# Same crime, same time

## The sentencing of federal offenders

By Isabella Cosenza

**The ALRC recently completed a major inquiry, spanning nearly two years, into the sentencing, administration and release of federal offenders. The Terms of Reference asked the ALRC to inquire and report on whether Part IB of the *Crimes Act 1914* (Cth) is an appropriate, effective and efficient mechanism for the sentencing, administration and release of federal offenders. In particular, the ALRC was asked to consider the changing nature and scope of federal offences; the relatively small number of federal offenders compared with state and territory offenders; and whether consistency in sentencing federal offenders should be maintained between federal offenders across Australia or between offenders within the same state or territory, regardless of whether they are state, territory or federal offenders.**

The sentencing landscape is fluid, and has undergone major changes and trends in local and overseas jurisdictions in the 18 years since the ALRC completed its first inquiry into the sentencing of federal offenders. These changes and trends—including the rise of restorative justice, the recognition of the role of victim impact statements in sentencing, the abolition of remissions, the growth of specialist courts focussed on rehabilitation, and the development of sophisticated sentence information systems, in particular the NSW Judicial Information Research System—provided a rich source of material for the ALRC to consider during the Inquiry.

The Inquiry considered a wide range of issues including: equality in the treatment of federal offenders; the framework within which sentences are to be determined; the sentencing options that should be available to federal offenders; the mechanics of sentencing, including the calculation of time spent in pre-sentence custody and sentencing for multiple offences; the specification of discounts for guilty pleas; procedure and evidence at a sentencing hearing; how breaches of sentencing orders are to be dealt with; methods of promoting better sentencing, including through judicial specialisation and education; methods of promoting consistency in sentencing; how federal offenders should be administered; and the sentencing of vulnerable and disadvantaged federal offenders, including young federal offenders and those with a mental illness, intellectual disability or cognitive impairment.

Following extensive research and nationwide consultation, the Inquiry culminated in the tabling of the report *Same Crime, Same Time* (ALRC 103) in June 2006. The Inquiry recommended an overhaul of Australia's system for sentencing federal offenders, having concluded that Part IB is ineffective. ALRC 103 contains 147 recommendations for reform, aimed primarily but not exclusively to the Australian Government. Other bodies to whom recommendations are aimed include courts, prosecutors, state and territory governments, correctional authorities, statisticians, and university law schools. Many of the recommendations are aimed at promoting greater clarity, consistency and fairness in the sentencing process.

This article outlines the special features of the ALRC's Inquiry and its key recommendations. It also discusses in more detail some of the Inquiry's main recommendations in relation to the sentencing of federal offenders, including the enactment of a new federal sentencing Act.

Isabella Cosenza is a Senior Legal Officer at the Australian Law Reform Commission

## Special features of the Inquiry

In addition to the ALRC's trademark processes of extensive community consultation and the establishment of an expert Advisory Committee, the ALRC collaborated with other agencies in relation to the provision and analysis of data, and made a special effort to engage federal offenders in the process of the Inquiry.

In 1988, when the ALRC undertook its first inquiry into the sentencing of federal offenders, it observed that there was little published information about the number and characteristics of federal offenders, and that many studies undertaken in respect of offenders in the states and territories did not distinguish between federal and non-federal offenders. Unfortunately, little has changed since then. It remains difficult to locate publicly available data on persons who are prosecuted or sentenced under federal legislation, and ALRC 103 makes a number of recommendations designed to address this shortfall.

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In order to develop sound evidence-based recommendations, the ALRC collaborated with a number of federal agencies in order to provide and analyse data on federal offenders. The Australian Institute of Criminology (AIC) analysed de-identified snapshot data, provided by the Attorney-General's Department, on the 695 federal prisoners held in custody on 13 December 2004. Further, the Commonwealth Director of Public Prosecutions (CDPP) provided the ALRC with de-identified information from its database in relation to federal drug and fraud offences prosecuted by the CDPP over the five-year period 2000–2004. The AIC also analysed this much richer dataset, and its analysis reveals significant disparity in both the type and severity of sentencing outcomes for federal offenders across state and territory state lines, including disparities in the percentage of the head sentence formed by the non-parole period. This evidence of disparity was a significant impetus to many of the ALRC's recommendations aimed at promoting consistency in sentencing.

