



OFFICE OF THE
PUBLIC ADVOCATE

**Submission to the Australian Law Reform Commission discussion
paper 70 on the sentencing of federal offenders**

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About the Office of the Public Advocate

The Public Advocate in Victoria is appointed by the Governor in Council pursuant to the *Guardianship and Administration Act 1986* (Vic). The Office of the Public Advocate (OPA) represents the interests of people with a disability, aiming to promote their rights and dignity and to strengthen their position in society. It is a statutory office, independent of government and government services, and can highlight situations in which people with disabilities are exploited, neglected or abused.

The Public Advocate delegates his authority to his staff, who may be advocates, investigators or guardians. The office also coordinates the Private Guardian Support Program, the Community Guardians Program, the Community Visitors Program and the Independent Third Person Program in Victoria. Further material on the role of the Office can be provided if required by consulting OPA's website:

www.publicadvocate.vic.gov.au.

Submissions and comments on Proposals and Issues

Proposal 2-1:

The Australian Parliament should enact a separate federal sentencing Act, which incorporates those provisions of the Crimes Act 1914 (Cth) that deal with the sentencing, administration and release of federal offenders. Provisions currently located in Parts I, IA, IB, III and VIIC of the Crimes Act that are relevant to the sentencing, administration and release of federal offenders should be consolidated within the federal sentencing Act

Submission: Proposal 2-1 is supported

Proposal 5-1

Federal sentencing legislation should state the fundamental principles that are to be applied in sentencing a federal offender, namely:

- (a) a sentence should be proportionate to the objective seriousness of the offence (proportionality);
- (b) a sentence should be no more severe than is necessary to achieve the purpose or purposes of the sentence (parsimony);
- (c) where an offender is being sentenced for more than one offence, or is already serving a sentence and is being sentenced for a further offence, the aggregate of the sentences should be just and appropriate in all the circumstances (totality);
- (d) a sentence should be similar to sentences imposed on like offenders for like offences (consistency); and
- (e) a sentence should take into consideration all circumstances of the individual case, in so far as they are relevant and known to the court (individualised justice).

Submission: Proposal 5-1 is supported

Proposal 6-1

Federal sentencing legislation should state that a court, when sentencing a federal offender, must consider any factor that is relevant to sentencing and known to the court. These factors may include, but are not limited to, any of the following matters to the extent that they are applicable:

- (a) the nature, seriousness and circumstances of the offence;
- (b) the maximum penalty for the offence;
- (c) the offender's culpability and degree of responsibility for the offence;
- (d) other offences (if any) that are required or permitted to be taken into account;
- (e) 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;
- (f) the personal circumstances of any victim of the offence and the impact of the offence on any victim;
- (g) any injury, loss or damage resulting directly from the offence; including effects beyond any immediate victim (such as effects on the environment or the market);
- (h) the degree to which the person has shown contrition for the offence;
- (i) the character, antecedent criminal history, cultural background, history and circumstances of the offender, including age, financial circumstances, physical and mental condition;
- (j) if a sentence is imposed other than a term of imprisonment—time spent in pre-sentence custody or detention in relation to the offence;
- (k) time spent in a rehabilitation program or other form of quasi-custody where the offender has been subjected to restrictions, except where full credit must be given for pre-sentence custody or detention;
- (l) subject to Proposal 6-4, the nature and extent of any forfeiture of property that is to be imposed as a result of the commission of the offence;
- (m) the probable effect on the offender of a particular sentencing option, including that the offender's circumstances may result in imprisonment having an unusually severe impact on him or her;
- (n) the probable civil and administrative consequences of being found guilty of the offence;
- (o) the prospect of rehabilitation of the offender;

Submission: Proposal 6-1 has only qualified support with the concern relating to 'Additional factors' [6.48].

6.48 The ALRC considers that the list of sentencing factors should also include a number of additional factors that are relevant to special categories of offenders. These factors are discussed in Chapters 27 to 30.

This issue is dealt with below in relation to Chapter 28, *Federal Offenders with a Mental Illness or Intellectual Disability*. In summary the OPA position is that the 'special categories of offenders' should consider a wider group of people with cognitive disability rather than being limited to people with either mental illness or intellectual disability.

Chapter 28 Issues and Proposals

Proposal 28-1

The Australian Government should initiate an inquiry into issues concerning the mentally ill and the intellectually disabled in the federal criminal justice system.

