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**Sentencing Law: A Review of
Developments in 1998-2001**

by

Rowena Johns

Briefing Paper No 2/02

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EXECUTIVE SUMMARY

This paper analyses major developments in sentencing procedure, practice and policy in New South Wales since 1998. Of fundamental importance among the statutory changes was the commencement of a package of new sentencing legislation in 2000. Case law was another influential force, an obvious example being the initiation of formal guideline judgments in 1998 by the Court of Criminal Appeal. Proposals and recommendations from Law Reform Commissions, Parliamentary Committees, and other parties are also addressed.

Sentencing standards interstate and overseas are referred to for comparative purposes but are not covered in as much detail. However, grid sentencing and mandatory sentencing receive closer examination, as although they have no counterpart in New South Wales, they represent the opposite extreme to unfettered judicial discretion.

Issues relating to the sentencing of juveniles, and the role of victims in the sentencing process, are not presented here. Instead, they will be dealt with in separate, forthcoming papers on young offenders and victims' rights.

Consolidation of sentencing legislation (pages 3-13)

Sentencing legislation in New South Wales was reorganised in 1999-2000. The *Sentencing Act 1989* was repealed, along with such other statutes as the *Corrective Services Act 1952*, *Community Service Orders Act 1979*, *Home Detention Act 1996*, and *Periodic Detention of Prisoners Act 1981*. Provisions were transferred from those Acts, as well as from various sections of the *Crimes Act 1900*, *Criminal Procedure Act 1986*, and *Justices Act 1902*, to create 2 new Acts: the *Crimes (Sentencing Procedure) Act 1999* and *Crimes (Administration of Sentences) Act 1999*. The substance of sentencing law remained the same, with most alterations being of a minor nature. However, some significant changes occurred, including: the reintroduction of suspended sentences; the codification of the 'Griffith's remand'; the abolition of common law bonds; and the requirement that judges state reasons for imposing a sentence of imprisonment of 6 months or less.

New offences (pages 14-17)

A range of new offences was created in the last 4 years, in response to allegedly lenient sentences or trends in criminal behaviour. Some of the topical criminal issues in 2001 were: gang-related offences, particularly gang rape; the unlawful use of premises for drug activities; bomb hoaxes; and the use of computers for unauthorised purposes. Aggravated offences, with higher maximum penalties, were also introduced for several existing crimes.

Sentences of full-time imprisonment (pages 18-23)

In recent years, statutory provisions in New South Wales have been strengthened to reinforce the common law principle that imprisonment should be imposed as a last resort. However, statistics show that the proportion of offenders receiving a sentence of imprisonment has remained stable or grown, depending on the offence, over the past decade. The use of short term sentences of imprisonment is particularly significant, as the majority

of prisoners are serving sentences of under 6 months. In November 2001, the Legislative Council's Select Committee on the Increase in Prisoner Population recommended that consideration be given to abolishing prison sentences of 6 months or less, in order to promote alternatives to full-time custody, and to alleviate the financial burden caused by the sharp rise in the prison population in the last 5 years.

Guideline judgments (pages 24-49)

The first formal guideline judgment was issued in New South Wales in 1998, as an initiative of the Court of Criminal Appeal. In 1999, legislative provisions were introduced to enable the Attorney-General to request a guideline judgment. Five guidelines had been delivered by the end of 2001: *R v Jurisic* (1998) 45 NSWLR 209 on dangerous driving occasioning death or grievous bodily harm; *R v Henry & Ors* (1999) 46 NSWLR 346 on armed robbery; *R v Ponfield & Ors* (1999) 48 NSWLR 327 on break, enter and steal; *R v Wong; R v Leung* (1999) 48 NSWLR 340 on drug importation; and *R v Thomson; R v Houlton* (2000) 49 NSWLR 383 on the discount to be allowed for pleading guilty. All except *R v Ponfield* adopted a quantitative approach, although the recommended sentence was expressed in different ways. A sixth guideline, dealing with basic and aggravated sexual assault, is due for hearing in March 2002.

In November 2001, the High Court held that the guideline judgment in *R v Wong; R v Leung* exceeded the Court of Criminal Appeal's jurisdiction by formulating sentence categories that were prescriptive and that contravened a Commonwealth statute. In response, the New South Wales Parliament passed amendments to the *Crimes (Sentencing Procedure) Act 1999* to specifically authorise, and retrospectively protect, guideline judgments issued on the Court's own motion.

The adoption of sentencing guidelines in New South Wales was influenced by the English Court of Appeal, which started the practice in the 1970s. The *Crime and Disorder Act 1998* (UK) implemented requirements for the framing of guidelines and established a Sentencing Advisory Panel. No other State or Territory of Australia has pursued guideline judgments as actively as New South Wales, but Western Australia's legislative provisions and sentence guidance cases are probably the most comparable.

Life sentence redeterminations (pages 50-61)

Certain offenders who were sentenced to life imprisonment before 'truth in sentencing' became operative in 1990 are eligible to have their sentences redetermined by the Supreme Court. In 2001, new restrictions were imposed upon the applications of life sentence prisoners who, in the opinion of the original sentencing judge, should never be released. The *Crimes Legislation Amendment (Existing Life Sentences) Act 2001* increased the period that such offenders have to serve before becoming eligible to apply for a sentence redetermination, from 20 to 30 years. The Amendment Act also provided that the Supreme Court was not permitted to set a total term, only a non-parole period. This meant that release must be assessed by the Parole Board. To be granted parole, a non-release offender whose sentence has been redetermined must now be dying or permanently incapacitated, and must demonstrate that he or she does not pose a risk to the community.

A bill introduced by the Opposition in August 2000 advocated that any life sentence prisoner who is the subject of a non-release recommendation be simply ineligible to apply for a redetermination.

Mandatory sentences (pages 62-83)

In the Northern Territory, mandatory sentencing for a wide range of property offences commenced in 1997. Adult offenders received a minimum term of imprisonment of 14 days for a first offence, 90 days for a second offence, and 12 months for a third or subsequent offence. Limited scope existed for the court to depart from these sentences in 'exceptional circumstances'. Juveniles escaped a mandatory sentence for their first property offence but a second conviction resulted in a minimum period of 28 days detention or a diversionary program. No diversionary alternative was available for a third or subsequent offence. The newly elected Labor Government repealed mandatory sentencing in October 2001. Instead, adults who commit aggravated property offences must receive a sentence of either imprisonment or a community work order. The sentencing of juvenile property offenders is at the discretion of the court, although the diversionary options of the previous system were retained.

Mandatory sentencing was implemented in Western Australia in 1996 and applies to a third or subsequent conviction for home burglary. Adults must be sentenced to a minimum of 12 months imprisonment, while juveniles either receive the same period of detention or an intensive youth supervision order. The Labor Government, which was elected in February 2001, supported mandatory sentencing in Opposition and has indicated an intention to retain the laws.

Grid sentences (pages 84-96)

Grid sentencing was introduced in the United States of America in the 1970s because of problems generated by the use of indeterminate sentencing there. It currently operates Federally and in at least 15 States. The appropriate sentence is identified on the grid by intersecting the offence's severity level and the offender's criminal history score. The presumptive sentences are usually devised by a sentencing commission, comprised of representatives from the judiciary, prosecution, defence, corrective services and the community. The latest versions of the Federal grid and the Minnesota grid, which served as a prototype for many other States, are included as appendices to the briefing paper.

In the late 1990s, the former Coalition Government of Western Australia attempted to introduce formulae for the sentencing of certain offences. However, the most prescriptive stage of the proposal in the *Sentencing Amendment Bill 2000* was removed in the Legislative Council and, despite receiving assent in December 2000, the legislation has not commenced.

Important High Court decisions on sentencing (pages 97-102)

The High Court's judgment in *Pearce v The Queen* (1998) 194 CLR 610 changed the approach of New South Wales courts to the sentencing of an offender for multiple crimes.

Judges formerly concentrated on the total effective sentence, to represent the overall criminality of the offences. Instead, the High Court held that a suitable sentence is to be determined for each offence before considering totality and whether to arrange the sentences concurrently or consecutively. In *Ryan v The Queen* (2001) 179 ALR 193, the Court confirmed that an offender is entitled to some element of leniency at sentence when there is evidence of good character, aside from the commission of the offences in question. The issue in *The Queen v Olbrich* (1999) 199 CLR 270 was whether the identification of the precise role of an offender in a drug operation was essential to the sentencing process. The High Court found that judges are not obliged, in the absence of evidence on this point, to sentence on the basis most favourable to the offender. The Court also clarified the onus of proof and the standard of proof applicable at sentence.

Sentencing Aboriginal offenders (pages 103-110)

Aboriginal people continue to account for a disproportionately high number of offenders and prisoners. The New South Wales Law Reform Commission, in its report on the sentencing of Aboriginal offenders, recommended that legislation be passed to require judges at sentence proceedings to have regard to customary law if offenders are separately punished by their indigenous community. The Commission also supported alternative penalties and community-based sentencing for Aboriginal people. One initiative from Canada is a type of conferencing called 'circle sentencing'. The participants include the offender, victim, judge, prosecution and defence lawyers, and support persons. The circle attempts to address the causes and affects of the crime, and supervises the offender's completion of a sentencing plan. An inter-agency working party developed a model for a 2 year pilot program of circle sentencing in New South Wales, scheduled to commence in early 2002.

This paper reflects the law as at 21 January 2002.

1. INTRODUCTION

Sentencing in New South Wales experienced numerous developments between 1998 and 2001. Most operated to clarify, amplify, or restrict existing options rather than constituting major shifts in policy. The impetus for changes originated from a variety of sources, including Parliament, the courts, and law reform bodies.

This paper begins by outlining the reorganisation of sentencing legislation in 1999, which involved the removal of sentencing provisions from statutes on procedure and substantive crime, and replaced the *Sentencing Act 1989* with the *Crimes (Sentencing Procedure) Act 1999* and the *Crimes (Administration of Sentencing) Act 1999*.

The legislative, judicial and executive arms of Government each exert an influence upon sentencing law. During 1998-2001, the Government and Opposition seemed to emphasise the role of sentencing to punish and deter offenders and to protect the community. Sentences that were perceived as lenient were criticised in Parliament and in the media. For example, a number of controversial sentences imposed for 'gang rape' in 2001 prompted the Government to introduce a separate offence of aggravated sexual assault in company, with a maximum penalty of life imprisonment. New offences or aggravated versions of present offences were enacted to counter other purported trends or dangers of criminal activity, such as bomb hoaxes, car rebirthing rackets, and juveniles being recruited into gangs.

Another legislative campaign in 2001 was the amendment of life sentence redeterminations. This system allows offenders who were sentenced to life imprisonment before 'truth in sentencing' commenced in 1990 to apply to the Supreme Court to convert their sentences into numerical amounts. The *Crimes Legislation Amendment (Existing Life Sentences) Act 2001* provided that offenders who were the subject of a non-release recommendation by the original sentencing judge, must serve 30 instead of 20 years before applying for a redetermination. The Supreme Court can now only specify a non-parole period for such offenders, not a total term. The power of release is thereby relocated with the Parole Board, a part of the Executive. The offender must be dying or permanently incapacitated to be granted parole.

A large portion of this review is devoted to grid sentencing, mandatory sentencing and guideline judgments, which all regulate, to differing degrees, the operation of judicial discretion. Mandatory sentencing and grid sentencing are invariably statutorily based, and have been widely opposed in Australia. Mandatory sentencing for property offences had a controversial history in the Northern Territory, from its inception in 1997 to its abolition in 2001. Western Australia is now the only jurisdiction with mandatory sentencing, which commenced in 1996 for home burglary. An attempt to create a grid-like sentencing scheme in Western Australia came to a halt in 2000.

Australia's first formal guideline judgment was promulgated by the New South Wales Court of Criminal Appeal in 1998. This initiative suggested that the judiciary too was conscious of the importance of consistency and accountability in sentencing. Statutory provisions to facilitate the delivery of guidelines were introduced in 1999. No other State has pursued guideline judgments at such a formal level.

In addition to guideline judgments, the influence of other significant case law is referred to throughout the paper. Special attention is paid to High Court decisions in recent years that clarify the correct methods of applying significant sentencing principles. Moreover, in 2001 the High Court found that one of the Court of Criminal Appeal's guideline judgments was erroneously framed and exceeded its powers. This may confine the approach and format of future guideline judgments. Parliament responded with legislation to grant the Court of Criminal Appeal the explicit authority to issue guideline judgments without needing an application from the Attorney-General. The Premier has publicly stated that he is willing to consider minimum mandatory sentences for serious crimes if the High Court finds guideline judgments to be unlawful. This would further restrict judges, compelling them to start with a standard of severity dictated by Parliament.

Despite the emphasis during 1998-2001 on tougher penalties and scrutinising judicial deliberations, interest in exploring alternative sentencing options was also apparent. This was partly motivated by the sharp increase in the prison population in the last 5 years, with its accompanying burden on finances and resources. One suggestion is to divert more offenders into alternative penalties by limiting the availability of full-time imprisonment to sentences of over 6 months. The Legislative Council's Select Committee on the Increase in Prisoner Population unanimously recommended that research be conducted into this concept. The negative impact of adversarial sentence proceedings and incarceration is accentuated for Aboriginal offenders, who are imprisoned at a relatively higher rate than non-Aboriginal people. Alternative methods such as conferencing between offenders and victims in the presence of community representatives may be more productive. Circle sentencing, a type of conferencing that addresses the causes of crime and confronts the offender with the damage inflicted on the victim, is currently being trialled in an indigenous community in New South Wales.

2. CONSOLIDATION OF SENTENCING LEGISLATION: CRIMES (SENTENCING PROCEDURE) ACT 1999 AND CRIMES (ADMINISTRATION OF SENTENCES) ACT 1999

The *Sentencing Act 1989* was repealed in 2000, and replaced with the *Crimes (Sentencing Procedure) Act 1999* No 92 and the *Crimes (Administration of Sentences) Act 1999* No 93. These Acts were assented to on 8 December 1999 and commenced on 3 April 2000.¹

The *Crimes Legislation Amendment (Sentencing) Act 1999* No 94 made amendments in connection with the enactment of the *Crimes (Sentencing Procedure) Act* and the *Crimes (Administration of Sentences) Act 1999*. For example, it repealed a range of sentencing-related statutes, and transferred to the *Criminal Procedure Act 1986* numerous procedural provisions that were formerly found in the *Crimes Act 1900*.²

The new sentencing package implemented several of the recommendations made by the New South Wales Law Reform Commission in its report on sentencing in 1996.³

Consolidation

The content of the *Crimes (Sentencing Procedure) Act 1999* includes: principles that apply to sentences of imprisonment; the imposition of concurrent and consecutive sentences; eligibility requirements for home detention, periodic detention and community service; the use of fines, good behaviour bonds and suspended sentences; dismissal of charges and deferral of sentence; guideline judgments; victim impact statements; and reducing sentences on grounds such as pleading guilty and assisting law enforcement authorities.

The *Crimes (Administration of Sentences) Act 1999* covers: the management and staffing of correctional centres; processing, classification and entitlements of inmates in full-time custody; conditions of home detention, periodic detention and community service orders; release on parole and the powers of the Parole Board; the Serious Offenders Review Council.

The restructuring of sentencing law involved:

- transferring **sentencing provisions** out of the *Crimes Act 1900*, the *Criminal Procedure Act 1986* and the *Justices Act 1902* ⇒ into the *Crimes (Sentencing Procedure) Act*

¹ *Government Gazette*, No 42 of 31 March 2000, pp 2486, 2489.

² Schedule 1 of the *Crimes Legislation Amendment (Sentencing) Act 1999* No 94 repealed 26 statutes and regulations, effective on 3 April 2000. The Amendment Act also abolished the expressions 'felony', 'misdemeanour' and 'penal servitude', as of 1 January 2000: *Government Gazette*, No 144 of 24 December 1999, p 12184.

³ New South Wales Law Reform Commission, *Sentencing*, Report 79, December 1996.

1999 and the *Crimes (Administration of Sentences) Act 1999*;

- transferring various **procedural provisions** out of the *Crimes Act* ⇒ into the *Criminal Procedure Act*;
- **repealing** legislation such as the *Correctional Centres Act 1952*, *Community Service Orders Act 1979*, *Home Detention Act 1996*, and *Periodic Detention of Prisoners Act 1981* ⇒ consolidating provisions from those statutes into the 2 new Acts.

Change of terminology

The *Crimes (Sentencing Procedure) Act 1999* and the *Crimes (Administration of Sentences) Act 1999* dispensed with some of the language of the *Sentencing Act 1989*. Instead, new terminology was created (eg. ‘serious indictable offence’) or previous expressions were revived (eg. ‘non-parole period’).

OUT	IN
Recognisance	Bond
Fixed term	Term of the sentence
Minimum term	Non-parole period
Additional term	Parole period
Minimum term plus additional term	Term of the sentence
Felony	Serious indictable offence
Misdemeanour	Minor indictable offence
Penal servitude Hard/light labour	Abolished – existing sentences are treated as ‘imprisonment’
Cumulative sentence	Consecutive sentence

Felonies and misdemeanours

The term ‘felony’ was replaced with ‘serious indictable offence’, which is defined as an offence punishable by imprisonment for 5 years or more. Misdemeanours became ‘minor indictable offences’, meaning all other indictable⁴ offences: ss 4, 580E *Crimes Act*.

Dividing a custodial sentence

Under the *Sentencing Act 1989*, a judge either:

- imposed a fixed term;⁵ or

⁴ An indictable offence is a serious crime for which the accused possesses an initial right to stand trial. But many indictable offences may be dealt with summarily: see Schedule 1, and Division 3, Part 2 of the *Criminal Procedure Act 1986*. Summary offences are minor crimes that are usually prosecuted in the Local Court before a Magistrate.

⁵ Section 6 of the *Sentencing Act* required the court to state the reason for setting a fixed term rather than a minimum and additional term, and suggested some acceptable reasons including the nature of the offence, the antecedent character of the person, or because of

- divided the sentence by, firstly, setting a minimum term that the offender had to serve, then setting an additional term during which the offender could be released on parole.⁶

The additional term was not to exceed one third of the minimum term unless the court decided there were 'special circumstances': s 5(2) *Sentencing Act 1989*. A 'special circumstance' was not (nor is it now) defined in sentencing legislation, but has been judicially interpreted to mean something that makes it desirable for the offender to have an extended period on parole: *Phelan v R* (1993) 66 A Crim R 446 at 449-450. Special circumstances may involve, for instance, the offender needing lengthy supervised rehabilitation, or needing to readjust to the community after being imprisoned for the first time.

By way of demonstration, the additional term would not exceed one third of the minimum term if a sentence of 12 months imprisonment was divided into a minimum term (MT) of 9 months and an additional term (AT) of 3 months. This can be represented figuratively as follows, where each box has a value of 3:

MT	MT	MT	AT
----	----	----	----

The *Crimes (Sentencing Procedure) Act 1999*, which superseded the *Sentencing Act 1989*, requires the court to:

- first set the term of the sentence to be imposed;
- then set a non-parole period: s 44(1).⁷

Like a minimum term, a non-parole period denotes the amount of time that an offender must actually spend in detention. The non-parole period must not be less than three quarters of the term of the sentence unless the court decides that there are special circumstances: s 44(2). Therefore, the statutory ratio remains unchanged from that of the *Sentencing Act 1989*, although it is expressed differently. A non-parole period (NPP) comprising three quarters of a 12 month sentence would still constitute 9 months, with 3 months on parole (P). Figuratively, the pattern is the same:

NPP	NPP	NPP	P
-----	-----	-----	---

Detention may be served by way of full-time imprisonment, home detention or periodic

the imposition of other sentences on the person.

⁶ This approach, as distinct from setting the total sentence first, was criticised by the Law Reform Commission, *Sentencing*, Report 79, para 8.27, and was described by the Chief Justice of New South Wales as 'quite artificial': cited by the Attorney-General, Hon. Bob Debus MP, *NSWPD(LA)*, 28 October 1999, p 2326.

⁷ This change of approach was supported by the Law Reform Commission, n 3, Recommendation 42 at p 175. The Court of Criminal Appeal has confirmed that the legislation requires the sentencing court to set the total sentence first, then a non-parole period: *R v Carrion* (2000) 49 NSWLR 149.

detention, and any of these sentences may be subject to release on parole.⁸

Short terms of imprisonment

A new requirement is imposed by s 5 of the *Crimes (Sentencing Procedure) Act*. When sentencing an offender to a term of imprisonment of 6 months or less, a judge must give reasons for imposing such a sentence and for deciding that no penalty other than imprisonment is appropriate.⁹

As under the *Sentencing Act*, a court may not set a non-parole period for a sentence of imprisonment of 6 months or less: s 46 *Crimes (Sentencing Procedure) Act*.¹⁰

For sentences of imprisonment for a term of 3 years or less, the court must make an order directing the release of the offender on parole at the end of the non-parole period: s 50. Sentences longer than 3 years are dealt with by the Parole Board.¹¹

Short prison sentences are discussed further in this paper, under '4. SENTENCES OF IMPRISONMENT' at pp 20-23.

Consecutive and concurrent sentences

Concurrent sentences are served at the same time, while consecutive sentences follow one after the other. When a sentence of imprisonment is imposed on an offender who is subject to another sentence of imprisonment, the sentences are presumed to run concurrently, unless the judge makes a direction to the contrary: s 55(1). The alternatives open to the judge are to direct the later sentence to be served consecutively, or partly concurrently with and partly consecutively upon the earlier sentence.¹²

Good behaviour bonds

An offender can be released on a good behaviour bond of up to 5 years in length: s 9. A good behaviour bond must contain conditions that the offender be of good behaviour and

⁸ Section 125 of the *Crimes (Administration of Sentences) Act 1999*.

⁹ This was the subject of Recommendation 40 by the Law Reform Commission, in furtherance of the principle that imprisonment should be a sanction of last resort: n 3, pp 166-168.

¹⁰ Section 7(1) of the *Sentencing Act* provided: 'A court may not set minimum and additional terms for an offence if they would together not exceed 6 months.'

¹¹ See Division 2 of Part 6 of the *Crimes (Administration of Sentences) Act 1999*.

¹² The term 'cumulative', rather than 'consecutive', appeared in the *Sentencing Act 1989* and is still often used by practitioners. Section 55(4) of the *Crimes (Sentencing Procedure) Act 1999* clarifies that a reference to a sentence of imprisonment means the period of the sentence to be actually served, namely, the non-parole period of the sentence in a case in which a non-parole period has been set, or the whole term of the sentence where a non-parole period has not been set.

appear before the court if called on at any time during the term of the bond: s 95(a),(b).

The bond may specify other conditions, such as submitting to the supervision of the Probation and Parole Service, or undertaking treatment, counselling, or a particular program. However, community service work, or payment of a fine or compensation cannot be imposed as a condition: s 95(c).

In addition, there are a couple of specialised types of good behaviour bonds. If a court finds a person guilty of an offence, but decides not to proceed to conviction, the court may make the discharge of the offender conditional on entering into a good behaviour bond for a period not exceeding 2 years: s 10. This period is shorter than the 3 years available under the former provision, s 556A of the *Crimes Act*.¹³

The power to impose bonds at common law is abolished: s 101 *Crimes (Sentencing Procedure) Act*.

Dismissal of charge

Like the former s 556A of the *Crimes Act*, s 10 of the *Crimes (Sentencing Procedure) Act* also enables a judge to make an order that the charge, although proven, simply be dismissed. The court is to have regard to certain factors before making any order under s 10.

Deferral of sentence

The sentencing option known as a 'Griffiths remand' (after the High Court case of *Griffiths v The Queen* (1977) 137 CLR 293) is codified by s 11. This allows a court to adjourn sentence proceedings and grant bail for a period up to 12 months, for rehabilitation or some other purpose that the court considers appropriate in the circumstances. Technically, this is not a bond because the offender is released on bail.

Suspended sentences

Basically, a suspended sentence is a sentence of imprisonment that is imposed but is not put into immediate effect. Rather, the offender is released on specific conditions and is liable to serve the term of imprisonment in the event of a breach of those conditions. Suspended sentences were re-introduced by the new sentencing legislation in 1999.¹⁴ Their primary

¹³ Bonds under s 10 of the *Crimes (Sentencing Procedure) Act 1999* were initially of unlimited duration, but the 2 year limit was introduced by the *Crimes Legislation Amendment Act 2000* No 43.

¹⁴ They existed at ss 558-562 of the *Crimes Act* until 1974, but were confined to offenders who had not previously been convicted of an indictable offence nor been sentenced to imprisonment. The offender entered into a recognisance to be of good behaviour for not less than 12 months: NSWLRC, Discussion Paper No 33, *Sentencing*, April 1996, paras 9.58-9.60. The present length of a maximum of 2 years is therefore more restrictive. Suspended sentences were abolished by s 13 of the *Crimes and Other Acts (Amendment) Act 1974* No 50. The Law Reform Commission supported the re-introduction of suspended sentences: Recommendation 20, *Sentencing*, Report No 79, December 1996, p 91. Every other

purpose is ‘to denote the seriousness of the offence and the consequences of re-offending, whilst at the same time providing an opportunity, by good behaviour, to avoid the consequences.’¹⁵

The *Crimes (Sentencing Procedure) Act* requires, as a preliminary assessment, that a judge consider all possible alternatives and be satisfied that no other penalty is appropriate before sentencing an offender to imprisonment - including a suspended sentence of imprisonment: s 5(1). This means that ‘a sentence of imprisonment which is suspended, is a heavier sentence than a non-custodial sentence and is inappropriate if a non-custodial sentence, such as a good behaviour bond, is appropriate’: *R v JCE* [2000] NSWCCA 498 at para 16 per Fitzgerald JA, with whom Whealy and Howie JJ agreed.

Section 12 of the *Crimes (Sentencing Procedure) Act* provides that suspended sentences are available when a court imposes a sentence of not more than 2 years imprisonment. The court suspends the sentence for a period not exceeding the term of the sentence, and directs that the offender be released from custody on a good behaviour bond (also not exceeding the term of the sentence).

Partially suspended sentences are valid in New South Wales. In *R v Gamgee* [2001] NSWCCA 251, the Court of Criminal Appeal (Mason P and Dowd J; Sully J dissenting) held that the words ‘suspending execution of the sentence for such period (not exceeding the term of the sentence) as the court may specify’ in s 12 of the *Crimes (Sentencing Procedure) Act* enabled a judge to suspend any part of the sentence. Therefore, the judge who sentenced Gamgee was entitled to impose imprisonment for 2 years and suspend the latter 18 months of the sentence, directing that the prisoner be released after 6 months to be placed on a good behaviour bond. The Court of Criminal Appeal also suggested reasons why a judge might suspend an initial portion of a sentence, such as to accommodate the completion of a pregnancy or a course of study: para 14.

Some other distinctive features of the New South Wales suspended sentence provisions are:

- the period of suspension is not to be longer than the term of the sentence. Other jurisdictions such as Victoria do not have this restriction;¹⁶

jurisdiction in Australia has suspended sentences: s 27 *Sentencing Act 1991* (Vic); s 38 *Criminal Law (Sentencing) Act 1988* (SA); s 144 *Penalties and Sentences Act 1992* (Qld); s 7 and Division 4, Part 3 *Sentencing Act 1997* (Tas); s 76 *Sentencing Act 1995* (WA); s 40 *Sentencing Act 1995* (NT); s 556B(1)(b) *Crimes Act 1900* (ACT); s 20(1)(b) *Crimes Act 1914* (Cth).

¹⁵ Hon. Bob Debus MP, Attorney-General, Second Reading Speech on the *Crimes (Sentencing Procedure) Bill 1999*, *Crimes (Administration of Sentences) Bill 1999* and *Crimes Legislation Amendment (Sentencing) Bill 1999*, NSWPD(LA), 28 October 1999, p 2326.

¹⁶ In Victoria, s 27 of the *Sentencing Act 1991* provides that the length of the sentence is not to exceed 3 years in the Supreme Court and County Court, and 2 years in the Magistrates’ Court, while the period for which the whole or part of the sentence may be suspended is the longer of either the duration of the suspended term of imprisonment, or a period specified by the court, not exceeding 3 years in the Supreme Court/County Court, or 2 years in the Magistrates’ Court. Therefore, the period of suspension could be greater than the term of

- a person sentenced to a suspended sentence can also be fined, as an additional penalty, pursuant to ss 14 or 15;
- however, the payment of a fine cannot be made a condition of the good behaviour bond attached to the suspended sentence: s 95(c)(ii);
- a court may not, in relation to the same offence, make both a community service order and an order that provides for the offender to enter into a good behaviour bond: ss 13, 95(c)(i);
- a sentence cannot be suspended if the offender is subject to another sentence of imprisonment: s 12(2).

In the event that the conditions of the good behaviour bond attached to a suspended sentence are breached, the court must revoke the bond unless it is satisfied that the offender's failure to comply was trivial or can be excused by 'good reasons': s 98(3). If the bond is revoked, the court must determine whether the sentence is to be served as full-time custody, home detention or periodic detention, and whether to set a non-parole period: s 99.

