



QSAC Review of Community-Based Sentencing Orders, Imprisonment and Parole Options

Submission by the Commonwealth Director of Public Prosecutions

Responses to the Consultation Question

Question 1: Sentencing Principles

1. Section 9 of the *Penalties and Sentences Act 1992* (Qld) (PSA) has no application to federal sentencing and we, therefore, decline to comment on this question.

Question 2: Mandatory sentencing provisions

2. The mandatory sentencing provisions have no application to federal sentencing.

Question 3: Legislative guidance on use of community correction orders (CCO's) and imprisonment

3. The imprisonment options made available under the *PSA* have no application to federal sentencing.

Question 4: Home detention

4. Home detention orders, available to federal offenders in New South Wales, South Australia, and the Northern Territory,¹ are imposed infrequently. Over the past three financial years, such orders have been imposed a total of 47 instances.² The CDPP considers that a reason for that may be that, due to combined state and federal legislative requirements, this sentencing option is only available in a limited number of cases and circumstances.
5. It is our view that absent prescription under the *Crimes Regulations*, a home detention order could not be applicable to federal offenders under section 20AB because it is not an order contemplated in section 20AB(1AA) nor could be considered similar to a sentence or order listed therein, as required in section 20AB(1AA)(b) of the *Crimes Act 1914* (Cth).

Question 5: Suspended sentences

5. The imprisonment options made available under the *PSA* have no application to federal sentencing. Part 1B div 4 of the *Crimes Act 1914* (Cth) makes exhaustive provision on the subject of the fixing of non-parole periods and the making of recognizance release orders for federal offenders.³

¹ Section 20AB of the *Crimes Act 1914* (Cth), read with Reg 6 of the *Crimes Regulations 1990* (Cth).

² This figure represents the number of home detention orders that a defendant sentenced in New South Wales, South Australia or the Northern Territory received as a sentence or penalty in the relevant years, and can include an imposition of the order as a result of a breach or appeal proceeding.

³ *Hili v The Queen; Jones v The Queen* [2010] 242 CLR 520; 85

Question 6: Guidance on setting operational period

6. Operational periods under section 147 of the *PSA* have no application to federal sentencing.

Question 7: Power of court dealing with offender on breach of a suspended sentence (s.147 PSA)

7. Breaches of suspended sentences brought under section 144(6) of the *PSA* have no application to federal sentencing.

Question 8: Breach powers

8. Breaches of suspended sentences brought under section 144(6) of the *PSA* have no application to federal sentencing.

Question 9: Combined suspended sentence/ community based order

9. A sentence combining a term of imprisonment and a community based order for a single federal offence is not permitted under the Commonwealth sentencing regime as it would be inconsistent with Part IB of the *Crimes Act 1914* (Cth) which provides that where a court imposes a term of imprisonment with a form of conditional release other than parole, this must be in the form of a recognizance release order.⁴

Question 10: Setting of parole release date

10. This decision has no application to federal sentences.

Question 11: Court power where offence committed while offender on parole (CSA ss 209, 211, 215 and PSA s. 160B)

11. Sections 209, 211, 215 of the *Corrective Services Act 2006* (Qld) and section 160B of the *PSA* have no application to federal sentencing.

Question 12: Sentence calculation

12. This question is better directed to Commonwealth Parole Office, Attorney-General's Department.

Question 13: Time in pre-sentence custody which is declarable

13. Section 16E of the *Crimes Act 1914* (Cth) has been interpreted to apply the Queensland law permitting pre-sentence custody to be taken into account when fixing a sentence for a federal offender.⁵ At present, there is significant complexity associated with sentence calculation and ambiguity surrounding how the pre-sentence custody declaration applies to an offender who is sentenced to both federal and state terms of imprisonment on the one occasion, this being an increasingly common occurrence across a number of crime types such as online child exploitation,

⁴ *Atanackovic v The Queen* (2015) 45 VR 179 (5 June 2015), 205–206 [82]–[87] (Weinberg, Kyrou and Kaye JJA).

⁵ *R v Siew Beng Hoong* (1994) 75 A Crim R 343.

financial crime, and drug offending. That is, whether the pre-sentence custody applies to one or both of those sentences. The issue is particularly acute when sentences are imposed with any degree of accumulation and commencement dates are to be set.

14. A further complexity associated with the pre-sentence custody declaration provisions is whether pre-sentence custody is declarable in respect of offences committed either prior to release on parole or in circumstances where a prisoner is returned to custody on suspicion of a breach of parole due to further offending. Greater clarity could be provided on how the pre-sentence custody provisions apply in such cases in order to avoid the time served being applied to prior and subsequent offending and, in effect, attributed twice.