Submission: Proposal 28-1 is strongly supported with the qualification that the terms of reference for the inquiry should be extended to issues concerning 'people with cognitive disability' who would include people who are mentally ill and people with an intellectual disability.

Definitions

28.19 Stakeholders emphasised that federal sentencing legislation should distinguish between ‘mental illness’ and ‘intellectual disability’. This is significant in the criminal law context because, for example, a person with a mental illness may, at some stages of his or her life, be fit to be tried for an offence. However, a person with a severe intellectual disability may never have the capacity to be tried.

ALRC’s views

28.25 It is the ALRC’s view that federal sentencing legislation should define the terms ‘mental illness’ and ‘intellectual disability’.

- The definition of ‘mental illness’ should not rely on the application of state and territory civil law tests. The operation of various provisions of federal sentencing legislation would be clarified and uniformity of treatment of offenders with these impairments would be more readily achieved if these terms were clearly defined in federal legislation.

Comment: While ‘mental illness’ and ‘intellectual disability’ are very different conditions the consequences of any disability for an individual are diverse and highly individualised. This issue is better addressed through the application of the proposed sentencing principles and the sentencing factors as submitted below.

Proposal 28-2

Federal sentencing legislation should define the terms ‘mental illness’ and ‘intellectual disability’. In defining these terms, account should be taken of:

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| <ul style="list-style-type: none">(a) the different contexts in which the terms are used;(b) the interaction between federal law and state and territory laws dealing with such persons;(c) the possibility that mental illness, intellectual disability and substance abuse may co-exist;(d) the potential difference between criteria used for clinical diagnosis and those appropriate for forensic purposes; and(e) the difference between the appropriate definitions in civil and criminal contexts. |
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Submission: Proposal 28-2 has qualified support. An additional term ‘cognitive disability’ should also be defined.

The adoption of the proposal would be a limited reform only. People with cognitive disability due to other conditions, for example acquired brain injury or dementia, will continue to be excluded from proper consideration of their disability. People with borderline conditions but real cognitive limitations could also be excluded. A better approach is to focus on the functional impact: the inability to make reasonable judgements by reason of disability.

Recommendation:

That the legislation should not be unduly dependent on definitions of these two particular conditions but also define and employ the term ‘cognitive disability’:

- Cognitive Disability – in relation to a person means that a person by reason of their intellectual impairment, mental disorder, brain injury, or dementia has impaired capacity to make decisions.

Proposal 28-3

Provisions relating to fitness to be tried, acquittal due to mental illness, and summary disposition of persons suffering from a mental illness or intellectual disability should remain in the *Crimes Act 1914* (Cth). Provisions relating to sentencing alternatives for persons suffering from a mental illness or intellectual disability should be relocated to federal sentencing legislation.

Submission: Proposal 28-3 has qualified support subject to above. This proposed measure should also be modified to incorporate the principle contained in the recommendation that has been made in relation to proposal 28-2.

Diversion from the criminal justice system

28.38 Another method of diversion is drug court programs, which are discussed in Chapter 29. However, offenders with a mental illness or intellectual disability are excluded from some of these programs. For example, to be eligible for the New South Wales Drug Court program the ‘person must not be suffering from any mental condition that could prevent or restrict the person’s active participation in a program under the Act’. The ALRC is interested in hearing views about how such programs may be adapted for federal offenders with a dual diagnosis that includes substance abuse.

Submission:

The provision of effective diversionary programmes is supported. Responses need to be highly individualised and inclusive of people with wide ranging conditions and complex needs. The service response needs to be aimed at serving people with multiple and previously unmet or inadequately met needs. Diversionary programs need to ensure that adequate safeguards for the rights of alleged offenders are implemented.

Sentencing factors

Proposal 28-4

Federal sentencing legislation should be amended to provide that the factors to be considered in sentencing a federal offender include:

- (a) ‘mental illness’ and ‘intellectual disability’ in addition to ‘mental condition’; and
- (b) that the offender is voluntarily seeking treatment or is undertaking a behaviour intervention program to address any physical condition, mental illness, intellectual disability or mental condition that may have contributed to the commission of the offence.

Submission: Proposal 28-4 is not supported.

The use of mental condition here could be interpreted to cover other types of disability such as acquired brain injury or personality disorder. However in the interests of consistency with other recommended changes the use of cognitive disability may be more appropriate.