Selecting a suspended sentence as a penalty involves 2 distinct steps, as the High Court observed in *R v Dinsdale* (2000) 202 CLR 321:

The first is the primary determination that a sentence of imprisonment, and not some lesser sentence is called for. The second is the determination that such term of imprisonment should be suspended for a period set by the Court. The two steps should not be elided. Unless the first is taken, the second does not arise. It follows that imposition of a suspended term of imprisonment should not be imposed as a "soft option" when the court with the responsibility of sentencing is "not quite certain what to do".¹⁷

R v Foster [2001] NSWCCA 215 is an example of a case in which the 2 steps were not articulated by the judge in imposing a suspended sentence, but the Court of Criminal Appeal found that this did not invalidate the sentence. Badgery Parker AJ, with whom Greg James J and Giles JA agreed, stated (at para 33):

It does not, I think, follow that every failure to advert to the two stage procedure requires a conclusion that this court must set the sentence aside and

sentence.

¹⁷ Per Kirby J at para 79; cited as being 'equally of application to New South Wales' by Wood CJ at CL in *R v Blackman and Walters* [2001] NSWCCA 121 at para 50. *R v Dinsdale* actually concerned a suspended sentence imposed in Western Australia, pursuant to s 76 of the *Sentencing Act 1995* (WA). Gleeson CJ and Hayne J, in a joint judgment, agreed with Kirby J on the issue of suspended sentences; Gaudron and Gummow JJ agreed generally with Kirby J in a separate joint judgment.

proceed to re-sentence. Failure to adopt the two stage procedure may be productive of error, and because it entails that risk, sentencing judges should be at pains, to proceed in the manner which the statute requires...

An issue related to the 2 stage approach is whether mitigating and aggravating circumstances are only to be taken into account in determining whether the proper penalty is imprisonment, or also in deciding to suspend the sentence. This was resolved by the High Court in *R v Dinsdale* (2000) 202 CLR 321 (per Kirby J at para 85): 'the same considerations that are relevant for the imposition of the term of imprisonment must be revisited in determining whether to suspend that term. This means that it is necessary to think again about all the matters relevant to the circumstances of the offence as well as those personal to the offender...'¹⁸

Some case law in various jurisdictions has regarded rehabilitation as the primary purpose of suspending a sentence: *R v Percy* [1975] Tas SR 62 at 72-73 per Green CJ; *Davies v Deverell* (1992) 1 Tas R 214; *R v GP* (1997) 18 WAR 196 at 233 per Murray J. However, other cases have acknowledged reasons for suspending a sentence besides rehabilitation, such as not wishing to send an offender to prison for the first time (*Wood v Samuels* (1974) 8 SASR 465 at 468 per Walters J), or situations justifying an exercise of mercy (*R v Liddington* (1997) 18 WAR 394 at 406 per Ipp J).

The High Court in *R v Dinsdale* confirmed that the discretion to suspend a sentence entailed consideration of all matters relevant to the circumstances of the offence and the offender, and not by reference wholly, mainly or specially to the effect that suspension would have on the offender's rehabilitation: Kirby J at para 84; Gleeson CJ and Hayne J at para 18; Gaudron and Gummow JJ at para 26. The High Court's emphasis on assessing all the relevant circumstances has been referred to in *R v Blackman and Walters* [2001] NSWCCA 121 at paras 55-56; and *R v Foster* [2001] NSWCCA 215 at para 35. In *R v Blackman and Walters*, Wood CJ at CL (with whom Stein JA and Studdert J agreed) held that a suspended sentence for armed robbery was justifiable where exceptional circumstances were shown: para 56.¹⁹ But in *R v Taylor* [2000] NSWCCA 442, Wood CJ at CL stated that a suspended sentence of 2 years (the maximum available) provided little, if any, general deterrence for an offence of robbery *simpliciter*: para 49.²⁰ The different outcomes of these 2 cases seem to substantiate the importance of matters beyond the charge in question.

The emphasis on 'all the circumstances' accords with other recent decisions in New South Wales that preceded *R v Dinsdale*. In *R v Laws* [2000] NSWSC 885, John Laws, the prominent radio commentator, was sentenced to 15 months imprisonment, suspended upon entering into a good behaviour bond for the same period, for soliciting information from a

¹⁸ Cf. *R v JCE* [2000] NSWCCA 498 at para 17.

¹⁹ The Court of Criminal Appeal dismissed the Crown's appeal against the imposition of a 2 year suspended sentence on each respondent for armed robbery.

²⁰ The Court of Criminal Appeal (Whealy J, with whom Wood CJ at CL and Studdert J agreed) held that the sentence was manifestly inadequate but exercised its discretion not to intervene, and dismissed the Crown's appeal against sentence.

former juror relating to jury deliberations, contrary to s 68A of the *Jury Act 1977*. Passing sentence in the Supreme Court, Wood CJ at CL reasoned (at paras 41-45) that home detention, a fine, or a good behaviour bond on its own, would not provide sufficient deterrence, and that Laws' personal safety would be jeopardised by periodic detention. A community service order was also eliminated on the ground that Laws 'already serves the community both as a benefactor and otherwise.' Wood CJ at CL concluded that the best option was a suspended sentence. As noted above, s 95(c)(ii) of the *Crimes (Sentencing Procedure) Act 1999* prevents a fine being imposed as a condition of the good behaviour bond attached to the suspended sentence. Otherwise, his Honour said (at para 47) that he would have done so.

In *R v Sette* [2000] NSWSC 648, the offender was sentenced for the manslaughter of her 15 month old son. The psychiatric evidence in the case indicated that the offender was suffering an 'abnormality of the mind' at the time of the offence. Delivering the sentence in the Supreme Court, Barr J found that the circumstances of the case were extraordinary, that Sette was unlikely to reoffend, and there was little need for protection of the public. Consequently, the weight attached to deterrence was reduced. The subjective features of Sette, such as her prior good character and early plea of guilty, also had a mitigating effect. Barr J imposed a suspended sentence of 2 years, with continued psychiatric consultation as a condition of the bond.

Research conducted on suspended sentences in Victoria, which were re-introduced there in 1986,²¹ suggested that the option had been used by judicial officers 'on a major scale'. Suspended sentences represented a means of diversion from prison at the point of initial sentencing, although diversion was largely confined to offenders with few or no prior convictions. The re-introduction of suspended sentences also led to an apparent reduction of prisoners who were serving short sentences.²²

Community service orders

The *Community Service Orders Act 1979* was repealed on 3 April 2000. The main procedural provisions were transferred to s 8 and Part 7 of the *Crimes (Sentencing Procedure) Act 1999*, while the administrative arrangements are governed by Part 5 of the *Crimes (Administration of Sentences) Act 1999* and Chapter 5 of the *Crimes (Administration of Sentences) Regulation 2001*.

²¹ Suspended sentences were re-introduced in Victoria when ss 20-24 of the *Penalties and Sentences Act 1985* came into effect in 1986. They had previously been a sentencing option in the *Crimes Act 1915* and the *Crimes Act 1928*, but not the *Crimes Act 1958*: D Tait, 'The Invisible Sanction: Suspended Sentences in Victoria 1985-1991' (1995) 28(2) *Australian and New Zealand Journal of Criminology* 143 at 143-144.

²² The research was based on information and statistics from the period 1985-1991: Tait, *ibid*, pp 148, 151, 156. However, for a critique of suspended sentences, mainly on the ideological basis that they contravene the principles of punishment and proportionality, see: M Bagaric, 'Suspended Sentences and Preventive Sentences: Illusory Evils and Disproportionate Punishments' (1999) 22(2) *University of New South Wales Law Journal* 535.

The system of community service orders is substantially unchanged from that which operated under the *Community Service Orders Act 1979*. However, one change of note is that a breach of a community service order no longer constitutes a separate offence.²³

The periods of community service allowable under cl 23 of the *Crimes (Sentencing Procedure) Regulation 2000* are (as previously):

- 100 hours - for offences with maximum penalties of up to 6 months imprisonment;
- 200 hours - where the maximum penalty is over 6 months to 1 year imprisonment;
- 500 hours - for penalties over 1 year imprisonment.

Periodic detention

The provisions from the repealed *Periodic Detention of Prisoners Act 1981* were re-enacted at s 6 and Part 5 of the *Crimes (Sentencing Procedure) Act 1999*, and Part 3 of the *Crimes (Administration of Sentences) Act 1999*. Relevant regulations are to be found in Part 3 of the *Crimes (Sentencing Procedure) Regulation 2000* and Chapter 3 of the *Crimes (Administration of Sentences) Regulation 2001*.

A periodic detention order can only be made where the term of imprisonment imposed is not more than 3 years in length: s 6 of the *Crimes (Sentencing Procedure) Act 1999*. This duration has been constant since February 1999. Prior to that, periodic detention was not available for sentences less than 3 months, with limited exceptions.²⁴

Home detention

The provisions on home detention are found at s 7 and Part 6 of the *Crimes (Sentencing Procedure) Act 1999*; Part 4 of the *Crimes (Sentencing Procedure) Regulation 2000*; Part 4 of the *Crimes (Administration of Sentences) Act 1999*; and Chapter 4 of the *Crimes*

²³ Under ss 23-25 of the *Community Service Orders Act 1979* a breach was a separate offence, punishable by a fine. The Law Reform Commission supported this change: *Sentencing*, Report 79, Recommendation 22, paras 5.13-5.15. The **children's** regime of community service orders has recently been amended to the same effect: *Criminal Legislation Amendment Act 2001* No 117, removing Part 5 of the *Children (Community Service Orders) Act 1987*. Schedule 1 of the *Criminal Legislation Amendment Act 2001*, which contains the reform, commenced on 21 December 2001: *Government Gazette*, No 196 of 21 December 2001, p 10437.

²⁴ Originally, s 5 of the *Periodic Detention of Prisoners Act 1981* No 18 specified a range of 'not less than 3 months and not more than 18 months'. A number of amendments followed, including raising the maximum to 3 years pursuant to the *Periodic Detention of Prisoners (Amendment) Act 1989* No 186. Section 5A was inserted by the *Periodic Detention of Prisoners (Domestic Violence) Amendment Act 1982* No 117 to permit periodic detention to be ordered for less than 3 months as a penalty for domestic violence. Later this was extended to other selected offences. The eligible sentence was simplified to a maximum of 3 years, and s 5A was abolished, when the *Periodic Detention of Prisoners Amendment Act 1998* No 43 commenced on 1 February 1999: *Government Gazette*, No 12 of 29 January 1999, p 280.

(Administration of Sentences) Regulation 2001.

As under the *Home Detention Act 1986* (now repealed), home detention can only be considered once an offender has been sentenced to imprisonment. In other words, after the court imposes a sentence of imprisonment it may refer the offender to the Probation and Parole Service to assess the offender's suitability for home detention: ss 80-81. This stipulation is intended to ensure that home detention is used to divert from correctional centres certain prisoners who pose little threat to the community, and not as an extra option for dealing with offenders who would otherwise receive a non-custodial penalty.²⁵ By contrast, the suitability of an offender for community service or periodic detention is evaluated before the judge pronounces sentence: ss 86 and 66 respectively.

²⁵ Hon. J.W. Shaw QC, Attorney-General, Second Reading Speech on the *Home Detention Bill 1996*, NSWPD(LC), 15 October 1996, pp 4732-4733; NSWLRC, Report 79, *Sentencing*, December 1996, para 7.2.

3. NEW OFFENCES AND INCREASED PENALTIES

At an elementary level, the sentence imposed on an offender is influenced by the nature of the charge involved and the maximum penalty available. Governments may express their dissatisfaction with sentencing decisions of the courts by increasing the penalties or creating new, more specialised offences which carry higher penalties than are offered by existing offences. This can result in an upward trend in the severity of sentences. Governments often assert that, by increasing maximum penalties, ‘a clear message is sent to the judiciary that the community expects offenders who commit these offences to be dealt with more severely than they have been in the past.’²⁶

An apparent rise in the crime rate for a particular offence, or publicity about controversial cases, often triggers Government action. In 2001, gang-related offences attracted much media and political attention. The Government created new offences to address purported gang activities, such as recruiting minors, that were not adequately covered by the law. Also, the aggravating circumstance of being in company was added to a range of present offences, for example, as provided by the *Crimes Amendment (Gang and Vehicle Related Offences) Act 2001* No 84.²⁷

The following tables depict a selection of the new offences, and higher penalties for aggravated offences, introduced by the Carr Government in New South Wales in 2001. While the list is not intended to be exhaustive, it demonstrates the volume of amendments. The section numbers referred to are those of the *Crimes Act 1900*, unless otherwise stated.

New offences in 2001

Offence	Maximum penalty	Amending Act
Leaving or sending an article with intent to cause alarm (‘bomb hoax’), s 93II	5 years imprisonment	Criminal Legislation Amendment Act 2001 ²⁸
Recruiting children into criminal activity, s 351A	10 years imprisonment	Crimes Amendment (Gang and Vehicle Related Offences) Act 2001 ²⁹
Threaten or intimidate a person to influence them not to provide information to the	7 years imprisonment	Crimes Amendment (Gang and Vehicle Related Offences) Act 2001

²⁶ Hon. Bob Debus MP, Attorney-General, Second Reading Speech on the *Crimes Amendment (Gang and Vehicle Related Offences) Bill*, NSWPD(LA), 17 October 2001, p 17519.

²⁷ On the subject of sentencing gang-related sexual offences, see also NSW Parliamentary Library Briefing Paper No 12/2001, *Sentencing “Gang Rapiers”: The Crimes Amendment (Aggravated Sexual Assault in Company) Bill 2001* by Rowena Johns, Gareth Griffith and Rachel Simpson.

²⁸ Assented to on 18 December 2001. The provisions in Schedule 3[5] relating to bomb hoaxes commenced on 21 December 2001.

²⁹ Commenced on 14 December 2001.

police, s 315A		
Stealing car parts, s 154AA(2)	10 years imprisonment	Crimes Amendment (Gang and Vehicle Related Offences) Act 2001
Receiving stolen car or car parts, s 188	12 years imprisonment	Crimes Amendment (Gang and Vehicle Related Offences) Act 2001
Unlawful possession of a stolen car or car parts, s 527C	12 months imprisonment	Crimes Amendment (Gang and Vehicle Related Offences) Act 2001
Unlawfully take a vehicle by force ('car jacking'), s 154C	10 years imprisonment, or 14 years in aggravated circumstances eg. in company, armed with an offensive weapon, or maliciously inflicting actual bodily harm	Crimes Amendment (Gang and Vehicle Related Offences) Act 2001
Contravention of a non-association or place restriction order, s 100E	6 months imprisonment	Justice Legislation Amendment (Non-association and Place Restriction) Act 2001 ³⁰
Causing sexual servitude, s 80D	15 years imprisonment	Crimes Amendment (Sexual Servitude) Act 2001 ³¹
Conduct a business involving sexual servitude, s 80E	15 years imprisonment, or 19 years in aggravated circumstances: victim is under 18 years or has a 'serious intellectual disability'	Crimes Amendment (Sexual Servitude) Act 2001
Unauthorised computer access, modification or impairment, with intent to commit or facilitate a serious indictable offence, s 308C	Same as the maximum penalty applicable to the serious indictable offence in question	Crimes Amendment (Computer Offences) Act 2001 No 20 ³²
Unauthorised modification of computer data, with intent to impair, s 308D	10 years imprisonment	Crimes Amendment (Computer Offences) Act 2001 No 20
Unauthorised impairment of electronic communication to or from a computer, with intent to impair, s 308E	10 years imprisonment	Crimes Amendment (Computer Offences) Act 2001 No 20
Possession of computer data with intent to commit or facilitate a serious computer offence, s 308F; Producing, supplying or obtaining the same, s 308G	3 years imprisonment	Crimes Amendment (Computer Offences) Act 2001 No 20

³⁰ The Act will amend the *Crimes (Sentencing Procedure) Act 1999*. It was assented to on 11 December 2001, but had not commenced by the end of January 2002.

³¹ Assented to on 11 December 2001, but had not commenced by the end of January 2002.

³² Commenced on 3 August 2001.

Unauthorised access to, or modification of, restricted computer data, s 308H (summary offence)	2 years imprisonment	Crimes Amendment (Computer Offences) Act 2001 No 20
Unauthorised impairment of data held in a computer disk, credit card etc, s 308I (summary offence)	2 years imprisonment	Crimes Amendment (Computer Offences) Act 2001 No 20
Entering or being on drug premises, s 12 ³³	12 months imprisonment for first offence; 5 years imprisonment for second or subsequent offence	Police Powers (Drug Premises) Act 2001 No 30 (Not amending another Act)
Owner or occupier allowing use of premises as drug premises, s 13	12 months imprisonment for first offence; 5 years imprisonment for second or subsequent offence	Police Powers (Drug Premises) Act 2001 No 30
Organising drug premises, s 14	12 months imprisonment for first offence; 5 years imprisonment for second or subsequent offence	Police Powers (Drug Premises) Act 2001 No 30
Obstructing police officer from entering drug premises, s 9	12 months imprisonment	Police Powers (Drug Premises) Act 2001 No 30

New aggravated types of offences in 2001

Offence	Penalty for basic offence	Penalty for new aggravated offence	Amending Act
Aggravated sexual assault <i>in company</i> , <i>and with</i> infliction of harm, <i>or</i> threat of harm, <i>or</i> deprivation of liberty, s 61JA	Section 61I: sexual assault - 14 years imprisonment; s 61J(2)(c): aggravated sexual assault, being in company - 20 years (still available)	Section 61JA: life imprisonment	Crimes Amendment (Aggravated Sexual Assault in Company) Act 2001 No 62 ³⁴
Detain for advantage ('kidnapping'), s 86 ³⁵	Old s 90A: 14 years imprisonment if the defendant proved the	Section 86(1): basic offence - 14 years; s 86(2): <i>aggravated</i> -	Crimes Amendment (Gang and Vehicle Related Offences) Act

³³ Section numbers hereafter refer to the *Police Powers (Drug Premises) Act 2001* No 30, which commenced on 1 July 2001.

³⁴ Commenced on 1 October 2001.

³⁵ The amendments to kidnapping were initially inserted at s 85A of the *Crimes Act* by Schedule 1[5] of the *Crimes Amendment (Gang and Vehicle Related Offences) Act 2001* No 84, which commenced on 14 December 2001. However, Schedule 3[2] of the *Criminal Legislation Amendment Act 2001* No 117 renumbered s 85A as s 86 and repealed ss 86-91 of the *Crimes Act*. Schedule 3[2] commenced on 21 December 2001.

³⁶ Commenced on 14 December 2001.

	victim was liberated without sustaining substantial injury. Otherwise, 20 years.	20 years; s 86(3): <i>especially aggravated</i> - 25 years	2001 No 84 ³⁶
Assault occasioning actual bodily harm <i>in company</i> , s 59(2)	Section 59(1): 5 years imprisonment	7 years imprisonment	Crimes Amendment (Gang and Vehicle Related Offences) Act 2001 No 84
Demanding property <i>in company</i> , with intent to steal, s 99(2)	Section 99(1): 10 years imprisonment	14 years imprisonment	Crimes Amendment (Gang and Vehicle Related Offences) Act 2001 No 84
Discharging loaded firearm <i>in company</i> , with intent to do grievous bodily harm, s 33A(2)	Section 33A(1): 14 years imprisonment	20 years imprisonment	Crimes Amendment (Gang and Vehicle Related Offences) Act 2001 No 84
Using or possessing a weapon <i>in company</i> , to resist arrest or commit an indictable offence, s 33 B(2)	Section 33B(1): 12 years imprisonment	15 years imprisonment	Crimes Amendment (Gang and Vehicle Related Offences) Act 2001 No 84
Maliciously wounding or inflicting grievous bodily harm <i>in company</i> , s 35(2)	Section 35(1): 7 years imprisonment	10 years imprisonment	Crimes Amendment (Gang and Vehicle Related Offences) Act 2001 No 84

4. SENTENCES OF FULL-TIME IMPRISONMENT

Full-time imprisonment is the most severe and most expensive form of punishment available in New South Wales. The manner in which it is used, and its consequences for the offender, the community and the State, will always be subjects for analysis and debate.

In recent years, statutory provisions in New South Wales have been strengthened to reinforce the common law principle that imprisonment should be imposed as a last resort. However, statistics show that the proportion of offenders receiving a sentence of imprisonment has remained stable or grown, depending on the offence, over the past decade. The use of short term sentences of imprisonment is particularly significant, as the majority of prisoners are serving sentences of under 6 months. In late 2001, the Legislative Council's Select Committee on the Increase in Prisoner Population recommended that consideration be given to abolishing prison sentences of 6 months or less, in order to promote alternatives to full-time custody, and to alleviate the financial burden of the rising prison population.

4.1 Recent statistics on rates and length of prison sentences

The rate of imprisonment in New South Wales between 1990 and 2000 increased by 31%, from 86 to 113 inmates per 100,000 of the population.³⁷

A study conducted by the Bureau of Crime Statistics and Research reveals that the number and duration of prison sentences imposed by the Higher (District, Supreme) Courts and Local Courts in 9 categories of offences remained steady or moved slightly upward in 1990-2000.³⁸

In the Higher Courts, for 5 offence categories - assault, sexual offences against children, robbery, break and enter, and fraud - there was a 'statistically significant' upward trend between 1990 and 2000 in the proportion of convicted offenders receiving imprisonment. For the other 4 offence categories - murder, manslaughter, sexual assault, and deal or traffic in opiates - the figures were stable.³⁹ Comparing the years 1990 and 2000, every offence category exhibited an increase in the percentage of convicted offenders imprisoned, including: murder from 90 to 100%, assault from 28 to 50%, sexual assault from 41 to 65%, robbery from 64 to 83%, break and enter from 66 to 74%, and fraud from 29 to 55%.

The average length of prison sentences for all of the offences was stable, with the exception

³⁷ S Mariasson and S Eyland, *Inmate Statistics July 1999 to June 2000*, Statistical Publication No 21, September 2000, New South Wales Department of Corrective Services.

³⁸ J Fitzgerald, 'Trends in sentencing in the New South Wales Criminal Courts: 1990-2000' 62 *Crime and Justice Bulletin* 1 (November 2001, NSW Bureau of Crime Statistics and Research). This report is available on the Bureau's website at <www.lawlink.nsw.gov.au/bocsar>

³⁹ *Ibid*, p 2.

of robbery which declined. However, as the number of offenders sentenced to imprisonment for robbery grew, the explanation offered is that more *short* sentences were imposed, hence a decline in the average sentence.⁴⁰

In the Local Courts, statistics for 6 major offence categories between 1993 and 2000 demonstrated stability in the percentage of offenders sentenced to imprisonment and the length of prison sentences, with only 2 exceptions. Firstly, the percentage of offenders convicted of break and enter who received a sentence of imprisonment in the Local Court rose by 22.8% between 1993 and 2000. Secondly, the average prison sentence imposed for drug dealing increased by 26.4%.⁴¹

These sentencing trends were presented in media reports as ‘appear[ing] to contradict claims that judges are being too lenient on criminals’ and as being ‘at odds with the law and order policy battle that has typified recent NSW elections.’⁴² Dr Don Weatherburn, the Director of the Bureau of Crime Statistics and Research, stated:

There is no evidence that the courts have reduced jail terms or that the likelihood of going to jail is lessening. In fact, the chances of going to jail have increased...The public has always put too much faith in prison as a means of controlling crime, and not placed enough faith in smart policing.⁴³

However, the Attorney-General, Hon. Bob Debus MP, welcomed the study’s findings, asserting that:

These figures show the results of the Government’s continuing approach to send a clear message to the courts that the community expects and wants those who commit crime to be dealt with harshly before the law.⁴⁴

A selection of sentencing statistics from the Bureau of Crime Statistics and Research are reproduced at **Appendix A** of this briefing paper.

4.2 Common law and statutory principles on imprisonment

According to the common law, imprisonment is a sanction of last resort, and consideration should be given to alternative penalties: *Parker v DPP* (1992) 28 NSWLR 282 at 296; *R v James* (1985) 14 A Crim R 364 at 364-365.

⁴⁰ Ibid, pp 2-3.

⁴¹ Ibid, p 3.

⁴² R Wainwright, ‘Life made harder for NSW crooks’, *The Sydney Morning Herald*, 22 January 2002, p 1.

⁴³ Ibid, p 6.

⁴⁴ Ibid, p 6.

Statutory provisions on sentencing also recognise this principle. The *Justices Act 1902*, which governs matters prosecuted summarily in the Local Court, requires a Magistrate to state that, before imposing a sentence of imprisonment, ‘all possible alternatives were considered’: s 80AB.⁴⁵

The *Sentencing Act 1989* (now repealed) required a judge who imposed a sentence of 6 months or less duration, to set a fixed term: s 7(2). In other words, such a sentence could not be divided into a non-parole period (‘minimum term’) and a parole period (‘additional term’).

In 1996 the New South Wales Law Reform Commission recommended that courts should be obliged to provide reasons when sentencing an offender to imprisonment for 6 months or less, including why an alternative penalty was not appropriate. The recommendation reflected the Commission’s support for the diversion of offenders who would normally be subject to short terms of imprisonment.⁴⁶ The Commission’s proposal was adopted as part of the reorganisation of sentencing legislation in 1999. The *Crimes (Sentencing Procedure) Act 1999*, which replaced the *Sentencing Act 1989*, acquired the general principles relating to imprisonment. Most of the provisions of ‘Part 4 - Sentencing Procedures for Imprisonment’ have already been outlined in this briefing paper under ‘2. CONSOLIDATION OF SENTENCING LEGISLATION’ at p 3.

Section 5 of the *Crimes (Sentencing Procedure) Act* stipulates that a court must not sentence an offender to imprisonment unless it is satisfied, after having considered all possible alternatives, that no other penalty is appropriate. When sentencing an offender to imprisonment for 6 months or less, the judge must record the reasons for doing so, including the reason for deciding that no other penalty is suitable.

Also, the tenor of s 7 of the *Sentencing Act 1989* is replicated in s 46 of the *Crimes (Sentencing Procedure) Act*, which states that a court may not set a non-parole period where the total term of imprisonment is 6 months or less.

4.3 Select Committee on the Increase in Prisoner Population

On 17 November 1999, the Coalition moved a motion in the Legislative Council to establish a Select Committee to examine the increase in the number of prisoners in New South Wales correctional facilities since 1995. The Government opposed the motion, and instead proposed that the issue be referred to the Standing Committee on Law and Justice. The cross benches voted with the Coalition to defeat the Government. The Select Committee on the Increase in Prisoner Population was composed of 7 Members of the Legislative Council, chaired by Hon. John Ryan MLC of the Liberal Party. Its Terms of Reference spanned a

⁴⁵ This section dates from 1988, when it was inserted by the *Justices (Sentencing) Amendment Act 1988* No 26.

⁴⁶ NSWLRC, Report 79, *Sentencing*, December 1996, Recommendation 40, paras 8.2-8.7. Arguments for and against the Commission’s stance are outlined therein. See also the Commission’s Discussion Paper 33, *Sentencing*, April 1996, paras 3.26-3.34.

range of topics, including:

- the effectiveness of imprisonment, particularly for people of non-English speaking backgrounds, Aboriginal people, and people with special needs;
- the use of prisons for people remanded in custody awaiting trial or sentence;
- alternatives to incarceration;
- post-release policies.

The Final Report of the Committee was tabled on 13 November 2001.⁴⁷ Although the Government was in the minority, comprising 3 of the 7 members, the Committee's recommendations were unanimous. Some important findings of the report were:⁴⁸

- the **prison population** in New South Wales has risen by 20.9% between 1995 and 2001. On a gender basis, there was a 67.6% increase in female prisoners and an 18.6% increase in male prisoners. There is no reliable evidence to indicate that this trend is the result of a significant growth in criminal behaviour in the community, or that the higher levels of incarceration have prevented crime;
- the expanding prison population has heavy **financial consequences** for the community. The cost of holding a prisoner in gaol can be as high as \$64,486 per annum (\$181 per day) compared to \$3,150 per annum (\$8.63 per day) for completing a community based program supervised by the Probation and Parole Service. The total annual expenses of the Department of Corrective Services 'has increased by 37 per cent in real terms since 1994, equating to approximately \$145 million additional expenditure a year in current terms',⁴⁹
- **short term sentences** account for a substantial proportion of the sentences being served in prison. About two thirds of the offenders who are sentenced to imprisonment stay in gaol for less than 6 months.⁵⁰ It is difficult for the Department of Corrective Services to design and implement effective rehabilitation programs and case management strategies for these inmates. The transition from prison back into the community can be more difficult for inmates who have served a short sentence without a parole period, because they are not supervised by the Probation and Parole Service;

⁴⁷ *NSWPD(LC)*, 13 November 2001, p 18350. The Leader of the Government in the Legislative Council must report within 6 months to the House what action, if any, the Government proposes to take in relation to the recommendations of the Committee. The Interim Report, which focussed on the incarceration of women, was presented in July 2000.

⁴⁸ New South Wales Parliament, Legislative Council, Select Committee on the Increase in Prisoner Population, *Final Report*, November 2001. Most of the information in the list of findings is derived from the Executive Summary of the report, at pp xiv-xvii.

⁴⁹ *Ibid*, p 74.

⁵⁰ The chart of 'People Starting Custodial Episodes' at para 4.42 of the Final Report, shows that 5011 out of 8004 prisoners in 2000/01 were serving sentences under 6 months, while 2993 were sentenced to over 6 months. These figures were substantially higher than in 1995/96, when 3597 prisoners had sentences above 6 months and 2331 had sentences below 6 months, from a total of 5928.

