Reasonable Cause CPD: Basics of Commonwealth Sentencing

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Introduction

One aspect of Commonwealth criminal law which can be particularly challenging is sentencing. Anyone who has been involved in the sentencing process will know just how difficult the task can be.

The aim of this talk is to provide an overview of the federal sentencing regime, and to note some matters to look out for on the way through.

Federal sentencing regime

I started at the CDPP as a young solicitor about one week before Part 1B of the *Crimes Act* 1914 was introduced by the *Crimes Legislation Amendment Act [No. 2]* 1989, on 17 July 1990. It was the first sentencing regime I learnt about – and I came to learn it by conducting many of the Commonwealth summary lists before the newly minted Magistrate at 99 Elizabeth Street, now Justice Derek Price, Chief Judge of the NSW District Court.

Prior to Part 1B, all Federal offenders had been sentenced in accordance with the law that applied in the particular state or territory where their offences were committed.

The introduction of Part 1B, however, has never been universally embraced. Back in 1990, in a decision I went up to collect for the office, the NSWCCA decision of *R v Paull*[2], Hunt J provided this rather pessimistic assessment:

> *It is to be hoped that the Federal Parliament will quickly come to realise the difficulties caused by this unnecessarily complicated and opaque legislation and that it will give urgent reconsideration*

[1] Commonwealth Director of Public Prosecutions.
[2] *R v Paull* (1990) 20 NSWLR 427

to its provisions. At the present time, the question of sentence will take longer to deal with in the average trial than the question of guilt itself.[3]

The regime has not grown any less complex since his Honour made those remarks. Compounding the difficulty is that presiding Magistrates and Judges may have limited familiarity with the intricacies of the Federal sentencing provisions, and often the courts have to deal with the added complexities involved in sentencing offenders for a mix of Federal and State offences.

The current scheme is still not a comprehensive federal scheme. The regime is an amalgam of three components:

1. specific Commonwealth legislation, principally Part 1B of the *Crimes Act 1914*;
2. common law principles that fill in the gaps in federal provisions where they are not complete, but only if they are not complete, applied by section 80 of the *Judiciary Act;*
3. state/territory procedural laws picked up and applied by sections 68 and 79 of the *Judiciary Act 1903*.

The unpopularity of the federal sentencing regime was potentially to be a thing of the past when in 2006 the Australian Law Reform Commission recommended that a new federal sentencing Act be enacted – to fix up many of the problems which had been identified. It would include a statement of the purposes of sentencing, the fundamental principles that must be applied in sentencing, and the factors that courts must consider in sentencing federal offenders.[4] Assembling federal sentencing law into one Act would, in the eyes of many, make the law more accessible and would be likely to assist the courts in achieving greater consistency. However, 11 years later there still does not appear to be any bureaucratic or political enthusiasm for a law in these terms.

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[3] *R v Paull* (1990) 20 NSWLR 427, at [437]

[4] ALRC, "Same Crime, Same Time: Sentencing of Federal Offenders", Report 103, April 2006, p15.

Federal Legislative provisions

The federal legislative provisions in Part 1B of the Crimes Act 1914, which largely reflect the common law, form the largest component of federal sentencing law.

Section 16A is the key provision within Part 1B. Section 16A(1) provides that the court must *'impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence'*.

The section 16A(1) requirement that the Court must impose a sentence or make an order that is of a *'severity appropriate in all the circumstances'* of the offence was referred to by the Western Australian Court of Criminal Appeal in *Smith v The Queen* (1991) 52 A Crim R 447, at [457] as the '*primary obligation'* of sentencing, which is reinforced by section 16A(2)(k) which requires the court to take into account the need to ensure the person is '*adequately punished for the offence'*.[5]

Section 16A(1) is accompanied by section 16A(2), which sets out a non-exhaustive list of matters to which the court is to have regard when passing sentence upon a federal offender. This list is diverse, it includes not only the nature and circumstances of the offence,[6] but also matters such as the degree to which the person has shown contrition for the offence,[7] the person's character, antecedents, age, means and physical or mental condition,[8] and the need to ensure that the person is adequately punished for the offence.[9]

So, in summary, the central sentencing issues are that the sentence must be proportional to the offending,[10] the principle of totality must apply,[11] and the court must take into account the non-exhaustive list of factors set out in section 16A(2) of the *Crimes Act*.