Whilst the extent to which the person is voluntarily participating is a consideration, it can be problematic for some people with a cognitive disability. Consideration should also be given to whether the person is participating in treatment and benefiting from this participation. The wording of this proposal also appears to be ambiguous as to whether the voluntary relates to seeking treatment or undertaking behaviour intervention.

Recommendation:

Proposal 28-4(a) measures should in addition refer to ‘cognitive disability’ as discussed above.

Proposal 28-4 (b) measures should be based on the following consideration:

That the offender is participating in treatment or behavioural support that will be of benefit to them in addressing any physical condition, mental illness, intellectual disability or cognitive disability that may have contributed to the commission of the offence.

Hospital Orders

Proposal 28-5

Federal sentencing legislation should provide that:

- (a) hospital orders are available as a sentencing option when a person with a mental illness is convicted of either a summary federal offence punishable by imprisonment or an indictable federal offence;
- (b) decisions in relation to the release from detention of persons subject to a hospital order are to be made by the proposed Federal Parole Board. The Board should consider the reports of two duly qualified psychiatrists in determining whether to release the person from detention, and on what conditions; and
- (c) the reforms identified in Proposals 9-1, 9-2 and 9-3 also apply in relation to hospital orders.

Submission: Proposal 28-5 has qualified support.

The patient’s views and those of involved case managers should also play a part in this process.

Recommendation: That the process envisaged in proposal 28-5(b) be modified so that:

- The patient is able to represent their views to the Parole Board and have access to independent advocacy support to assist them if required.
- The Board also considers the reports of case managers involved in coordinating support arrangements for the patient.

New sentencing options - Justice plans

28.67 Submissions suggested that there is a lack of adequate sentencing alternatives under Part IB for federal offenders with an intellectual disability. This section considers three options that may be appropriate for these offenders—justice plans, compulsory care and rehabilitation orders, and guardianship orders. The section also considers assessment and treatment orders, which may be appropriate for federal offenders with a mental illness.

Proposal 28-7

Federal sentencing legislation should provide that, in jurisdictions where justice plans are available, participation in the services specified in the plan may be attached as a condition of a community based order, discharge, conditional release, deferred sentence, program probation order and the proposed compulsory care and rehabilitation order.

Submission: Proposal 28-7 is supported.

Proposal 28-8

The proposed Office for the Management of Federal Offenders should collaborate with state and territory authorities to promote the adoption of justice plans throughout Australia. These plans should specify the services that are recommended for a person with an intellectual disability for the purpose of reducing the likelihood of the person committing further offences.

Submission: Proposal 28-8 has qualified support in that the target group should be expanded to cognitive disability.

Care and rehabilitation orders

Proposal 28-9

Federal sentencing legislation should provide that a court may make an order for the long-term care and rehabilitation of a federal offender with an intellectual disability. The provision should be modelled on s 20BS of the *Crimes Act* and provide that the court may, in lieu of imposing a sentence of imprisonment, make an order that the person be detained in secure accommodation for a period specified in the order, and require compliance with any condition that the court considers appropriate in the circumstances.

Submission: Proposal 28-9 has support but should be expanded to also include people with cognitive disability

Guardianship orders

28.74 *The Council of Social Service of New South Wales (NCOSS) submitted that consideration should be given to the use of guardianship orders to sentence federal offenders with an intellectual disability. Guardianship orders are available as a sentencing alternative in the United Kingdom. Under s 37 of the Mental Health Act 1983 (UK), where a person is convicted before the Crown Court or a Magistrates' Court the court may place the person under the guardianship of a local social services authority or other approved person.*

28.75 *The adoption of guardianship orders as a sentencing alternative for federal offenders raises a number of issues including: the circumstances in which a guardianship order is appropriate; the factors a court must consider when imposing such an order; and whether the order should be available without passing sentence on the offender. A significant issue is who would be responsible for the administration of these orders. NCOSS noted that regard would need to be given to whether federal offenders would be placed under the guardianship of state and territory guardianship boards or a guardian.*

28.76 *ALRC 44 recommended the introduction of guardianship orders. The ALRC commented that where the power to commit a person to the guardianship of another is vested in a board or other tribunal, the form of guardianship order will have to be that the department of corrective services in that jurisdiction take the necessary steps to have the offender placed under guardianship.*