- the largest contributing factor to the growth in the prison population is the number of people on **remand**. At 30 June 2001, those on remand represented more than a quarter of the prison population. This number has almost doubled since 1995.⁵¹ The majority of people on remand are held in custody up to their court hearing but are ultimately not given sentences of imprisonment;
- **other factors** contributing to the rise in levels of imprisonment include increased police activity and a trend towards longer sentences being imposed;
- greater examination needs to be made of **alternatives to prison sentences**. Many prisoners currently in full-time custody may be more appropriately and cost-effectively supervised under alternative sentencing options, including community service orders, probation and parole, periodic detention and home detention, as well as diversionary programs such as the Drug Court and the MERIT (Magistrates' Early Referral Into Treatment) scheme. Certain groups, most notably indigenous offenders, are under-represented in these alternative procedures.

Among the 28 recommendations of the report, Recommendation 16 is of particular relevance to this briefing paper. The Committee suggested that research be commissioned by the Attorney-General to investigate **abolishing sentences of 6 months or less** in New South Wales. The research should consider:

- the impact upon the size of the New South Wales prison population;
- potential savings to the State budget;
- consequences for the management of correctional centres;
- effects on other services such as the Probation and Parole Service;
- the development of alternatives to full-time custody;
- profiling inmates who are sentenced to less than 6 months, including the number of males, females and indigenous people, and the severity of their offences.⁵²

The Committee anticipated that abolishing prison sentences of less than 6 months would generate beneficial outcomes:

The merits of such a proposal are that it would have a significant impact on the size of the increasing prison population in NSW and it would enable better targeting of scarce resources in that the expensive option of full time custody should be reserved for more serious offenders, while the less expensive but very effective community based penalties are best employed on less serious

⁵¹ The Final Report found that the increase in the remand population may in part be due to increased bail refusals, changes to the *Bail Act 1978* removing the presumption of bail in many cases, the inability of accused persons to meet bail conditions, and police 'over-charging' in the hope that one of the charges will result in a guilty plea: pp xv, 40-48.

⁵² *Ibid*, p 113.

offenders.

It has also been very difficult for the Department of Corrective Services to prepare and implement effective case management and rehabilitation plans for inmates who stay full time in prison for less than six months. Finally, sentences of less than six months do not include a period of supervision from the Probation and Parole Service, and consequently the offenders' return to the community after imprisonment can be more difficult and increase the possibility that they will re-offend.⁵³

In making the recommendation that the use of short term imprisonment be reviewed, the Committee noted that the Gallop Government in Western Australia is considering abolishing prison sentences of 6 months or less. Section 86 of the *Sentencing Act 1995 (WA)* already prevents a court from sentencing an offender to imprisonment for 3 months or less, except as provided. The Attorney-General of Western Australia stated in September 2001 that the Government would legislate 'in the not too distant future...to divert those offenders at the minor end of the scale away from prison.' The Attorney-General envisaged:

...taking out of the prison system those people who the judiciary thought might benefit from a short, sharp shock and that is, I think, a fairly discredited theory in terms of incarceration thinking.

We think that if somebody only warrants a sentence of six months or less, then they should not be in prison. They should be given effective work to do in the community...so that prisons will be there as a punishment of last resort for serious offenders and, hopefully, we will take those people who are occupying prison beds at great cost to the community, and no doubt detriment to themselves and their families, out of the prison population and punish them in the community.⁵⁴

However, the Select Committee on the Increase in Prisoner Population acknowledged that enacting legislation in New South Wales to abolish full-time imprisonment of 6 months or less would need to be publicly supported and might inadvertently lead to longer sentences, particularly if funding was not provided for more alternative programs.⁵⁵ The danger of longer sentences arises because judges who resolve to send offenders to prison may simply calculate a figure higher than they would otherwise have done, to overcome the 6 month threshold.

⁵³ Ibid, p 112.

⁵⁴ Hon. Jim McGinty, Attorney-General, *WAPD (LA)*, Estimates Committee B, 27 September 2001, p E424-E425.

⁵⁵ Final Report, p xvii.

5. GUIDELINE JUDGMENTS

In late 2001, guideline judgments seemed in jeopardy in New South Wales. The High Court in November ruled that the guideline issued by the Court of Criminal Appeal in *R v Wong; R v Leung* (1999) 48 NSWLR 340 was erroneous. The High Court's findings were interpreted by some analysts as casting doubt on the validity of guideline judgments in general. Others regarded the criticisms as confined to the particular approach adopted in *R v Wong; R v Leung*.

The New South Wales Government acted swiftly, introducing amendments that are intended to confirm the authority of the Court of Criminal Appeal to pronounce guideline judgments on its own motion. The relevant provisions, contained in Schedule 5 of the *Criminal Legislation Amendment Act 2001* No 117, commenced on the date of assent, 18 December 2001.

The Premier, Hon. Bob Carr MP, also vowed that the Government would legislate minimum sentences for serious crimes if the High Court found sentencing guidelines to be unlawful. On 30 November 2001, he told ABC radio:

I'd introduce minimum sentencing overnight... We are not going to have High Court decisions get in the way of us giving this community what it's asking for and what it's beginning to get, and that is sentences for serious crimes that reflect the seriousness of those crimes.⁵⁶

The High Court judgment and consequential legislative developments are examined in greater detail under '5.2.3 Criminal Legislation Amendment Act 2001' and '5.3.4 Heroin and cocaine importation - *R v Wong & Leung*'.

5.1 General principles

Guideline judgments are judicial pronouncements on the appropriate range, starting point, or relevant factors to be considered, when imposing sentences for a particular type of criminal offence. Guidelines have also been given on sentencing issues of more general application, such as the discount to be allocated to offenders who plead guilty.

Guideline judgments may be a purely judicial initiative, or be reinforced by legislative provisions. The concept of producing explicit sentencing guidelines was instigated by the English Court of Appeal (Criminal Division) in the 1970s, without a statutory basis. England is discussed in greater detail below at 5.5.1.

The first formal guideline judgment was promulgated in New South Wales in 1998 by the Court of Criminal Appeal,⁵⁷ in the course of determining a sentence appeal by the Crown

⁵⁶ Quoted in 'Debus closes the loophole on sentencing guidelines', *The Sydney Morning Herald*, Weekend, 1-2 December 2001, p 6.

⁵⁷ The appellate courts of the Supreme Court are the Court of Appeal and the Court of Criminal

in *R v Jurisic* (1998) 45 NSWLR 209. To date, 5 guidelines have been delivered, all in conjunction with a specific appeal or appeals, although this is due to change in 2002. With one exception, the guidelines have been considered by a bench of 5 judges. In terms of the procedural framework, Spigelman CJ noted in *R v Jurisic* (at 222):

A guideline judgment is more likely to arise in the context of a Crown appeal than in the context of an appeal against severity by an offender. In the usual case it will be the Director of Public Prosecutions who draws the attention of the Court of Criminal Appeal to the background circumstances, in terms of inconsistency of judgments and other matters, which may make it desirable to promulgate a guideline judgment with respect to a particular offence. In England the court has often heard a number of cases concerning the same offence together - both Crown appeals and severity appeals. This has the advantage of presenting a range of factual circumstances to the court.

The purpose of sentencing guidelines is to foster consistency in sentencing, while enabling judicial discretion to still operate in each individual case.⁵⁸ The Court of Criminal Appeal favoured the flexibility of guideline judgments in contrast to statutory minimum sentences or a grid system, because guidelines accommodate special or exceptional cases, serve the objectives of rehabilitation, denunciation and deterrence, and allow a judge to respond to all the circumstances of a matter.⁵⁹

Guidelines are intended to be ‘a relevant indicator’, not to dictate rules that are binding in every case.⁶⁰ However, a judge who departs from a guideline is expected to explain the departure.⁶¹ In *R v Romanic* [2000] NSWCCA 524, Wood CJ at CL stated (at para 16) that guidelines are ‘to be regarded as persuasive, and as a considered expression by this Court [of Criminal Appeal] as to the proper range of sentences, from which there should be no departure save in accordance with a reasoned and justifiable exercise of discretion.’

The prosecution welcomed the introduction of guideline judgments, and nominated allegedly inadequate sentences to be used as ‘vehicles’ for guidelines. Nicholas Cowdery QC, the Director of Public Prosecutions in New South Wales, stated:

Guideline judgments go some way to redressing the unfortunate impression, driven by the media’s concentration on specific instances of unusually lenient sentences, that sentences in general are too lenient.

...

Appeal. They are respectively the highest civil court and highest criminal court in New South Wales.

⁵⁸ *R v Jurisic* at 220 per Spigelman CJ.

⁵⁹ *R v Jurisic* at 221 per Spigelman CJ.

⁶⁰ *R v Jurisic* at 220-221 per Spigelman CJ.

⁶¹ *R v Henry & Others* (1999) 46 NSWLR 346 at para 31 per Spigelman CJ.

The[r]e are significant benefits for the prosecution - more consistent and appropriate sentences moulded by reference to known guidelines, fewer Crown appeals and less pressure on the Executive to respond to media hype.⁶²

Defence lawyers were not so enthusiastic, expressing concerns about the erosion of judicial discretion and the prospect of greater use of imprisonment. According to Paul Byrne SC, a criminal law barrister:

The introduction of guideline sentencing adds to the difficulties confronted by defence lawyers by appearing to undermine one of the fundamental principles of sentencing; namely, that imprisonment is a sentence of *last* resort and that the shortest possible sentence should be imposed...For defence lawyers, there will now need to be a new emphasis on establishing that the facts and circumstances of a particular case justify it being categorised as “exceptional”, so that the rigid application of the guidelines may be relaxed to the advantage of the accused person.⁶³

5.2 Statutory recognition in New South Wales

5.2.1 Criminal Procedure Act 1986

Guideline judgments received legislative reinforcement in New South Wales in 1999, when the *Criminal Procedure Act 1986* was amended by the *Criminal Procedure Amendment (Sentencing Guidelines) Act 1998* No 159.⁶⁴

The statutory provisions authorised the Attorney-General to make an application to the Court of Criminal Appeal for a guideline judgment. This enabled the Court to consider issuing a guideline on a chosen offence without needing an appeal as a vehicle. The Second Reading Speech to the *Criminal Procedure Amendment (Sentencing Guidelines) Bill 1998* clarified this expansion of past practice:

Under the existing appeal structure, the Court of Criminal Appeal is only able to issue a sentencing guideline as a result of a particular matter when that matter is brought before the court.

... The Crown...does not have the ability to bring general issues to the attention of the court. Inconsistency in sentences for a particular offence cannot be addressed unless, and until, an appeal regarding an example of the offence in question is brought before the court. Accordingly, there may be a significant

⁶² N Cowdery QC, ‘Guideline Sentencing: A Prosecution Perspective’ (1999) 11(8) *Judicial Officers’ Bulletin* 57 at 58, 59.

⁶³ P Byrne SC, ‘Guideline Sentencing: A Defence Perspective’ (1999) 11(11) *Judicial Officers’ Bulletin* 81 at 81.

⁶⁴ The Amendment Act received assent on 14 December 1998 and commenced on 1 March 1999: *Government Gazette*, No 25 of 26 February 1999, p 971. The provisions were inserted in Part 8 of the *Criminal Procedure Act 1986*, at ss 25-29A.

delay, of months or even years, between the recognition of the need for a particular sentencing guideline and the ability of the court to issue the guideline.⁶⁵

The Attorney-General's power was (and still is) limited to requesting, not ordering, a guideline judgment: 'This distinction is crucial in ensuring that the fundamental principle of judicial independence from the executive is retained.'⁶⁶ The Senior Public Defender was explicitly granted appearance rights, but no reference was made to the Director of Public Prosecutions.

Originally, an application for a guideline judgment could only be made with respect to indictable offences, as opposed to summary offences.⁶⁷ A guideline could not be directed at an individual offender. The Court was entitled to review, vary or revoke a guideline in a subsequent guideline judgment.

5.2.2 Crimes (Sentencing Procedure) Act 1999

In the restructure of sentencing legislation in 1999, the guideline judgment provisions of Part 8 of the *Criminal Procedure Act 1986* were transferred to Division 4, Part 3 of the *Crimes (Sentencing Procedure) Act 1999*. Some key changes were also made, notably, the extension of guideline judgments to summary offences, and a formal right of appearance for the Director of Public Prosecutions.⁶⁸

The main guideline provisions of the *Crimes (Sentencing Procedure) Act* remain unchanged today:

- the Court of Criminal Appeal is authorised to issue a guideline judgment on the **application of the Attorney-General**: s 37. The Attorney-General's application may include submissions about the framing of the proposed guidelines;
- an application is not to be made in any proceedings before the Court with respect to a **particular offender**: s 37(3);
- the Court may give a guideline in relation to an **indictable or summary** offence: s 37(4);
- a guideline may be **reviewed, varied or revoked** in a subsequent guideline judgment of

⁶⁵ Gabrielle Harrison MP, *NSWPD(LA)*, 28 October 1998, p 9190.

⁶⁶ *Ibid*, p 9190.

⁶⁷ See n 4 for an explanation of indictable and summary offences.

⁶⁸ The Director of Public Prosecutions was accorded the statutory right to intervene in guideline proceedings by the *Crimes Legislation Amendment (Sentencing) Act 1999* No 94 (4.69 in Schedule 4), amending the *Criminal Procedure Act 1986*. Shortly thereafter, the guideline (and other sentencing) provisions of the *Criminal Procedure Act* were transferred to the new *Crimes (Sentencing Procedure) Act 1999*.

the Court: s 37(6);

- the Court **does not have to comply with the Attorney-General's request** to issue a guideline: s 40(b);
- the **Senior Public Defender** and the **Director of Public Prosecutions**, or their representatives, have the right to appear in guideline judgment proceedings: ss 38 and 39 respectively. They may support or oppose the giving of a guideline and make submissions with respect to its framing.

5.2.3 Criminal Legislation Amendment Act 2001

On 15 November 2001, the High Court in *Wong v The Queen; Leung v The Queen* [2001] HCA 64 found that ss 5D and 12 of the *Criminal Appeal Act 1912* (NSW) did not authorise the Court of Criminal Appeal to prescribe sentencing ranges to be implemented in future cases. The Government reacted by proposing to strengthen the guideline judgment powers in the *Crimes (Sentencing Procedure) Act 1999*. The new provisions were contained in Schedule 5 of the *Criminal Legislation Amendment Bill 2001*, which was introduced into the Legislative Assembly on 30 November 2001. In the Second Reading Speech of the Bill, the Attorney-General, Hon. Bob Debus MP, stated:

The decision of their Honours [Gaudron, Gummow and Hayne JJ] in this joint judgment did not turn upon the power of the court to issue a guideline judgment. However, for abundant caution, the Government considers that it is appropriate to introduce these amendments in order to ensure that the court has the power and jurisdiction to give guideline judgments on its own motion... The promulgation of guideline judgments is an integral part of the Government's strategy to provide guidance to the courts and the community about sentencing practices and principles. These amendments ensure the continued use and effectiveness of these judgments.⁶⁹

The Bill was passed unopposed by the Legislative Assembly on 5 December 2001, and without amendment in the Legislative Council on 12 December. The provisions on guideline judgments commenced on the date of assent, 18 December, pursuant to s 2(2).

The *Criminal Legislation Amendment Act 2001* No 117 inserted s 37A into Division 3, Part 4 of the *Crimes (Sentencing Procedure) Act 1999* to explicitly authorise the Court of Criminal Appeal to deliver a guideline judgment on its own motion in any proceedings considered appropriate by the Court, whether or not it is necessary for the purpose of determining the proceedings. The Court is to grant the Senior Public Defender, Director of Public Prosecutions and Attorney-General the opportunity to appear in such proceedings: s 37A(2).

⁶⁹ Second Reading Speech, *Criminal Legislation Amendment Bill 2001*, NSWPD(LA), 30 November 2001, p 19300.

Section 39A further elaborates the Attorney-General's power to intervene in the hearing of a guideline judgment authorised by s 37A. The Attorney-General may oppose or support the framing of a guideline, make submissions, and inform the Court of any relevant pending appeal. A guideline judgment under s 37 or s 37A may be reviewed, varied or revoked in a subsequent guideline, irrespective of whether or not it was given under the same section: s 37B. The definition of 'guideline proceedings' in s 36 is expanded to accommodate proceedings under s 37A.

The *Criminal Legislation Amendment Act 2001* also inserted Part 5 into Schedule 2 of the *Crimes (Sentencing Procedure) Act 1999*, to validate previous guideline judgments that were not the subject of an Attorney-General's reference under s 37:

Any guideline judgment given by the Court of Criminal Appeal before the commencement of section 37A that would have been validly given had section 37A commenced before it was given has, and is taken always to have had, the same force and effect as it would have had if section 37A had commenced before it was given: cl 41, Schedule 2.

On the issue of retrospectively protecting past guideline judgments, the Attorney-General said:

It is not, and has never been, any secret that sentencing guidelines are preferred Government policy. It therefore does not offend any jurisprudential principle to introduce these retrospective provisions to make plain and explicit the powers of the court.⁷⁰

5.3 Guideline judgments issued to date in New South Wales

Five guideline judgments have been promulgated in New South Wales: one in 1998, three in 1999 and one in 2000. The next is due to be heard in March 2002. Each guideline has employed a distinctive approach, depending on the offence. Most have quantified the sentence, in the form of a range or starting point.

5.3.1 Dangerous driving - *R v Jurisic* (1998)

The first formal guideline judgment was pronounced by the Court of Criminal Appeal in *R v Jurisic* (1998) 45 NSWLR 209, a Crown appeal against an allegedly inadequate sentence. It is the only guideline that the Court has issued on its own motion. The offences in question were dangerous driving occasioning death and dangerous driving occasioning grievous bodily harm, both found at s 52A of the *Crimes Act*. The statutory maximum penalties are imprisonment for 10 years and 7 years respectively. To commit these offences, the driver must, at the time of impact, be driving:

- under the influence of alcohol or a drug; or

⁷⁰

ibid.

- at a speed dangerous to another person; or
- in a manner dangerous to another person.

Spigelman CJ (Wood CJ at CL, Sully, James and Adams JJ concurring on the subject of guideline judgments) reasoned that a guideline was justified because the sentences being imposed for s 52A offences did not reflect the ‘sharp upward movement in penalty’ that the Court of Criminal Appeal had repeatedly emphasised was warranted since the offences of dangerous driving occasioning death or grievous bodily harm replaced ‘culpable driving’ in 1994: at 229-230.

The following guideline was pronounced by Spigelman CJ (at 231):

1. A non-custodial sentence for an offence against s 52A should be exceptional and almost invariably confined to cases involving momentary inattention or misjudgment.⁷¹
2. With a plea of guilty, wherever there is present to a material degree any aggravating factor involving the conduct of the offender, a custodial sentence (fixed term or minimum term plus additional term)⁷² of less than 3 years for dangerous driving causing death, and less than 2 years for dangerous driving causing grievous bodily harm should be exceptional.

Spigelman CJ stated (at 231): ‘The period of three or two years, once the threshold of abandoning responsibility has been reached, is a starting point. The presence of additional aggravating factors, or their increased intensity, will determine the actual sentence.’

Spigelman CJ identified a number of matters (at 231), the presence or absence and the degree of which, would determine the appropriate penalty:

- (i) extent and nature of the injuries inflicted;
- (ii) number of people put at risk;
- (iii) degree of speed;
- (iv) degree of intoxication or substance abuse;
- (v) erratic driving;

⁷¹ The terms ‘momentary inattention’ and ‘abandoning responsibility’ were not defined in *R v Jurisic*, but have been considered in numerous cases. In *R v Foster* [2001] NSWCCA 215, the Court of Criminal Appeal (Badgery Parker AJ with whom Giles JA and Greg James J agreed) held that there is a continuum of moral culpability between the 2 extremes of momentary inattention and abandonment of responsibility, and that every case does not have to be classified as one or the other: para 16. If the conduct of the offender does not amount to abandonment of responsibility, the threshold of the guideline has not been reached, and the imposition of a non-custodial sentence may be justifiable.

⁷² In the *Jurisic* guideline, the total sentence was described as a fixed term, or a minimum term plus an additional term. This reflected sentencing practice under the *Sentencing Act 1989*. However, since the enactment of the *Crimes (Sentencing Procedure) Act 1999*, a sentencing judge sets the ‘term of the sentence’ and may or may not elect to specify a ‘non-parole period’: ss 44-46. The non-parole period, like the minimum term, is the period that the prisoner must actually spend in custody.

- (vi) competitive driving or showing off;
- (vii) length of the journey during which others were exposed to risk;
- (viii) ignoring of warnings;
- (ix) escaping police pursuit.⁷³

The operation of factors in paragraphs (iii) to (ix) may indicate that the offender has abandoned responsibility:⁷⁴ at 231.

5.3.2 Armed robbery - *R v Henry & Ors (1999)*

In *R v Henry and Others* (1999) 46 NSWLR 346, the Court of Criminal Appeal issued a guideline judgment on armed robbery, an offence contrary to s 97(1) of the *Crimes Act*. The statutory maximum penalty is 20 years imprisonment. The Court heard 6 Crown appeals against armed robbery sentences, and one severity appeal for an aggravated offence under s 97(2). The Crown submitted that it was appropriate for the Court to promulgate a guideline for s 97(1) offences.

Spigelman CJ (with whom Wood CJ at CL, Newman, Hulme and Simpson JJ agreed) identified (at 380) a category of case that was sufficiently common for the purposes of determining a guideline:

- (i) young offender with no or little criminal history;
- (ii) weapon like a knife, capable of killing or inflicting serious injury;
- (iii) limited degree of planning;
- (iv) limited, if any, actual violence but a real threat thereof;
- (v) victim in a vulnerable position such as a shopkeeper or taxi driver;
- (vi) small amount taken;
- (vii) plea of guilty, the significance of which is limited by a strong Crown case.

Spigelman CJ proceeded to identify a narrow range within which sentences in such cases should fall, of between 4 and 5 years imprisonment for the full term: at 380.⁷⁵ Aggravating or mitigating factors justify a sentence above or below the range.

Spigelman CJ noted (at 386):

The guideline is particularly directed to overcoming the very significant

⁷³ Some of these factors also feature in the separate offences of 'aggravated dangerous driving occasioning death' and 'aggravated dangerous driving occasioning grievous bodily harm': s 52A(2)&(4). The difference is that to commit the aggravated offences the offender, at the time of impact, must be: exceeding the speed limit by more than 45 kph; have the prescribed concentration of alcohol (0.15 or above) in their blood; be driving to escape pursuit by police; or be 'very substantially impaired' by a drug: s 52A(7).

⁷⁴ See n 71 regarding the concept of 'abandoning responsibility'.

⁷⁵ Wood CJ at CL, Newman and Simpson JJ agreed on this range; Hulme J (at 406) preferred a figure of 5 years, with a minimum term of 3 years.

proportion of cases in which non-custodial sentences have been imposed. Henceforth, such sentences should be restricted to the exceptional cases to which the authorities have always referred.

The Court rejected the defence submission that drug addiction should be regarded as a mitigating circumstance,⁷⁶ and this approach has been reiterated in subsequent guideline judgments.

5.3.3 Break, enter and steal - *R v Ponfield & Ors* (1999)

In *Re Attorney-General's Application [No 1] under s 25 of the Criminal Procedure Act, R v Ponfield; R v Scott; R v Ryan; R v Johnson* (1999) 48 NSWLR 327 (often abbreviated as *R v Ponfield*), the Court of Criminal Appeal delivered a guideline judgment on the offence of break, enter and steal.⁷⁷ The maximum penalty for the basic offence under s 112(1) of the *Crimes Act* is 14 years imprisonment.

The Court (Grove J, with whom Spigelman CJ and Sully J agreed) considered that a guideline judgment should be issued because of the prevalence of breaking, entering and stealing, and inconsistency in sentencing offenders: at 334. However, the Court favoured a guideline that indicated relevant sentencing considerations without establishing a starting point or range. A quantitative approach was rejected due to the diversity of circumstances in which offences under s 112(1) are committed, and the fact that many of the offences are dealt with summarily in the Local Court, where the maximum sentence is 2 years imprisonment: at 336.

In formulating a guideline, Grove J stated (at 337):

A court should regard the seriousness of an offence contrary to s112(1) of the *Crimes Act* as enhanced and reflect that enhanced seriousness in the quantum of sentence if any of the following factors are present. Necessarily, if more than one such factor is present there is a cumulative effect upon seriousness and the need for appropriate reflection.

The factors referred to by Grove J can be summarised as follows:

⁷⁶ Per Spigelman CJ at 381-387 and Wood CJ at CL at 387-398, agreeing with each other's observations. Newman J (at 399) and Hulme J (at 410) agreed with both Spigelman CJ and Wood CJ at CL on the subject of drug addiction. Simpson J differed in her reasoning at 410-414 but concurred 'with the proposition that the bare fact that an offence is motivated by a need for money to support a drug habit does not, alone, mitigate the offence or operate to reduce the sentence to be imposed.'

⁷⁷ As the name of the case indicates, the Attorney-General applied for a guideline judgment pursuant to Part 8 of the *Criminal Procedure Act 1986*, now Part 3 of the *Crimes (Sentencing Procedure) Act 1999*. The wording of s 112(1) of the *Crimes Act* is lengthy and refers to breaking and entering a dwelling house and therein committing a serious indictable offence (a 'felony' at the time of the guideline judgment). In practice, the offence committed in conjunction with breaking and entering is usually larceny. The colloquial expression 'break, enter and steal' does not actually appear in the text of s 112.

- (i) the offender was at conditional liberty, such as on bail or parole, at the time of committing the offence;
- (ii) the offence was the result of professional planning, organization and execution;
- (iii) the offender has a prior record, particularly for like offences;
- (iv) the offence was committed at premises of the elderly, sick or disabled;
- (v) the offence was accompanied by vandalism or other significant damage to property;
- (vi) there were multiple offences, represented as charges or matters taken into account on a Form 1;⁷⁸
- (vii) the offence was committed in a series of repeat incursions into the same premises;
- (viii) the value of the stolen property to the victim, whether measured in monetary terms or sentimental value;
- (ix) the offence was committed at a time when it was likely that the premises would be occupied, particularly at night;⁷⁹
- (x) actual trauma was suffered by the victim;⁸⁰
- (xi) force was used or threatened.⁸¹

⁷⁸ A 'Form 1' is a document presented by the prosecution at sentence, listing an additional charge or charges that the offender wishes the court to take into account when dealing with the principal offence. A separate sentence is not imposed for an offence on a Form 1. The principal offence is normally more serious than a Form 1 offence, but not always. See ss 31-35 of the *Crimes (Sentencing Procedure) Act 1999*; the guideline judgment refers to the former provision at s 21 of the *Criminal Procedure Act 1986*. A sample Form 1 appears at Schedule 1 of the *Crimes (Sentencing Procedure) Regulation 2000*.

⁷⁹ This excludes any specific knowledge on the part of the offender, which is a distinct circumstance of aggravation under s 105A(1)(f) of the *Crimes Act*. The aggravated version of break, enter and steal appears at s 112(2) and attracts a maximum penalty of 20 years imprisonment. The specially aggravated offence under s 112(3) is punishable by 25 years imprisonment. Section 105A defines circumstances of aggravation and special aggravation.

⁸⁰ The trauma is to be other than as a result of corporal violence, infliction of actual bodily harm or deprivation of liberty, which are defined circumstances of aggravation under ss 105A(1)(c),(d) and (e) of the *Crimes Act*.

⁸¹ Use or threat of force excludes by means of an offensive weapon or instrument, being a separate circumstance of aggravation under s 105A(1)(a) of the *Crimes Act*.

5.3.4 Heroin and cocaine importation - *R v Wong & Leung* (1999)

In November 2001, the High Court of Australia ruled that the guideline judgment on the importation of heroin and cocaine, *R v Wong; R v Leung* (1999) 48 NSWLR 340, was erroneous and produced without jurisdiction. The guideline will be examined first, before turning to the reasoning of the High Court.

Drug importation is a type of prohibited import under s 233B of the *Customs Act 1901* (Cth). The maximum penalties for importing narcotics are outlined by s 235, and depend on the substance and the quantity involved.⁸² The maximum penalties for importing heroin are:

- not less than a commercial quantity (1.5 kgs) ⇒ \$750,000 fine and/or life imprisonment;
- not less than a trafficable quantity (2 gms) and a prior offence of the same ⇒ \$750,000 fine and/or life imprisonment;
- not less than a trafficable quantity (2 gms) ⇒ \$500,000 fine and/or 25 years imprisonment;
- lesser amount ⇒ \$2000 fine and/or 2 years imprisonment: s 235.

The same maximum penalties apply to cocaine, except that the commercial quantity of cocaine is 2 kgs.

Although the offences contravened Commonwealth law, the New South Wales Court of Criminal Appeal exercised Federal jurisdiction invested in it by s 68 of the *Judiciary Act 1903* (Cth). Section 68 enables States and Territories to apply their laws of arrest, custody and criminal procedure to persons charged in their jurisdiction with Commonwealth offences. In the present case, the relevant State law included s 5D and s 12 of the *Criminal Appeal Act 1912* (NSW) which, respectively, govern Crown appeals and grant supplemental powers to the Court. Pursuant to s 5D, the Commonwealth Director of Public Prosecutions appealed against the sentences imposed on Wong and Leung, of 12 years imprisonment with a non-parole period of 7 years. The Director also requested a guideline judgment for the offences of importing heroin and cocaine.

The Court of Criminal Appeal held unanimously that the sentences were manifestly inadequate, and increased the terms of imprisonment to 14 years with a non-parole period of 9 years. The conclusion of manifest inadequacy was based on the size of the importation (9.356 kgs) and the significant role of the respondents.