The Inquiry also promoted the participation of federal offenders themselves. The ALRC produced a brochure in late June 2004, which it sought to distribute to all federal offenders in Australia. The brochure provided general information about the Inquiry and invited federal offenders to register their interest via a reply-paid form and to make submissions.

In the absence of a centralised agency with ready access to federal offenders, the ALRC was required to write to the corrective service agencies in each jurisdiction, seeking their cooperation in distributing the brochures. Brochures were distributed to nearly 2000 federal offenders and the ALRC received 214 reply-paid forms, the large majority from prisoners. Many forms identified concerns about lack of information on parole, transfer to another jurisdiction, and the content of relevant federal legislation. All who responded were sent a copy of the consultation papers and were invited again to make a submission. Of a total of 98 submissions received during the course of the Inquiry, 20 of these were from past or present federal offenders, some of which were confidential. Their submissions provide unique insights into the way some federal offenders experience the criminal justice system, from the imposition of sentence until release.

## Key recommendations

The Inquiry's key recommendations include:

- the pursuit by the Australian Government of broad equality across Australia in the sentencing, administration and release of federal offenders in different states and territories;
- the enactment of a new federal sentencing Act, which includes the objects of the legislation, the purposes of sentencing, the principles to be applied in sentencing, and the types of factors that a court must consider in sentencing federal offenders;
- the development of a database of federal sentences for use by judicial officers and others as a practical tool in promoting consistency in federal sentencing;
- the establishment of a reference point for the non-parole period of a federal sentence at two-thirds of the head sentence, in order to strike an appropriate balance between consistency in sentencing and individualised justice, with retention of the court's discretion to set a different non-parole period whenever it considers it appropriate in all the circumstances;
- the expansion of the original jurisdiction of the Federal Court of Australia to hear and determine proceedings in relation to nominated federal offences whose subject matter is closely allied to the existing civil jurisdiction of the Federal Court, in areas

such as taxation, trade practices and corporations law;

- federal provision for the use of victim impact statements and pre-sentence reports in the sentencing of federal offenders, with designated minimum standards for their use, content and disclosure;
- the introduction of a sentence indication scheme to provide offenders with an indication of the likely sentencing outcome if they were to plead guilty;
- the abolition of automatic parole;
- the establishment of a federal parole authority to make parole-related decisions in relation to federal offenders;
- the establishment of an Office for the Management of Federal Offenders within the Attorney-General's Department with a broad range of responsibilities to monitor, advise and liaise with the states and territories in relation to federal offenders;
- the introduction of federal minimum standards in the sentencing of young federal offenders; and
- the initiation by the Australian Government of a comprehensive inquiry into all issues concerning people in the federal criminal justice system who have a mental illness, intellectual disability or cognitive impairment.

Of importance also are the areas in which the ALRC did not make a recommendation following consideration of the relevant issues. The ALRC considered—as it did in its first inquiry—whether it was viable to establish a completely separate federal criminal justice system, including federal criminal courts, federal corrective service agencies and federal prisons. The ALRC concluded that this was not viable, given existing state and territory infrastructure, the relatively small number of federal offenders, and the geographical dispersal of offenders across Australia. This means that the current cooperative system will remain. The overwhelming majority of federal offenders will continue to be sentenced in state and territory courts and the sentences imposed will continue to be administered by state and territory corrective service agencies. However, as noted above, the ALRC has recommended an expanded role for the Federal Court of Australia.

The ALRC considered the use of guideline judgments. Although it supported their use in principle, the constitutional uncertainty surrounding guideline judgements at the federal level did not provide a firm foundation for recommending the extension of their use at this time. The ALRC also considered whether the jury should be given an extended role in sentencing and concluded that such a position was neither necessary nor desirable.

