

## Executive summary

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This study presents a national empirical picture of the sentencing patterns for the serious drug offences in Pt 9.1 of the *Criminal Code* (Cth) (the Code). It utilises data from the Commonwealth Sentencing Database (CSD) which is a joint project of the National Judicial College of Australia, the Commonwealth Director of Public Prosecutions and the Judicial Commission of NSW. The CSD was specifically designed to provide readily accessible information about sentences for Commonwealth offences prosecuted by the Commonwealth Director of Public Prosecutions.

In a federation of States and Territories it is essential for the punishment of Commonwealth offenders that like cases are dealt with in a like manner so far as possible. A challenge to achieving consistency in sentencing for Commonwealth offences begins at a jurisdictional level as there is no Commonwealth court which deals with Commonwealth matters under a single set of Commonwealth laws. This study examines the notion of sentencing consistency by reference to High Court and intermediate appellate court decisions.

The introduction of Pt 9.1 of the Code in December 2005 was a major statutory reform which saw the creation of a greater range of offences and, in the case of the trafficking and manufacturing of drugs, regulation by the Commonwealth Parliament in areas traditionally the province of the States and Territories. The empirical analysis shows that the most common offences prosecuted under Pt 9.1 relate to the importation and possession of marketable and commercial quantities of border controlled drugs. These offences carry maximum penalties of 25 years and life imprisonment respectively and are among the more serious types of offences in Pt 9.1. In the period from 1 January 2008 to 31 December 2012, we found an increase in the number of cases involving offences where the maximum penalty was less than 25 years. These were mainly offences involving the importation of marketable quantities of precursors. We also found an increase in the number of cases involving the less serious possession offences in Pt 9.1 of the Code, that is, those possession offences where the maximum penalty is 2 years imprisonment. That increase was most marked in 2011 and 2012.

### The sentencing principles

The sentencing principles which a sentencing judge must apply in this area are well established. There have been a series of High Court decisions which provide appellate guidance in relation to the application of Pt 1B (Sentencing, imprisonment and release of federal offenders) of the *Crimes Act* 1914 (Cth) (the *Crimes Act*) and the operation of Pt 9.1 of the Code. These decisions include: *Wong v The Queen*,<sup>i</sup> *The Queen v Olbrich*,<sup>ii</sup> *Adams v The Queen*,<sup>iii</sup> *Weininger v The Queen*,<sup>iv</sup> *Hili v The Queen*<sup>v</sup> and *Barbaro v The Queen*.<sup>vi</sup> *Power v The Queen*<sup>vii</sup> and *Bugmy v The Queen*<sup>viii</sup> provide guidance for setting non-parole periods. In Chapter 4, “The relevant sentencing principles”, we examine those cases and discuss some areas of controversy. For example, when an offender is charged with a serious drug offence which involves a commercial quantity, to what degree should the potential for profit affect the sentence ultimately imposed? This issue arose in the Court of Appeal decision in Victoria of *DPP (Cth) v Maxwell*,<sup>ix</sup> a case involving the importation of a commercial quantity of gammabutyrolactone (GBL). Some of the practical issues that might arise as a consequence of

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i (2001) 207 CLR 584.

ii (1999) 199 CLR 270.

iii (2008) 234 CLR 143.

iv (2003) 212 CLR 629.

v (2010) 242 CLR 520.

vi (2014) 88 ALJR 372.

vii (1974) 131 CLR 623.

viii (1990) 169 CLR 525.

ix (2013) 228 A Crim R 218.

that decision are discussed in Chapter 4. The empirical analysis clearly shows that the sentences imposed when an offence involves a commercial quantity of GBL were significantly lower than those imposed when the offence involved other drug types such as heroin, 3,4-methylenedioxymethamphetamine (MDMA) and cocaine. This is an area which may require further appellate examination.