However, the Court was divided on whether to deliver a guideline judgment. The majority (Spigelman CJ, with whom Mason P, Sperling and Barr JJ agreed) determined that it was appropriate for a guideline to be promulgated with regard to couriers and other participants low in the hierarchy of a drug importing organisation. The reasons in support of the decision were: to clarify the sentence indication given in the case of *R v Ferrer-Esis* (1991) 55 A

⁸²

See Schedule VI of the *Customs Act 1901* for the trafficable quantity and commercial quantity of every listed substance. Note that the Act uses the word 'trafficable', whereas the guideline judgment refers to 'traffickable'. Therefore, the spelling replicated in this paper changes according to the context.

Crim R 231;⁸³ to contribute to general deterrence; and to provide further guidance to trial judges, thereby reducing the likelihood of appellate review.

The Court chose to structure the guidelines according to ‘levels of quantum’ because the statutory scheme of the Commonwealth *Crimes Act* indicated the importance of the quantity of drugs involved in an offence, and because the ‘guideline’ in *R v Ferrer-Esis* was expressed in that manner: at 364. Other factors, both objective and subjective, were intended to be accommodated within the ranges provided, although the Court recognised that there may be circumstances in which an offender’s assistance to the authorities or plea of guilty justified a sentence below the range: at 365.

The guideline for drug couriers did not apply to Wong and Leung, who were assessed by the trial judge to be major participants in the distribution chain. Spigelman CJ observed (at 369): ‘Whilst they may not have been principals in the act of importation, the level of objective criminality was of a similar order to a principal.’ This disparity between the guideline and the status of the appellants was unusual. Every other guideline judgment has been compatible with the appeals related to it.

Simpson J disagreed with issuing a guideline at that time, given that it related to offenders of lesser criminality than Wong and Leung, and a perusal of relevant case law demonstrated that the sentencing of couriers was consistent and at an appropriate level: at 373. But, on the basis that a guideline was to be promulgated by the majority, Simpson J concurred with the range of sentences proposed and the outcomes of the actual appeals.

The guideline specifies amounts of heroin and cocaine, and the corresponding range of the total sentence (at 366):

Amount of drug	Range of sentence
Low level traffickable quantity 2 gms – 200 gms heroin or cocaine	5 – 7 years imprisonment
Mid level traffickable quantity 200 gms – 1 kg heroin or cocaine	6 – 9 years imprisonment
High range traffickable quantity 1 – 1.5 kgs heroin; 1 – 2 kgs cocaine	7 – 10 years imprisonment
Low range commercial quantity 1.5 – 3.5 kgs heroin; 2 – 3.5 kgs cocaine	8 – 12 years imprisonment
Substantial commercial quantity 3.5 – 10 kgs heroin or cocaine	10 – 15 years imprisonment

⁸³ The Court of Criminal Appeal in that case indicated that drug couriers involved in the importation of ‘substantial quantities’ of heroin should receive a ‘head’ (ie. total) sentence of between 8½ and 11 years.

Wong & Leung v The Queen (2001) - High Court

The case was appealed to the High Court in *Wong v The Queen; Leung v The Queen* [2001] HCA 64. On 15 November 2001, the majority of the Court allowed the appeals: Gaudron, Gummow and Hayne JJ in a joint judgment, and Kirby J in a separate judgment. Gleeson CJ and Callinan J dissented in separate judgments. The appellants submitted that the sentencing guideline was beyond power, or involved an improper or inappropriate exercise of power.

The joint judgment held that the New South Wales Court of Criminal Appeal had **no jurisdiction to prescribe a table of sentences to be applied in future cases:**

...the guideline stated in the present matters was intended to have a prescriptive effect...it was to be treated as if departure from it would evidence an error of principle by the sentencing judge...[T]here is an important distinction between a court articulating the principles which do, or should, underpin the determination of a particular sentence and the publication of the expected or intended results of future cases: para 83.

...In the words of s 5D(1) of the *Criminal Appeal Act*, the Court's powers were to "vary the sentence and impose such sentence" on the *particular* offenders as was proper. It had jurisdiction in the matter which concerned the sentence passed on those particular offenders. It had no jurisdiction in respect of sentences passed or to be passed on others. The publication of a table of future punishments was neither to vary the sentence that was passed nor to pass a new sentence. It is not within the jurisdiction or the powers of the Court to publish such a table because, to adopt constitutional terms, that is not directed to the quelling of the only dispute which constitutes the matter before the Court. Nothing in s 12 of the *Criminal Appeal Act* gave the Court any relevant additional jurisdiction or power: para 84.

This reasoning was interpreted by some commentators as suggesting that guideline judgments in general were unlawful.⁸⁴ The Government responded by introducing provisions in the *Criminal Legislation Amendment Act 2001* No 117 that aimed to safeguard past and future guidelines issued by the Court on its own motion: see discussion above at 5.2.3.

The other major problem that the High Court identified with the guideline judgment in *R v Wong; R v Leung* was the significance it attributed to the **quantity of the drugs** imported:

...the Court of Criminal Appeal's tabulation of sentences...offers a grid against which future sentences are to be judged and it is a grid which is founded entirely on the gravity of the offence as measured only by the weight of narcotic

⁸⁴

For example, a *Sentencing Bulletin* posted on the Judicial Information Research System, the online database of the Judicial Commission, within days of the judgment, stated: 'Although the full implications of this decision are yet to be determined, it is respectfully suggested that the effect may be to negate other guideline judgments issued by the NSW Court of Criminal Appeal.'

concerned: per Gaudron, Gummow and Hayne JJ at para 72.

Gaudron, Gummow and Hayne JJ (at paras 64-65) and Kirby J (at paras 130-131) held that the guidelines **contravened Part 1B of the Commonwealth Crimes Act 1914**.⁸⁵ Section 16A of that Act provides that, in determining the sentence to be passed for a Federal offence, a court must impose a sentence of a severity appropriate in all the circumstances of the offence. A number of factors are listed and must be considered where relevant and known to the court. These include the nature and circumstances of the offence, and the subjective features of the offender, such as antecedents, cultural background, age, character, and physical and mental condition. Gaudron, Gummow and Hayne JJ found that:

It is not enough to say, as the Court of Criminal Appeal said, that other matters mentioned in s 16A may be taken into account by fixing a sentence within the ranges specified or, as appears to be acknowledged elsewhere in the reasons, in some unspecified cases, outside those ranges. The starting point which is given by the Court of Criminal Appeal is based on the false premise that gravity of the offence can usually (perhaps even always) be assessed by reference to the weight of narcotic involved: para 73. [*Footnotes omitted*]

These objections may represent a barrier to further New South Wales guideline judgments being promulgated on Federal criminal offences.

Numerical guidelines and mathematical formulations also attracted criticism by Gaudron, Gummow and Hayne JJ:

...the reasons of the Court of Criminal Appeal suggest a mathematical approach to sentencing in which there are to be "increment[s]" to, or decrements from, a predetermined range of sentences. That kind of approach, usually referred to as a "two-stage approach" to sentencing, not only is apt to give rise to error, it is an approach that departs from principle. It should not be adopted: para 74.

Numerical guidelines either take account of only some of the relevant considerations or would have to be so complicated as to make their application difficult, if not impossible. Most importantly of all, numerical guidelines cannot address considerations of proportionality. Their application cannot avoid outcomes which fail to reflect the circumstances of the offence *and* the offender...: para 78. [*Footnotes omitted*]

The majority of the High Court concluded that the Court of Criminal Appeal's erroneous

⁸⁵

Gleeson CJ and Callinan J held similar views, but expressed them somewhat less conclusively. According to Gleeson CJ, there was a 'substantial risk that they [the guidelines] may result in an approach to sentencing which is inconsistent with the requirements of s 16A of the *Crimes Act 1914* (Cth)': para 31. Callinan J stated that the 'guidelines do have a legislative flavour about them, and...by their very nature, they may detract from a proper consideration and application of the principles which the section [s 16A] requires be considered and applied in each case': para 167.

reasoning had affected the outcome of the Crown appeals against Wong and Leung: per Gaudron, Gummow and Hayne JJ at para 56, Kirby J at para 149. The Court therefore set aside the sentences and remitted them for further consideration. At this stage, the case has not been relisted by the Court of Criminal Appeal.⁸⁶

Technically, however, the High Court could not quash the guideline as it was not the subject of an order by the Court of Criminal Appeal. Gaudron, Gummow and Hayne JJ explained:

The "guideline judgment" in the present matters produced no order or declaration setting out the table of range of sentences proposed by the Court. The content of the table is, therefore, not directly subject to appellate review by this Court in exercise of the jurisdiction conferred by s 73 of the Constitution: para 39.

Despite agreeing with the majority that the guideline was flawed, Gleeson CJ (at para 29) and Callinan J (at para 164) accepted that the Court of Criminal Appeal did not apply the guideline to the individual cases of Wong and Leung. Their Honours dismissed the sentence appeals, reasoning that the Court of Criminal Appeal was entitled to find that the appellant's sentences were manifestly inadequate: Gleeson CJ at para 25, Callinan J at para 162.

Some of the implications of the *Wong v The Queen; Leung v The Queen* are clear from the judgment, while others await the interpretation of the Court of Criminal Appeal in subsequent guideline judgments and perhaps the renewed scrutiny of the High Court in the future. Three members of the High Court (Gaudron, Gummow and Hayne JJ) have now indicated their opposition to numerical guidelines. Such guidelines were also pronounced in *R v Jurisic* (1998) 45 NSWLR 209; *R v Henry and Others* (1999) 46 NSWLR 346; and *R v Thomson and Houlton* (2000) 49 NSWLR 383. Only the non-quantitative approach of *R v Ponfield* (1999) 48 NSWLR 327 rated a positive mention in the joint judgment: at para 60.

It would seem perilous for the Court of Criminal Appeal to exercise Federal jurisdiction in delivering any further guidelines, especially as s 16A of the *Crimes Act 1914* (Cth) stipulates sentencing principles for Federal offences. The majority of the High Court has also discouraged guidelines that have prescriptive force, or utilise sentencing tiers or sub-categories that are not statutorily based: joint judgment at para 82, Kirby J at para 125.⁸⁷

The Attorney-General, Hon. Bob Debus MP, asserted that the outcome in *Wong v The Queen; Leung v The Queen* did not jeopardise the substance of any of the other guidelines:

⁸⁶ A new hearing date may be listed at the callover on 4 February 2002: personal communication, Peter Schell, Registrar of the Court of Criminal Appeal, 13 December 2001.

⁸⁷ For further analysis of the consequences of the case, including from a constitutional perspective, see: H Donnelly, 'Wong and Leung: The Kable guy and numerical guidelines' (2001) 8(11) *Criminal Law News* 100.

There has been some speculation raised in the media about the impact that the recent High Court decision may have on sentencing guidelines. The government is concerned that what is essentially a technical point in terms of the application of guidelines in some instances has been misinterpreted in the media to cause concern that guideline judgments are altogether somehow unlawful. That is certainly not the case.⁸⁸

However, the Government heeded the High Court's finding that the Court of Criminal Appeal lacked jurisdiction to issue guideline judgments under s 5D of the *Criminal Appeal Act 1912*. Jurisdiction was conferred retrospectively on the Court of Criminal Appeal by the *Criminal Legislation Amendment Act 2001* No 117.

5.3.5 Guilty plea - *R v Thomson & Houlton* (2000)

A sentencing court has a statutory duty to give recognition to a plea of guilty. Section 22 of the *Crimes (Sentencing Procedure) Act 1999* requires the court:

- to take into account the fact that an offender has pleaded guilty;
- to take into account the timing of the plea;
- to record its reasons if it does not impose a lesser penalty on an offender who pleads guilty than it would otherwise have imposed.

In *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, Spigelman CJ (with whom Wood CJ at CL, Foster AJA, Grove and James JJ agreed) stated:

The absence of any reference to actual consideration of the guilty plea in the course of sentencing should, as a general rule, in the light of the obligation of sentencing judges to give reasons for their decision, lead to an inference that the plea was not given weight. This conclusion is significantly influenced by the express statutory obligations: at 395.

The Crown requested a guideline judgment concerning the discount to be granted for pleading guilty to State offences. The Court promulgated a guideline to facilitate the objective of encouraging early pleas of guilty:

...this Court should adopt a guideline designed to ensure that offenders, and those who advise them, will know that in this State a discount for a plea is in fact given on a systematic basis and that the earlier the plea, the greater the benefit. This objective will best be served if sentencing judges adopt the practice of quantifying the discount and relating the quantification in some way to the timing of the plea. This Court should promulgate a guideline which encourages sentencing judges to do this: at 411.

⁸⁸ Second Reading Speech, *Criminal Legislation Amendment Bill 2001*, NSWPD(LA), 30 November 2001, p 19300.

In favouring a numerical guideline, Spigelman CJ referred to the need for regularity in the approach taken by sentencing judges, and maintained that:

...the identification of a quantitative guideline in this specific respect is not necessarily inconsistent with the instinctive synthesis approach to the sentencing task. This is particularly so if this Court lays down a broad range within which sentencing judges can exercise a discretion: at 413.

The guideline listed 4 key issues (at 419):

- (i) A sentencing judge should **explicitly state** that a plea of guilty has been taken into account. Failure to do so will generally be taken to indicate that the plea was not given weight.
- (ii) Sentencing judges are encouraged to **quantify the effect of the plea** on the sentence. This can encompass any matters of relevance to the plea, including contrition, witness vulnerability, and particularly utilitarian value. Where other matters are regarded as deserving to be quantified in a particular case, such as assistance to the authorities, a 'single combined quantification' will often be appropriate.
- (iii) The **utilitarian value** to the criminal justice system of a guilty plea should generally be assessed in the range of **10-25% discount** on sentence. The primary consideration in determining where in the range an individual case should fall is the timing of the plea. The concept of an 'early plea' will vary according to the circumstances of the case and is a matter for the sentencing judge.
- (iv) 'In some cases the plea, in combination with other relevant factors, will change the nature of the sentence imposed. In some cases a plea will not lead to any discount.'

The discount within the range of 10-25% is calculated at the sentencing judge's discretion. However, Spigelman CJ elaborated (at 418) on the 2 aspects that will generally affect the level of discount:

- *The time at which the plea is entered:* The top of the range is expected to be reserved for pleas at the earliest opportunity and, save in an exceptional case, not for pleas after a matter has been set down for trial. A discount towards the bottom of the range is suitable for late pleas, for example, on the date fixed for trial;
- *The complexity of the evidentiary issues:* The greater the difficulty of assembling the relevant evidence and the greater the length and complexity of the trial, the higher the utilitarian value of a plea.

Examples of cases which may warrant departure from the recommended range of discount were also suggested (at 418):

Rare cases involving exceptional complexity and trial duration may justify a

higher discount. ... In some cases the “discount” will be reflected in a step down in the hierarchy of sentencing options.

There are circumstances in which the protection of the public requires a long sentence to be imposed so that no discount for the plea is appropriate: see, eg, *R v Stabler* (1984) 6 Cr App R (S) 129 at 131; *R v Costen* (1989) 11 Cr App R (S) 182 at 184.

There are crimes that so offend the public interest that the maximum sentence, without any discount for any purpose, is appropriate. This includes situations in which a life sentence can be and is imposed, notwithstanding the plea: see, eg, *R v Kalache* [2000] NSWCCA 2; see especially per Sully J (at [38]-[42]).

The relationship between the guideline judgment on pleading guilty, and the previous guideline judgments in *R v Henry* (1999) 46 NSWLR 346 and *R v Jurisic* (1998) 45 NSWLR 209 was clarified. The standard case identified in those guidelines should be understood to involve a late plea of guilty, and therefore one of limited value.

5.4 Forthcoming guideline on sexual assault

On 13 September 2001, the Attorney-General lodged an application with the Court of Criminal Appeal for a guideline judgment on sexual assault and aggravated sexual assault. Those offences are found under ss 61I and 61J of the *Crimes Act* and attract a maximum penalty of 14 years and 20 years imprisonment respectively. The guideline judgment is listed for hearing on 15 March 2002.

Sentencing trends indicate that the maximum penalties for sexual assault offences are rarely used. This may be an argument in favour of providing greater guidance to sentencing judges. Between April 1993 and March 2000, 235 cases of sexual intercourse without consent (s 61I) were sentenced in the District Court. Of those, full-time imprisonment was imposed in 201 cases (approximately 86%). The average total sentence was around 4 years, with an average minimum or fixed term (ie. the period actually spent in custody) of around 2.3 years. No case received the maximum penalty, the highest being 10 years.⁸⁹

For the same period, 248 cases of aggravated sexual intercourse without consent (s 61J) were sentenced. Full-time imprisonment was imposed in 237 (approximately 96%) of those cases. The average total sentence was around 6.3 years, with an average minimum or fixed term of around 3.9 years. The maximum penalty was utilised in 3 cases.⁹⁰

Controversy over the alleged leniency of sentences in a ‘gang rape’ case, *R v AEM (jnr) & AEM (snr) & KEM* (District Court, Sydney, 23 August 2001), fuelled support for a

⁸⁹ Calculations are based on data from the statistics component of the Judicial Information Research System, an online electronic database maintained by the Judicial Commission. More precisely, the average full term was 48.42 months, and the average minimum/fixed term was 28.18 months.

⁹⁰ The specific calculations from the Judicial Commission statistics were an average full term of 75.57 months, and an average minimum/fixed term of 47.16 months.

guideline judgment on sexual assault. The Crown also lodged appeals against the sentences imposed on 2 of the offenders in that case, AEM (snr) and KEM, and a co-offender, MM, who was sentenced separately on 2 November 2001. The hearing date for the Crown appeals is 1 February 2002. Departing from the practice that has been observed since *R v Jurisic* (1998) 45 NSWLR 209, the appeals will not be heard in conjunction with the sexual assault guideline judgment. Rather, in view of the High Court's decision in *Wong v The Queen; Leung v The Queen* [2001] HCA 64, it was decided that the guideline judgment should be severed from the other proceedings.⁹¹

For further information on sexual assault offences and the case of *R v AEM (jnr) & AEM (snr) & KEM* see: NSW Parliamentary Library Research Service, Briefing Paper No 12/2001, *Sentencing "Gang Rapists": The Crimes Amendment (Aggravated Sexual Assault in Company) Bill 2001* by Rowena Johns, Gareth Griffith and Rachel Simpson.

5.5 Guideline judgments in other jurisdictions

Guideline judgments are available in various jurisdictions of the common law world. **England** was the originator of sentencing guidelines in the 1970s and has been the most prolific jurisdiction.

In **Canada**, the Supreme Court has affirmed that it is appropriate for a criminal appellate court to nominate a 'starting point' for sentencing a particular offence: *R v McDonnell* (1997) 114 CCC (3d) 436. The starting point may be adjusted upward or downward on the basis of factors relating to the individual offence and offender. Appellate courts in several Canadian provinces have applied this approach.⁹²

The **New Zealand** Court of Appeal adopted the practice of incorporating into judgments a schedule of penalties to be imposed in similar cases. Schedules of penalties for drug offences were set down in *R v Smith* [1980] 1 NZLR 412, *R v Dutch* [1981] 1 NZLR 304 and *R v Ulrich* [1981] 1 NZLR 310. In other cases, the Court has focused on assessing aggravating and mitigating factors for the relevant offence. This occurred in *R v Te Pou* [1985] 2 NZLR 508, which dealt with rape.

The Full Court of the Supreme Court of **South Australia** has implemented 'sentencing standards' which indicate a preferred sentencing range. For example, a standard for armed robbery was determined in *R v Spiero* (1979) 22 SASR 543, and further considered in *Director of Public Prosecutions (SA) v Fermaner* (1994) 61 SASR 447 and *R v Drumgoon* (unreported, Supreme Court, 20 November 1995). In 2000, the Full Court issued a sentencing standard for social security fraud: *Kovacevic v Mills* (2000) 76 SASR 404. The

⁹¹ Personal communication, Peter Schell, Registrar of the Court of Criminal Appeal, 13 December 2001.

⁹² For example, starting points for armed robbery were identified in Nova Scotia: *R v Brennan & Jensen* (1975) 11 NSR (2d) 84, *R v Hingley* (1977) 19 NSR (2d) 541; New Brunswick: *R v Chiasson* (1975) 24 CCC (2d) 159; and Alberta: *R v Johnas* (1982) 2 CCC (3d) 490, *R v Kurichh* (1982) 9 WCB 138.

Court affirmed (at 411) that ‘it is appropriate for this Court to indicate that a certain type of offending is likely to attract a certain type of punishment, and in particular imprisonment, and to indicate an appropriate sentence range for particular types of offending.’

In **Victoria** there has traditionally been a lack of support for guideline judgments from the majority of Supreme Court judges, reflecting concern at the restriction of judicial discretion. The Victorian Sentencing Committee proposed the introduction of guideline judgments in 1988 without success.⁹³ In 2000, the Attorney-General, Hon. Rob Hulls MP, commissioned a review of the State’s sentencing laws by Arie Freiberg, Professor of Criminology at the University of Melbourne. The Discussion Paper, entitled *Sentencing Review*, was released in August 2001.⁹⁴ Term of Reference 4.2 required the Review to consider ‘Whether superior courts in Victoria should adopt a practice of publishing guideline judgments on various categories of offences.’

Professor Freiberg recommended the introduction of guideline judgments to facilitate transparency, consistency and wider community input into the sentencing process.⁹⁵ In addition, Freiberg proposed the establishment of a Sentencing Advisory Council comprised of judicial officers, legal representatives, academics, and members of the public.⁹⁶ The Advisory Council would contribute to the preparation of sentencing guidelines and maintain a statistical sentencing database. The Attorney-General stated that the Government’s formal response to the Sentencing Review would follow a period of public consultation. He noted that, ‘Guideline judgments and a Sentencing Advisory Council are two discussion points raised by the Freiberg Review that I expect will generate a great deal of public debate.’⁹⁷

Commentary is provided below on England, because it was a major source of inspiration for the adoption of guidelines in New South Wales, and on **Western Australia**, because it is the only other jurisdiction in Australia that has introduced legislation specifically on guideline judgments.

5.5.1 United Kingdom

Case law

Guideline judgments were initiated in the 1970s by the English Court of Appeal (Criminal

⁹³ Report of the Victorian Sentencing Committee, *Sentencing*, April 1988, Victorian Attorney-General’s Department, Volume 1, 4.20.7-4.20.14 (pp 217-221). The Committee was chaired by Hon. Sir John Starke QC.

⁹⁴ The Discussion Paper is available online through the website of the Victorian Department of Justice at <www.justice.vic.gov.au> Go to ‘About the Department’, followed by ‘Policy and Development’.

⁹⁵ Freiberg, *ibid*, p 91.

⁹⁶ *Ibid*, pp 93-94.

⁹⁷ ‘Hulls Releases Freiberg Review of Sentencing’, *Media Release from the Office of the Attorney-General*, 13 August 2001, available from <www.dpc.vic.gov.au/pressrel>

Division). Some are limited to identifying factors to be taken into account at sentence, while others suggest numerical amounts. The guideline judgments issued by the Court of Appeal in relation to particular offences include:

- armed robbery - *R v Turner* (1975) 61 Cr App R 67, *R v Gould* (1983) 5 Cr App R (S) 72;
- cannabis importation - *Aramah v The Queen* (1982) 4 Cr App R (S) 407, *R v Ronchetti* (1998) 2 Cr App R (S) 100;
- reckless/dangerous driving causing death - *R v Boswell* [1984] 3 All ER 353, *Attorney-General's References Nos 14 and 24 of 1993* (1994) 15 Cr App R (S) 640;
- rape - *R v Billam* [1986] 1 All ER 985;
- social security fraud - *R v Stewart & Others* [1987] Crim LR 521;
- heroin and cocaine importation - *R v Arunguren & Others* (1994) 16 Cr App R (S) 211;
- ecstasy importation - *R v Warren & Beeley* (1996) 1 Cr App R (S) 223;
- manslaughter - *Attorney-General's Reference No 33 of 1996 (Daniel Latham)* (1997) 2 Cr App R (S) 10;
- domestic burglary - *R v Brewster* (1998) 1 Cr App R 220;
- theft by employees - *R v Clark* [1998] Crim LR 227;
- amphetamine importation - *R v Wijs* [1998] Crim LR 587;
- firearms offences - *R v Avis* (1998) 1 Cr App R 420;
- possessing explosives - *R v Martin* [1999] Crim LR 97;
- indecent assault - *R v Wellman* [1999] Crim LR 343.

The Court of Appeal has also produced guidelines on other aspects of sentencing, such as:

- length of imprisonment - *R v Bibi* (1980) 71 Cr App R 360;
- non-violent petty offenders - *R v Upton* (1980) 71 Cr App R 102;
- suspended sentences - *R v Clarke* (1982) 4 Cr App R (S) 197;
- deferment of sentence - *R v George* (1984) 79 Cr App R 26.

However, the focus of the Court of Appeal on serious indictable offences has been regarded by some legal commentators as a shortcoming of English guideline judgments. The editorial of the *Criminal Law Review* observed:

When the Court of Appeal has issued guideline judgments in the past it has tended to do so by reference to a group of cases it has pulled together for the purpose. Finding these cases is not difficult when they concern serious indictable offences (rape, robbery, class A drugs, etc.) which reach the Court regularly. With less common indictable offences, and either-way offences usually tried by magistrates, this technique is problematic. Groups of such cases may not be available. The Court may need therefore to change its practice. It may need to become more proactive, in seeking out individual cases which might be appropriate vehicles for guideline judgments.⁹⁸

⁹⁸ Editorial, 'The Sentencing Advisory Panel' [2000] *Criminal Law Review* 629 at 630. This was also one of the criticisms of English guideline judgments mentioned by G Hall, 'Reducing Disparity by Judicial Self-Regulation: Sentencing Factors and Guideline Judgments' (1991)

Statutory law

Guideline judgments received statutory recognition in England in the *Crime and Disorder Act 1998*.

Section 80 provides for the Court of Appeal (Criminal Division) to consider whether to frame sentencing guidelines on a certain category of offence, or to review existing guidelines. The legislation restricts the practice to indictable offences.

When the Court decides to frame or revise guidelines, it is obliged by s 80(3) to have regard to:

- the need to promote consistency in sentencing;
- the sentences imposed by courts in England and Wales for the offences in question;
- the cost of different sentences and their relative effectiveness in preventing re-offending;
- the need to promote public confidence in the criminal justice system; and
- the views communicated to the Court by the Sentencing Advisory Panel, a body described below.

A guideline judgment may arise for the consideration of the Court of Appeal by several methods:

- an appeal against a sentence, where leave to appeal has been granted by the Court of Appeal or by a single judge, or a certificate of fitness to appeal was given by the sentencing judge: ss 9&10 of the *Criminal Appeal Act 1968*;
- a reference under s 36 of the *Criminal Justice Act 1988* whereby, if it appears to the Attorney-General that the sentencing of a person in the Crown Court has been unduly lenient, the Attorney-General, with the leave of the Court of Appeal, can refer the case to the Court for review;
- a proposal by the Sentencing Advisory Panel, pursuant to s 81(3) of the *Crime and Disorder Act 1998*, that guidelines be framed or revised.

The Sentencing Advisory Panel was established by s 81 to assist and advise the Court of Appeal on the issuing of guidelines. The Panel was appointed by the Lord Chancellor, after consultation with the Secretary of State and the Lord Chief Justice. The current chairman is the renowned criminal law scholar, Professor Martin Wasik. The duties of the Panel, upon being advised by the Court of Appeal that it has decided to frame or revise a guideline, are outlined in s 81(4). These include to convey sentencing information and the Panel's own views on the relevant offences to the Court. The Panel may also propose the creation or revision of guidelines on its own initiative.

In 2000, the Sentencing Advisory Panel provided written advisings in favour of guidelines on such topics as environmental offences, importation of opium, possession of offensive weapons, and racially aggravated offences.⁹⁹ The Panel also releases consultation papers on sentencing, expressing its provisional opinion and inviting responses from interested parties pursuant to s 81(4)(a) of the *Crime and Disorder Act*. A consultation paper published in January 2002 on child pornography recommended a guideline judgment, while in September 2001, a paper on rape suggested a review of the guideline in *R v Billam* [1986] 1 All ER 985.

5.5.2 Western Australia

Section 143 of the *Sentencing Act 1995* (WA) empowers the Full Court of the Supreme Court or the Court of Criminal Appeal to give a guideline judgment in any proceeding considered appropriate by the Court. The guideline may be reviewed, varied or revoked in a subsequent guideline judgment.