## A new federal sentencing Act

Federal sentencing provisions are currently dispersed throughout the *Crimes Act*, with the majority of such provisions appearing in Part IB. The *Crimes Act* deals with a wide range of subjects—including search warrants, the investigation of Commonwealth offences, and forensic procedures—and it also sets out a number of federal criminal offences. By contrast, the sentencing laws of states and territories are contained in separate sentencing Acts.

The ALRC has recommended the consolidation of all legislative provisions for the sentencing, administration and release of federal offenders into a separate federal sentencing Act, distinct from federal provisions dealing with criminal procedure and those dealing with substantive criminal law. A new sentencing Act will increase the transparency and accessibility of federal sentencing law. In addition, the ALRC has recommended that in drafting the new legislation, the Australian Government should ensure that the structure of the Act is clear and logical and that it employs language that is simple, modern and (where practicable) consistent with the language used in state and territory legislation. This recommendation was developed to address the abundant criticisms and concerns expressed by judicial officers, legal practitioners and federal offenders about the complex and ambiguous drafting of Part IB, its illogical structure and its use of archaic language, such as 'recognizance release order', 'estreatment', and 'hard labour'.

The ALRC has recommended that the new federal sentencing Act include a clear statement of the objects of the legislation. One of the criticisms of Part IB is that it is unclear whether it is intended to achieve greater equality of treatment between federal offenders regardless of the state or territory in which they serve their sentence. The new federal sentencing Act should, therefore, be explicit about pursuing the policy of promoting greater consistency in the sentencing of federal offenders, regardless of where they are sentenced. Other objects of the legislation should include the provision of fair and efficient procedures for the sentencing,

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administration and release of federal offenders, and the recognition of the interests of victims of federal offences.

## Sentencing purposes, principles, and factors

The ALRC has made a number of recommendations aimed at providing greater guidance to judicial officers exercising the sentencing discretion. It has concluded that the only legitimate purposes of sentencing are retribution, deterrence, rehabilitation, incapacitation of the offender, denunciation and restoration, and that these purposes should be set out in federal sentencing legislation to promote consistency, clarity and transparency in sentencing. In addition, in order to emphasise their importance to the sentencing process, federal sentencing legislation should set out the fundamental principles that should be applied in sentencing federal offenders, namely: proportionality, parsimony, totality, consistency and individualised justice.

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ALRC 103 also makes a recommendation overhauling the current approach in Part IB in relation to the listing of factors to be considered in sentencing. Section 16A(2) of the *Crimes Act* sets out a non-exhaustive list of 13 matters that a court must take into account in sentencing a federal offender, to the extent that they are relevant and known. Some of the matters included in the list, such as specific deterrence and punishment, are properly regarded as purposes of sentencing. The ALRC advocates an approach that distinguishes sentencing factors from sentencing purposes and principles. It has recommended that federal sentencing legislation should express the primary principle that a court must consider any factor that is relevant to a purpose or principle of sentencing and known to the court. For example, the prospect of an offender's rehabilitation is a factor that should be considered by the court where relevant and known because it is relevant to the sentencing purpose aimed at the rehabilitation of the offender.

The ALRC rejected the current approach of listing an ad hoc list of factors on the basis that such a list can be unwieldy to work with: the longer the list the greater the likelihood that judicial officers will use it as a check list without considering other factors that might not be listed but might nevertheless be relevant in the circumstances of a particular case.

The ALRC concluded that, in order to provide a more principled and usable framework for judicial officers, and to promote clarity of approach, federal sentencing legislation should group factors into broad categories that share a common theme—such as factors relating to the offence, factors relating to the background and circumstances of the offender, and factors relating to the impact of the offence—and provide examples of sentencing factors under each category. For instance, examples of specific factors relating to the offence are: the nature, seriousness and circumstances of the offence; the maximum penalty for the offence; and whether the commission of the offence involved a breach of trust. Both the categories of factors and the factors themselves should be non-exhaustive.

## Increasing fairness at the sentencing hearing

The sentencing hearing is the stage in the criminal justice process at which an offender is often at risk of losing his or her liberty or having it curtailed in some way. The ALRC has made a number of recommendations to improve the fairness of the sentencing hearing, including recommendations in relation to the explanation of the sentence imposed and the provision of sentencing orders to offenders.

