be allowed to participate in the re-investigation of complaints against police. He emphasises that the seconded officers are of an extremely high calibre, effective, credible and vigorous investigators and of value due to their experience of the NSW police force. However civilian investigators, especially former police from interstate or overseas or people with specialized experience, would supplement such a system and enable enquiries to be conducted more expeditiously and economically.

In response to the *Special Report* on 'The First Three Years of the NSW Police Complaints System' released in August 1987, NSW Premier, Mr Barrie Unsworth indicated that the Government was 'giving active consideration to allowing civilian investigations.' (*Press Release* 14 August 1987) Shortly afterwards, Mr Masterman's 'mix' of police and civilian investigators was approved by Cabinet in the face of strong criticism from police representatives. (*Sun* 3 September 1987, *DT* 20 August 1987)

a successor? Commenting on the Ombudsman's resignation, Mr Unsworth said that Mr Masterman had made significant improvements to the nature of Government and would be particularly remembered for his work in dealing with complaints against police. (*CT* 4 September 1987) The question that John Slee, the SMH's legal writer, asked is 'do Mr Unsworth and his Government . . . have the courage to appoint as successor to Mr Masterman a person as committed to it as he has been?' (*SMH* 14 July 1987)

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sentencing

> A well-written life is almost as rare as a well-spent one.
>
> Thomas Carlyle, *Essays*

three discussion papers. The ALRC has released three Discussion Papers dealing with proposals for reform of the sentencing process. Discussion Paper 29, *Sentencing: Procedure*, suggests principles to guide the courts in the imposition of punishment in accordance with specified goals. Discussion Paper 30, *Sentencing: Penalties*, proposes a new penalty structure. Discussion Paper 31, *Sentencing: Prisons*, looks at the need for a prison system in the Australian Capital Territory and suggests guidelines for regulating prisons. When releasing the first of the documents, the Commissioner-in-charge, George Zdenkowski, said

> While the criminal justice system attributed great importance to procedures necessary for the determination of guilt or innocence, it neglected procedures for the determination of punishment. Australia's system of punishment is arbitrary and operates haphazardly and inconsistently. For example, the courts should not be able to increase sentences just because they see the particular crime as prevalent in the community. To do so is unjust. Merely because a person is convicted for such an offence does not mean he or she should be punished for the crimes of others. There is an urgent need for Australia to develop its own modern punishment system reflecting Australian values relevant to the 21st Century.

sentencing procedures. DP 29 discusses sentencing goals, procedures and general principles to guide sentencing

authorities. It points out that there is currently little guidance in Australian law on the goals of sentencing or on how they are to be achieved. It suggests that the goals of punishment should be set out in legislation to govern the sentencing of federal and ACT offenders. Just deserts should be the primary goal. Rehabilitation, incapacitation and individual deterrence should be given subsidiary weight. General deterrence should be eliminated as a sentencing goal.

reliable information. DP 29 also points out that the information used in determining sentence and the way it is presented to the court are largely unregulated. It is suggested that sufficient information be available to assess the nature of the criminal conduct, the characteristics of the offender and any other relevant matters. Where any ambiguity or uncertainty exists concerning the circumstances of the offence the court should invite the Crown to adduce such further relevant and admissible evidence as may be available and should invite the defence to do likewise. If necessary, the court may of its own motion compel the production of further written or oral evidence (other than by the defendant) to inform itself as to the facts of the offence. Such evidence should be on oath and cross examination permitted. Standard procedures for resolving conflicts as to facts about the offence are also suggested. The information must be proved to be reliable. It is proposed to require proof and the application of the rules of evidence to all factual material relevant to sentence. Pre-sentence procedures designed to reduce the time taken in court by the requirement of proof are suggested.

aggravating and mitigating factors. The law does not presently place any limit on the matters which may be taken into account in sentencing. The Commission has proposed a statutory list of aggravating and mitigating factors to which judicial officers may have regard in formulating sentence. A plea of guilty entered for reasons other than remorse should not be regarded as a factor in mitigation but should still attract a discount in sentence. Certain aggravating factors currently in use, such as the prevalence of the offence, and prior record to the extent that it is relied upon to justify excessive punishment, should be excluded. Providing information about other offenders and the impact of sentence on third parties should no longer be mitigating factors. Sentencers may step outside the approved list where the facts of the case clearly give rise to an aggravating or mitigating factor not listed, provided that the proposed goals of sentencing are adhered to.