To date, this capacity has not been exercised in a formal manner in Western Australia. Requests have been made to the Court of Criminal Appeal on a number of occasions, mostly by the Director of Public Prosecutions, but in each case the court has declined to issue a guideline.¹⁰⁰

Although no formal guideline judgments have been produced in Western Australia, the Court of Criminal Appeal has given ‘sentencing guidance’ in relation to several specific offences. Prominent examples are burglary in *R v Cheshire* (unreported, WA CCA, 7 November 1989), and sexual assault in *R v Podirsky* (1989) 43 A Crim R 404 at 411. In those cases, Chief Justice Malcolm referred to previous decisions and stated the range of sentences commonly imposed. This approach can be regarded as endorsing existing practices rather than nominating a preferred range or starting point. But some commentators have suggested that the result is much the same as a guideline judgment, because the cases set a standard that has been followed in subsequent cases and considered on appeal.¹⁰¹

More recently, the case of *R v Tognini; R v McGuire* [2000] WASCA 31 (22 February 2000) was called a ‘guideline judgment’ in the head note, but not by the judges in the actual

⁹⁹ Editorial, ‘The Sentencing Advisory Panel’ [2000] *Criminal Law Review* 629 at 629; and the website of the Sentencing Advisory Panel at <www.sentencing-advisory-panel.gov.uk>

¹⁰⁰ For example, the WA CCA rejected the DPP’s applications for guideline judgments on: the imposition of suspended sentences for the offence of having a sexual relationship with a child - *R v GP* (1997) 93 A Crim R 351; fraud - *R v Simcock* (unreported, WA CCA, 27 May 1997); the presence of domestic violence in the commission of an offence - *R v Kerr* (unreported, WA CCA, 15 August 1997); and indefinite sentences - *R v Lowndes* (1997) 82 A Crim R 516. The Court also declined a defence application in *R v Halliday* (unreported, WA CCA, 3 April 1998) for a guideline on the relevance to the sentencing process of an offender’s intellectual disability. For a critique of the WA CCA’s stance on guideline judgments, see: N Morgan and B Murray, ‘What’s in a Name? Guideline Judgments in Australia’ (1999) 23(2) *Criminal Law Journal* 90 at 101-106.

¹⁰¹ N Morgan and B Murray, n 100, at 98.

text. Significantly, there was no mention of the Court's power to issue guidelines under s 143 of the *Sentencing Act 1995*. The case involved 2 Crown appeals against 'spent conviction orders', which are available under the *Spent Convictions Act 1988* to offenders who have passed 10 years since their conviction.¹⁰² Spent conviction orders can also be made pursuant to the *Sentencing Act* when an offender is fined, released without sentence, or receives a conditional release order or a community based order, as long as certain preconditions are met.¹⁰³ Once the conviction is declared to be spent, it is unlawful to discriminate against the offender on the basis of the prior conviction, for example, in matters of employment, membership, or holding office.

Apart from dealing with the Crown appeals,¹⁰⁴ the Court provided guidance on spent conviction orders. Murray J, with whom Malcolm CJ and Wallwork J agreed, stated (at para 27) that:

...the discretionary power to make a spent conviction order conferred by s 45 of the *Sentencing Act* should be regarded as being of an exceptional character...It should therefore look to see whether there is some particular circumstance to show that it would be desirable, not only from the point of view of the offender but also, having regard to his or her rehabilitation, from the point of view of the community, why the adverse affect of the conviction should be immediately set aside.

The court considered examples of such a 'particular circumstance', including impediments to employment, exceptional hardship to the offender or their family, or positively aiding the offender's rehabilitation in a way that best accorded with the interests of the community.

In addition to the 'guidance cases', the Court of Criminal Appeal has also supported the numerical increase of sentences for some offences in response to crime trends. This happened in 1997-1998 in relation to armed robbery offences.¹⁰⁵ In *R v Miles* (1997) 17 WAR 518, the Court reviewed the proposition stated in *R v Norman* (unreported, WA

¹⁰² The *Spent Convictions Act 1988* enables an offender who has a 'lesser conviction' to apply to the Commissioner of Police for a certificate that the conviction is spent. The certificate is granted automatically and the Commissioner has no discretion. By contrast, an offender with a 'serious conviction' seeks an order from the District Court. The Court's power is discretionary, and relevant considerations include the nature of the offence, time elapsed since conviction, the public interest, and whether the conviction prevents the applicant from engaging in particular employment.

¹⁰³ See ss 39 and 45 of the *Sentencing Act 1995*. This was the type of spent conviction order granted to Tognini and McGuire. The penalty imposed upon McGuire, who was convicted of indecent assault, was a conditional release order for 12 months, while Tognini was fined \$2000 for a fraud offence.

¹⁰⁴ The Court dismissed the Crown appeal in Tognini's case, but allowed the appeal against McGuire's sentence and set aside his spent conviction order.

¹⁰⁵ Other examples are dangerous driving (*R v Stebbings* (1990) 4 WAR 538), burglary (*R v Pezzino* (1997) 92 A Crim R 135) and ecstasy supply (*R v Darwell* (1997) 94 A Crim R 135): Morgan and Murray, n 100, p 99.

CCA, 1 February 1989) that for a ‘conventional armed robbery of a bank or similar premises, the range of sentences...would seem to be between five and seven years or upwards, depending on the seriousness of the offence.’ Malcolm CJ in *R v Miles* observed that ‘armed robbery has become significantly more prevalent since 1989 and sentences have been firmed up in that period’: at 521. The Court recognised that the appropriate range of sentence, depending on the circumstances, was from 6 to 9 years, before a discount for a plea of guilty.

One of the most prominent critics of the Supreme Court’s inactivity on formal guideline judgments is Neil Morgan, Director of Studies at the Crime Research Centre of the University of Western Australia. He suggests that, ‘It would have been quite straightforward - and far less of a step up than it was in New South Wales - for the “guidance cases” and the “firming up” cases to have been drawn together in the simple form of explicit and well-publicised guideline judgments.’¹⁰⁶

In 1999, concerned at the prospect of the Coalition Government introducing a sentencing ‘matrix’ in Western Australia, Morgan advocated:

...the Court of Criminal Appeal should seriously - and as a matter of urgency - revisit the notion of guideline judgments in order to provide clear and substantive guidance for the lower courts, and also to communicate and ‘market’ sentencing policies more effectively to the public.¹⁰⁷

Also in 1999, the Law Reform Commission of Western Australia recommended that the Court of Criminal Appeal should:

...give notice that more general guidelines will be made and allow submissions from a ‘friend of the court’, *amicus curiae*, who by his or her special expertise or interest in an area may, on an important issue, be able to bring a broader perspective to bear than the particular parties to the case.¹⁰⁸

In response, Chief Justice Malcolm released a press statement in which he declared that there were ‘a number of recommendations in relation to changes in criminal and civil proceedings which I support. In criminal proceedings, these include...[m]ore use of guideline judgments’.¹⁰⁹ However, no guideline judgments have been officially pronounced to date.

¹⁰⁶ Morgan and Murray, n 100, pp 100-101.

¹⁰⁷ N Morgan, ‘Accountability, Transparency and Justice: Do We Need a Sentencing Matrix?’ (1999) 28(2) *The University of Western Australia Law Review* 259 at 290.

¹⁰⁸ Law Reform Commission of Western Australia, Review of the Criminal and Civil Justice System in Western Australia, *Final Report*, September 1999, p 290.

¹⁰⁹ Hon. David Malcolm AC, Chief Justice of Western Australia, *Media Statement*, 27 October 1999, at <www.supremecourt.wa.gov.au/media/media07.htm>

6. REDETERMINATION OF EXISTING LIFE SENTENCES

Changes to sentencing practices in New South Wales over recent decades have enabled certain prisoners serving life sentences of imprisonment to apply to the Supreme Court for the conversion of their sentences into numerical amounts. This is known as sentence ‘determination’, which is the language of the *Crimes (Sentencing Procedure) Act 1999*, although legal practitioners and the media often refer to sentence ‘redetermination’.¹¹⁰

The *Crimes Legislation Amendment (Existing Life Sentences) Act 2001* No 29 implemented harsher criteria for applications for life sentence redeterminations. To understand the impact of the amendments, it is necessary to review the genesis and operation of the system.

6.1 Life sentence redetermination under the Sentencing Act 1989¹¹¹

The *Sentencing Act 1989* (now repealed) introduced a regime that is commonly referred to as ‘truth in sentencing’. One of its major features was the abolition of remissions, which involved the deduction of time from an offender’s sentence for good behaviour. Instead, sentences of imprisonment had to identify the period to be actually served in custody. This was referred to as a ‘fixed term’ if no parole period was specified. Alternatively, the sentence could be divided into a ‘minimum term’ and a period during which the prisoner was eligible for release on parole, known as an ‘additional term’.¹¹² Where the total sentence was 3 years or less, judges had the authority to direct that an offender be released on parole at the expiration of the minimum term. By contrast, offenders sentenced to over 3 years imprisonment were assessed by the Parole Board for release at the end of the minimum term.¹¹³

The Corrective Services Minister at the time, Hon. Michael Yabsley MP, explained:

...the central purpose of this legislation is to restore truth in sentencing. It is designed to bring certainty to sentencing in this State. It is designed to ensure that the public and prisoners know exactly when a sentence shall commence and exactly when a prisoner will be eligible for consideration for parole. It is fair

¹¹⁰ The now repealed *Sentencing Act 1989* also used the word ‘determination’, while ‘redetermination’ was favoured by the Premier, Hon. Bob Carr MP, in the Second Reading Speech on the *Crimes Legislation Amendment (Existing Life Sentences) Bill*. Another variation, ‘re-determination’, appears throughout the recent judgment of Justice Greg James in *R v Baker* [2001] NSWSC 412 except when statutory provisions are quoted.

¹¹¹ The *Sentencing Act 1989* was assented to on 2 June 1989 and commenced on 25 September 1989: *Government Gazette*, No 89 of 18 August 1989, p 5662.

¹¹² Section 5 required the sentencing judge to give reasons if the additional term exceeded one third of the length of the minimum term.

¹¹³ Section 17 of the *Sentencing Act* provided that the Board had to consider certain matters, such as the public interest, the antecedents of the prisoner, and any relevant comments by the sentencing judge, before making a parole order.

while at the same time recognizing the important rights of the public and prisoners alike.¹¹⁴

However, an anomaly existed because offenders who had received indeterminate life sentences in the past were not necessarily serving the sentence for the rest of their natural lives. Amendments were passed to apply truth in sentencing principles to these offenders. The *Crimes (Life Sentences) Amendment Act 1989* No 218¹¹⁵ inserted s 19A into the *Crimes Act 1900* and s 33A into the *Drug Misuse and Trafficking Act 1985* to provide that the maximum penalty of penal servitude for life for murder and certain offences involving large commercial quantities of drugs, meant imprisonment for the term of the offender's natural life. Therefore, when sentencing offenders to imprisonment for these crimes, judges could either impose a sentence of natural life or a lesser determinate period.

Prisoners serving an existing life sentence were integrated into this new system by a cognate statute, the *Sentencing (Life Sentences) Amendment Act 1989* No 220, which inserted s 13A into the *Sentencing Act 1989*.¹¹⁶ Under s 13A, a prisoner serving an existing life sentence who met certain conditions could apply to the Supreme Court for the redetermination of the life sentence into a minimum term and an additional term. At the same time, the practice of releasing prisoners 'on licence', including prisoners who were serving life sentences, was abolished by the *Prisons (Serious Offenders Review Board) Amendment Act 1989* No 219.¹¹⁷

Section 13A was further amended in 1993, 1994 and 1997.¹¹⁸ It is sufficient for present purposes to focus on the version in force immediately before the repeal of the *Sentencing Act* in 2000.

¹¹⁴ NSWPD(LA), 10 May 1989, p 7910.

¹¹⁵ The Amendment Act was assented to on 21 December 1989 and commenced on 12 January 1990: *Government Gazette*, No 7 of 12 January 1990, p 171.

¹¹⁶ The assent and commencement dates of the *Sentencing (Life Sentences) Amendment Act 1989* were the same as for the *Crimes (Life Sentences) Amendment Act 1989*: *ibid.*

¹¹⁷ Commencing on the same date as the other 2 statutes in the reform package, the *Prisons (Serious Offenders Review Board) Amendment Act 1989* No 219 repealed s 463 of the *Crimes Act* (which authorised the release of prisoners on licence), abolished the Release on Licence Board, and established the Serious Offenders Review Board (later the Serious Offenders Review Council) to manage prisoners who were sentenced to life imprisonment, as well as other serious offenders. Release on licence involved the Governor granting a written licence which suspended the prisoner's sentence. The prisoner was allowed to be 'at large', residing within limits and subject to conditions specified in the licence, for the unexpired portion of the sentence.

¹¹⁸ The amending Acts were the: *Sentencing (Life Sentences) Amendment Act 1993* No 74, commencing on 21 November 1993; *Sentencing (Amendment) Act 1993* No 90, commencing on 14 January 1994; *Statute Law (Miscellaneous Provisions) Act 1994* No 32, commencing on assent at 2 June 1994; *Sentencing Legislation Further Amendment Act 1997* No 6, commencing on assent at 9 May 1997.

A prisoner serving an existing life sentence could apply to the Supreme Court for the redetermination of a minimum term and an additional term if the following conditions were met:

- the person had served at least **8 years** of the sentence concerned, or at least **20 years**, if the person was the subject of a non-release recommendation;¹¹⁹
- the Supreme Court, when considering the application, was satisfied that **special reasons**¹²⁰ existed to justify making the determination.

The Court could redetermine the sentence by setting a minimum term (the period that must be served) and an additional term (the period during which the person may be released on parole), or decline to redetermine the sentence.

If the Court declined to redetermine the sentence, it could direct that the person never re-apply, or not re-apply for a specified period. But such a direction could only be given if the person was sentenced for ‘a most serious case of murder’ and it was in the public interest that the direction be made: s 13A(8C).¹²¹

In the event that the Court failed to direct that the applicant either never re-apply or not re-apply for a specific period, s 13A(8B) provided that the applicant was not to re-apply for 3 years from the date of the court’s decision.¹²²

In considering the application, the Court was to have regard to various factors, including:

- the circumstances surrounding the offence;

¹¹⁹ A non-release recommendation was defined in s 13A(1) of the *Sentencing Act* as a recommendation, observation, or expression of opinion by the original sentencing court to the effect that a person serving an existing life sentence should never be released from imprisonment.

¹²⁰ The term ‘special reasons’ was not defined in the *Sentencing Act*, nor in its successor, the *Crimes (Sentencing Procedure) Act*. Rather, the concept is a matter to be assessed by the judge hearing the application, on a case by case basis. For example, in *R v Baker* [2001] NSWSC 412, the applicant submitted that the special reasons for a redetermination of the sentence were: parity with his co-offender; the applicant’s youth (25 years) at the time of the offences; the 27 years spent in custody; the extent of his rehabilitation; the low risk of recidivism; and the fact that the maximum penalty for conspiracy to murder (one of the charges on which Baker was convicted) had been reduced to 25 years since he was sentenced: para 100. Justice Greg James considered ‘all the reasons said to be special individually and together’ and declined to find that the special reasons criteria had been met: para 122.

¹²¹ This provision currently appears at cl 6(4), Schedule 1 of the *Crimes (Sentencing Procedure) Act 1999*.

¹²² The original version of s 13A, inserted by the *Sentencing (Life Sentences) Amendment Act 1989*, was more lenient in this regard. Section 13A(8) provided that if the court declined to set a minimum term, the prisoner could not re-apply within 2 years of the court’s decision, or a shorter period as specified by the court.

- any prior convictions;
- relevant reports;
- the age of the person, both at the time of the offence and the time of the application;
- the need to preserve the safety of the community;
- any relevant recommendations, observations and comments made by the original sentencing court;
- the knowledge of the original sentencing court that a person sentenced to life imprisonment was eligible, prior to 1989, to be released on licence: ss 13(4A), 13(9).

6.2 Redetermination under the Crimes (Sentencing Procedure) Act 1999 before July 2001¹²³

In 1999 the *Sentencing Act 1989* was repealed. However the Acts which replaced it, the *Crimes (Sentencing Procedure) Act 1999* and the *Crimes (Administration of Sentences) Act 1999*, preserved numerous features of the previous sentencing system. These included: the absence of remissions; the stipulation of a period of actual custody to be served (the ‘non-parole period’ instead of the ‘minimum term’); the ratio between the period of actual custody and the total sentence; and the need for the Parole Board to determine whether a prisoner should be released on parole if the term of sentence exceeds 3 years: ss 44-46, 50 of the *Crimes (Sentencing Procedure) Act 1999*.

Importantly, the system of life sentence redetermination also continued. The relevant provisions were transferred from s 13A of the *Sentencing Act 1989* to Schedule 1 of the *Crimes (Sentencing Procedure) Act 1999*. Clause 2 of Schedule 1 enabled an application to be made to the Supreme Court for the redetermination of a term of sentence and a non-parole period in circumstances where:

- the offender was serving an existing sentence of life imprisonment;
- the sentence was imposed prior to 12 January 1990 (when the *Crimes (Life Sentences) Amendment Act 1989* commenced operation);
- the offender had served at least 8 years of the sentence, or **20 years** if a non-release recommendation had been made;
- the court was satisfied that **special reasons**¹²⁴ existed to justify such an order: cl 2(2)(b), 2(3), 3 & 7, Schedule 1 of the *Crimes (Sentencing Procedure) Act 1999*.

The Supreme Court could deal with an application for redetermination by:

- setting a specified term, together with a non-parole period; or
- setting a non-parole period but not a specified term; or
- declining to set a specified term or a non-parole period: cl 4(1).

¹²³ The *Crimes (Sentencing Procedure) Act 1999* was assented to on 8 December 1999 and commenced on 3 April 2000: *Government Gazette*, No 42 of 31 March 2000, p 2489.

¹²⁴ See n 120 for an explanation of ‘special reasons’.

The matters to be taken into account in considering an application have not changed since the *Sentencing Act*, and include the circumstances of the offence, prior convictions, the safety of the community, the age of the offender when committing the crime and making the application, relevant reports, and any recommendations of the sentencing court: cll 3, 7. In addition, the court retains the discretion to consider ‘any other relevant matter’.

The recommendations, observations and comments made by the sentencing court must also be taken into account by the Parole Board in considering whether or not parole should be granted to an offender who has had a specified term and/or a non-parole period set by the court under Schedule 1 of the *Crimes (Sentencing Procedure) Act*. The Parole Board must state its reasons for declining to adopt or give effect to any such comments: s 154 of the *Crimes (Administration of Sentences) Act 1999*.

6.3 Crimes Legislation Amendment (Existing Life Sentences) Act 2001 No 29

Much of the debate about life sentences in 2000-2001 concerned the remaining prisoners who were sentenced to life imprisonment, with non-release recommendations, prior to 1989.¹²⁵ In particular, the debate focused on the application by Allan Baker to the Supreme Court for redetermination of life sentences imposed on him on 20 June 1974.

Baker had been convicted, after a trial, of the murder of Ian Lamb and conspiracy to murder Virginia Morse in 1973. The circumstances of Lamb’s death were that Baker shot him in order to steal money and petrol from his car. Baker and an acquaintance, Kevin Crump, then abducted Morse from her property, took turns in raping her, and shot her. The charge of conspiracy to murder reflected the fact that Morse was actually killed in Queensland, and therefore the men could not be charged with murder in New South Wales. Baker received 2 terms of life imprisonment for the crimes, as well as lesser sentences for trying to avoid apprehension.¹²⁶ No non-parole periods were specified. Kevin Crump received identical sentences for the same charges. The original sentencing judge made a recommendation that Baker and Crump never be released.

Crump successfully applied to have his life sentences redetermined in the Supreme Court. On 24 April 1997, Justice McInerney substituted a minimum term of 30 years and an additional term for the remainder of Crump’s natural life, for the murder of Ian Lamb. The life sentence for conspiracy to murder Virginia Morse was replaced with a term of 25 years.¹²⁷ On 25 May 2001, Justice Greg James ruled that Baker was ineligible for

¹²⁵ The prisoners in question are: Allan Baker and Kevin Crump, who were convicted of the murder of Ian Lamb and conspiracy to murder Virginia Morse in 1973; Michael, Leslie and Gary Murphy, John Travers and Michael Murdoch, who participated in the murder of Anita Cobby in 1986; and Stephen Jamieson, Matthew Elliott and Bronson Blessington, who killed Janine Balding in 1988.

¹²⁶ For one count of maliciously wounding a police officer to prevent lawful apprehension, and one count of maliciously shooting at 2 other police officers, Baker received 15 years hard labour for each offence, to be served concurrently with the life sentences.

¹²⁷ The sentences date from 13 November 1973, when Crump was taken into custody. Therefore, he will be eligible for parole on 12 November 2003.

redetermination, but decided against issuing a direction that Baker never re-apply. The crucial basis for the rejection of the application was Justice James's finding that the statutory requirement of 'special reasons' had not been met.¹²⁸

Soon after the result, the Premier, Hon. Bob Carr MP, announced that he would be introducing legislation to make eligibility for life sentence redetermination more restrictive. In his Second Reading Speech on the *Crimes Legislation Amendment (Existing Life Sentences) Bill 2001*, Mr Carr stated that the Bill was approved by Cabinet in October 2000.¹²⁹ However, the Government had been constrained from acting earlier because of concerns that debate on the issue could affect the Baker redetermination hearing. The Director of the Criminal Law Review Division of the Attorney-General's Department had previously advised the Attorney-General:

A real danger exists that any debate or statements made about the pending hearing could and would be regarded as an attempt to influence Justice James in his decision. If there was a perception of potential bias the Judge may on application of a party or his own motion adjourn the hearing to allow that perception to dissipate.

If he did not adjourn then there is a danger that Baker, if the Court were to hold against him, would be handed grounds of appeal on a plate. Actual bias would not have to be proved just the perception that he had not received a fair hearing because of the prejudicial comments and controversy so immediate to the hearing of his case. See *R v Livesey* (High Court) (1983) 151 CLR 288.¹³⁰

The *Crimes Legislation Amendment (Existing Life Sentences) Bill* was introduced in the Legislative Assembly on 30 May 2001. It passed through both Houses and was assented to on 27 June 2001. The Act commenced on 20 July 2001.¹³¹

The amendments do not affect an application made to the Supreme Court before the commencement of the amending legislation. Nor do the amendments affect any proceedings or order made by the Parole Board prior to the commencement of the amendments: Part 3, Schedule 2 of the *Crimes (Sentencing Procedure) Act 1999*; and cl 61, Part 3, Schedule 5 of the *Crimes (Administration of Sentences) Act 1999*.

¹²⁸ See n 120 for commentary on 'special reasons'.

¹²⁹ *NSWPD(LA)*, 30 May 2001, p 13971.

¹³⁰ Memo from Andrew Haesler, Director of the Criminal Law Review Division, to Jeff Shaw QC MLC, Attorney-General, 27 June 2000, Attachment C to *News Release*, Premier of New South Wales, 'Carr Government's Response to the Baker Decision', 25 May 2001.

¹³¹ *Government Gazette*, No 113 of 20 July 2001, p 5467. Mr Carr was reported as saying that he expected a High Court challenge to the legislation but that he had strong legal advice that a challenge would fail: 'Worst killers "cemented in their cells"', *The Sydney Morning Herald*, 26 May 2001, p 1.

Eligibility for redetermination of life sentence

The *Crimes Legislation Amendment (Existing Life Sentences) Act 2001* requires an offender serving an existing life sentence who is the subject of a non-release recommendation (a 'non-release offender') to serve **30 years** of his or her sentence before becoming eligible to apply for a redetermination of the sentence. This substantially increases the previous period of 20 years under cl 2(2)(b), Schedule 1 of the *Crimes (Sentencing Procedure) Act 1999*.

Non-parole period

The *Crimes Legislation Amendment (Existing Life Sentences) Act* does not change the methods available to the Supreme Court for dealing with applications from life sentence prisoners who did not attract a recommendation that they never be released, namely:

- setting a specified term, together with a non-parole period; or
- setting a non-parole period, without a specified term; or
- declining to set a specified term or a non-parole period - in other words, rejecting the application: cl 4(1) of Schedule 1 of the *Crimes (Sentencing Procedure) Act*.

However, the *Crimes Legislation Amendment (Existing Life Sentences) Act* restricts the options for determining an application from an offender who is the subject of a 'non-release recommendation'.¹³² The amending Act inserts cl 4(3) into Schedule 1 of the *Crimes (Sentencing Procedure) Act* to limit the Supreme Court to dealing with a 'non-release offender' by:

- setting a non-parole period; or
- declining to set a non-parole period;
- but not by setting a specified term.

The purpose of the amendment is 'that a non-release offender will never be released from custody unless a parole order is granted.'¹³³

Since the inception of life sentence redeterminations, offenders have been able to appeal against the rejection of their applications to the Court of Criminal Appeal. The amending Act confirms this right of appeal for non-release offenders governed by cl 4(3).

¹³² The definition of 'non-release recommendation' under cl 1 of Schedule 1 is 'a recommendation or observation, or an expression of opinion, by the sentencing court that (or to the effect that) the offender should never be released from imprisonment.' The definition was almost identical in s 13A(1) of the *Sentencing Act 1989* at the time of its repeal. The *Crimes Legislation Amendment (Existing Life Sentences) Act* expands the definition of 'sentencing court', to clarify that non-release recommendations can be made by the original sentencing court or another court on appeal or on a re-trial: cl 1, Schedule 1 of the *Crimes (Sentencing Procedure) Act 1999*.

¹³³ Hon. Bob Carr MP, Second Reading Speech on the *Crimes Legislation Amendment (Existing Life Sentences) Bill*, NSWPD(LA), 30 May 2001, p 13971.

Release of an offender on parole

The Amendment Act removes the right of non-release offenders to be automatically considered for parole. This limits the operation of s 143 of the *Crimes (Administration of Sentences) Act 1999*, which requires the Parole Board to otherwise consider, on an annual basis, whether or not a serious offender should be released on parole, once the offender becomes eligible for parole.

The Amendment Act inserts s 154A into the *Crimes (Administration of Sentences) Act*, to require 3 conditions to be met for a non-release offender to be granted parole. The Parole Board must be satisfied:

- that the non-release offender is in **imminent danger of dying or is incapacitated** to the extent that he or she no longer has the physical ability to do harm to any person; and
- that the non-release offender has demonstrated that he or she **does not pose a risk to the community**; and
- that because the first 2 conditions are met, the making of a parole order is justified: s 154A(3).

Significantly, the second condition appears to place the onus on the offender to demonstrate that he or she is not a risk to the community. However, s 154A(3)(a) states that the Parole Board is to be satisfied of the first 2 conditions on the basis of a report prepared by the Chief Executive Officer of the Corrections Health Service.

The Premier explained in the Second Reading Speech on the *Crimes Legislation Amendment (Existing Life Sentences) Bill* the intention behind the parole provisions:

Changes to the criteria for parole are very deliberate. By changing the criteria for parole the legislation catches Crump, whose sentence has already been redetermined and who is eligible for parole in 2003. By focusing on parole we avoid constitutional problems. The Parole Board is not a court. Parole is an Executive function. Changes to the parole rules do not affect judicial functions or judicial independence.¹³⁴

The Solicitor General of New South Wales advised the Government that the validity of the proposed s 154A could not successfully be challenged:

In my view, there is no reason to doubt the capacity of the New South Wales Parliament to prescribe the matters on which the Parole Board must be satisfied before it directs the release of an offender on parole. It has done so, of course, since the Parole Board was established by the *Crimes (Amendment) Act 1950*. Accordingly, there is no legal basis, in my opinion, on which the validity of the

¹³⁴

Second Reading Speech, *NSWPD(LA)*, 30 May 2001, p 13972.

proposed s 154A might be challenged.¹³⁵

6.4 Responses to the legislation

The *Crimes Legislation (Existing Life Sentences) Act 2001* itself attracted analysis and debate, but equally so did the issue of the delay in introducing it because of the Baker case.

Some sections of the media supported the Government's decision to wait until Baker's application had been dealt with by the Supreme Court before introducing the legislation. An editorial in the *Daily Telegraph* stated:

...the fervour of...members of the community to ensure Baker remains in prison - including members of Parliament - serves no purpose other than to further inflame passions over this despicable crime. The future of Baker is to be determined by the process of law, not by the weight of public outcry.¹³⁶

Eleven months later, after the Supreme Court rejected Baker's application, the *Daily Telegraph* again endorsed the wait:

Any comment by the Government before yesterday could have prejudiced Baker's appeal - a position that has been supported by legal opinion. For the families of victims the decision brings solace in the fact that the intentions of the sentencing judges will be carried out - without any further waste of the court's time, taxpayers' money and unnecessary personal anguish.¹³⁷

Some prominent criminal law practitioners criticised the legislation. Stephen Odgers SC considered it to be 'not just harsh and discriminatory, but unprincipled, *ad hominem* and bad law.' He questioned the fettering of the power of the courts:

Mandatory sentencing is bad law, and doubly bad when the sentence is one of life meaning life. Even assuming that natural-life sentences are sometimes appropriate, they should be imposed by a court, fully informed as to the facts of the case and the present circumstances of the offender, hearing full argument, and with the possibility of an appeal to a higher court. They should not be imposed by parliament.¹³⁸

¹³⁵ M Sexton SC, Solicitor General, 'Crimes Legislation Amendment (Existing Life Sentences Bill) 2000', 5 October 2000, p 3, Attachment B to *News Release*, Premier of New South Wales, 'Carr Government's Response to the Baker Decision', 25 May 2001.

¹³⁶ 'Outrage and proper processes', *The Daily Telegraph*, 1 July 2000, p 22.

¹³⁷ 'Ruling ends torment for families', *The Daily Telegraph*, 26 May 2001, p 20.

¹³⁸ S Odgers, 'Politics should not change the meaning of life', *The Sydney Morning Herald*, 29 May 2001, p 13.

