DPP

Commonwealth Director of Public Prosecutions

Your reference:

Our reference:

19 March 2013

Ms Christine McDonald
Inquiry Secretary
Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Ms McDonald

Inquiry into the value of a justice reinvestment approach to criminal justice in Australia

I refer to your letter dated 7 December 2012 to the Commonwealth Director of Public Prosecutions (CDPP) inviting the CDPP to make a submission to the Committee's Inquiry into the value of a justice reinvestment approach to criminal justice in Australia.

The CDPP thanks the Committee for the invitation; however, the CDPP does not wish to make a submission to this inquiry. Instead, the CDPP provides the following information in relation to sentencing Commonwealth offences which we hope will be of assistance to the Committee, by way of background, in considering this inquiry.

Sentencing in Commonwealth Criminal Matters

The Commonwealth's principal sentencing provision, Part 1B of the *Crimes Act 1914*, largely provides a uniform sentencing law for Commonwealth offences, however, it is not an exclusive code on sentencing. It has been noted that the objectives of Part 1B *"varied between making exhaustive provision on some subjects and supplementary provision on others"*.[1] Some State and Territory based variations are adopted for the purposes of Commonwealth sentencing. The following are examples:

- the commencement date for sentences;[2]

- some additional alternative sentencing options available in a particular *"participating State or a participating Territory"* are available in respect of Commonwealth offenders. These sentencing options are State/Territory based and will vary depending on where the sentencing takes place. These may include an order known as a community service order, a work order, a sentence of periodic detention, an attendance centre order, a sentence of

1 Putland v The Queen (2004) 218 CLR 174 at 181, 193 and 215.

2 See s 16E Crimes Act 1914 specifically adopts State law in relation to this aspect of sentencing.

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weekend detention or an attendance order or a similar sentence or order or a sentence or order that is prescribed.[3]

- additional forms of sentences not specifically available under Commonwealth law and not inconsistent with specific Commonwealth sentencing provisions, e.g. a State or Territory law providing for a single global sentence for multiple counts.

Federal criminal jurisdiction is exercised by State and Territory courts and therefore, it is State and Territory courts that generally sentence offenders for Commonwealth offences. Sections 71 and 77 of the Constitution provide that the Commonwealth Parliament may invest State courts with Federal jurisdiction. The Commonwealth Parliament has invested State courts with federal jurisdiction through the *Judiciary Act 1903*. Section 68(2) of the *Judiciary Act 1903* provides that the State courts exercising criminal jurisdiction have *"like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth".*

There has been acceptance in both commentary and by the judiciary that there will be some variation in federal sentencing given the policy choice that has been made to invest State courts with federal jurisdiction. In the ALRC report "*Same Crime, Same Time*"[4] it was noted that "*Part 1B of the Crimes Act 1914 (C'th) operated as a complete code for sentencing Federal offences while on other topics state and territory laws are picked up and applied*". The Commission noted:

> *"Given existing state and territory infrastructure (including courts and corrective services agencies and facilities) the relatively small number of Federal offenders, and the geographic dispersal of offenders across Australia, it is not viable to establish a completely separate federal criminal justice system. This means that the overwhelming majority of Federal offenders will continue to be sentenced in state and territory courts and that the sentences imposed will continue to be administered by state and territory corrective services agencies for the foreseeable future. On this basis, it is the ALRC's view that it is not possible to achieve complete inter-jurisdictional equality for federal offenders. ... Broad equality can be achieved while accepting certain differences that arise from Australia's federal system of government".*[5]

It has been accepted by the High Court that the reliance on State courts and their procedures will sometimes produce different results but this is a concomitant of the policy choice made under Australia's constitutional arrangements to invest State courts with federal jurisdiction.

In *Leeth v The Commonwealth*[6] the Court considered the federal sentencing law before Part 1B of the *Crimes Act 1914* came into operation. The sentencing regime for federal offenders then in existence relied to a significantly greater extent on State parole systems than the current arrangements under Part 1B. There were some differences with the way the State parole and remission systems operated in relation to federal offenders sentenced in different States for the same type of offending. One of the offenders appealed to the High Court. The Court noted:

> *"It is obviously desirable that, in the sentencing of offenders, like offenders, should be treated in a like manner. But such a principle cannot be expressed in absolute terms. .... it has long been recognised that sentencing practices may not be uniform from State to State but may be affected by local circumstances. Of course, with many offences, particularly federal offences, local circumstances may, under State sentencing practices,*

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3 s 20AB Crimes Act 1914 (C'th).