28.77 *The ALRC has formed the preliminary view that it is unnecessary for federal sentencing legislation to provide for guardianship orders. Program probation orders and psychiatric probation orders allow a federal offender with a mental illness or intellectual disability to live in the community and address their offending behaviour under the supervision of a probation officer. Additionally, guardianship legislation in each Australian state and territory allows for a guardianship board or tribunal to make a guardianship order. However, the ALRC is interested in receiving further information and submissions on the use of guardianship orders for federal offenders with an intellectual disability either as a sentencing option or as an order without passing sentence.*

OPA Submission:

Guardianship is not appropriate as a sentencing option as it has quite different purposes to those of the criminal law system. It is not clear how it could work as an order of a federal court with or without the passing of a sentence. Guardianship requires consideration of a person's capacity to make decisions about key aspects of their circumstances. It results in legitimated substitute decision making that is generally time limited. The use of guardianship as a form of civil detention can also be a significant denial of human rights given that there is no independent review of guardianship decisions in most states and territories.

Much of the comment reported above appears to misunderstand the role, function, practice and legislative framework of guardianship in Australia. Guardianship is necessarily concerned with the best interests of the person and is not constructed around a goal of community protection. Guardians have very limited coercive powers.

A formalised case management process might be appropriate if it is not clear what services are appropriate to meet the needs of a particular individual at the time of sentencing. Further assessment or actual trials of particular approaches might be first required. It is likely that advocacy will also be needed to obtain an appropriate service response. Incarceration or release without conditions might also be viewed as inappropriate due to the impact of the cognitive disability. In such cases it may be appropriate to have an additional support available that could assist the offender to access the services they need to address their offending behaviour. Additional measures might also be required to generate improved relationships and interfaces between the courts, corrections and human services systems.

It would be inappropriate to call the person responsible for locating the appropriate service response a guardian. They are acting in a different capacity, both conceptually and practically, and are operating within the jurisdiction of the federal criminal courts. It might be appropriate to have a panel of experts in the human services field that are called upon to perform this case management role as a friend of the court.

It is likely that in most cases, if not all, the provision of "Assessment and treatment orders" that is discussed next will be sufficient and superior in addressing this perceived need.

Assessment and treatment orders

28.80 ALRC has not received any submissions in relation to whether federal sentencing legislation should provide for assessment or diagnosis, assessment and treatment orders. The ALRC is interested in receiving further information and submissions on this issue.

OPA Submission: Federal sentencing legislation should provide for assessment and treatment orders modelled on the Victorian legislation.

Treatment by state and territory authorities

ALRC's views

28.85 It is important that state and territory authorities are authorised to treat federal offenders with a mental illness who are subject to orders requiring psychiatric treatment but who do not have the capacity to consent to treatment. Without this authority the rehabilitative function of these orders cannot be fulfilled. However, the provision of involuntary treatment is a controversial issue. The ALRC has received only one submission in relation to this issue and is interested in receiving further information and views on appropriate options for reform

OPA Submission: Whilst any involuntary measures must include sufficient safeguards to ensure the protection of the human rights of persons subjected to such treatment, it is important that federal offenders be able to access such treatment.

Involuntary measures must be conceived as a planned behaviour management approach that contains clear descriptions or explanations of:

- The nature of the treatment that is to be used (restraint or seclusion);
- The circumstances in which the proposed form of treatment is to be used;
- How the treatment will be of benefit to the person;
- That the treatment is the least restrictive of the person as is possible in the circumstances;
- Consultation with the person with disability and where appropriate their guardian, representatives of disability service providers, and any other person considered to be integral to the treatment.

Pre-sentence reports

ALRC's views

28.92 Pre-sentence reports are particularly important when a federal offender has a mental illness or intellectual disability because their impairment may justify diversion from the criminal justice system or imposition of a less severe sentence. Additionally, if a court is aware that a federal offender has a mental illness or intellectual disability, it will be able to tailor a sentence or other order to ensure that the offender receives the treatment, support or care required.

Proposal 28-10

Federal sentencing legislation should provide that a court must request a pre-sentence report when: (a) an offender has a mental illness or intellectual disability, or such a condition is suspected; and (b) there is a reasonable prospect that the court will impose a sentence that deprives the offender of his or her liberty or places the offender in jeopardy of being deprived of his or her liberty.
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Submission: Proposal 28-10 has support but should be expanded to also include people with cognitive disability.

Certificate of available services

ALRC's views

28.102 Federal sentencing legislation should provide for a certificate of available services such as that provided for in Victorian legislation. In R v Batori, Gullaci J noted that the lack of a mechanism similar to s 47 was a gap in federal sentencing legislation.