The Sydney Morning Herald criticised the legislation as creating inconsistency between the treatment of offenders:

The crimes committed by the nine worst murderers sentenced before truth-in-sentencing were dreadful. But no sound reason has been suggested why they should be treated more harshly than murderers who, since the introduction of truth-in-sentencing, commit equally heinous crimes but who, under the law, will not be “cemented in their prison cells”. Respect for the law is damaged when politicians, seeking political advantage, introduce inconsistencies in the law. The discretion of judges, and of the judicially supervised Parole Board, should never be completely removed.¹³⁹

The Opposition did not oppose the *Crimes Legislation (Existing Life Sentences) Bill*, but the Leader of the Opposition, Mrs Kerry Chikarovski MP, vowed to pursue her own legislation, to prevent life sentence prisoners who had received non-release recommendations from applying for parole at the outset. Mrs Chikarovski was quoted as saying:

Why are we going through this farce of allowing them to go for a determination and then say the Parole Board cannot implement that determination? It is a very strange way of going about it. The better way of doing this would be to prevent these people from going to court in the first instance and applying for parole.¹⁴⁰

6.5 Opposition’s proposed legislation

The Leader of the Opposition, Mrs Kerry Chikarovski MP, introduced a Private Member’s Bill, the *Crimes (Sentencing Procedure) Amendment (Life Sentence Confirmation) Bill 2000*, in the Legislative Assembly on 10 August 2000. After the Second Reading Speech, debate was adjourned on that day.¹⁴¹ The Bill was also introduced in the Legislative Council on 29 August 2000, but the following day was defeated by 20 to 19 votes.¹⁴²

In Parliament during August, Mrs Chikarovski revealed that, according to the Opposition’s legal advice, Parliament had the power to pass a valid Act which would have a direct or indirect effect on the ability of Allan Baker to continue with his application for redetermination.¹⁴³ In a November press release, Mrs Chikarovski stated that she ‘had

¹³⁹ ‘Unequal treatment’, *The Sydney Morning Herald*, 29 May 2001, p 12.

¹⁴⁰ ‘Worst killers ‘cemented in their cells’’, *The Sydney Morning Herald*, 26 May 2001, p 1.

¹⁴¹ Debate was again adjourned on 17 August 2000, 2 November 2000, 29 March 2001 and 5 April 2001.

¹⁴² 6 representatives of minor parties voted with the Government to defeat the legislation.

¹⁴³ Mrs Chikarovski cited the *Builders Labourers’ Federation* case in the High Court (*The Australian Building Construction Employees’ and Builders Labourers’ Federation and Others v The Commonwealth of Australia and Another* (1986) 161 CLR 88) to argue that the Constitution does not expressly or impliedly prohibit rights in issue in legal proceedings from

received external legal advice that the Opposition's legislation was entirely valid in its intention, and would not present legal complications later on in an appeals court.¹⁴⁴

Main provision of the Opposition's Bill

The *Crimes (Sentencing Procedure) Amendment (Life Sentence Confirmation) Bill 2000* sought to amend the *Crimes (Sentencing Procedure) Act 1999* to ensure that an existing life sentence imposed on an offender whom the sentencing court has recommended should never be released from imprisonment can no longer be redetermined under Schedule 1 of the Act.

The main content of the Bill is at clause 9. An offender who is serving an existing life sentence and is the subject of a non-release recommendation is referred to as a 'disqualified person': cl 9(3). The Bill provides that a disqualified person is no longer eligible to apply to the Supreme Court for a redetermination of an existing life sentence.

The barring of applications from such offenders was proposed by the Bill to apply from the date of its assent as an Act, even if an application was made but not determined before the date of assent.

Responses to the Opposition's bill

The Government maintained that it did not wish to debate the Bill until after the Supreme Court dealt with the application of Allan Baker for redetermination of his life sentence. According to the Government, debate could create grounds for Baker to appeal against a rejection of his application, or for a constitutional challenge.

Critics of the Opposition's Bill included the Law Society and the New South Wales Bar Association. They warned that the Bill could impact upon the outcome of the Baker case.¹⁴⁵

However, some media commentators, such as Miranda Devine in the *Daily Telegraph*, were critical of the Government for blocking the Opposition's legislation:

If Baker's sentence, like Crump's [his co-accused] is shortened because of the Premier's inaction then every word he utters about law and order means nothing.¹⁴⁶

being the subject of legislative action. In other words, Parliament can legislate to affect rights in pending litigation without interfering with the exercise of judicial power in a way that is inconsistent with the Constitution: *NSWPD(LA)*, 10 August 2000, p 8091.

¹⁴⁴ Kerry Chikarovski MP, Leader of the Opposition, *Press Release*, 'Carr Government Refuses to Support Baker Bill - Again', 2 November 2000.

¹⁴⁵ 'Husband's anger over House vote', *The Daily Telegraph*, 31 August 2000, p 3; 'Lawyers lobby against bill', *The Daily Telegraph*, 1 September 2000, p 19. Some of the barristers who were reported as opposing the Bill were Ruth McColl SC (President of the New South Wales Bar Association), Stephen Odgers SC and Tim Game SC.

¹⁴⁶ M Devine, 'Husband's anguish is Bob Carr's shame', *The Daily Telegraph*, 21 August 2000,

In memory of Virginia Morse, let's hope the Upper House MPs can make a difference. Their vote cannot change the law but will put pressure on the Premier to recall Parliament and debate the original bill.¹⁴⁷

After Baker's redetermination application was rejected, the Government proceeded with its legislation which was passed unopposed by the Opposition: see discussion above at pp 54-55, 58-59. At the time of writing, the Opposition has not pursued the redetermination issue further in Parliament.

7. MANDATORY SENTENCING

Mandatory sentencing, for the purposes of this paper, refers to statutory guidelines that require sentencing judges to impose a minimum penalty for a particular category of offence or offender. Obvious examples in Australia are the statutory provisions in Western Australia and until recently in the Northern Territory, prescribing minimum penalties for repeat property offenders.

Although nothing like these schemes exists in New South Wales, the political debate surrounding mandatory sentences has attracted wide interest. Also, the 'mandatory' concept already appears in some New South Wales legislation, albeit in a less strict form than in Western Australia and (formerly) the Northern Territory. For instance, the *Crimes Amendment (Mandatory Life Sentences) Act 1996* No 5 introduced criteria which, if met, require the imposition of a life sentence for murder and certain drug offences: inserting s 431B into the *Crimes Act*; now at s 61 of the *Crimes (Sentencing Procedure) Act 1999*.¹⁴⁸ But these natural life sentences are maximum penalties only, are rarely used, and still allow for the exercise of considerable judicial discretion.

In November 2001, the Premier, Hon. Bob Carr MP, confirmed that he would be willing to legislate minimum sentences in some circumstances. Reacting to the High Court's decision that the guideline judgment issued by the New South Wales Court of Criminal Appeal in *R v Wong; R v Leung* was erroneous, Mr Carr stated:

I'd introduce minimum sentencing overnight. We are not going to have High Court decisions get in the way of us giving this community what it's asking for and what it's beginning to get, and that is sentences for serious crimes that reflect the seriousness of those crimes.¹⁴⁹

7.1 Northern Territory

Mandatory sentencing operated in the Northern Territory for over 4 years, from its commencement in 1997 until it was abolished by the newly elected Labor Government in October 2001. The scheme provoked strong criticism and complaints, both within Australia and internationally. The provisions, as they existed immediately before their repeal, will be examined first, followed by a description of the recent changes in policy and legislation.

¹⁴⁸ Section 61(1) of the *Crimes (Sentencing Procedure) Act 1999* provides that a court 'is to impose a sentence of imprisonment for life on a person who is convicted of murder if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence.' Section 61(2) applies some additional criteria to the imposition of a life sentence for 'serious heroin or cocaine trafficking'.

¹⁴⁹ Mr Carr's comments were made on ABC radio on 30 November 2001, reported in 'Debus closes the loophole on sentencing guidelines', *The Sydney Morning Herald*, 1 December 2001, at <www.smh.com.au/news/0112/01/national/national19.html>

7.1.1 Mandatory sentencing provisions under NT law: 1997-2001

The Northern Territory mandatory sentencing scheme came into force on 8 March 1997. Mandatory penalties were introduced for adult and juvenile repeat property offenders, amending the *Sentencing Act 1995* and the *Juvenile Justice Act 1983*.

In the Second Reading Speech on a package of bills including the *Sentencing Amendment Bill 1996* and the *Juvenile Justice Amendment Bill 1996*, the then Attorney-General, Denis Burke, stated:

The government believes these proposals for compulsory imprisonment have the following benefits:

- effective punishment requires a punitive component with retribution as an underlying concept;
- imprisonment is deterrent to offending;
- compulsory imprisonment for offenders will send a clear and strong message to the community that these offenders will not be treated lightly; and
- imprisonment acts as a preventive measure, in that offenders are removed from the community for a specified period of time.¹⁵⁰

As the mandatory provisions are distinct for adults and juveniles, they are dealt with separately below.

Adult property offenders

Mandatory minimum sentences of imprisonment for adult property offenders were located in Division 6 of Part 3 of the *Sentencing Act 1995*. Specifically, ss 78A and 78B were inserted by the *Sentencing Amendment Act 1996*.

Subsequently, the *Sentencing Amendment Act 1999* allowed the courts a limited discretion not to impose a mandatory term of imprisonment in 'exceptional circumstances'.

Types of offences

Minimum mandatory terms of imprisonment applied to property offences listed in Schedule 1 of the *Sentencing Act* that were committed on or after 8 March 1997. The offences outlined in Schedule 1 included:

- stealing (s 210 of the *Criminal Code*), with some exceptions, most notably shoplifting (described as an offence that 'occurred at premises, or a place, where goods are sold');
- robbery (s 211 of the *Criminal Code*), assault with intent to steal (s 212), unlawful entry of a building (ss 213-215), unlawful use of a vehicle (s 218), receiving stolen property (ss 229, 231) or unlawful damage to property (s 251);

¹⁵⁰

NTPR, 17 October 1996, p 9687.

- being suspected of having stolen goods (s 61 of the *Summary Offences Act*).

The ordinary maximum penalties for these offences span a considerable range, from life imprisonment for robbery while armed or in company, to 12 months for possession of goods suspected of being stolen.

Periods of imprisonment

Section 78A categorised types of offenders, and accompanying periods of imprisonment:

- an offender who was found guilty of one or more property offences but had not on a previous day been sentenced under s 78A for a property offence - imprisonment of **not less than 14 days**;
- an offender found guilty of one or more property offences who was on a previous day sentenced under s 78A for a property offence - imprisonment for **not less than 90 days**;
- an offender found guilty of one or more property offences who was on 2 or more previous days sentenced under s 78A for a property offence - imprisonment for **not less than 12 months**.

The mandatory term of imprisonment was not to be served concurrently with either a term of imprisonment for a non-property offence, or a term of imprisonment for another property offence if the sentence in respect of that offence was imposed on a different day: s 78A(6A).

Exceptional circumstances

A court did not have to impose the mandatory sentence on a first-time adult property offender if 'exceptional circumstances' were present: s 78A(6B).¹⁵¹ Exceptional circumstances only existed if:

- the offender was to be sentenced for a single property offence; and
- the offender had not on any previous day been dealt with under subsection (6B); and
- the court was satisfied of all of the following:
 - (a) that the offence was trivial in nature;
 - (b) the offender had made reasonable efforts at full restitution;
 - (c) the offender was otherwise of good character, and there were mitigating circumstances (not including intoxication due to alcohol or illegal drugs) that significantly reduced the extent to which the offender was to blame and demonstrated that the offence was an aberration from the offender's usual behaviour;and

¹⁵¹

The original scheme did not make such an allowance. Exceptional circumstances were introduced by s 16 of the *Sentencing Amendment Act (No 2) 1999* No 33, which commenced on 4 July 1999.

- (d) the offender co-operated with law enforcement agencies in the investigation of the offence.

The onus of proving the matters referred to in paragraphs (a)-(d) was on the offender.

Section 78A(6F) clarified that a court must not impose a mandatory term of imprisonment in respect of multiple property offences for which the offender was being sentenced on one day, if that exceeded the sum of the maximum terms of imprisonment that could be imposed separately on each offence.

Punitive work orders

Punitive work orders were outlined by Part 3, Division 7 of the *Sentencing Act*, and were among the orders that could be made against a property offender, in addition to the mandatory term of imprisonment. The offender was required to participate in an approved project for 224 hours, within such time frame as the court ordered: s 78C(2). This was intentionally harsher than community service.

The philosophy behind punitive work orders was outlined by the then Attorney-General, Mr Burke, in the Second Reading Speech on the *Sentencing Amendment Bill 1996* and the *Juvenile Justice Amendment Bill 1996*:

Both bills create a new, tougher, non-custodial order called a punitive work order which will involve the performance of hard physical labour in circumstances designed to stress the shame of performing the sentence, and will be made available as an additional option to compulsory imprisonment. The order will be intensive and highly visible to the community. It will be supervised by correctional services officers. Offenders who are unable - for example, if they turn up drunk - or unwilling to carry out work under the order will be imprisoned for the outstanding term of the order.¹⁵²

A punitive work order could be breached due to a wide range of conduct, including failing to comply with a condition of the order, failing to participate in a satisfactory manner, assaulting, threatening or insulting a supervising officer, or committing an offence against a State, Territory, or Commonwealth law during the period of the order: s 78G(1).

When the court was satisfied of the breach, irrespective of whether the offender had completed some of the period, the court was to order that the offender be imprisoned for 28 days: s 78G(4).

Juvenile property offenders

¹⁵² NTPR, 17 October 1996, p 9686.

Minimum mandatory sentences for juvenile property offenders were established by the *Juvenile Justice Amendment Act (No 2) 1996* No 61,¹⁵³ which inserted ss 53AE-53AG into the *Juvenile Justice Act 1983*.

Main provisions

The relevant provisions were located in Division 3, Part VI of the *Juvenile Justice Act 1983* and initially applied to persons aged from 15 years to under 17 years. In 2000, the upper age limit was changed to less than 18 years.¹⁵⁴ The maximum period of detention for a juvenile property offender was effectively 12 months: s 53AE(10).

A juvenile who was found guilty of a property offence for the **first** time was dealt with according to the usual juvenile options under s 53(1).¹⁵⁵

A court sentencing a juvenile for a **second** property offence was required to either:

- order the juvenile to participate in an **approved program** and adjourn the matter for that purpose; **or**
- order the juvenile to serve **not less than 28 days** detention for all of the offences: s 53AE(2).

When a juvenile was being sentenced for a **third** or subsequent property offence, the court had to impose **at least 28 days** detention; diversion was not available: s 53AE(6).

The option of a diversionary program for second time offenders was added by the *Juvenile Justice Amendment Act (No 2) 1999* No 34; the original regime did not give such an alternative.

If the Court was satisfied that a juvenile who was ordered to participate in a program satisfactorily completed the program, s 53AE(4) provided that the Court could:

- make an order discharging the juvenile without penalty in respect of all of the offences; **or**
- do anything specified in section 53(1).¹⁵⁶

¹⁵³ The Amendment Act commenced on 8 March 1997.

¹⁵⁴ The *Sentencing of Juveniles (Miscellaneous Provisions) Act 2000* No 17 amended the definition of 'juvenile' in s 3 of the *Juvenile Justice Act 1983* to 'a child who has not attained the age of 18 years.' The lower limit of 15 years was stipulated by s 53AE(1) and remained constant.

¹⁵⁵ The penalties under s 53(1) include: discharge without penalty; fine of up to \$500; adjournment for up to 6 months and if the juvenile does not commit a further offence, discharging without penalty; good behaviour bond not exceeding 2 years; probation for a maximum of 2 years subject to conditions; and detention or imprisonment for a period not exceeding the maximum under the relevant offence or 12 months, whichever is the lesser.

¹⁵⁶ As outlined by n 155.

Failure to complete the program satisfactorily compelled the court to revoke the order, record a conviction, and sentence the juvenile to at least 28 days detention: s 53AE(5).

A period of detention under Division 3 was permitted to be served by way of periodic detention at the discretion of the Court: s 53AG(1). A mandatory period of detention was not to be served concurrently with another term of detention: s 53AG(9).

A juvenile in detention who turned 18 years of age was transferred from the detention centre to an adult prison to serve the remainder of their sentence: s 53AG(2).

Punitive work orders

Additional orders for repeat juvenile property offenders were enabled by s 53AF. Like adults, juveniles who were subjected to a punitive work order had to participate in an approved project for 224 hours, within a time frame determined by the Court.

Sections 53AJ-53AM specified the circumstances in which a punitive work order could be made, the duties of a juvenile in carrying out the order, reviewing the order, and the consequences of breach. The provisions paralleled those for adult offenders.

Changes pursuant to Territory-Commonwealth agreement

The impact of mandatory sentencing on juveniles was addressed at a meeting between the Prime Minister and the then Chief Minister of the Northern Territory, Denis Burke, on 10 April 2000. It was agreed that the Northern Territory juvenile sentencing provisions would be amended to categorise a person as an adult from the age of 18 years rather than 17 years. This was implemented by the *Sentencing of Juveniles (Miscellaneous Provisions) Act 2000* No 17, which commenced on 1 June 2000. In addition, changes would be made to the 'general orders' of the Northern Territory Police to facilitate the diversion of juvenile offenders, while Commonwealth funding of \$5 million per annum was pledged for the expansion of diversionary programs.¹⁵⁷ An agreement between the Commonwealth and the Northern Territory was signed on 27 July 2000.¹⁵⁸

7.1.2 Repeal of mandatory sentencing

The Australian Labor Party won the Northern Territory election on 18 August 2001 after 26 years of rule by the Country Liberal Party. Clare Martin became the new Chief Minister.

In April 2000, Labor had launched a series of 'Position Papers' to outline its policies. The

¹⁵⁷ 'Joint Statement by the Prime Minister, the Hon. John Howard MP, and the Chief Minister of the Northern Territory, the Hon. Denis Burke MLA', 10 April 2000, <www.pm.gov.au/news/media_releases>

¹⁵⁸ Senator Vanstone on behalf of the Attorney-General, Answer to a Question Upon Notice from Senator Brown on 8 June 2000, *CPD (Senate)*, 26 February 2001, p 21970.

law and order paper, entitled 'Crime - Protection, Punishment, Prevention', revealed a 6 point plan. Point 1 pledged that Labor would repeal mandatory sentencing and introduce a new system. However, Labor emphasised its opposition to 'any soft sentencing approach'.¹⁵⁹

On 17 October 2001, 5 bills were introduced into Parliament by the Attorney-General, Hon. Dr Peter Toyne, to reform the mandatory sentencing system in the Northern Territory. The Country Liberal Party opposed the repeal of the laws. Denis Burke, the Leader of the Opposition (and former Chief Minister), criticised Labor's proposals as investing too much power in the courts:

This [Labor] government will let the courts decide why someone who trashes a Territorian's home or steals their property should go free because of some exceptional circumstance that the court has found.

...what discretion is needed when you are dealing with someone who has defiled your home is something that I do not see in terms of protecting the victim in this legislation. All I see is discretion for the criminal to ensure the criminal has every opportunity to escape any punishment, or any worthwhile punishment...

The discretion we put into our legislation was in the discretion between minimum [mandatory sentences] and maximum [penalties]. What we have at the moment is absolute discretion.¹⁶⁰

The bills were passed on 18 October 2001, received assent on 19 October, and commenced on 22 October, as provided by s 2 of each of the Acts.

The *Sentencing Amendment Act (No 3) 2001* No 55 and the *Sentencing (Consequential Amendments) Act 2001* No 56 repealed the mandatory sentencing provisions for adult property offenders, and established a new sentencing regime for adults convicted of aggravated property offences. The *Juvenile Justice Amendment Act (No 2) 2001* No 53 and the *Juvenile Justice (Consequential Amendments) Act 2001* No 54 repealed mandatory sentencing for juvenile property offenders.

A related Act, the *Criminal Code Amendment Act (No 2) 2001* No 52, introduced new crimes of home invasion and invasion of business premises.

Offenders sentenced on or after 22 October 2001 are subject to the amended legislation.

¹⁵⁹ Electronic versions of the Position Papers on Labor's Plan to Build a Better Territory can be viewed on the website of the Northern Territory branch of the Australian Labor Party at <www.nt.alp.org.au/policy/newdirections/ndcrimpp.html> The policy document on crime contains assessment and criticism of mandatory sentencing, much of which also appears in the Second Reading Speech on the amending legislation: see n 161.

¹⁶⁰ *NTPR*, 18 October 2001, electronic version of Hansard available through <<http://notes.nt.gov.au>>

Those offenders who are in prison serving a mandatory sentence for a property offence will not be automatically entitled to have their cases reopened. In the Second Reading Speech on the bills repealing mandatory sentencing, the Attorney-General stated:

This government respects the rule of law and the fact is that these people committed offences and were sentenced under the law of the day. However, in the case of any real injustice an offender will still be able to apply for a probity of mercy. That provision has always been available.¹⁶¹

The Attorney-General maintained that mandatory sentencing had caused detrimental effects and had not achieved its aims:

There is no evidence to suggest that under mandatory sentencing offenders have been deterred from committing property offences. Moreover, the mandatory sentencing regime has done nothing for victims. The current minimum mandatory sentencing regime for property offences provides no scope for discretion except insofar as it commits the imposition of greater sentences. This has resulted in a regime that operates unfairly and inconsistently. Because the mandatory minimum periods apply to all types of property offences, the current regime has not properly targeted suitable offences. We have seen inappropriate sentences of imprisonment apply to trivial offences and inadequate sentences apply to more serious offences such as housebreaking.

...[M]any members of the community, including the legal profession, have spoken out against the current regime. Magistrates have repeatedly indicated that they have been forced to impose sentences that they consider to be manifestly excessive in the particular circumstances of a case. The regime has been investigated by the Federal Parliamentary Committee and is the subject of a complaint to the United Nations Human Rights Committee for breaching Australia's treaty obligations.

...Mandatory sentencing has had little or no positive effect. In fact, unlawful entries in Alice Springs and Darwin urban regions continue to increase. Nearly 90% of offenders in urban areas continue to get away with property offences undetected. The simple fact is that Territorians do not feel safer in their own homes under mandatory sentencing.¹⁶²

Adult property offenders

The original mandatory sentencing regime for adult property offenders has been dismantled

¹⁶¹ Dr Peter Toyne, Attorney-General, Second Reading Speech on the *Juvenile Justice Amendment Bill (No 2) 2001*, *Juvenile Justice (Consequential Amendments) Bill 2001*, *Sentencing Amendment Bill (No 3) 2001*, *Sentencing (Consequential Amendments) Bill 2001*, NTPR, 17 October 2001, <<http://notes.nt.gov.au>>

¹⁶² Ibid.

and replaced with a choice of minimum options.

Repeal of mandatory sentencing provisions

The *Sentencing Amendment Act (No 3) 2001* repeals the mandatory sentencing provisions for adults, at Division 6, Part 3 of the *Sentencing Act 1995*. Also repealed is Schedule 1, which specified the relevant property offences governed by mandatory sentences.

New system of aggravated offences

A definition of aggravated offences is inserted by the Amendment Act into s 3 of the *Sentencing Act 1995*. The aggravated offences include: robbery (s 211 of the *Criminal Code*); assault with intent to steal (s 212); unlawful entry of a building (ss 213, 215); invasion of a home or business where damage of a serious nature or resulting in a loss of more than \$5000 is caused (s 226B(3)); aggravated unlawful use of a vessel (s 218(2)) and aggravated criminal damage (s 251(2)). Some of the offences covered by the repealed mandatory provisions have been dropped, notably, stealing (s 210) and receiving stolen property (ss 229, 231).

A new Division 6, Part 3 is substituted by the amending Act. It contains a statement of purpose at s 78A: 'The purpose of this Division is to ensure that community disapproval of persons committing aggravated property offences is adequately reflected in the sentences imposed on those persons.' Section 78B provides that this objective must be taken into account by a court when sentencing an offender.

A person found guilty of an aggravated property offence must be ordered to serve a term of imprisonment, or ordered to participate in an approved work and/or rehabilitation program under a community work order, unless exceptional circumstances exist with regard to the offence or the offender: s 78B.

The meaning of 'exceptional circumstances' is broader under the new regime, as the Attorney-General explained:

...if exceptional circumstances are found to exist, the court can make any order it considers appropriate.

It must be stressed that the term exceptional circumstances under the new scheme is to have the common law definition. The court can have regard to any factor it considers exceptional. It is not to be confused with the narrowly defined term as used in the current mandatory sentencing regime. All aspects of the current mandatory sentencing regime are irrelevant to the new scheme and should not be considered or taken into account in any matter.¹⁶³

A term of imprisonment imposed for an aggravated property offence may be partly suspended, but may only be wholly suspended upon the offender entering into a home

¹⁶³ Electronic Hansard, n 161. See 7.1.1 at p 64 for a description of the former concept of 'exceptional circumstances'.

detention order: s 78B(3).

Abolition of punitive work orders

Punitive work orders were introduced at the same time as the original mandatory sentencing regime and required 224 hours of work to be performed.

The main provisions relating to punitive work orders, in Division 7, Part 3 of the *Sentencing Act 1995*, were repealed by the *Sentencing Amendment Act (No 3) 2001*, while s 5 of the *Sentencing (Consequential Amendments) Act 2001* repealed the Sentencing (Punitive Work Order) Regulations.

The Attorney-General asserted that:

...these orders have been shown to be both ineffective and extremely expensive to maintain. They are inflexible orders that cannot be tailored to suit specific cases. In addition, the assessment...for such an order [is] both onerous and resource intensive. The courts have been reluctant to order them and in the last four years only 20 have been ordered. In reality, the limited role they can play can be more aptly covered by a flexible community based order.¹⁶⁴

Community work orders

Community service orders are renamed community work orders. The provisions are found at Division 4, Part 3 of the *Sentencing Act 1995* and are unchanged in their substance.

A statement of purpose is also inserted at s 33A of the *Sentencing Act*, by s 5 of the *Sentencing Amendment Act (No 3) 2001*: 'The purpose of making a community work order is to reflect the public interest in ensuring that a person who commits an offence makes amends to the community for the offence by performing work that is of benefit to the community.'

New home invasion offences

The *Criminal Code Amendment Act (No 2) 2001* No 52 introduced new home invasion offences, inserting Division 1A into Part VII of the *Criminal Code*. Home invasion did not previously have the status of a separate criminal offence. The Government considered that the existing offences of unlawful entry and criminal damage, which carry maximum penalties of 2 years imprisonment for the basic offences and 7 years imprisonment for the aggravated offences, 'do not properly target the type of behaviour that typifies home and business invasion.'¹⁶⁵

¹⁶⁴ Electronic Hansard, n 161.

¹⁶⁵ Dr Peter Toyne, Attorney-General, Second Reading Speech on the *Criminal Code Amendment Bill (No 2) 2001*, NTPR, 17 October 2001, <<http://notes.nt.gov.au>> Dr Toyne concluded that the Bill 'emphasises that a person's home should be a place of security and privacy; that the invasion of that privacy is unacceptable to the community and that there

The new provisions stipulate that a person who unlawfully enters a dwelling house or business premises and unlawfully damages the premises or property therein is liable to imprisonment for 7 years: s 226B. If damage caused is of a 'serious nature' or results in a loss over \$5000, the maximum penalty is 10 years.

The concepts of damage, serious nature, and business premises are defined at s 226A. Damage has a broad meaning and encompasses defacing, despoiling, vandalising and interfering, whether or not the conduct causes monetary loss or damage of a permanent nature.

Amendments were also made to the offence of criminal damage of property, at s 251 of the *Criminal Code*. Damage to a motor vehicle, where the loss caused by the damage is 50% or more of the value of the vehicle, is added to the list of aggravating factors that attract a maximum penalty of 7 years imprisonment, compared to 2 years for the basic offence.

Juvenile provisions

The mandatory sentencing laws for juvenile repeat property offenders were abolished, but unlike the adult provisions, were not replaced with another system.

Repeal of mandatory sentencing

The *Juvenile Justice Amendment Act (No 2) 2001* No 53 repeals the regime of minimum mandatory sentences for juveniles that existed under Division 3 of Part VI and Schedule 1 of the *Juvenile Justice Act 1983*. Instead, the sentencing of juveniles is to occur according to judicial discretion.

A juvenile sentenced after the repeal of mandatory sentencing will be sentenced as if the regime had never been in place. This is regardless of when the property offence was committed.

Diversiory programs retained

Importantly, the option to sentence juveniles to a diversionary program remains. Moreover, it is extended to be available as a penalty for all offences committed by juveniles. The relevant subsections are transferred to s 53, which outlines methods of disposition.

In the Second Reading Speech, the Attorney-General stated:

Under the current regime [at that time], the court has the power to order that a juvenile found guilty of a second or subsequent property offence is to participate in a diversionary program. These often include victim offender

should be a severe penalty for such an offence. It is also a reflection that a person is entitled to engage in trade and business in safety and without unnecessary disruption to that business.'

conferencing. Instead of repealing a program that has enjoyed a level of success, it will be expanded to cover all types of offences. This will mean that in any case involving a juvenile offender, the court will have this additional sentencing option available.¹⁶⁶

Repeal of punitive work orders

The *Juvenile Justice Amendment Act (No 2) 2001* repeals the provisions on punitive work orders in Division 3A, Part VI of the *Juvenile Justice Act*. The *Juvenile Justice Consequential Amendments Act* repeals the Juvenile Justice (Punitive Work Orders) Regulations.

Community work orders

The renaming of community service orders as community work orders also applies to juveniles. A purpose statement, almost identical to the one for adults, is inserted at s 53AAA of the *Juvenile Justice Act*.