[5] Also, *Minniti v The Queen* [2006] NSWCCA 30; (2006) 159 A Crim R 394
[6] *Crimes Act 1914* (Cth), s. 16A(2)(a)
[7] *Crimes Act 1914* (Cth), s. 16A(2)(f)
[8] *Crimes Act 1914* (Cth), s. 16A(2)(m)
[9] *Crimes Act 1914* (Cth), s. 16A(2)(k)
[10] *Crimes Act 1914* (Cth), s. 16A(1)
[11] *Crimes Act 1914* (Cth), s. 16B

Matters listed in section 16A(2) are only required to be taken into account where '*relevant and known'* to the Court. This does not require the judicial officer to refer to all matters listed in 16A(2).

In relation to the threshold for when a matter can be considered 'known' to the court, in *Weininger v The Queen* (2003) 212 CLR 629 the majority of the High Court (Gleeson CJ, McHugh, Gummow and Hayne JJ) commented:

> *the phrase "known to the Court", rather than "proved in evidence", or some equivalent expression, suggests strongly that section 16A was not intended to require the formal proof of matters before they could be taken into account in sentencing. Rather, having been enacted against a background of well-known and long established procedures in sentencing hearings, in which much of the material placed before a sentencing judge is not proved by admissible evidence, the phrase "known to the court" should not be construed as imposing a universal requirement that matters urged in sentencing hearings be either formally proved or admitted.*[12]

As the list of factors in section 16A(2) is somewhat lengthy I will focus on a couple that may be of interest.

The fact of the entering of a plea of guilty – section 16A(2)(g)

As you are aware, in most state jurisdictions a guilty plea must always be taken into account even if it is motivated solely by self-interest and even where it is a plea to lesser offences than originally charged. A sentencing judge has a wide discretion and must take into account a range of matters including the strength of the Crown case, the fact victims are spared the trauma of the trial and any demonstrated remorse on the part of the offender.[13]

In 2002, a majority of the High Court in *Cameron v The Queen* expressed the view that in sentencing for the offence in that case it was incorrect to base the discount for a guilty plea on the fact that the community is spared the expense of a trial (or the utilitarian value of the plea of guilty). Rather, the court held, it should be accepted on the basis that the defendant has expressed a *"willingness to facilitate the*

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[12] *Weininger v The Queen* (2003) 212 CLR 629, 21 (Gleeson CJ, McHugh, Gummow and Hayne JJ)
[13] *Giordano v The Queen* [2010] VSCA 101

course of justice". The majority said this rationale enables reconciliation of the requirement that a person not be penalised for pleading not guilty and the rule that a plea of guilty may be taken into account in mitigation.[14]

In NSW, it is the position of the NSWCCA that *Cameron* applies to Federal offences. This is not the position of the Victorian Court of Appeal. In 2016, in the decision of *DPP (Cth) v Thomas; DPP (Cth) v Wu* [2016] VSCA 237 it was held that *Cameron* did not purport to set out the position in relation to Federal offending, but rather involved Western Australian law. The Victorian Court of Appeal held that the utilitarian benefit of a plea of guilty, that is the benefit to the community in saving the expense of a trial and the need to call witnesses, must be taken into account when discounting a federal sentence that would otherwise be imposed.[15] This divergence between these two courts in most cases is probably of no practical effect – a distinction without a difference. It remains to be seen if the position can be resolved either judicially or legislatively in the next year or two. But at the moment, at least in NSW, the State position of a discount for the utilitarian value of a plea of guilty is different to the Commonwealth position of a discount for a willingness to facilitate the course of justice.

Co-operation with law enforcement agencies (past co-operation) – section 16A(2)(h)

Section 16A distinguishes between two types of co-operation that can be relevant, section 16A(2)(h) deals with past co-operation whereas s 16AC (formerly s 21E) deals with promised future co-operation.

Where s 16A(2)(h) is relevant (ie past co-operation), the effect upon the sentence is to be considered as but one of the various matters within the "instinctive synthesis" of the sentencing process. The preferred approach in sentencing a federal offender is not to specify a discount allowed for past co-operation of the type covered in s 16A(2)(h), but to have regard to this along with all other relevant matters in arriving at the appropriate sentence which is the "instinctive synthesis" of all those relevant matters.