A fundamental aspect of a fair hearing is that the person who will ultimately be affected by its outcome should be able to participate in a meaningful way. Part IB of the *Crimes Act* does not require an offender to be present at sentencing. In contrast, some state and territory sentencing legislation makes provision for the presence of an offender at sentencing although the reach of these provisions varies. The ALRC has recommended that legislation require the presence of an offender at the time of sentencing where a court intends to impose a sentence that deprives the offender of his or her liberty or where an offender is required to consent to conditions or give an undertaking. The presence of an offender at sentencing increases the likelihood of meaningful participation and may also promote those sentencing purposes that aim to deter the offender or denounce his or her conduct. It is also important for an offender to hear what impact his or her offending has had on any victims of the offence because it may promote those sentencing purposes aimed at rehabilitation of the offender and restoration of relations between the community, the offender and the victim.

In *Dietrich v The Queen* the High Court recognised the defendant's right to a fair trial, and that depending on the circumstances, the absence of legal representation not due to any fault on the defendant's part may mean that a defendant is unable to receive a fair trial. In such cases, the courts have a power to stay the criminal proceedings. However, a stay is only necessary where injustice would otherwise result from the defendant's lack of representation. The ALRC considers that the principles enunciated in *Dietrich* in relation to trials are applicable by analogy to sentencing. The ALRC has therefore recommended that where a federal offender is not legally represented in sentencing proceedings the court should generally adjourn the proceedings to allow the offender a reasonable opportunity to obtain legal representation. However, the court may proceed to impose a sentence without adjournment in certain defined cases—for example, where the court is of the view that a fair sentencing hearing can be conducted without the offender being legally represented or where the court does not intend to impose a sentence depriving the offender of his or her liberty.

## A new sentence indication scheme

ALRC 103 recommends a sentence indication scheme for federal offenders, which is designed to encourage guilty defendants to plead guilty by indicating the likely sentencing outcome prior to the plea. The indication is to be limited to the choice of sentencing option and a general indication of severity of sentencing range. Potential benefits of such a scheme include the timely resolution of sometimes complex matters, savings in time and costs as a result of preventing 'last-minute' guilty pleas, and avoiding unnecessary trials, and distress to victims. Having regard to the criticisms made of the failed pilot sentence indication scheme that operated in New South Wales from 1993–1996, the ALRC has built into its recommended scheme a number of safeguards that aim to minimise the potential to induce guilty pleas improperly, the potential for excessively lenient sentencing, and the practice of 'forum-shopping'. These safeguards include that a sentence indication should only be given at a defendant's request; that the court should issue standard advice before giving any indication to the effect that the indication does not derogate from the defendant's right to require the prosecution to prove its case beyond reasonable doubt; that an indication must be based on the same purposes, principles and factors that would apply to sentencing; and that a defendant is entitled to one sentence indication only.

## Looking to the future

If the Australian Government accepts the recommendations in ALRC 103, it will take time for those recommendations to be implemented and take effect. The introduction of a federal sentencing Act with clearly stated objects—including the promotion of greater consistency in the sentencing of federal offenders—as well as the specification of purposes, principles and examples of factors relevant to sentencing, and the development of a national sentencing database will help to ensure that federal offenders are treated in a more consistent manner by state and territory courts. However, the ALRC has recommended that the new federal sentencing Act should include provision for a later review of sentencing in federal criminal matters to determine whether there is a significant unjustified disparity in the sentencing of federal offenders across Australia. That review should take place three years after the legislation comes into force and should include an examination of the data collected for the national sentencing database. If significant and unjustified disparity is found to exist, the review should consider whether general appellate jurisdiction should be conferred on the Federal Court of Australia in federal criminal matters. The conferral of such jurisdiction would represent a major overhaul of the appellate structure.

Accordingly, issues in relation to the sentencing of federal offenders will remain on the horizon for the foreseeable future. Experience suggests that the sentencing landscape will continue to witness new trends and developments that will be ripe for consideration in any future review of federal sentencing laws.

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