appeals. A time limit should be imposed for bringing appeals against sentence and credit should always be given for any time served in custody pending the hearing of the appeal. Submissions are sought as to whether appeals against sentence should be as of right or by leave and as to whether there should be a change in the avenue of appeals against sentence in federal cases from the State and Territory Courts of Criminal Appeal to the Federal Court. If appeals are to the Federal Court should it be empowered to hear appeals against sentence for a State offence, where the offender is also appealing against a federal offence and should it be empowered to transfer any appeal in a federal case to a State Supreme Court if it considers this more appropriate?

further guidelines. Other sentencing principles to guide decision mak-

ers are set out. Where possible the courts should seek to ensure that reparation is made by the offender to the victim. In some circumstances victim impact statements may be tendered by the prosecution. The penal value of an offence should be determined by its seriousness, with regard to the harm or risk which the conduct involved and the offender's degree of culpability for the offence. Judicial discretion should be structured by reference to the principles of consistency, proportionality and parsimony. The maximum punishment prescribed for an offence should not be imposed except in the most extreme case and no cruel or unusual punishments should be imposed. There should be no imprisonment solely for rehabilitation. No punishment should be increased by the reason only that there has been an increase in the penalty prescribed for the offence since the time it was committed. Sentencing courts should give reasons for sentence which indicate the facts relied upon in reaching sentence.

sentencing commissions. Sentencing Commissions can play a valuable role in collecting and disseminating sentencing information, developing sentencing guidelines, educating judicial officers and advising Parliament and the courts on sentencing issues. A Federal and an ACT Sentencing Commission should be established to perform these tasks. If there is not the money available to establish two Sentencing Commissions then it is suggested that one Sentencing Commission might be established in Canberra.

sentencing: penalties. In a rational system of punishment it is desirable that penalties prescribed by law correspond to offence seriousness in a consistent fashion and that different penalty types be applied in accordance with readily accessible rules. Penalty structures in Australia are inconsistent and chaotic. Discussion Paper 30 proposes a new penalty structure which includes a hierarchy of sanctions and a hierarchy of offences. It is proposed that there be a list of authorised sentencing options, selected from available State and Territory options, for federal offenders. Such a list would be an exhaustive one drawing only upon existing options considered acceptable by the Commission. These options should be legislated for and set out in a clearly defined hierarchy in ascending order of severity. The following list is offered for consideration: absolute discharge, conditional discharge, fine, deferment of sentence, probation order, community service order, attendance centre order, periodic detention, imprisonment. Not all options will be available in all jurisdictions so courts sentencing federal offenders will need to inform themselves as to the availability of sentencing options. The penalty structure proposed should also apply in the ACT. This will involve expanding the range of sentencing options so that ACT courts will have the same hierarchy of sanctions available to them as courts sentencing federal offenders. Two extra sentencing options might also be added. Consideration should be given to establishing a pilot scheme based on the European day fine system in the ACT and home detention as a sentencing option. The latter scheme should not involve electronic surveillance.

an offence hierarchy. The ALRC also proposes that a hierarchy of offences be established which relates in a consistent way to the hierarchy of sanctions outlined above. The first step in this process involves dividing offences into specified categories according to seriousness. In ranking offence

seriousness the Commission was guided by the view that a greater premium should be placed on personal physical security than the security of property. Further, offences against the person should be ranked according to harm and culpability while offences against property should be ranked according to the method of commission. This ranking should take into account both public perception and sentencing practice. It is tentatively proposed that there be at least eight categories of offences: *Category A* should be life imprisonment. It should be discretionary and only available for murder. *Category B* should have a maximum period of imprisonment of 15 years and should only be available for offences regarded as extremely serious by the community such as complicity in or conspiracy to murder, manslaughter and extremely serious forms of drug trafficking. *Category C* should have a maximum of 10 years imprisonment. Offences in this category might include armed robbery, hijacking aircraft, aggravated sexual assault, assault intentionally occasioning grievous bodily harm, kidnapping and other offences against the person involving acts endangering life. *Category D* should carry a maximum of 5 years imprisonment and apply to break enter and steal, serious fraud or misappropriation, arson and driving causing death. *Category E* should have a maximum penalty of 2 years imprisonment. It might include theft, receiving, unlawful possession of stolen goods and reckless driving. *Category F* should have a maximum of 6 months imprisonment and should include gaming and betting, theft under $1 000, escape from custody and indecent acts. *Category G* should not have imprisonment available as a penalty. It should cover all offences not specifically allocated to other categories. *Category H* should be fixed monetary penalties dealt with on an infringement notice basis such as airport parking violations and minor tax and customs matters.