7.2 Western Australia

Mandatory sentencing in Western Australia focuses on home burglary, whereas the Northern Territory scheme applied more generally to various property offences. The Western Australian provisions follow a '3 strikes and you're out' approach, and were introduced by the Liberal Government pursuant to the *Criminal Code Amendment Act (No 2) 1996*. The Labor Party supported the Bill, having advocated similar proposals for repeat offenders in its policy on home invasion and burglary in May 1996.¹⁶⁷ The Act commenced on 14 November 1996.

The then Attorney-General, Hon. Peter Foss, explained in the Second Reading Speech on the *Criminal Code Amendment Bill (No 2) 1996* the impetus for imposing mandatory minimum sentences upon recidivist home burglars:

The Bill targets the unacceptable prevalence of home invasion offences and burglary involving circumstances of aggravation; reflects the views of the community and the legislature that current penalties are manifestly inadequate to deter offenders and fail to give due weight to the distressing effect of these offences on victims; and responds with far tougher penalties where the burglary involves home invasion, involves circumstances of aggravation, or is part of a pattern of repeat offending.¹⁶⁸

Adult offenders

¹⁶⁶ Second Reading Speech on the *Juvenile Justice Amendment Bill (No 2) 2001* et al, n 161.

¹⁶⁷ Jim McGinty, Deputy Leader of the Opposition, *WAPD(LA)*, 23 October 1996, p 7061.

¹⁶⁸ *WAPD(LC)*, 22 August 1996, p 4430.

Burglary offences are found in Chapter XXXIX of the Criminal Code.¹⁶⁹ Entering or being in the place of another person, without that person's consent, with intent to commit an offence, is a crime under s 401(1), while committing an offence while in the place of another person without their consent, is an offence against s 401(2).

A mandatory minimum sentence of **at least 12 months** imprisonment applies to an adult repeat offender, 'notwithstanding any other written law', upon conviction for burglary of a place ordinarily used for human habitation: s 401(4)(a).

A 'repeat offender' is defined by s 400(3) as a person who, prior to the time of sentencing for the instant offence:

- (a) has been convicted of a 'relevant offence' (an offence against Chapter XXXIX, except for s 407)¹⁷⁰ in respect of a place ordinarily used for human habitation; and
- (b) subsequently was again convicted of a relevant offence in such a place.

In other words, an adult offender who has been convicted of home burglary on at least 2 previous occasions must receive a minimum sentence of 12 months imprisonment for their third conviction.

The term 'conviction' is defined to include a finding or admission of guilt that led to a punishment being imposed, or an order being made in respect of an offender, whether or not a conviction was actually recorded. A conviction that has been set aside or quashed is to be disregarded.

In the calculation of prior offences, any convictions accrued as a young person count towards the total. Therefore, an adult who has 2 prior convictions of home burglary as a young person will reach the 'third strike' on their first conviction as an adult.¹⁷¹

Converting a mandatory term of imprisonment into a suspended sentence is expressly prohibited by s 401(5).

Juvenile offenders

¹⁶⁹ The Criminal Code is found at Schedule 1 of the *Criminal Code Compilation Act 1913*. The maximum penalty for home burglary is 18 years imprisonment, or 20 years for an aggravated offence. For a non-aggravated burglary on a place that is not ordinarily used for human habitation, the maximum penalty is 14 years.

¹⁷⁰ Section 407 covers offences such as possession of an instrument for housebreaking, being armed with a dangerous or offensive weapon or instrument with intent to enter a place to commit a crime, and being disguised with intent to commit a crime.

¹⁷¹ Parliament of the Commonwealth of Australia, Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*, March 2000, paras 2.29, 2.31-2.34.

Section 401(4)(b) of the *Criminal Code* provides that a young person who is a repeat offender (ie. has 2 prior convictions) at the time of committing a burglary on a place ordinarily used for human habitation, must be sentenced to **at least 12 months** of either imprisonment¹⁷² or juvenile detention, as the court sees fit.

A 'young person' is defined in the *Young Offenders Act 1994* as under 18 years at the time of allegedly committing the offence in question.

Section 401(4) expressly excludes the operation of s 46(5a) of the *Young Offenders Act 1994*, which states that a court dealing with a young person is not obliged to impose a mandatory penalty or a minimum penalty provided by law. However, ss 98 and 99 of the *Young Offenders Act* are not so constrained. These sections enable a court to make an intensive youth supervision order, with or without a sentence of detention. In 1997, the then President of the Children's Court, Judge Fenbury, ruled that the Court could use ss 98 and 99 to release a juvenile who was a repeat home burglar on an intensive youth supervision order.¹⁷³

Also available is the system of special orders in Division 9, Part 7 of the *Young Offenders Act*, whereby the offender can be released on a supervised release order after serving 12 months in detention. Details of supervised release orders are found under Part 8 of the Act.

Furthermore, on 4 November 1997, the Supreme Court of Western Australia held that a young person's convictions which are over 2 years old cannot count towards a mandatory sentence: *P (a child) v The Queen* (CCA 122 of 1997). The Court affirmed that, pursuant to s 189(2) of the *Young Offenders Act*, the priors were 'not to be regarded as a conviction for any purpose.'¹⁷⁴

The prohibition on a court suspending a term of mandatory imprisonment applies equally to juveniles as to adults: s 401(5) of the *Criminal Code*.

Review of mandatory sentencing by the WA Labor Government

The Labor Party defeated the Coalition Government at the State election on 10 February 2001, and Dr Geoff Gallop became the new Premier. The Labor Party did not refer explicitly to mandatory sentencing in its 'official' election policies.¹⁷⁵ However, in the lead-up to the

¹⁷² Note that s 118 of the *Young Offenders Act 1994* provides that, if the offender is at least 16 years and under 18 years, the court may direct that the offender serve the sentence in an adult prison. See also s 178(4)(a) for matters which the court is to consider in making such a determination.

¹⁷³ Department of Justice (WA), *Review of Section 401 of the Criminal Code*, November 2001, p 8.

¹⁷⁴ *Ibid*, p 9.

¹⁷⁵ For the full list of election policy statements, see Premier Gallop's website at <www.premier.wa.gov.au/policies.htm>

election, Dr Gallop stated that ‘All of the government legislation we have supported in Opposition will be retained by Labor in government.’¹⁷⁶ He was also reported as vowing that ‘We will vigorously defend them [the mandatory sentencing laws] should any government of any colour at the federal level move against them. If necessary we would go to the High Court.’¹⁷⁷

Late in 2001, the first formal review of the mandatory sentencing provisions in s 401 of the *Criminal Code* was concluded, complying with the *Criminal Code Amendment Act (No 2) 1996*. Section 6 of the Amendment Act required the Minister to review the operation and effectiveness of s 401 as soon as practicable after 4 years, and table a report in Parliament within 5 years of the Act’s commencement on 14 November 1996.

On 15 November 2001, the Department of Justice released its *Review of Section 401 of the Criminal Code*.¹⁷⁸ The review did not explicitly recommend that mandatory sentencing should be retained or not. But it concluded that, overall, the amendments have had little effect on the criminal justice system.¹⁷⁹ The main findings of the research were:

- Sentencing data in the Courts of Petty Sessions did not reveal any dramatic changes since the introduction of mandatory sentencing. The proportion of sentences of imprisonment and the length of prison sentences for home burglary, relative to other offences, appeared to have increased slightly. However, in the District Court the proportion of prison sentences clearly increased for non-aggravated home burglary, while prison sentence length remained relatively unchanged for both aggravated and non-aggravated ‘other’ burglary.¹⁸⁰
- As a percentage of the total number of prison sentences for all offences, burglary sentences were relatively static from 1995-1998.¹⁸¹
- Statistics for the number of reported offences of home burglary from July 1995 to March 1998 showed a general increase each month until about August 1996 then, aside from

¹⁷⁶ ‘Rebel Labor MP attacks Gallop “populism”’, *The Australian*, 7 February 2001, p 4.

¹⁷⁷ ‘ALP Under Fire on Sentencing Laws’, *The Australian*, 2 February 2001, p 6. Throughout the election campaign, the Premier, Richard Court, claimed that if Labor gained power it would scrap mandatory sentencing to comply with the wishes of the Labor State Executive: ‘Crime Laws Won’t Soften, Vows Gallop’, *The West Australian*, 8 February 2001, Reuters Business Briefing service. The previous year, the State Executive had passed a motion in agreement with Federal Labor’s opposition to the Western Australian mandatory sentencing laws, while acknowledging that they were not as harsh as those of the Northern Territory.

¹⁷⁸ The review is accessible electronically at: <www.justice.wa.gov.au/content/files/3_strikes_review.pdf>

¹⁷⁹ *Review of Section 401 of the Criminal Code*, Summary and Conclusions, para 5.

¹⁸⁰ *Ibid*, pp 19-20.

¹⁸¹ *Ibid*, pp 27-28.

a peak in January 1997, a relatively unchanged rate from the commencement of the mandatory provisions in November 1996 through to January 1998. This suggested the amendments may have played a part in slowing the increase in the home burglary rate, but other legislative reform could also have contributed.¹⁸²

- The laws had little impact on court statistics for adult offenders because of the very high probability that an adult offender facing a third home burglary conviction would be imprisoned for longer than 12 months (ie. the mandatory minimum term).¹⁸³
- In the first 4 years of operation, 143 sentences were imposed on repeat juvenile offenders, involving 119 individuals. 81% of those sentences applied to Aboriginal juveniles. During the same period, over 13,000 juveniles were convicted of various offences. The juvenile repeat offenders in a sample of 118 cases had an average of 21 previous burglary convictions and 50.7 general prior convictions.¹⁸⁴
- There was little evidence that mandatory sentencing for burglary offences has caused ‘offence substitution’, meaning the transferral of criminal activity to other offences.¹⁸⁵
- The workload of the courts and legal practitioners did not appear to be greatly affected by the changes, although there was evidence of some strain on the resources of the Australian Legal Aid Commission and the Aboriginal Legal Service.¹⁸⁶ Prosecutors and Children’s Court staff were also burdened by having to establish the repeat offender status of some defendants, mainly juveniles and those who had committed home burglaries before the amendments.¹⁸⁷
- The requirement that all aggravated burglaries be prosecuted in the District Court should be revised, especially where the circumstance of aggravation is ‘in company’. It would be preferable to allow all aggravated burglaries to be initially dealt with summarily, with a discretion for Magistrates to remit matters to the District Court where appropriate. This would arguably be quicker, less costly, and more efficient.¹⁸⁸

The Attorney-General, Hon. Jim McGinty MLA, did not regard the review as undermining

¹⁸² For example, amendments in 1996 to the *Pawnbrokers and Secondhand Dealers Act 1994* made it harder to sell household items when no proof of ownership was available: *ibid*, pp 30-31.

¹⁸³ *Ibid*, p 22; and Summary and Conclusions, para 5.

¹⁸⁴ *Ibid*, pp 23-24; and Summary and Conclusions, para 2. See also the juvenile offender profiles in Appendix 8.

¹⁸⁵ *Ibid*, pp 30-31; and Summary and Conclusions, para 4.3.

¹⁸⁶ *Ibid*, p 13.

¹⁸⁷ *Ibid*, pp 14-17.

¹⁸⁸ *Ibid*, p 14.

the legitimacy of mandatory sentencing. Mr McGinty cited the statistic of 143 juvenile mandatory sentences imposed, compared with 13,000 juvenile convictions for various offences, as evidence that only a 'tiny fraction' of juvenile offenders were being dealt with by mandatory sentencing. He also maintained that considerable flexibility was allowed by the mandatory provisions, as judges had imposed non-custodial sentences in 22 of the 143 cases. Noting the high number of prior convictions of many of the offenders who received mandatory sentences, Mr McGinty was confident that the laws were 'targeting a very real problem with serious property offences.' However, he expressed concern about the disproportionate impact on Aboriginal people, particularly in country areas.¹⁸⁹

7.3 Comments and comparisons

A table setting out the mandatory sentencing laws of the Northern Territory (now repealed) and Western Australia is reproduced for ease of reference at **Appendix B**. Comparison between the 2 regimes indicates:

- the Northern Territory laws applied to a much wider range of property offences than home burglary;
- the Western Australian laws only affect 'third strike' offenders, whereas the Northern Territory laws covered all adult property offenders and juvenile property offenders with at least one prior conviction;
- the age range for the mandatory sentencing of juveniles was narrower in the Northern Territory, starting from 15 years of age to under 18 years. In Western Australia, the meaning of 'young person' in the mandatory sentencing provisions is under 18 years, the same as for sentencing young offenders generally;
- the Northern Territory laws implemented minimum sentences of 14 days, 90 days and 12 months imprisonment upon adult offenders for a first, second and third offence respectively. The juvenile scheme was more lenient, with no mandatory sentences for first time offenders, and the choice of at least 28 days detention or a diversionary program for second time offenders. Third or subsequent offences received a mandatory minimum of 28 days detention, and no option of diversion. By contrast, 12 months imprisonment or detention is the standard in Western Australia for both adults and juveniles convicted of a third offence;
- the period of detention for a 'third strike' juvenile offender has the potential to be harsher in Western Australia than it was in the Northern Territory. There, a juvenile sentenced for a third property offence received a mandatory minimum of 28 days detention. However, juveniles sentenced in Western Australia for their third property offence receive at least 12 months imprisonment or detention unless an intensive youth

¹⁸⁹ Hon. Jim McGinty MLA, Attorney-General, *Media Statement*, 'Review shows mandatory sentencing laws target chronic offenders', 15 November 2001, at <www.mediastatements.wa.gov.au>

supervision order is made.¹⁹⁰

A huge amount of academic literature has been written in recent years on mandatory sentencing, most of it strongly critical. It is beyond the general review of developments undertaken in this briefing paper, to assess the arguments for and against mandatory sentencing. However, a list of further references, which examine the relationship between mandatory sentencing and such issues as judicial discretion, constitutional implications, and international human rights obligations, is provided at **Appendix C**. See also New South Wales Parliamentary Library Briefing Paper No 18/1998, *Mandatory and Guideline Sentencing: Recent Developments*, by Honor Figgis.

7.4 Federal developments

A number of attempts were made in recent years at a Federal level to introduce legislation to override the Northern Territory and Western Australian mandatory sentencing laws.

The prospect of intervention seems less likely since the new Labor Government in the Northern Territory repealed mandatory sentencing in October 2001. However, some Commonwealth politicians continue to push for reform.¹⁹¹

7.4.1 Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999

This Private Member's Bill was introduced on 25 August 1999 by Senator Bob Brown of the Australian Greens. In his Second Reading Speech on the Bill, Senator Brown asserted that Federal action was required to defend the human rights of children, as the governments of Western Australia and the Northern Territory had not 'heeded' calls to repeal mandatory detention laws.¹⁹² The Bill was passed on 15 March 2000 with the support of the Labor Party and the Democrats. The Bill was received in the House of Representatives on the same day, but the Government used its majority to defeat the motion of the Opposition Leader, Hon. Kim Beazley MP, 'that the second reading be moved forthwith'.¹⁹³

Provisions

¹⁹⁰ The Western Australian Government has argued that its laws are more flexible and have a more limited impact than the mandatory sentencing laws did in the Northern Territory: Western Australia, Ministry of the Premier and Cabinet, Submissions No 96 and 96A to the Senate Legal and Constitutional References Committee's Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999 (Volume 5 of the written submissions).

¹⁹¹ For example, on 22 August 2001, Senator Greig (Australian Democrats, Western Australia) moved that the Senate urge the Western Australian Government to repeal its mandatory sentencing laws. The motion was defeated.

¹⁹² *CPD (Senate)*, 25 August 1999, p 7735.

¹⁹³ *CPD (HR)*, 15 March 2000, pp 14781, 14793.

The provisions of the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* are:

- Commonwealth, State and Territory laws must not require a court to sentence a person to imprisonment for an offence committed as a child, that is, a person under 18 years of age: clause 5 of the Bill;
- Laws of the Commonwealth or a State or Territory which are contrary to the Bill have no force or effect, except as regards the lawfulness or validity of anything done in accordance with those laws before the Bill's commencement as an Act: clause 6;
- At the commencement of the Bill as an Act, any child in prison or detention due to an enactment that is contrary to the Bill, must be brought within 28 days of commencement before the original sentencing court for reconsideration of the remainder of the sentence: clause 7.

Senate Legal and Constitutional References Committee

On 1 September 1999, a motion by Senator Brown (at the request of Senators Crossin and Greig) was agreed to, that the Senate refer the following matters to the Legal and Constitutional References Committee for inquiry and report:¹⁹⁴

- (a) the legal, social and other aspects of mandatory sentencing;
- (b) Australia's international human rights obligations in relation to mandatory sentencing;
- (c) the implications of mandatory sentencing for particular groups, including indigenous Australians and people with disabilities; and
- (d) the constitutional power of the Commonwealth Parliament to legislate with respect to existing laws affecting mandatory sentencing.

In its report on 13 March 2000, the Committee made the following key observations and conclusions:¹⁹⁵

- The *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* should be passed by Parliament;
- The Commonwealth has the power to **override Territory legislation**, under s 122 of the Constitution. A notable example was the *Euthanasia Laws Act 1996* (Cth), which

¹⁹⁴ CPD (Senate), 1 September 1999, p 8140.

¹⁹⁵ The findings on the Northern Territory are preserved in the present tense because the mandatory sentencing provisions were in force there at the time of the report in March 2001. Most of the material extracted is from Chapter 8: Summary and Conclusions, Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*, March 2000. An electronic version of the report is available at <www.aph.gov.au/senate/committee/legcon_ctte/mandatory/index.htm>

displaced the *Northern Territory Rights of the Terminally Ill Act 1995*;

- The Commonwealth, under s 51(xxix) of the Constitution, can use its **external affairs power** to regulate a subject matter which is otherwise within the jurisdiction of the States and Territories. Under s 109 of the Constitution, any conflict between State and Commonwealth laws is resolved in the Commonwealth's favour;
- The Commonwealth has the ultimate responsibility for ensuring that **international obligations** incurred through the ratification of treaties and conventions are met. The Northern Territory mandatory sentencing legislation on juveniles contravenes Australia's international obligations. The Western Australian mandatory sentencing provisions for juveniles, in practice as distinct from the legislation, are less blatantly in contravention;
- The statistical information produced by the Western Australian and Northern Territory Governments suggests that the **social impact** of mandatory sentencing may not be as great as some of its critics believed. However, the Committee heard evidence of 'case after case where the social impact on individual children was terrible';¹⁹⁶
- More work should be done on **alternatives** to mandatory sentencing, such as diversionary programs, victim conferencing, and the development of judicial sentencing guidelines;¹⁹⁷
- The Committee is conscious of the apparent safeguards that are now present in the practices of the Western Australian Children's Court.¹⁹⁸ Nevertheless, while mandatory sentencing remains in force in **Western Australia**, regardless of the safeguards which have been developed to ameliorate the harsher effects of the laws, there is a case for legislative action by the Commonwealth;
- Mandatory minimum sentencing is not appropriate in a modern democracy that values **human rights**, and it contravenes the United Nations Convention on the Rights of the Child. Whilst there are differences between the Western Australian and Northern Territory mandatory sentencing regimes, the Committee accepts the views as expressed by the Law Council of Australia, that 'we are comparing bad with bad and we are trying to prioritise badness';¹⁹⁹
- The Committee would **prefer that the Northern Territory and Western Australian Governments take action** but does not believe that they will act of their own volition

¹⁹⁶ Para 8.5.

¹⁹⁷ The Committee noted that the Northern Territory Government appeared to accept this by its announcement on 15 February 2000 of additions to diversionary programs: para 8.13.

¹⁹⁸ Para 8.15. For information on this topic, see '7.2 Western Australia' at p 75 of this paper.

¹⁹⁹ Para 8.16.

to resolve the issue.²⁰⁰

The Federal Government had not tabled a response to the Legal and Constitutional References Committee's report at the time of writing. No further indication has been publicly given since the announcement in the Senate on 27 June 2001 that 'Consultations are continuing in relation to the Government's response. The response will be tabled as soon as possible.'²⁰¹

House of Representatives

On 15 March 2000, the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* was received in the House of Representatives from the Senate and read a first time. Motions by the Opposition Leader, Hon. Kim Beazley MP, on 15 March and 3 April 2000,²⁰² and by Mr Peter Andren MP on 4 April 2000,²⁰³ to proceed to the second reading of the Bill were defeated.

Mr Beazley presented a duplicate Bill, the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 2000*, in the House of Representatives on 10 April 2000.²⁰⁴ However, the Bill has not proceeded further.

7.4.2 Human Rights (Mandatory Sentencing for Property Offences) Bill 2000

This Private Member's Bill was introduced into the Senate on 6 September 2000, again by Senator Bob Brown. The provisions are the same as those of the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*, except the 1999 Bill covered all offences committed by children, whereas the 2000 Bill only applies to property offenders, both adult and juvenile.

In support of the *Human Rights (Mandatory Sentencing for Property Offences) Bill 2000*,

²⁰⁰ It should be noted that the Governments of the Northern Territory and Western Australia have both changed since the time of the report. The Country Liberal Party, under the leadership of Denis Burke, was defeated by the Labor Party at the State election in October 2001. One of the first legislative priorities of the new Chief Minister, Clare Martin, was the repeal of mandatory sentencing: see section 7.1.2 of this paper at p 67. In Western Australia, the Court Government was defeated by the Labor Party in February 2001. The recent review of mandatory sentencing by the Western Australian Government is examined at p 75.

²⁰¹ 'Government Responses to Parliamentary Committee Reports: Response to the Schedule Tabled by the President of the Senate on 7 December 2000', document presented by Senator Minchin, *CPD (Senate)*, 27 June 2001, p 25246. The Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999 is mentioned on p 25248.

²⁰² *CPD (HR)*, 15 March 2000, pp 14781, 14793; 3 April 2000, pp 15020-15023.

²⁰³ *CPD (HR)* 4 April 2000, p 15144.

²⁰⁴ *CPD (HR)*, 10 April 2000, p 15543. Mr Beazley stated (at p 15545): 'The only way this bill is to be considered by this House, given the attitude of this government, is for us to vote on and have a chance to debate an identical bill moved by a member of the House.'

Senator Brown submitted a summary of the findings of a report produced for the North Australian Aboriginal Legal Aid Service, entitled *Dollars Without Sense: A Review of the NT's Mandatory Sentencing Laws*.²⁰⁵

Senate Legal and Constitutional References Committee

The *Human Rights (Mandatory Sentencing for Property Offences) Bill 2000* was referred to the Senate Legal and Constitutional References Committee on 24 May 2001. Initially, the Committee was to report by 7 August 2001, but the conduct of hearings was postponed because of the Northern Territory election and subsequent revision of mandatory sentencing there.

According to the Committee's website, a number of factors, including the Federal election on 10 November 2001, 'led the Committee to consider that the issues could be dealt with more appropriately in a longer timeframe.'²⁰⁶ On 25 September 2001, the Senate granted the Committee's request for a further extension of the reporting deadline, to the last sitting day in March 2002.

²⁰⁵ J Sheldon and K Gowans, *Dollars Without Sense: A review of the NT's mandatory sentencing laws*, North Australian Aboriginal Legal Aid Service, 5 November 1999. The summary of findings appears at pp 3-5 of the report. The Hansard reference for Senator Brown's Second Reading Speech is: *CPD (Senate)*, 6 September 2000, p 17461.

²⁰⁶ See <www.aph.gov.au/senate/committee/legcon_ctte/HR_mandsent/hr_mandsent.htm>

8. GRID SENTENCING

Grid sentencing is the most rigid form of guideline sentencing, because it prescribes a numerical amount or range of sentence for an offence. Resembling a chart or graph, the grid classifies crimes in order of severity on one axis (customarily the vertical axis), and the number of prior convictions on the other. The intersection of the offence and the offender's criminal record denotes the appropriate sentence.

The concept of sentencing grids was developed in the United States in the late 1970s. General principles, theoretical analysis, and arguments for and against grid sentencing are examined in the New South Wales Parliamentary Library Research Service Briefing Paper No 18/98, *Mandatory and Guideline Sentencing: Recent Developments* by Honor Figgis.

No Australian jurisdiction has introduced grid sentencing. In the late 1990s, the former Coalition Government in Western Australia passed a statutory scheme for a sentencing 'matrix', but the legislation seems unlikely to commence under the present Labor Government.

In New South Wales, strong opposition has been voiced to grid sentencing from most sections of the legal profession, including the judiciary, law reform commissions, and the Director of Public Prosecutions.²⁰⁷

8.1 United States of America

Grid sentencing evolved in the United States of America out of widespread dissatisfaction with the traditional use of indeterminate sentencing. In the absence of a fixed limit to an offender's sentence, release depended on the discretion of the court or parole board. The time actually served under an indeterminate sentence therefore did not necessarily bear any relationship to the gravity of the offence, resulting in inconsistency between sentences. Appellate review tended to be restricted to constitutional questions or breaches of specific statutory requirements.²⁰⁸

In the mid-1970s, States began to enact determinate sentences, limiting judicial and parole

²⁰⁷ Nicholas Cowdery QC (NSW Director of Public Prosecutions), *Getting Justice Wrong: Myths, Media and Crime*, 2001, Allen & Unwin, pp 113-114; Justice Michael Adams (of the NSW Supreme Court), 'Launch of UNSW Law Journal Forum' (1999) 22(1) *UNSW Law Journal* 257. Chief Justice Spigelman expressed a preference for guideline judgments over grids or minimum sentences in *R v Jurisic* (1998) 45 NSWLR 209 at 229. The Australian Law Reform Commission and the Victorian Sentencing Committee have both rejected the concept of sentencing grids based on the Minnesota prototype: ALRC, *Sentencing*, Report No 44, 1988, para 183; Victorian Sentencing Committee, *Sentencing: Report of the Victorian Sentencing Committee*, 1988, Volume 2, p 573.

²⁰⁸ N Morgan, 'Accountability, Transparency and Justice: Do We Need a Sentencing Matrix?' (1999) 28(2) *University of Western Australia Law Review* 259 at 262.

board discretion. Grid sentencing was one of the options selected by legislatures.²⁰⁹

8.1.1 Minnesota grid

Grid sentencing has been adopted in at least 15 States of America and varies between jurisdictions. The usual sequence of events is that legislation is passed which establishes a sentencing commission, empowered to formulate and modify the guidelines. Most grids apply to felonies rather than misdemeanours.

One of the most widely known and well regarded grids in the United States is that of Minnesota.²¹⁰ A copy of the latest version of the grid, effective from 14 September 2001, is attached to this briefing paper at **Appendix D**. The commentary provided below is more easily followed by consulting the grid.

The grid displays the recommended sentence, called the ‘presumptive’ sentence, for any offender convicted of a felony committed on or after 1 May 1980. The vertical axis measures the offence severity, while the horizontal axis ranks the criminal history. The appropriate sentence is located at the intersection of these 2 variables.

Other main features of the Minnesota system are:²¹¹

Level of offence severity

Felony offences are arranged into 10 levels of severity, except for first degree murder which carries a sentence of mandatory imprisonment for life and is therefore excluded from the grid. When an offender is convicted of 2 or more felonies, the severity level is determined by the most severe offence.

Criminal history

The criminal history score ranges from zero to ‘6 or more’. To arrive at the final score, points are allocated depending on the number and severity of prior offences, custody status at the time of the offence, and any juvenile record. This weighting system enables serious offences to be differentiated from less serious offences. Not all grids make this allowance.

Misdemeanours are treated more leniently. The basic rule, although there are exceptions, is that 4 prior misdemeanour convictions equal one point, which is the maximum allowed

²⁰⁹ R Frase, ‘Sentencing Guidelines in Minnesota and Other American States: A Progress Report’, in C Clarkson and R Morgan (eds), *The Politics of Sentencing Reform*, 1995, Clarendon Press, Oxford, p 169 at 170.

²¹⁰ For a largely favourable assessment of the Minnesota grid see: R Frase, *ibid*, at p 196.

²¹¹ Information on Minnesota was current at 2 November 2001, when it was obtained from the website of the Minnesota Sentencing Guidelines Commission at <www.msgc.state.mn.us>. The *Minnesota Sentencing Guidelines and Commentary*, revised on 14 September 2001, was particularly useful.

for misdemeanours. Traffic offences are generally excluded from consideration in computing the score.

If the offender was under some form of supervision when the offence was committed, such as imprisonment, probation, parole, conditional release or work release, one point is added.

Felonies committed after turning 14 years of age are counted towards the score for young adult offenders who are under the age of 25 at the time of sentencing. Each prior juvenile offence is worth half a point, with a maximum generally of one point.

Out of state convictions are converted into the equivalent offences under Minnesota law, and points are assigned accordingly.

Presumptive sentence

The presumptive or recommended sentence for a felony is located on the grid at the intersection of the criminal history score and the severity level of the offence. The sentences displayed are presumptive in 2 respects: the duration of the sentence, and whether it should be executed. The duration of the sentence is shown in months and includes both the term of imprisonment and the period of supervised release. The bold diagonal line on the grid, known as the 'disposition line', marks the division between executed sentences and stayed sentences. Since the inception of the grid in 1980 the presumptive duration of stayed and executed sentences has been raised for certain violent offences in response to rising crime rates, and lowered for other offences to relieve strain on prison capacity.²¹²

Executed sentences

The sentences of imprisonment for cases above and to the right of the disposition line should be executed, meaning served immediately. The guidelines in this section provide 2 numerical amounts: a fixed recommended sentence, and a range of sentence. A judge who imposes a sentence outside the range has departed from the guideline.