Proposal 28-11

Federal sentencing legislation should provide that a court must request that the state or territory department with responsibility for the provision of services to persons with a mental illness or intellectual disability provide the court with a 'certificate of available services' if the court is considering imposing an order that a federal offender receive treatment or participate in a rehabilitation program.

Submission: Proposal 28-11 has support but should be expanded to also include people with cognitive disability

NB OPA is not clear on what process is to be followed if the 'certificate' were to indicate that no appropriate services were available.

Administration and release

Programs and pre-release schemes

Comment

It should be noted that the issue of informed consent is less of an issue in these circumstances where a person is already being treated within a coercive regime. Issues more frequently arise in relation to the access of appropriate services to support the release process into the community. Better collaboration between 'corrections' and 'community' services is required so that support to the person being released is seamless and effective.

Offenders on shorter terms sentences should also not be precluded from accessing pre-release and rehabilitation programs to address the possibility of a 'revolving door' for minor but serial offenders.

Proposal 28-12

State and territory departments of corrective services should ensure that appropriate advice and support is provided to federal offenders with a mental illness or intellectual disability who are required to give consent to participate in a rehabilitation program or give an undertaking to participate in a pre-release scheme.

Submission: Proposal 28-12 has support but should be expanded to also include people with cognitive disability.

Adequacy of service provision

ALRC's views

28.131 The ALRC believes that the Australian Government should play a greater role in the coordination and oversight of service provision to persons with a mental illness or intellectual disability who have come into contact with the federal criminal justice system. This is particularly important to ensure that federal offenders with a mental illness or intellectual disability are treated uniformly across jurisdictions. Improved service

provision should be directed to ensuring that federal offenders have equal access to diversionary schemes, sentencing options, prison programs, pre-release schemes and parole.

28.132 The Australian Government will need to work with state and territory governments to ensure that services are provided to federal offenders with a mental illness or intellectual disability in accordance with international obligations, international standards, and national standards. As noted in Chapter 22, the OMFO's role will include monitoring compliance with these standards.

Proposal 28-13

The Australian Government and state and territory governments should work together to improve service provision to federal offenders with a mental illness or intellectual disability.

Submission: Proposal 28-13 has support but should be expanded to also include people with cognitive disability

The objective should be to produce a national strategy that will improve collaboration between corrections and community services systems and the provision of rehabilitation, pre-release and post-release programs.

Proposal 28-14

The Corrective Services Administrators' Conference should develop and promote compliance with national standards for the assessment, detention, treatment and care of persons with a mental illness or intellectual disability who come into contact with the criminal justice system. These standards should comply with relevant international instruments.

Submission: Proposal 28-14 has support but should be expanded to also include people with cognitive disability

Recommendation: The application of these standards in disability and mental health services as well as in corrections systems should also be fully considered.

Monitoring

Comment

The Office for the Management of Federal Offenders will need to liaise with organisations providing direct support or case management to ex-offenders in the community.

Proposal 28-15

The Office for the Management of Federal Offenders should monitor persons with a mental illness or intellectual disability who have been accused of a federal offence and are subject to continuing obligations under a court order in connection with the offence.

Submission: Proposal 28-9 has support but should be expanded to also include people with cognitive disability

28.153 In Chapter 22 the ALRC proposes that the OMFO monitor and report on all federal offenders. The ALRC also proposes that the OMFO should monitor persons with a mental illness or intellectual disability who have been accused of a federal offence and subsequently acquitted due to mental impairment, are found unfit to be tried, or summarily discharged when they are subject to ongoing court orders. This proposal should also apply to young persons with a mental illness or intellectual disability who have been accused of a federal offence

Relevant Elements of Proposal 22-4

The functions and powers of the OMFO should be negotiated with the states and territories, and should include the following:

- (a) maintaining an up-to-date case management database in relation to all federal offenders;
- (c) liaising with the states and territories in relation to federal offenders, including special categories of offenders;
- (f) ensuring that the treatment of federal offenders complies with Australia's international obligations;
- (k) providing advice to the Australian Government about funding, including priorities for special programs for federal offenders;
- (n) performing all of the above in relation to young federal offenders and federal offenders with a mental illness or intellectual disability.

Submission: These Elements of Proposal 22-4 have support but should be expanded to also include people with cognitive disability

The other elements of this proposal are outside the purview of OPA.