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[14] *Cameron v The Queen* (2002) 209 CLR 339. See also Mirko Bagaric and Julie Clarke, *'The Guilty Plea Discount: Why and How Much – An Analysis of Cameron*' (2002) 2 Bourke's Criminal Law News 17.

[15] *DPP (Cth) v Thomas; DPP (Cth) v Wu* [2016] VSCA 237

It is not the case that past co-operation with law enforcement authorities will always result in a sentencing discount. The benefit which has flowed from co-operation is a relevant factor to be taken into account,[16] as is the need to encourage offenders to provide full and frank co-operation with the authorities, whether or not the information supplied turns out to be effective.

In the Commonwealth context the distinction between past and future co-operation is important as they are dealt with differently and where both are relevant they need to be dealt with separately. Promised future co-operation must be treated separately from past co-operation.[17] Where there is an undertaking for future co-operation, the court must quantify the discount given as this is explicitly required by s 16AC.[18]

While the promise or undertaking does not have to be expressed in a particular fashion, it must be given in clear terms and be given in contemplation of the possible institution of some future proceeding if disagreement arises regarding compliance.[19]

Where, at a point in time after the sentence is imposed, it becomes apparent that the undertaking has not been carried into effect by the person who has been sentenced, section 16AC permits the Commonwealth DPP to appeal against the reduced sentence. The onus of proving beyond reasonable doubt that the failure was without reasonable excuse is on the Commonwealth DPP.[20]

Sentencing options for federal offenders

In general terms there six sentencing options contained in the *Crimes Act 1914.* These include:

1. dismissing the charge under section 19B(c);

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[16] See *Wangsaimas v The Queen* (1996) 6 NTLR 14 (1996) 87 A Crim R 149, 172-173; *R v Gallagher* (1991) 23 NSWLR 220

[17] *R v Gladkowski* [2000] QCA 352; (2000) 115 A Crim R 446.

[18] *R v Tae* [2005] NSWCCA 29.

[19] *R v Burns* (Unreported, Supreme Court of Victoria, Phillips CJ, Hampel and Vincent JJ, 9 November 1992); *R v Gangelhoff* [1998] VSCA 20

[20] *R v YZ* (1999) 162 ALR 265

2. discharging the offender without proceeding to a conviction upon the offender entering into a recognisance (for a maximum period of 3 years) pursuant to section 19B(d);[21]
3. convicting but releasing the offender without passing sentence upon the offender entering into a recognisance (for a maximum period of 5 years) pursuant to section 20(1)(a) of the *Crimes Act*;
4. convicting and imposing a pecuniary penalty under section 4B;[22]
5. the State or Territory sentencing options set out in section 20AB or prescribed in Regulation 6 of the *Crimes Regulations 1990*;
6. a term of imprisonment, including either fully or partly suspended

The following are options not available in sentencing Federal offenders:

1. Convicting and discharging. If a federal offender is convicted something more than the conviction itself must occur (i.e. a s 20(1)(a) bond or a fine).[23]

2. Imposing a fine without conviction. Section 19B of the *Crimes Act 1914* (Cth) only permits the imposition of certain types of payments as a condition of a non-conviction bond – namely, reparation, restitution, compensation or costs.[24]

3. Imposing a fine and a bond as two different penalties. The only way to achieve that effect is by making a pecuniary penalty a condition of section 20(1)(a)(iii) bond.

Non-custodial sentencing options

Section 17A of the *Crimes Act* provides that a court shall not sentence a person to imprisonment for a federal offence unless the judge has considered all other available sentences and is satisfied that no other sentence is appropriate.

[21] Any 'other conditions' which are imposed as part of the recognisance can only operate for a maximum of 2 years – s.19B(1)(d)(iii)

[22] Where a natural person is convicted of an offence punishable by imprisonment only, the court may, if the contrary intention does not appear and the court thinks it appropriate, instead of or in addition to imprisonment, impose a pecuniary penalty, in accordance with the formula stated in section 4B of the *Crimes Act* (the term of imprisonment in months x 5 x the penalty unit)

[23] See *Lanham & Anor v Brake* (1983) 34 SASR 578

[24] *Commissioner of Taxation (Cth) v Doudle* (2005) 195 FLR 76.