4 Australian Law Reform Commission, "Same Crime, Same Time", Report 103, April 2006.

5 Ibid, paras 3.25 and 3.26.

6 (1992) 174 CLR 455.

> *have no bearing upon the appropriate sentence and it may be proper to have regard to sentences imposed elsewhere in Australia.*
>
> *Even if it is accepted for the purpose of argument that any fundamental departure by the legislature from the principle that like offenders should be treated in a like manner may involve the imposition upon a court of a non-judicial function, it is in our view apparent that to require a court, in the case of a federal offender, to have regard to the sentencing practices of the State in which he is convicted involves no such departure. To require a court to do so does not convert the sentencing process into some process of a non judicial kind but merely reflects the manner in which the Commonwealth, within the means made available to it by the Constitution, has chosen in the administration of its criminal law to operate through the existing State systems."*[7]

Since the decision in *R v Leeth* in 1992, the Commonwealth enacted Part 1B of the *Crimes Act 1914* which includes a separate regime for fixing federal non-parole periods rather than relying on applied State or Territory legislation.

In *Putland v The Queen* it was noted that one of the objects of Part 1B was to provide a separate regime for fixing federal non parole periods, rather than relying on applied State or Territory legislation. However, despite the attempt at uniformity in some aspects of sentencing, in that case, the High Court recognised that the Commonwealth sentencing regime inevitably allowed for variation. It has been noted that uniformity of treatment of federal offenders was not explicitly stated to be a goal of the legislation embodying the current federal sentencing regime. Gleeson CJ noted:

> *"Section 68 of the Judiciary Act 1903 (C'th) reflects a permissible legislative choice, and one which, for a century, has resulted in some differences in the sentencing of federal offenders according to where they are sentenced."*[8]

That having been said it would be wrong to suggest that the High Court has endorsed in consistency. There is strong judicial support for a broad consistency in Commonwealth sentencing. As noted above in *Leeth* the High Court said:

> *"It is obviously desirable that, in the sentencing of offences, like offenders should be treated in a like manner."*[9]

More recently, in Wong v The Queen, Gleeson CJ noted:

> *"Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency."*[10]

Leaving to one side the options in respect of mentally ill and intellectually disadvantaged offenders and young offenders, and the more limited options where a federal offender is convicted of a terrorism offence or a people smuggling offence, there are 6 federal sentencing options following a finding of guilt:

- dismiss the charge
- bond without conviction
- bond with conviction

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7 (1992) 174 CLR 455 per Mason CJ, Dawson and McHugh J at 470-471.

8 Putland v The Queen (2004) 218 CLR 174 at 185.

9 Leeth v The Commonwealth (1992) 174 CLR 455 at 470 and see also Lowe v The Queen (1984) 154 CLR 606 at 610-611.

10 (2001) 207 CLR 584 at 591, see also Hon JJ Spigelman AC, "Consistency and Sentencing", (2008) 82 ALJ 450.

- fine with conviction
- prescribed State or Territory order with conviction (i.e. community service order or work order – see section 20AB of the *Crimes Act 1914*)
- prescribed State or Territory sentence with conviction (i.e. periodic or weekend detention – see section 20AB of the *Crimes Act 1914*)
- imprisonment which can be fully or partially suspended or can involve a prescribed State or Territory sentence (i.e. periodic or weekend detention – see section 20AB of the *Crimes Act 1914*), and depending on the length of the sentence will usually involve a release mechanism of a recognisance release order (a form of conditional bond) or a non-parole period.