choice of sanction. Once an offence seriousness hierarchy has been determined and a classification of sanctions has been achieved, there still remains the question as to how these are to be related. What rules should govern the allocation of particular sanctions in the hierarchy to particular offence categories? The Commission suggests that guidelines should be incorporated in the sentencing legislation providing that: offences in categories A, B and C should presumptively result in a custodial sentence; offences in categories D, E and F should presumptively result in a non-custodial sentence; offences in categories G and H should only result in a non-custodial sentence. Once a particular type of disposition has been determined, the court should fix the penalty level by reference to the aggravating and mitigating factors. Mitigating factors should operate to reduce the penalty type or amount of penalty otherwise appropriate. Aggravating factors should operate to increase the penalty type or amount otherwise appropriate.

other suggestions for the imposition of punishment. Imprisonment should be a punishment of last resort. Additional guidelines should be introduced in the proposed sentencing legislation in this respect. There should be a general downgrading of maximum penalties and a particular downgrading of maximum penalties in respect of non-violent property related offences. Prison terms should be imposed in weeks to be served rather than by years or months. If a non-custodial sentence is selected, the court

should impose the least onerous form of non-custodial disposition warranted by the circumstances having regard to the severity scale referred to. The eroding effect of inflation on fines should be addressed by introducing a penalty unit system whereby the prescription of a monetary maximum fine for each offence is replaced by a defined number of penalty units. When courts impose a fine on federal or ACT offenders they should first conduct a means inquiry which takes account of the defendant's income, assets, debts and dependants. The legislation governing such inquiries should reflect the approach in the Penalties and Sentences Act 1985 (Vic). A defendant given a fine on conviction should be able to opt to perform community service in lieu of payment of the fine in whole or in part. Suspended sentences should not be available for federal and ACT offenders. Existing provisions granting the courts power to suspend sentences should be repealed. Existing powers to impose so-called split sentences whereby the court partially suspends a sentence of imprisonment should also be removed. Courts sentencing ACT and federal offenders should retain the power to defer passing sentence for a limited period. The maximum period of supervision during probation should be one year. Community service orders should only be made with the consent of the offender and a maximum number of hours which can be ordered (say 300) and a maximum number of hours which can be served each week (say 40) should be fixed. The Commission invites comment on the desirability of introducing home detention as a sentencing option for federal offenders and on the restrictions which should apply. If it is introduced it ought to be a genuine alternative to imprisonment, not merely an additional sentencing option which carries the risk of net-widening. There should be a general prohibition on combining penalties. The broad exception to this is that it should be possible to combine fines and ancillary orders with non custodial, non monetary penalties. Gender, *per se*, should not form the basis for differential treatment as far as sentencing is concerned. Commonwealth habitual offender legislation should be repealed.

conditional release. A sentence does not end when an offender is conditionally released from custody. Rather it continues to be served in the community under appropriate supervision and conditions. There are various forms of conditional release. The Commission proposes that parole remain as a form of conditional release and that there be a separate system of parole for federal and ACT Offenders. Where such offenders are serving fixed terms they should be automatically released on appropriate conditions to be specified by the parole board after serving one third of their sentence. Life sentence prisoners would not be covered by this scheme however their suitability for parole should be considered not longer than 10 years after the commencement of sentence. If these suggestions are implemented it will mean that there will no longer be any need for release on licence schemes for federal or ACT offenders.

special categories of offenders. Should Aboriginality be included in a legislative statement of mitigating factors and ought there be special sentencing options available for Aboriginal offenders or special rules regulating the operation of sentencing options for Aboriginal offenders? A broader range of sentencing options for use against corporations is required. Should all or any of the following sentencing options

be adopted for corporate offenders: dissolution, disqualification from government contracts, equity fines, internal discipline orders, organisational reform orders, punitive injunctions, community service orders and publicity orders? Offenders found unfit to plead or not guilty by reason of insanity should no longer be detained at the Governor-General's pleasure. Alternative dispositions are put forward based upon recent changes in other jurisdictions. Submissions are sought on the desirability of hospital orders, treatment orders, guardianship orders and program orders being available for ACT and federal mentally disordered offenders found guilty or found not guilty by reason of insanity.