Discharge of offender without proceeding to conviction: s 19B

The *Crimes Act 1914*, section 19B, makes provision for a court, notwithstanding that a charge has been proven, to either dismiss the charge or to discharge the defendant without proceeding to a conviction on the defendant entering into recognizance to be of good behavior.

This provision is similar in nature to that found in section 10 of the *Crimes (Sentencing Procedure) Act 1999* although the range of factors which may inform such a decision is more limited, with no equivalent of the discretion under section 10(3)(d) for the court to consider *“any other matter that the court thinks proper to consider”.* Despite the expansive words used the court should not impose any condition impossible of being complied with or one which is beyond the power of the court to impose.

The application of section 19B(1)(b) involves a two-stage enquiry. The first is the identification of one or more of the following factors:

a. the character, antecedents, age, health or mental condition of the person (s 19B(1)(b)(i));
b. the extent to which the offence is of a trivial nature (s 19B(1)(b)(ii); and
c. the extent to which the offence was committed under extenuating circumstances (s 19B(1)(b)(iii)).

In order to enliven the discretion under the ‘first-stage’ of section 19B, the defendant must raise circumstances that make that matter ‘relatively atypical’.[25]

The second stage is the determination that, having regard to the factor or factors so identified, it “is inexpedient to inflict any punishment, or to inflict any punishment other than a nominal punishment, or that it is expedient to release the offender on probation”.[26]

[25] *Paterson v Fenwick* (1994) 115 FLR 462 (Higgins J)
[26] s. 19B(1)(b) *Crimes Act 1914*

Where the defendant is released on a recognizance order under section 19B(1)(d) that order cannot exceed 3 years in length and may contain conditions including the payment of reparation, restitution or compensation and any other conditions that '*the court thinks fit to specify in the order*'.

Conditional release of offender after conviction: s 20(1)(a)

Section 20 enables the court to release a federal offender on a bond with conviction upon their giving security, with or without sureties and conditions. This is commonly referred to as a recognizance and is the equivalent of a NSW section 9 or good behavior order.

A conviction bond may be imposed for up to 5 years with conditions which may include payment of reparation, restitution, compensation costs or pecuniary penalty.[27] Other conditions may be imposed for up to 2 years.[28]

Small procedural differences between a state and federal bond do exist. For an offender to enter into a federal bond a state bond form should not be used, a prescribed form exists under the *Crimes Regulations 1990*.[29] A section 20 bond also needs to specify the monetary amount of security to be given by the offender, neither the *Crimes Act* nor the common law provide a limit for this amount.[30] A bond can also involve a surety but this is almost never required.

Reparation order: s 21B

Where a person is convicted or an order made under section 19B, the Court may, in addition to the penalty if any is imposed, order the offender to make reparation to the Commonwealth, or to any other person in respect of loss suffered by that person as a direct result of the offence.[31]

[27] s. 20(1)(a)(i) *Crimes Act 1914*
[28] s 20(1)(a)(iv) *Crimes Act 1914*
[29] See *DPP v Cole* (2005) 91 SASR 480
[30] *Assafiri (No.2) v R* [2007] NSWCCA 356
[31] s. 21B *Crimes Act 1914*.

A condition that an offender pay reparation or compensation may be one of the conditions of an order made under section 19B or section 20, however, in this situation if the offender fails to pay the reparation or compensation within the period of the order the offender will be in breach of the order.

Orders for forfeiture and pecuniary penalties may also be made under the *Proceeds of Crime Act 2002*, and in limited circumstances an order may be made in relation to forfeiture of the Commonwealth's contribution to the superannuation of a Commonwealth Public Servant or member of the AFP under the *Crimes (Superannuation Benefits) Act 1989*.

Fine: s 16C

Under the *Crimes Act 1914* (Cth) a reference to a "fine" is defined in s 3(2) to include a reference to a pecuniary penalty other than:

a) a pecuniary penalty imposed under Division 3 of Part 13 of the *Customs Act 1901*,

b) a pecuniary penalty order under the *Proceeds of Crime Act 1987* (Cth), and from 1 January 2003, a pecuniary penalty order or a literary proceeds order under the *Proceeds of Crime Act 2002* (Cth); or

c) a superannuation order made under the *Australian Federal Police Act 1979* or the *Crimes (Superannuation Benefits) Act 1989* (Cth).