In sentencing, the Court must take into account the matters section out in section 16A of the Crimes Act 1914, which provides:

> 16A Matters to which court to have regard when passing sentence etc.—federal offences
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> (1) In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.
>
> (2) In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court:
>
> (a) the nature and circumstances of the offence;
>
> (b) other offences (if any) that are required or permitted to be taken into account;
>
> (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character—that course of conduct;
>
> (d) the personal circumstances of any victim of the offence;
>
> (e) any injury, loss or damage resulting from the offence;
>
> (f) the degree to which the person has shown contrition for the offence:
>
> (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or
>
> (ii) in any other manner;
>
> (fa) the extent to which the person has failed to comply with:
>
> (i) any order under subsection 23CD(1) of the *Federal Court of Australia Act 1976*; or
>
> (ii) any obligation under a law of the Commonwealth; or
>
> (iii) any obligation under a law of the State or Territory applying under subsection 68(1) of the *Judiciary Act 1903*;
>
> about pre-trial disclosure, or ongoing disclosure, in proceedings relating to the offence;
>
> (g) if the person has pleaded guilty to the charge in respect of the offence—that fact;
>
> (h) the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences;
>
> (j) the deterrent effect that any sentence or order under consideration may have on the person;
>
> (k) the need to ensure that the person is adequately punished for the offence;
>
> (m) the character, antecedents, age, means and physical or mental condition of the person;

(n) the prospect of rehabilitation of the person;

(p) the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.

(2A) However, the court must not take into account under subsection (1) or (2) any form of customary law or cultural practice as a reason for:

(a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or

(b) aggravating the seriousness of the criminal behaviour to which the offence relates.

(2AA) Subsection (2A) does not apply in relation to an offence against the following:

(a) section 22 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*;

(b) sections 15A, 15C, 17B, 22A, 27A, 74AA, 142A, 142B, 207B, 354A, 355A and 470 of the *Environment Protection and Biodiversity Conservation Act 1999*;

(c) section 48 of the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986*;

(d) sections 69 and 70 of the *Aboriginal Land Rights (Northern Territory) Act 1976*;

(e) section 30 of the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987*;

(f) any other law prescribed by the regulations that relates to:

(i) entering, remaining on or damaging cultural heritage; or

(ii) damaging or removing a cultural heritage object.

(2B) In subsection (2A):

criminal behaviour includes:

(a) any conduct, omission to act, circumstance or result that is, or forms part of, a physical element of the offence in question; and

(b) any fault element relating to such a physical element.

(3) Without limiting the generality of subsections (1) and (2), in determining whether a sentence or order under subsection 19B(1), 20(1) or 20AB(1) is the appropriate sentence or order to be passed or made in respect of a federal offence, the court must have regard to the nature and severity of the conditions that may be imposed on, or may apply to, the offender, under that sentence or order.

(4) For the purposes of a reference in this section to a family, the members of a person's family are taken to include the following (without limitation):

(a) a de facto partner of the person;

(b) someone who is the child of the person, or of whom the person is the child, because of the definition of ***child*** in section 3;

(c) anyone else who would be a member of the person's family if someone mentioned in paragraph (a) or (b) is taken to be a member of the person's family.

In imposing a fine, the court must take into account the financial circumstances of the person (see section 16C of the *Crimes Act 1914*). A person can only be sentenced to imprisonment if the court is satisfied that no other sentence is appropriate in the circumstances of the case (see section 17A of the *Crimes Act 1914*).

ALRC Report – Same Time, Same Crime

On 13 September 2006, the ALRC published its report *Same Time, Same Crime: The Sentencing of Federal Offenders*, after its inquiry into the sentencing of federal offenders. The report considered a number of issues, including the sentencing of special categories of federal offenders, that the Committee may be interested in considering. The report is available on the ALRC's website at http://www.alrc.gov.au/report-103.

Commonwealth Sentencing Database

The purpose of the Commonwealth Sentencing Database is to provide judicial officers and other users with rapid and easy access to information about sentencing for Commonwealth offences. While the sentencing information in the Database will not limit sentencing discretion, it may assist the judicial officers with their sentencing decisions in relation to Commonwealth offences.

The Database is designed to provide primary research sources, such as judgments and legislation, linked to an array of secondary research material including commentary on sentencing principles and sentencing statistics.

This Database may be a valuable resource to the Committee in considering the issue of justice reinvestment and can be accessed at http://njca.anu.edu.au/Projects/Cth%20Sen%20DB/CSD%20homepage.htm

Yours sincerely

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