sentencing options available under state and territory law. Some of these options are specifically identified by that section, while others must be prescribed by federal regulation.

It is the procedure for picking up state and territory sentencing options by regulation that gives rise to concern. As mentioned above, there has been a proliferation of sentencing options in the states and territories in recent years, but the federal regulations are not amended regularly and do not cover many available options.

Drug courts provide a good example. These specialised courts have been established in at least five Australian jurisdictions and they have generally received very positive report cards on their ability to deal with drug-related crime. However, federal offenders cannot access these specialised programs because drug court orders are not prescribed in federal regulations. In Discussion Paper 70, the ALRC suggested that federal offenders should have greater access to innovative programs such as these.

More generally, there should be a regular process for monitoring the suitability of state and territory sentencing options and deciding whether they should be made available for federal offenders. This assessment might include an evaluation of the relevance of the state and territory options for the types of conduct proscribed by federal criminal law, their efficacy, and their availability in different jurisdictions.

Better sentencing procedures

The changing nature of federal crime and the characteristics of federal offenders also invite a reconsideration of procedural aspects of federal sentencing. This can be illustrated by reference to the issue of victim impact statements.

Many federal crimes, such as tax fraud and social security fraud, historically have been described as ‘victimless’ in the sense that harm is caused to the Commonwealth as a polity rather than to an identifiable person. Although this claim is misconceived—all Australians are the unwitting victims of fraud against the Commonwealth—many newer federal offences cannot be described as ‘victimless’. Federal crimes such as terrorism, sexual servitude, child sex tourism and people smuggling directly affect identifiable individuals.

A victim impact statement is one way of informing a court about the harm suffered by victims of crime. At present, a victim impact statement is available in a federal case only if it is allowed under state or territory law. This can be a problem because there are substantial differences from state to state in the scope and operation of victim impact statement provisions. For example, some jurisdictions limit victim impact statements to victims of violent crime, while others confine them to indictable offences.

The ALRC has proposed minimum standards for victim impact statement in federal criminal cases. Some of these standards are directed towards ensuring that victim impact statements are available in relation to typical sorts of federal crime: for example,

a victim impact statement should allow a victim to present particulars of economic loss, not only physical injury. Other standards are directed to ensuring the interests of defendants are adequately protected in the process. For example, if the victim impact statement is in writing, it should have to be signed or acknowledged by the victim; and there should be a procedure to verify material facts in the statement to avoid false or spurious claims.

Constitutional constraints

In keeping with the federal theme of this paper, I would like to conclude with a brief discussion of the constitutional constraints on reforming federal sentencing law. It is difficult enough to develop sound policy in the field of sentencing. It is even harder when the most desirable policies have to be sifted through a constitutional filter.

Several express constitutional provisions have posed challenges for the ALRC's Inquiry. These include the requirement in s 80 that indictable federal offences must be prosecuted in the state or territory where they were committed, and the requirement in s 120 that states must make their prisons available for federal offenders—presumably with the corollary that the Commonwealth must take those prisons as they find them.

However, the most important constraint has been the implication from Chapter III of the Constitution that federal judicial power must be separated from the exercise of both legislative power and executive power. Three examples illustrate how this principle has constrained the development of legal policy.

Federal guideline judgments

I have already mentioned that consistency in sentencing has been a central theme of the ALRC's Inquiry, prompted by the direction in the Terms of Reference that the ALRC have regard to:

whether parity 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.

In principle, federal guideline judgments might have been a useful way to promote consistency in sentencing in so far as they would allow federal sentencing principles to be laid down for the benefit of all state and territory courts. However, the High Court's decision in *Wong v The Queen*¹⁶ has shown judicial hostility to that solution, even if it is not completely foreclosed. The problem, as seen by the High Court, is that a guideline judgment may infringe Chapter III because it purports to lay down rules governing cases that are yet to come before the court. In this way a guideline judgment may share some of the qualities of legislative power, which cannot be exercised by a Chapter III court.

¹⁶ *Wong v The Queen* (2001) 207 CLR 584.

A sentence indication scheme

In Discussion Paper 70 the ALRC proposed the establishment of a federal sentence indication scheme. A sentence indication scheme entails a judicial officer, prior to the commencement of a trial, advising the defendant of the sentence, or the type or range of sentences, that the defendant is likely to receive if he or she pleads guilty to the offence. The purpose of the scheme is to ensure a defendant is in a position to make an informed decision in relation to a plea,¹⁷ and to save judicial and other resources in the event the defendant does plead guilty.

There is a lingering constitutional question about whether the giving of a sentence indication involves the exercise of federal judicial power. The indication itself does not determine the rights of the parties, and that often suggests the function is not judicial. However, where the indication is accepted, it is clearly a step in the process by which those rights are finally determined. The ALRC is still considering the constitutional foundations of such a scheme. The example illustrates the constraints imposed by the Constitution on the development of a new legal policy that has generally been very well received by stakeholders.

Breach of sentence conditions

When state offenders breach a condition of their sentences, they are often dealt with administratively by a parole board or correctional authority. For federal offenders this is often not possible. The adjudication of a breach of a sentencing order involves the exercise of federal judicial power and this power must be exercised by a court, and not administratively. This can result in substantial delay in comparison with the arrangements for dealing with state or territory offenders. Indeed, the inability to deal effectively with breaches of federal sentences received publicity in 2004 in relation to the sentence of periodic detention imposed on Mr Rene Rivkin, who had been found guilty of insider trading.¹⁸

For constitutional reasons, the options for dealing with a breach of a federal sentencing order are limited. While some stakeholders expressed the view that breach procedures for federal offenders should be the same as those for state and territory offenders, this is not constitutionally possible where a state or territory administrative body deals with the breaches. In the result, the ALRC had to be satisfied with a proposal to streamline the procedures to be followed by state and territory correctional authorities and prosecutors when a federal offender breaches a sentencing order, through the development of a suitable protocol.

¹⁷ New Zealand Law Commission, *Criminal Pre-Trial Processes: Justice Through Efficiency*, NZLC R89 (2005), [304].

¹⁸ This is discussed in Australian Law Reform Commission, *Sentencing of Federal Offenders*, Issues Paper 29 (2005), [12.35].

Conclusion

The ALRC's Inquiry into the sentencing of federal offenders is due to be completed by 28 April 2006. By that time the ALRC will have received nearly 100 submissions from interested parties, and considered the views of hundreds of stakeholders expressed in over 80 consultations held around Australia.

It is never possible to achieve perfection in human affairs; and all the more so in a complex discretionary task like sentencing, which must weigh broad social objectives with the unique circumstances of individual cases.

Even so, the ALRC's forthcoming report aims to contribute to the rational development of a federal sentencing law that is capable of accommodating the changing character of federal crime. If it does no more than allow judicial officers to escape from the 'labyrinth' of Part IB, it will have played its part.