Under section 4B of the *Crimes Act 1914* (Cth) a fine is an available penalty even where a person has been convicted of an offence that is designated in the legislation as punishable by imprisonment only. There is a formula for calculating a fine set out at s 4B(2). The court can impose a pecuniary penalty instead of, or in addition to, imprisonment.[32]

Where an indictable offence carries a pecuniary penalty only, a court of summary jurisdiction can hear and determine offences where the pecuniary penalty is not more than 600 penalty units (for an

[32] *Crimes Act 1914* (Cth), s 4B(2).

individual) or 3000 penalty units (for a body corporate) where both prosecution and defence consent.[33] A penalty unit is currently $180, and is subject to indexation: see s4AA.

Where a corporation is convicted of a federal offence and the contrary intention does not appear the maximum pecuniary penalty that can be imposed is five times the amount that could be imposed on a natural person convicted of the same offence.[34]

In determining an appropriate fine or pecuniary penalty, under section 16C(1) of the *Crimes Act* the court is required to have regard to the financial circumstances of the offender, although that is only one of many considerations and is not determinative.[35] Under section 16C(2) a court is not precluded from imposing a fine if the financial circumstances of the offender cannot be ascertained.

Sentences of imprisonment

If a court imposes a term of imprisonment it must state the reasons for its decision that no sentence other than a term of imprisonment is appropriate and cause those reasons to be entered on the court record.[36] Notwithstanding this requirement, a failure to cause the reasons to be entered on the court record does not in itself invalidate the sentence imposed.[37]

In considering the imposition of a term of imprisonment the Court needs to have regard to the following key sections:

- section 16A(1) – a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence;
- section 16A(2) –a non-exhaustive list of factors that the court must take into account that are *relevant and known to the court*;
- section 16AC - any undertaking to co-operate with Law Enforcement Agencies;

[33] *Crimes Act 1914* (Cth), s 4JA.
[34] *Crimes Act 1914* (Cth), s 4B(3).
[35] *Jahandideh v R* [2014] NSWCCA 174, at [16]-[17]
[36] *Crimes Act 1914,* s. 17A(2)
[37] *Crimes Act 1914*, s. 17A(3)

- section 17A – that a term of imprisonment must be a sentence of last resort.[38]

Where a term of imprisonment of greater than three years (including a total aggregate sentence of greater than three years) is imposed the Court, under section 19AB of the *Crimes Act*, must fix a non-parole period. The Court may decline to fix a non-parole period under this section if satisfied that a non-parole period is not appropriate, having regard to '*the nature and circumstances of the offence or offences'* and *'the antecedents of the person*', or *'if the person is expected to be serving a State or Territory sentence on the day after the end of the federal sentence, or the last to be served of the federal sentences'.*[39]

If the sentence imposed does not exceed three years, under section 19AC the Court must make a Recognizance Release Order rather than fix a non-parole period. Under section 19AC(4) a Court may decline to make a recognizance release order in the same circumstances as set out above in relation to electing to decline to fix a non-parole period.

Under section 19AC(3), if the aggregate sentence does not exceed 6 months the Court is not required to make a recognizance release order.

It is also worth noting that there are a number of restrictions on imposing terms of imprisonment for minor offences. Section 17B provides that if a person is convicted of an offence or offences under the Criminal Code relating to property, money or both and the total value of the property or money involved is $2000 or less and the other person has not previously been sentenced to imprisonment for any offence, the court is not to impose imprisonment unless the court is satisfied that there are exceptional circumstances that warrant it.

[38] See *R v Parker* (1992) 28 NSWLR 282
[39] *Crimes Act 1914,* s. 19AB(3)

Commencement of imprisonment

The *Crimes Act* does not specify that unless otherwise directed sentences are to be concurrent. The Court is required to direct when federal sentences are to commence, in accordance with section 19 of the *Crimes Act*.

Section 19 sets out how terms of imprisonment are to be structured where:

- subsection 1, a person is to be sentenced to a term of imprisonment for a federal offence while they are currently serving a term of imprisonment for either a state or federal offence;
- subsection 2, a person is to be sentenced to a term of imprisonment for two or more federal offences at the same time;
- subsection 3, a person is to be sentenced to a term of imprisonment for one or more federal and one or more state offences at the same time.