sentencing: prisons. It is proposed that a prison system be established in the ACT. The ACT has relied on the already overcrowded New South Wales prisons for too long. This view is shared by ACT prisoners and their families and by almost all ACT judges, magistrates, police and welfare officials interviewed by the Commission. The ACT is a mature community of over 250 000 people and should assume complete responsibility for its criminal justice system including the welfare of its prisoners. In developing a prison system, the ACT should develop new standards for the humane containment of prisoners. It should take the opportunity to avoid the problems found in State prison schemes and should develop a system along the lines of the model outlined in the Discussion Paper. The Commission has proposed the establishment of an ACT prisons system to occur in two stages. The first stage would see the establishment of an open (minimum security) prison, a new remand centre and possibly a periodic detention/work release centre. The second stage would be the construction of a closed (maximum/medium security) prison. All these facilities could be combined in one complex. The Commission has not recommended that a separate prison system for federal offenders be established at this stage. The Commission has however made a number of specific proposals designed to protect the interests of both federal and ACT prisoners. The Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment should be ratified to provide safeguards for all Australian prisoners as well as for all members of the community. Legislation should guarantee that no federal or ACT offenders are punished by corporal punishment, solitary confinement or dietary restrictions. The Health Insurance Act (Cth) should be amended to ensure that all prisoners are covered by Medicare, to the same extent as members of the community, for medical costs incurred for treatment provided other than by prison medical officers. The Commonwealth Electoral Act 1918 should be amended so that persons with convictions are no longer prevented from voting in Federal elections. Federal legislation should be introduced to remove restrictions on the capacity of federal and ACT prisoners to sue in the courts because of their convictions. Sentencing authorities should receive detailed information about prison conditions and programs (such as drug rehabilitation programs) available in prisons in their jurisdiction. Federal funding should be provided to the States to enable compliance by them with the Minimum Standard Guidelines for Australian Prisons. Any ACT Prisons Ordinance should provide prisoners with certain basic rights and should contain guiding principles to structure future developments

and the exercise of discretion by prison staff. The discussion paper also contains detailed proposals for the treatment of ACT prisoners, an ACT prison discipline scheme and grievance mechanisms for ACT prisoners.

comment invited. All three Discussion Papers and a summary of them are available from the Commission. The Commission's proposals are tentative and are published in order to attract public comment. Extensive consultations including public hearings in all Australian capital cities will be undertaken later this year. Submissions are invited and should be directed to: Mr George Zdenkowski, Commissioner-in-Charge, Sentencing Reference, Law Reform Commission, GPO Box 3708, Sydney NSW 2001, DX 1165 Sydney, Telephone (02) 231-1733, Fax (02) 223-1203.

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constitutional commission

> There is only one thing in the world worse than being talked about, and that is not being talked about.
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> Oscar Wilde, *The Picture of Dorian Gray.*

reports of advisory committees. Discussion of the Australian Constitution has increased markedly in recent months. The Constitutional Commission's Advisory Committees on Executive Government, Distribution of Powers, Trade and National Economic Management and the Australian Judicial System have now reported to the Commission and their reports have been published. The report of the Advisory Committee on Individual and Democratic Rights was discussed in the previous issue of *Reform* ([1987] *Reform* 125).

The Constitution is also the subject of a most entertaining book by Associate Professor Michael Coper entitled *Encounters with the Australian Constitution* published by CCH Australia Limited. Professor Coper is a member of the Advisory Committee on Trade and National Economic Management to the Constitutional Commission. Various chapters in the book provide useful background information to the reports of the Advisory Committees. For example, chapter 4, 'How Far Can the Commonwealth Go?' provides a useful background to the report of the Advisory Committee on Distribution of Powers, chapters 5 and 7 entitled respectively 'The Fiery Fiscal Furnace', and 'Guaranteed Free Intercourse and Other Advantages of Border Crossing' provide background to the report on Trade and National Economic Management and chapter 6 'Apocalypse 1975' to the report on Executive Government. Students of the Constitution should also be fascinated by the second chapter which delineates the history of the federal movement and the drafting of the Constitution.

executive government. Four of the matters dealt with in the report of the Advisory Committee on Executive Government are:

- the head of state
- the system of government
- the power of the Senate to block supply
- the position of the Governor-General.

head of state. The Committee recommends that a referendum to make Australia a republic should not be held