Another area of controversy, also discussed in Chapter 4, has been the approach to fixing non-parole periods and recognizance release orders under Pt 1B. Here, in *Hili v The Queen*, the High Court overturned the NSW Court of Criminal Appeal approach.<sup>x</sup> The High Court made it clear that there is no usual fixed custodial period relative to a head sentence. In Chapter 6, “Sentencing patterns for the period 2008–2012”, we analyse the impact of *Hili*. The analysis shows that since that decision there have been what appear to be significant shifts in non-parole periods relative to head sentence levels. Notably, there have been shifts towards non-parole periods which are either less than, or higher than, what was previously considered to be the norm. It is too early to make firm predictions about the impact of *Hili*. Moreover, the number of cases available for analysis in some States since *Hili* was relatively small.

### **Achieving consistency**

Consistency in the application of sentencing principles is a strong theme in the cases and persistently emphasised by the High Court. The study reviews the law as it relates to the use of statistics and comparative cases in the sentencing exercise. This has been the subject of several intermediate appellate decisions, such as *DPP (Cth) v De La Rosa*<sup>xi</sup> and *R v Cheung*,<sup>xii</sup> and by the High Court in *Hili v The Queen* and *Barbaro v The Queen*. For a national system to work effectively it is essential that in a given case the sentencing judge synthesise the relevant case law and the sentences imposed in past cases when determining the appropriate sentence. This issue is discussed in detail in Chapter 5, “The imperative of achieving reasonable consistency”. The practical issues which might arise when a court is required to sentence an offender for the newer Commonwealth offences, such as trafficking or manufacturing which were previously only dealt with by the States and Territories, are also discussed.

The empirical analysis shows that there are differences in the lengths of the sentences being imposed in the States and the Northern Territory. Perhaps the most notable result was that offenders sentenced in Victoria were given less severe sentences (as were offenders in Queensland and, to a lesser extent, in South Australia) than elsewhere. There are also differences in the non-parole periods being fixed in the States and the Northern Territory.

### **The empirical analysis**

Notwithstanding that numerical ranges of sentences are historical statements of what has occurred in the past, they do provide a useful yardstick against which a sentencing court can examine a proposed sentence.<sup>xiii</sup> The empirical analysis in the study examines the types of offences being dealt with by higher courts and the sentences imposed during the period from 1 January 2008 until 31 December 2012. A number of the key findings of the analysis have been highlighted above. The analysis also shows that:

- Overall, the vast majority of offenders sentenced for offences in Pt 9.1 of the Code are sentenced to a term of full-time imprisonment.
- A significant majority of these offenders plead guilty and a significant majority have no prior record.

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x (2010) 242 CLR 520 at [36]–[44].

xi (2010) 79 NSWLR 1.

xii (2010) 203 A Crim R 398.

xiii *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [304].

- NSW deals with almost half of the cases involving Commonwealth serious drug offences; almost double that of the next most common State, Victoria. However, there has been a steady increase in the number of cases being dealt with in Victoria since 2009 and a dramatic increase in the number of cases dealt with in South Australia in 2011 and 2012.
- Cases involving heroin and cocaine are still the most common. However, over the period of the study there has been an increase in the number of offenders being dealt with for offences involving methamphetamine and pseudoephedrine. Offences involving other drugs such as methcathinone and GBL are becoming a small but significant feature of the drug type profile of the offences being dealt with at the Commonwealth level.
- The sentences being imposed on the offenders whose offences involve commercial quantities of GBL are significantly lower than the sentences being imposed for offences involving drugs such as heroin, cocaine, MDMA and methamphetamine.
- The number of offences being dealt with where the maximum penalty is less than 25 years is increasing.
- There are particular types of offences where the offenders are not sentenced to full-time gaol terms and these are generally those offences which involve particular drug types and where the maximum penalty is less than 25 years imprisonment.
- The most common role of offenders was as a courier. This reflects that many offences involve the actual importation of border controlled drugs, and recognises that those people who import drugs are more likely to be caught than those who occupy higher roles.
- Factors identified in the case law as significant in terms of the sentence length, such as role and drug quantity, affect the sentence ultimately imposed.

This study demonstrates that when sentencing Commonwealth offenders for offences in Pt 9.1 of the Code it is important that judges around Australia are familiar with not only the intermediate appellate decisions from around Australia applying Pt 1B of the *Crimes Act*, but also the national range of sentences imposed for offences against Pt 9.1. Such knowledge will ensure greater consistency in the application of the sentencing principles and also ensure that like cases are treated in a like manner.