In each of these scenario's stating only that the sentences are to be cumulative or concurrent will be ineffective and will not comply with the requirements of section 19(3).[40]

The requirements of section 19 can be met by:

a. directing that each sentence commence on a specific date; or

b. by directing that the first sentence commence on a specified date and other sentences by reference to the start date of that or another sentence; eg:

    i. the sentence on charge 1 to commence today;

    ii. the sentence on charge 2 is to commence 5 months after the commencement of the sentence on charge 1;

    iii. the sentence on charge 3 is to commence 1 month after the commencement of the sentence on charge 2.

[40] *O'Brien v R* (1991) 57 A Crim R 80 at 86; *R v Carroll* (1991) 2 VR 509 at 515

One of the main objects of this section is that there are no gaps in a person's custodial term when they are sentenced to more than one term of imprisonment.

Section 16E of the *Crimes Act* headed 'Commencement of Sentences" picks up and applies the legislation of the relevant State or Territory dealing with various aspects of joint Commonwealth and State sentences.

In relation to pre-sentence detention, section 16E also provides a 'fail safe' by making it mandatory for a Court to take into account any time spent in custody in the event that a State or Territory do not have laws allowing for this to occur.

Discounts on Federal sentences

The *Crimes Act* provides for a sentence to be discounted to reflect the following:

- time spent in pre-sentence detention – section 16E *Crimes Act;*
- if the person has pleaded guilty to the charge in respect of the offence, that fact – section 16A(2)(g) *Crimes Act;*
- the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences – section 16A(2)(h) *Crimes Act;*
- an undertaking to co-operate with law enforcement agencies – section 16AC of the *Crimes Act.*

If the Federal sentence is reduced due to a section 16AC undertaking (previously section 21E) the court must specify that the sentence was reduced for that reason and state the sentence that would have been imposed but for the reduction. The undertaking to co-operate may relate to either a Federal or a State or Territory offence. Where a sentencing judge is required to indicate the sentence that would have been imposed but for the discount this indication should also include a reference to the non-parole period that would have been imposed.

Sentencing for joint Federal and State or Territory offences

For those matters that do involve a mix of Federal and State or Territory offences, the complexities of sentencing are increased. Under section 19AJ of the *Crimes Act 1914*, a court cannot impose a single non-parole period or recognizance release order for both federal and state terms of imprisonment.

There are three common scenarios that may apply when a Court comes to sentence an offender for both Federal and State or Territory offences at the one sitting:

i. where the offender is not currently undergoing any sentence;
ii. where the offender is already undergoing a sentence of imprisonment for a state or federal offence;
iii. where the offender is already undergoing a federal sentence.

With the exception of imposing an aggregate sentence, a separate sentence needs to be imposed for each Federal offence, with commencement dates specified. The court must fix a separate single non-parole period or single recognizance release order for the federal offences.[41] However, a court is not required to make a recognizance release order where the aggregate of the federal sentences does not exceed 6 months and a non-parole period cannot be imposed if the aggregate of the sentences does not exceed 3 years.[42]

If a non-parole period applies in respect of a state or territory offence and the Court wishes to impose a Federal sentence which is cumulative on that state or territory sentence the decision will need to be made which sentence is to be served first in time.

Where the offender is already undergoing a State or Territory sentence

Where the offender is already undergoing a State or Territory sentence of imprisonment the court must direct when the federal sentence commences and ensure that the federal sentence commences no later

[41] *Crimes Act 1914,* s. 19AB
[42] *Crimes Act 1914,* ss 19AC(1) and 19AC(3)

than the end of the State or Territory non-parole period.[43] As I mentioned before, the intention behind section 19 is that there is no gap or hiatus between the periods of imprisonment to be served.[44]

Where the offender is already undergoing a Federal sentence

Where the offender is already undergoing a Federal sentence at the time of sentencing the Court must again ensure that the sentence to be imposed has a commencement date no later than the end of a sentence the commencement of which has already been fixed.[45]

Where the Federal offender who is sentenced to a further Federal term or terms is already the subject of a non-parole order or a recognizance release order, the *Crimes Act 1914* (Cth) requires that the court give consideration to imposing a new global non-parole order or recognizance release order.

Where the offender is already the subject of an existing non-parole order section 19AD applies and where the offender is already subject to an existing recognizance release order and before being released the Court imposes a further Federal sentence on the offender section 19AE applies.