Question 14: Availability of parole for short sentences of imprisonment

15. The parole provisions in the *PSA* have no application to federal sentences.

Question 15: Pre-sentence reports

16. We do not wish to comment on this proposal.

Question 16: Operation of s.651 and 561 Criminal Code (Qld) and s.189 PSA

17. The CDPP is of the view that the section 651 process under the *Criminal Code* (Qld) is not applicable to Commonwealth prosecutions due to the bounds of the Director's power to prosecute under section 6 of the *Director of Public Prosecutions Act 1983* (Cth).
18. The power to present an *ex officio* indictment in respect of a federal offence is found in section 6(2A) of the *Director of Public Prosecutions Act 1983* (Cth). Accordingly, we are unable to constructively comment on the issues raised in respect of section 561 of the *Criminal Code* (Qld).
19. Section 16BA of the *Crimes Act 1914* (Cth) contains the power for a court to have regard to other offences as applicable to federal offenders. We are unable to constructively comment on the issues raised in respect of section 189 of the *Penalties and Sentences Act 1992* (Qld).

Question 17: Sentencing disposition- convicted, not further punished

20. This disposition has no application to federal sentencing and we, therefore, decline to comment on this question.

Question 18: Ability of higher court to deal with breach of a magistrate's court community based order (CCO)

21. Were CBO's introduced and applicable in the federal sentencing schema via section 20AB, breaches would be initiated by an information sworn pursuant to section 20AC of the *Crimes Act 1914* (Cth). Section 20AC(2)(a) of the *Crimes Act 1914* (Cth) requires such information to be returned to the court before which the original sentence was passed. Accordingly, any amendments made to the *PSA* in respect of the procedure and jurisdiction to empower a court other than the original sentencing court

to deal with a breach would be inconsistent with the federal law and therefore not applicable to federal sentences.⁶

Question 19: Power of lower courts to deal with higher court CBO breach

22. Were CBO's introduced and applicable in the federal sentencing schema via section 20AB, breaches would be initiated by an information sworn pursuant to section 20AC of the *Crimes Act 1914* (Cth). Section 20AC(2)(a) of the *Crimes Act 1914* (Cth) requires such information to be returned to the court before which the original sentence was passed. Accordingly, any amendments made to the PSA in respect of the procedure and jurisdiction to empower a court other than the original sentencing court to deal with a breach would be inconsistent with the federal law and therefore not applicable to federal sentences.⁷

Question 20: Magistrates Courts' power to deal with breach of a CBO imposed by a Magistrate's Court of its own initiative.

23. Were CBO's introduced and applicable in the federal sentencing schema via section 20AB, breaches would be initiated by an information sworn pursuant to section 20AC of the *Crimes Act 1914* (Cth). Section 20AC(2)(a) of the *Crimes Act 1914* (Cth) requires a breach to be initiated by the making or laying on oath an information alleging that the person has failed to comply with a sentence or order without reasonable cause or excuse. Accordingly, any amendments made to the PSA in respect of the jurisdiction to empower a magistrate to initiate a breach would be inconsistent with the federal law and not applicable to federal sentences.⁸

Further questions for Interstate Stakeholders

Victoria

24. The imposition of CCO's on federal offenders is not common such that limited feedback can be provided in response to the interstate stakeholder questions. To those matters which we can respond (following your numbering):
- (a) Q9: The duration of the CCO's does not present as a practical issue. The duration of a maximum of 5 years for indictable offences provides sufficient sentencing scope in appropriate cases.
 - (b) Q14: Pre-sentence reports are no longer provided for CCO's of less than a certain duration due to the resources required from Corrections Victoria to meet the demand for the provision of pre-sentence reports in all cases where CCOs were being considered.
 - (c) Q20&21: Breach proceedings are initiated and conducted pursuant to section 20AC of the *Crimes Act 1914* (Cth) rather than the State provisions.

New South Wales

25. Like Victoria, the new sentencing orders are not regularly imposed on federal offenders. Whilst suspended sentences were not available under the *Crimes Act 1914* (Cth), home detention remains

⁶ *Putland v The Queen* (2004) 218 CLR 174 at [7].

⁷ *Putland v The Queen* (2004) 218 CLR 174 at [7].

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an available condition under an ICO. In the small sample size available, it is apparent that curfew conditions and home detention orders have been used. We are unable to comment on the efficacy of those orders.

26. No obvious deficiency in the legislative guidance has been identified to date. The meaning of section 66 was considered in *R v Pullen* [2018] NSWCCA 264.

Tasmania

27. CCO's have only been applicable to federal sentencing in Tasmania since December 2018, and has been imposed on one occasion only to date. Accordingly, we are unable to meaningfully comment on the proposed questions regarding the efficacy and administration of such orders in this jurisdiction.
28. In respect of home detention orders (HDO's), we are of the view that the form of such is not sufficiently similar to those preserved in section 20AB(1AA)(a) of the *Crimes Act 1914* (Cth). The CDPP has asked the AGD to consider prescribing HDO's under Reg 6 of the *Crimes Regulations*.

Conclusion

29. The CDPP hopes that this response is of assistance to QSAC in its review. Please do not hesitate to contact this office for clarification or further comment.