Fixing non-parole periods and recognizance release orders

The fixing of a non-parole period or recognizance release order must be made with reference to sections 19AB and AC of the *Crimes Act*.

Under section 19AJ of the *Crimes Act,* a court cannot fix a single non-parole period or recognisance release order for both Federal and State sentences.

Minimum non-parole periods apply for certain offences, including terrorism.

Section 19AG(2) provides that the court must fix a non-parole period of at least three-quarters of the sentence of imprisonment. This includes juveniles convicted at law for terrorism offences.

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[43] *Crimes Act 1914,* s. 19(1)(b)
[44] *Mercanti v the Queen* (2011) WACA 120, *R v Dobie* (2004) QCA 140
[45] *Crimes Act 1914,* s. 19(1)(a)

Breaches

Where an offender fails to comply with the condition of a recognizance imposed under section 19B or 20(1) or the terms of a sentence imposed under section 20AB of the *Crimes Act*, such as a community service or intensive corrections order, breach proceedings can be commenced against the offender under section 20A or section 20AC of the *Crimes Act 1914*.

Unless the breach is via further offending, under section 20A(1A) of the *Crimes* Act, the summons must be issued before the end of the period during which the person is to be of good behaviour.

Where an offender is the subject of breach proceedings in relation to a community service order or an Intensive Corrections Order imposed under section 20AB of the *Crimes Act 1914,* section 20AC(9) preserves the relevant state provisions for revoking and varying community service and Intensive Corrections Orders when the offender appears to have a reasonable cause or excuse for failing to comply. In other words, applications under section 115 and 163 of the *Crimes (Administration of Sentences) Act 1999* (NSW) involving Commonwealth offenders are appropriate where, for example, an offender is prevented from performing the order because of serious illness.

Current issues in achieving consistency in sentencing

With one of the stated objectives of the development of a federal sentencing regime being the achievement of greater uniformity between jurisdictions it is worth looking at the impact of this on sentencing considerations and current challenges to achieving this aim.

One of the major challenges to achieving greater uniformity is the continuing tension between dealing with all federal offenders consistently across the nation, as opposed to dealing with federal offenders like state or territory offenders in that location. While maintaining the integrity of a federal criminal system clearly requires that a federal offender in Perth should be sentenced consistently with a federal offender in Sydney, from the perspective of the offender it is understandable that it some may say it may be more

important that their sentence for a federal offence is consistent with that imposed on the state offender in the cell next door.

However, in two reasonably recent decisions the High Court has made clear statements about the relative benefits of federal consistency and intrastate/territory consistency. [46]

Regard to national sentencing comparatives

In *The Queen v Pham*[47] the High Court firmly (in a unanimous bench of five) made it clear that sentencing courts must have regard to national sentencing comparatives, not just those from the jurisdiction in which the sentence is taking place.[48] This approach will help to promote national consistency to some degree.

The High Court made it clear that the need for sentencing consistency of federal offenders throughout Australia requires the court to have regard to federal sentencing principles across the country and to follow the decisions of the intermediate appellate courts in other states and territories unless convinced they are plainly wrong. Conversely, to have regard only to the current sentencing practice in the state or territory where the federal offender is sentenced is likely to lead to inconsistency.[49]

Along similar lines, where someone is being sentenced for a state offence, the High Court has rejected the idea that where there is a very similar federal offence, not charged but which was open to be charged, and that carried a lower maximum penalty than the state offence charged, that somehow this could have an impact on the sentencing of the state offender.[50] Clearly the obverse is impermissible as well. The High Court has observed that the first and paramount means of achieving consistency in federal sentencing is to apply the relevant statutory provisions without being distracted or influenced by other and different provisions that would apply if the offender wasn't a federal offender.[51]

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[46] *R v Pham* (2015) 256 CLR 550; *Elias v The Queen*, *Issa v The Queen* (2013) 248 CLR 483.
[47] *R v Pham* (2015) 256 CLR 550.
[48] See French CJ, Keane & Nettle JJ at [17]-[29], adopted by Bell and Gageler JJ at [41].
[49] *Pham*, above, at [18]-[19] per French CJ, Keane and Nettle JJ.
[50] *Elias v The Queen*, *Issa v The Queen* (2013) 248 CLR 483.
[51] *Hili v The Queen* (2010) 242 CLR 520.

In *The Queen v Pham*, the Chief Justice and Justices Keane and Nettle emphasised the following:

1. Consistency in sentencing means that like cases are to be treated alike and different cases are to be treated differently.
2. The consistency that is sought is consistency in the application of the relevant legal principles.
3. Consistency in sentencing for federal offenders is to be achieved through the work of intermediate appellate courts.
4. Such consistency is not synonymous with numerical equivalence and it is incapable of mathematical expression or expression in tabular form.
5. For that and other reasons, presentation in the form of numerical tables, bar charts and graphs of sentences passed on federal offenders in other cases is unhelpful and should be avoided.
6. When considering the sufficiency of a sentence imposed on a federal offender at first instance, an intermediate appellate court should follow the decisions of other intermediate appellate courts unless convinced that there is a compelling reason not to do so.
7. Appellate intervention on the ground of manifest excessiveness or inadequacy is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude there must have been some misapplication of principle.[52]

While *Pham* reinforces the focus on national consistency in federal sentencing, the lack of a comprehensive federal sentencing regime means that complete consistency is not possible. Relying in part on the procedure and sentencing options of the states and territories invariably results in some variation.

Conflicting approaches between jurisdictions

The lack of consistency between jurisdictions is not, however, only the result of the lack of a comprehensive federal regime. Appellate courts in different jurisdictions continue to demonstrate their

[52] *Pham*, above, at [28] per French CJ, Keane and Nettle JJ.

independence in their approach to sentencing considerations for federal offences. Two examples of this are the relevance of the utilitarian value of a plea of guilty on sentencing (which I mentioned at the beginning of my talk) and the relevance of any potential risk of deportation as a consequence of a conviction and sentencing.

Risk of deportation

The position taken by the NSW Court of Appeal, in *R v Chi Sun Tsui* (1985) NSWLR 308, is that 'the prospect of deportation is not a relevant matter for consideration by a sentencing Judge, in that it is the product of an entirely separate legislative policy area of the regulation of society'.[53] Those remarks were cited with apparent approval by Brennan and McHugh JJ in *R v Shrestha* (1991) 173 CLR 48, at [58].

The Western Australian Court of Appeal, in *Dauphin v The Queen* [2002] WASCA 104, at [22], also held that the prospect that an offender will be deported at the conclusion of his or her sentence is, without more, an irrelevant sentencing consideration. The following two reasons were provided:

> 'First, the law relating to deportation of offenders on character grounds reflects an entirely separate legislative policy. Second, it is an affront to the proper administration of criminal justice that offenders who are liable to deportation are treated more leniently than Australian citizens.'

The South Australian Court of Appeal, in *R v Berlinksy* [2005] SASC 316, followed the NSW decision *R v Van Hong Pham* [2005] NSWCCA 94 and held deportation is irrelevant as a sentencing consideration and that it would be wrong for a sentencing judge to impose a lesser sentence in order to improve an offender's prospects of avoiding deportation.[54] (Doyle CJ at [27], Bleby J concurring). Similarly, the Queensland Court of Appeal has recently affirmed that the prospect of deportation is not relevant: *R v Lincoln; R v Kister; R v Renwick* [2017] QCA 37.

[53] *R v Chi Sun Tsui,* at [311], Street CJ (with whom the other members of the court were in agreement)
[54] *R v Berlinksy* [2005] SASC 316 (Doyle CJ, at [27], Bleby J concurring)

A different approach has been taken, however, by the Victorian Court of Appeal in *Guden* where it was held that if the risk of deportation following a sentence to a term of imprisonment greater than one year is capable of assessment by the court of being more than merely a 'speculative possibility' then it may be shown by evidence to be relevant in two ways:

1. It may mean the burden of imprisonment will be greater for the offender than for someone who faces no risk of deportation; and

2. In an appropriate case it will be proper to take into account the fact that a sentence of imprisonment will result in the offender losing the opportunity of settling permanently in Australia.[55]

Conclusion

It is neither possible, nor advisable, in a speech such at this to comprehensively cover every issue in relation to a topic as broad and complex as federal sentencing in Australia. I hope I have provided a general overview of the sentencing regime, highlighted a number of issues for those more familiar with the sentencing regime for state offences, and identified a number of current issues arising as a result of a divergence in approaches to federal sentencing between jurisdictions.

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[55] *Guden v R* (2010) 28 VR 288, at [27]