An executed sentence consists of a 'minimum term', which represents two thirds of the total sentence, and a 'maximum supervised release term' equal to one third of the total sentence. The actual amount of time served in prison may be extended if the offender violates disciplinary rules in prison or the conditions of supervised release. See **Appendix D** for a table showing the ratio of minimum term to supervised release in executed sentences from one to 35 years duration.

Stayed sentences

The sentences imposed for cases below and to the left of the dispositional line should be stayed, meaning suspended. A stayed prison sentence is not served unless the defendant violates the terms of probation and the stay is revoked. The conditions of probation that may

²¹² Frase, n 209, p 183.

be imposed at the discretion of the judge include incarceration in a local jail for up to one year, community service, victim restitution, payment of a fine, participation in a treatment program, and varying degrees of supervision by a probation officer.²¹³

The philosophy behind the practice of staying sentences is to limit the expansion of the prison population.²¹⁴

Mandatory minimum sentences

Some offences carry a mandatory minimum sentence of imprisonment under Minnesota State law, including dangerous weapons offences, a second or subsequent criminal sexual conduct offence, and a second or subsequent controlled substance offence. This can potentially conflict with the status of the offence on the grid as attracting a stayed sentence. In that situation, imprisonment of the offender is the presumptive disposition. The duration of the sentence is the longer of either the mandatory minimum sentence or the amount provided in the appropriate cell of the grid.

Departure from the guidelines

Each individual case should conform with the guidelines unless there are ‘substantial and compelling circumstances’. When such circumstances are present, the judge may impose any sentence authorised by law but must provide written reasons explaining the nature of the circumstances and why the sentence selected is more appropriate, reasonable, or equitable than the presumptive sentence.

Factors that are explicitly identified by the Sentencing Commission as not suitable reasons for departure include the race, gender, marital status or level of education of the offender, or the impact of the sentence on their occupation.

Mitigating factors that may be used as reasons for departing below the guideline include:

- the victim was an aggressor;
- the offender played a minor or passive role in the crime;
- the offender lacked substantial capacity for judgment due to physical or mental impairment;
- a mandatory minimum sentence is not applicable, and the offence in question is:
 - at Level I or II and the offender received all their prior felony sentences during less than 3 separate court appearances, or

²¹³ Ibid, p 180.

²¹⁴ The *Minnesota Sentencing Guidelines and Commentary*, n 211, states (at p 21): ‘The dispositional policy adopted by the Commission was designed so that scarce prison resources would primarily be used for serious person offenders and community resources would be used for most property offenders. The Commission believes that a rational sentencing policy requires such trade-offs, to ensure the availability of correctional resources for the most serious offenders.’

- at Level III or IV and the offender received all their prior felony sentences during one court appearance.

Aggravating factors that may justify imposing a sentence above the guideline include:

- the victim was especially vulnerable, due to age, infirmity, or reduced physical or mental capacity, which was known or should have been known to the offender;
- the victim was treated with particular cruelty;
- the current conviction is for criminal sexual conduct or another offence in which the victim was injured, and the offender has a prior felony conviction for a similar offence;
- the offender is a ‘patterned sex offender’, a ‘dangerous offender who commits a third violent crime’ or a ‘career offender’, within the meaning of Minnesota State law;
- the offender committed the crime as part of a group of 3 or more persons;
- the offender was hired to commit the offence;
- aggravating features of major economic offences and major controlled substance offences are present, as detailed in the commentary to the guidelines.²¹⁵

Concurrent and consecutive sentences

Generally, when an offender is convicted of multiple offences, the sentences are to be served concurrently. But when an offence that is located above the disposition line on the grid is committed by an offender who is serving a prison sentence, has escaped, or is on supervised release, the sentence for the instant offence is to be served consecutively. In addition, consecutive sentences are permissible in certain situations such as for a crime ‘against the person’, if the offender’s sentence for a similar offence has not expired.²¹⁶ A judge who uses consecutive sentences other than as specifically allowed, must give written reasons for departing from the grid.

The results of the Minnesota grid have been mostly positive, according to Richard Frase, a Minnesota law professor who assessed the system after 13 years of operation in 1993:

The Minnesota sentencing guidelines have, with varying degrees of success, achieved all of the principal goals of this reform. More violent offenders, and fewer property offenders, were sent to prison (although these shifts were not as dramatic as the Sentencing Commission intended). Sentencing has become more uniform, and racial disparities have been reduced. At the same time, the guidelines still give judges and other officials considerable discretion to tailor sentences to the facts of individual cases, by means of charging discretion as well as formal departure from the presumptive sentence.

...The guidelines’ heavy reliance on [stayed prison] sentences provides a very effective and efficient crime-control device: the power of judges immediately to revoke probation and impose the stayed term gives offenders a strong incentive

²¹⁵ Ibid, pp 27-29.

²¹⁶ Ibid, pp 35-36.

to co-operate and stay out of trouble.

The guidelines have been particularly successful in promoting the parsimonious use of prison sentences and in preventing prison overcrowding – despite rapidly increasing arrest rates, felony caseloads, and public concern about crime.²¹⁷

8.1.2 Federal grid²¹⁸

Grid sentencing for Federal offences was introduced by the *Sentencing Reform Act 1984*. The guidelines became effective on 1 November 1987 and are implemented by the United States Sentencing Commission, an independent agency within the judicial branch of government. The appropriate length of imprisonment is prescribed by the guidelines for offenders convicted of Federal crimes, encompassing all Federal felonies and most serious misdemeanours.

The ‘sentencing table’ from the latest version of the United States Sentencing Commission’s *Guidelines Manual*, effective on 1 November 2001, is attached at **Appendix E**.

Like the Minnesota grid, the Federal grid is oriented by 2 main determinants: the type of offence and the offender’s criminal history. But the Federal system places greater emphasis on factors influencing the offence level and provides less scope to modify the criminal history score to reflect the individual’s personal circumstances than the Minnesota grid. Offences are graded according to 43 levels of severity, and each offence is assigned a ‘base offense level’, which acts as a starting point. For example, trespassing has a ‘base offense level’ of 4, kidnapping is rated 24, and first degree murder is 43, the highest level.

There are 6 criminal history categories along the horizontal axis, based on the extent of an offender’s past misconduct and how recently the crimes took place.

Numerous other variables operate within the system, such as:

- ***Specific offence characteristics***

The gravity of the offence modifies the base offence level. Fraud, which has a base level of 6, attracts a higher score depending on the amount of money involved. If \$50,000 was defrauded, the level of the offence is 11. The base level of 20 for robbery, increases to 25 if a firearm was produced, or 27 if the firearm was discharged.

- ***Adjustments***

The circumstances of the crime also increase or decrease the offence level. Relevant issues include the role of the offender and the treatment of the victim. For example, if the offender was a minimal participant in the offence, 4 levels are deducted.

- ***Multiple counts***

²¹⁷ Frase, n 209, p 196.

²¹⁸ Information on Federal grid sentencing was obtained from the website of the United States Sentencing Commission at <www.ussc.gov>

The most serious count is used as a starting point. The other counts determine whether, and to what degree, to increase the offence level.

- ***Acceptance of responsibility***

A discount of 2 levels may be applied if, in the judge's opinion, the offender has accepted responsibility. In deciding whether to grant this deduction, the judge may take into account factors such as a plea of guilty, an admission of the offender's role in the crime, and restitution.

The actual range of sentence is determined by identifying the base level, adding or subtracting levels to accommodate any specific offence characteristics or adjustments, and then intersecting the result with the criminal history category.

After the correct range is established, the court may depart in an upward or downward direction if the judge considers that an element is present which the guidelines do not adequately cover. However, the judge must give reasons for departing from the recommended sentence.

The most prominent supporters of the Federal system have been associated with the United States Sentencing Commission, and with Federal agencies such as the Department of Justice. Reviews of the guidelines have also indicated that a majority of the judges, prosecutors and probation officers surveyed thought that the sentences stipulated were appropriate.²¹⁹ Apart from these groups, there has been vocal opposition to the Federal grid. Basic criticisms are that it is harsh, overly rigid, and caused an increase in the length of the sentences and the imprisonment rate.²²⁰

8.1.3 Sentencing commissions

Sentencing commissions operate Federally and in many States of America. They are established by legislation to formulate sentencing guidelines or grids, evaluate their effects, and make adjustments. Typically, the majority of commission members are drawn from the criminal justice system. For example, the Minnesota Sentencing Commission is comprised of the Commissioner of Corrections, a County Attorney, a County Sheriff, a Probation Officer, a representative from the Public Defenders, 3 citizen representatives, and a judge from the Minnesota Supreme Court, the District Court and the Court of Appeals.

Some of the broader activities that may be undertaken by sentencing commissions are exemplified by those of the Federal body, the United States Sentencing Commission. As well as its ongoing functions to prescribe the guidelines, assess the consequences, and recommend modifications to Congress, the Commission:

²¹⁹ A Doob, 'The United States Sentencing Commission Guidelines: If you don't know where you are going, you might not get there' in C Clarkson and R Morgan (eds), *The Politics of Sentencing Reform*, 1995, Clarendon Press, Oxford, p 199 at p 244.

²²⁰ Ibid, pp 202, 213, 248, 249.

- formulates sentencing policies and practices for the Federal courts;
- advises and assists Congress and the Executive branch in the development of crime policy;
- collects, researches, analyses and distributes information on Federal crime and sentencing issues.

The sentencing commissions play a part in modulating the prison population, by altering the disposition line or other variables on a grid. This in turn affects the number of offenders who will receive sentences of imprisonment. Some commentators consider an advantage of sentencing commissions is that they bear some responsibility for the outcomes of the policy they implement. In relation to Minnesota, for example, Richard Frase stated:

The key to the Commission's success in controlling the prison population was its inmate population prediction model – an approach to corrections planning which...allowed the state, for the first time, to link sentencing policy choices with available correctional resources. Advocates of 'get tough' severity increases, both within the Commission and in the political sphere, were forced to confront the full costs of their proposals. This linkage, and the greater degree of fiscal responsibility encouraged by it, is perhaps the most unique and important achievement of the Minnesota guidelines...[I]t is also one of the principal reasons why other states are moving to adopt commission-based presumptive guidelines.²²¹

8.1.4 Comparison of Federal and Minnesota grids

Comparing the Federal grid and the Minnesota grid, it can be observed that:

- the Federal grid is arguably more rigid and complex;²²²
- the Federal grid focuses on determining the applicable offence level;
- factors mitigating and aggravating the circumstances of the offence result in an addition or subtraction of a specific number of severity levels in the Federal grid, whereas the same factors are not precisely calculated in the Minnesota grid but may be used as reasons for departure from the guideline sentence;
- more attention is given in the Minnesota scheme to refining the criminal history score, by assessing the points and fractions of points to be allocated for prior felonies, misdemeanours and juvenile offences;
- a significant proportion of the offences on the Minnesota grid attract a presumptive

²²¹ Frase, n 209, pp 196-197.

²²² This view was held by the New South Wales Law Reform Commission, Discussion Paper 33, *Sentencing*, April 1996, pp 262-263.

stayed sentence, thereby reflecting a greater concern about the rate of imprisonment in the State.

8.2 Sentencing matrix in Western Australia

8.2.1 Background

The former Coalition Government in Western Australia developed a sentencing regime that utilised some of the principles of grid sentencing. The concept of a sentencing 'matrix' was first announced in broad terms in July 1998, apparently in the wake of public protest against the perceived inadequacy of sentences for home invasions involving elderly victims.²²³ The Government's official rationale was to promote greater accountability, transparency, and consistency in the sentencing process.

Some regarded the matrix plan as signalling 'a new phase of overt and direct political control of judicial sentencing.'²²⁴ The Chief Justice of the Supreme Court of Western Australia voiced his opposition in a report to Parliament.²²⁵ Neil Morgan, the Director of Studies at the Crime Research Centre, University of Western Australia, asserted that the proposal 'appears to be driven primarily by political considerations, underpinned by strident criticism of the courts'.²²⁶

The matrix was initially outlined in the *Sentencing Legislation Amendment and Repeal Bill 1998*, which was subsequently divided into 2 bills: the *Sentencing Legislation Amendment and Repeal Bill 1999* and the *Sentencing Matrix Bill 1999*. The latter Bill was referred to the Legislative Council's Standing Committee on Legislation in May 1999. The Government members of the Committee, constituting the majority, supported the Bill subject to a number of amendments. The minority recommended that the Bill should be rejected.²²⁷

The original concept involved 3 stages, but the third and most extreme stage was rejected by the Legislative Council. The title of the *Sentencing Matrix Bill 1999* was changed to the *Sentencing Amendment Bill 2000* during committee stage in the Legislative Council.

The *Sentencing Amendment Bill 2000*, outlining the remaining 2 stages, was read for a second time in the Legislative Assembly on 15 November 2000 by the Minister for Police, Hon. Antony Prince MLA. The Minister stated that the purpose of the Bill was to 'provide a clearer sentencing regime which the public will be able to understand, to increase the

²²³ Morgan, n 208, at 259.

²²⁴ A Freiberg, 'The Politics of Sentencing' (2000) 4(4) *The Judicial Review* 357 at 368.

²²⁵ Morgan, n 208, p 260.

²²⁶ *Ibid*, p 260.

²²⁷ Parliament of Western Australia, Legislative Council, *Report of the Standing Committee on Legislation in Relation to the Sentencing Matrix Bill 1999*, Report No 53, October 2000.

accountability of courts, and to promote consistency in sentencing.’²²⁸

The Minister also anticipated that the Act would ‘be a suitable starting point for the introduction of stage three of the matrix. The coalition will go to the people for a mandate on this and reintroduce it after the election.’²²⁹

The *Sentencing Amendment Act 2000* No 64 received assent on 6 December 2000 but has not commenced. The Coalition Government of Richard Court was defeated at the State election on 10 February 2001.

8.2.2 Provisions

The *Sentencing Amendment Act 2000* proposes the insertion of Part 14A into the *Sentencing Act 1995*. Part 14A comprises 2 stages: the first involves the judge reporting the elements that affect the sentence imposed for specific offences, while the second stage prescribes indicative sentences for certain offences, although judges retain the discretion to depart from the benchmark.

Stage 1: reporting offences

Stage 1 requires a judge who sentences a person for an offence prescribed by regulation (a ‘reporting offence’), to prepare a sentencing report, setting out:

- each mitigating and/or aggravating factor that was taken into account;
- the degree to which these factors and the maximum penalty affected the sentence;
- any other information specified by the regulations: Part 14A, Division 1, ss 101A-101D of the *Sentencing Amendment Act 2000*.

The reporting procedure of Stage 1 was intended by the former Government to clearly and consistently identify the issues that the court considered, and the degree to which they were influential in sentencing an offender for a prescribed offence. This would ‘allow better comparisons to be made, but also...enable the Government to publish detailed sentencing information.’²³⁰

Stage 2: regulated offences and indicative sentences

The regulations can also prescribe ‘regulated offences’, and a method to determine the appropriate sentence (the ‘indicative sentence’) for a regulated offence. In other words, the regulations may provide for the indicative sentence to be calculated by a prescribed formula. The use of the word ‘formula’ in s 101F(2) could suggest that numerical calculations are part of the process.

²²⁸ WAPD(LA), 15 November 2000, p 3160.

²²⁹ WAPD(LA), 15 November 2000, p 3161.

²³⁰ WAPD(LA), 15 November 2000, p 3161.

A judge sentencing an offender for a regulated offence must:

- apply the prescribed method to determine the ‘indicative sentence’;
- decide on the ‘actual sentence’ to be imposed; and
- prepare a sentencing report in accordance with the regulations.

The sentencing report must state the indicative sentence, identify factors which were taken into account, and explain any difference between the indicative sentence and the actual sentence: Part 14A, Division 2, ss 101E-101H.

Whilst deviation from the benchmark is permissible, the court has to give reasons for doing so. Remarking on this phase of the proposal, the Minister for Police stated:

We hope this will lead to greater consistency in sentencing or a greater elucidation of the distinguishing factors. This stage should address perceived inconsistencies, which are a common ground of complaint from the public.²³¹

Part 14A, Division 3 (ss 101I-101L) sets out procedures for assessing whether an actual sentence is more severe, less severe, or the same as an indicative sentence. Division 4 (ss 101M-101P) explains the limited application of the provisions to the sentencing of young persons under the *Young Offenders Act 1994* (WA).

Stage 3: controlled offences

The original matrix concept featured a third stage of presumptive sentences from which it would be difficult to depart. However, this aspect of the proposal was defeated in the Legislative Council.

In Stage 3, the regulations were to prescribe ‘controlled offences’, and the formula or other method to be applied by a court to arrive at a ‘relevant sentence’ for a ‘controlled offence’: cl 101J(1) of the *Sentencing Matrix Bill 1999*.

A court sentencing an offender for a controlled offence was to determine the relevant sentence, impose a sentence for the offence (the ‘actual sentence’) and prepare and deliver a sentencing report: cl 101L(1) *Sentencing Matrix Bill 1999*.

The court could only depart from the relevant sentence if it would be ‘so unreasonable that it would be unjust to impose that sentence’: cl 101L(2) *Sentencing Matrix Bill 1999*. Subclause 101L(3) clarified that the relevant sentence was not ‘unreasonable’ to the extent that it was arrived at by the prescribed method.

The sentencing report to be provided for a controlled offence followed the same requirements as for Stage 1 and Stage 2. In addition, the court had to give reasons if it

²³¹ WAPD(LA), 15 November 2000, p 3161.

considered that imposing the relevant sentence would be unjust, and was required to explain any difference between the actual sentence and the relevant sentence: cl 101M *Sentencing Matrix Bill 1999*.

Stage 3 was accompanied by an unusual appellate procedure. If the actual sentence was less severe than the relevant sentence, and the prosecution appealed, the onus fell on the offender to show cause why the actual sentence should not be replaced with a more severe sentence. If the actual sentence was less severe than the relevant sentence and the defence appealed, the onus switched to the prosecution to show cause why a lower sentence should not be passed: cl 101N *Sentencing Matrix Bill 1999*. As Neil Morgan points out, it could be difficult for an unrepresented respondent to a Crown appeal to show cause why the sentencing judge should not be overruled.²³²

8.2.3 A flawed strategy?

The criticisms that were made of the matrix proposal in anticipation of its introduction would still apply if the legislation commenced. Some of the major drawbacks, according to Neil Morgan, are:²³³

- the matrix scheme is not accompanied by the establishment of a sentencing guidelines commission. In the United States, these organisations have been formed in the jurisdictions which use grid sentencing, and are comprised of diverse participants. The sentencing commissions perform the important tasks of planning, monitoring, and evaluating the impact of the guidelines;
- the United States grids were preceded by extensive consultation, whereas in Western Australia the matrix was devised without the input of the judiciary, the Director of Public Prosecutions, defence lawyers, the parole board, Aboriginal organisations, or other ‘stakeholders’;
- the *Sentencing Amendment Act 2000* delegated a disproportionate amount of power to the regulations, thereby reducing the amount of parliamentary scrutiny and increasing the role of the Executive. Only the regulations in Stage 3 are required to be laid before and approved by Parliament;
- important issues in the sentencing process, such as the role of an offender’s criminal record, the presence of multiple offenders, and matters in aggravation and mitigation, are not mentioned in the contents of the legislation itself;
- while the scheme would initially apply only to adult offenders in the higher courts, it can be extended by future regulations to the lower courts and to the Children’s Court;

²³² Morgan, n 208, p 275.

²³³ Ibid, pp 270-271, 278-286.

- like mandatory sentencing, it can be expected that the matrix would impact more heavily upon socio-economically disadvantaged groups and indigenous people, particularly if the weight accorded to the offender's subjective circumstances was minimised by the formula;
- defendants may be compelled to engage in charge bargaining to evade or lessen the prescribed sentence. Charge bargaining usually occurs 'behind closed doors' and consequently is not transparent, accountable, or controlled by the court.
- the changes signify a huge shift in power away from the courts and towards the Executive branch of government.

There appears to be no immediate likelihood of the *Sentencing Amendment Act 2000* commencing. However, as Morgan notes with caution, 'there is no indication that the new Government anticipates repealing the enabling legislation and the issues which gave rise to the proposal are alive and well.'²³⁴

²³⁴

N Morgan, 'A Sentencing Matrix for Western Australia: Accountability and Transparency or Smoke and Mirrors?', in N Hutton and C Tata (eds) *Sentencing and Society: International Perspectives*, Ashgate, United Kingdom. (Forthcoming publication; advance copy of chapter provided by the author.)

9. IMPORTANT HIGH COURT DECISIONS ON SENTENCING

The High Court is reluctant to intervene in the sentences imposed on individual offenders by State courts. Consequently, it is rare for special leave to be granted to appeal against the severity of a sentence.²³⁵ However, in 3 recent cases the High Court has made rulings on several principles of sentencing that have had substantial impact in New South Wales.

Note: The High Court's landmark decision on guideline judgments, *Wong v The Queen; Leung v The Queen* [2001] HCA 64, is dealt with separately at pp 36-39 of this paper. Suspended sentences were examined by the Court in *R v Dinsdale* (2000) 202 CLR 321, which features at pp 9-10.

9.1 Sentencing multiple offences: *Pearce v The Queen*

When a person is sentenced on one occasion for a number of offences, the total effective sentence must adequately address the criminality of the person's actions. Before 1998, the 2 methods commonly used by judges in New South Wales to handle multiple offences were as described by Simpson J in *R v Hammoud* (2000) 118 A Crim R 66 at para 9:

The first was to select a single charge (a lead or representative count) and, in accordance with the principle of totality, on that charge impose a sentence that properly reflected the overall criminality involved in all offences. On the remaining counts, comparatively lenient sentences, frequently fixed terms, were imposed. The second approach was, again with the principle of totality in mind, to select a sentence appropriate to the overall criminality and impose that sentence in respect of all or most of the charges. Both of these approaches avoided the need for elaborate exercises in accumulation of sentences.

Therefore, the actual sentence for each count was not necessarily proportional to the severity of the crime committed. If the first method was used, the offences that received the the short, concurrent terms were often of similar gravity to the offence which carried the heavier, representative sentence.

The High Court decision of *Pearce v The Queen* (1998) 194 CLR 610 changed the way multiple offences are sentenced in New South Wales. The majority (McHugh, Hayne and Callinan JJ in a joint judgment) held that a suitable sentence for each individual offence is to be determined before considering the issues of totality and whether to arrange the sentences concurrently or cumulatively.²³⁶ Their Honours stated (at para 45):

²³⁵ It should be noted that there is no automatic right to appeal to the High Court. Rather, an application for special leave to appeal is made and if the application is granted, the matter proceeds to a hearing.

²³⁶ A concurrent sentence runs at the same time as another sentence, whereas a cumulative sentence follows after another sentence. The term 'cumulative', which featured in the *Sentencing Act 1989*, was replaced with 'consecutive' in the *Crimes (Sentencing Procedure) Act 1999*.

To an offender, the only relevant question may be “how long”, and that may suggest that a sentencing judge or appellate court should have regard only to the total effective sentence that is to be or has been imposed on the offender. Such an approach is likely to mask error. **A judge sentencing an offender for more than one offence must fix an appropriate sentence for each offence and then consider questions of cumulation or concurrence, as well, of course, as questions of totality.** [Emphasis added]

McHugh, Hayne and Callinan JJ gave several reasons (at paras 47-49) for preferring this method:

- ‘Questions of cumulation and concurrence may well be affected by particular statutory rules. If, in fixing the appropriate sentence for each offence, proper principle is not applied, orders made for cumulation or concurrence will be made on an imperfect foundation’;
- Failure to correctly sentence on each count may give rise to claims of disparity between co-offenders;
- When a case involving multiple sentences is appealed to the Court of Criminal Appeal on the basis of severity, the individual sentences have to be considered, and not just their overall effect.

This third point, as Smart AJ noted in *R v Itamua* [2000] NSWCCA 502 at para 43, was not the customary appellate approach in New South Wales: ‘Indeed, the Court of Criminal Appeal of this State had made it clear that on sentence appeals it was only concerned with the effective total of the sentences involved and not with the manner in which individual sentences were structured. That approach is no longer open.’

Another important factor relating to appeals was articulated by Smart J in *R v Itamua* at para 45:

The approach taken in *Pearce* has special force where the major sentence has been imposed on one count and subsequently the conviction on that count has been quashed and either a verdict of acquittal entered or a new trial ordered. This brings into sharp focus the correctness of the sentences imposed on the other counts.

In other words, the remaining sentences need to be independently accurate. The Government has since legislated to enable the Court of Criminal Appeal, when it quashes or varies a sentence on appeal, to alter other sentences passed at the same time on the offender even though they are not the subject of an appeal: *Criminal Legislation Amendment Act 2001* No 117, inserting s 7(1A) in the *Criminal Appeal Act 1912*.²³⁷

²³⁷

The amendment is found in Schedule 6[1] of the *Criminal Legislation Amendment Act 2001* No 117 and commenced on 21 December 2001. The Explanatory Note to the *Criminal*

However, when an offender is being dealt with for many offences, the court is not obliged to impose a series of separate sentences and commencement dates: *R v Fraser* [2000] NSWCCA 97 at para 18 (in which there were 25 charges). The preferable strategy is to arrange the sentences concurrently, or as partially concurrent and partially consecutive, or to group some of the sentences together to run concurrently and make others consecutive on that group: *R v Itamua* [2000] NSWCCA 502 at para 46. These options are facilitated by s 55(2) of the *Crimes (Sentencing Procedure) Act 1999* which empowers sentencing judges to impose sentences of imprisonment that are partly concurrent and partly consecutive.

A practical example of the problem addressed in *Pearce v The Queen* occurred in *R v Itamua*. The applicant pleaded guilty to multiple offences including 42 counts of armed robbery with a dangerous weapon, which carries a maximum penalty of 25 years imprisonment under s 97(2) of the *Crimes Act*. The sentencing judge in the District Court imposed a minimum term of 12 years and an additional term of 6 years on one of the most serious offences, stating that this reflected the total criminality. Fixed terms of 3 years were imposed on the remaining charges, to be served concurrently with each other and the main sentence. The Court of Criminal Appeal (Smart AJ, with whom Sheller JA and Dowd J agreed) found that the sentencing judge had erred by not following the requirements of *Pearce v The Queen*. The fixed terms were manifestly inadequate in relation to the gravity of those offences, while the 18 year sentence on a single count was excessive in the circumstances of the case. The Court re-sentenced the applicant to a total term of 14 years with a non-parole period of 8 years. The fixed terms could not be disturbed because they were not part of the applicant's appeal, nor had they been appealed by the Crown. At that stage, the Court did not have the power under the *Criminal Appeal Act* to intervene of its own motion in sentences that were not the subject of an appeal.

Some legal practitioners consider that the Court of Criminal Appeal's application of *Pearce v The Queen* can cause difficulties. John Stratton, a Public Defender, stated:

The approach adopted by the Court of Criminal Appeal in the cases referred to above [*R v Hammoud* (2000) 118 A Crim R 66; *R v A* [1999] NSWCCA 61; and *R v Lemene* (2001) 118 A Crim R 131] in re-sentencing has been to impose multiple partially concurrent sentences.

It is respectfully submitted that *Pearce* has been too literally applied by the Court of Criminal Appeal. Far from benefiting prisoners being sentenced, the approach of the Court of Criminal Appeal increases the complexity of the sentences, and thereby increases the risk of mathematical error.²³⁸

Legislation Amendment Bill 2001 reinforced that empowering the Court to adjust sentences other than those appealed was intended to ensure that the totality of sentences for multiple offences adequately reflects the criminality of the offender's conduct. The Explanatory Note also acknowledged the influence of the reasoning in *R v Itamua*.

9.2 Good character as a mitigating factor: *Ryan v The Queen*

In *Ryan v The Queen* (2001) 179 ALR 193, the High Court examined whether an offender is entitled to a reduction in sentence for displaying good character in areas of their life apart from the conduct that gave rise to the offences in question.

Ryan, a Catholic priest, pleaded guilty to 14 counts of indecency and sexual offences upon young boys, and requested that 39 additional offences be taken into account on a Form 1.²³⁹ The offences were committed over a period of nearly 20 years and the appellant had met the 28 victims in the course of his priestly duties. But many of the offences were only discovered because the appellant volunteered information to the police.²⁴⁰

In the District Court, the sentencing judge found that the appellant's disclosures indicated contrition and entitled him to a discount on sentence. Testimonials were tendered and evidence given as to his good character aside from the offences. However, the sentencing judge concluded that 'an unblemished character and reputation is something expected of a priest. His unblemished character and reputation does not entitle him to any leniency whatsoever.' The overall sentence imposed on the appellant was 16 years imprisonment with a minimum term of 11 years.

The Court of Criminal Appeal upheld the decision of the sentencing judge. An appeal followed to the High Court on several grounds. By majority, the High Court (McHugh, Kirby and Callinan JJ; Gummow and Hayne JJ dissenting) allowed the appeal on the good character issue.

The Court held that the 'otherwise good character' of an offender is a mitigating circumstance that a sentencing judge is bound to consider. In the present case, the nature of the offences meant that the appellant's otherwise good character could only be a minor element to be weighed in the sentencing process, but it was incorrect for the sentencing judge to say that the appellant was entitled to no leniency whatsoever: McHugh J at para 35; Kirby J at para 100; Callinan J at para 178. Therefore, whilst the Court of Criminal Appeal was correct in stating that the appellant was not entitled to significant leniency, it erred by failing to correct the sentencing judge's refusal to grant the appellant any leniency for good character: McHugh J at para 2; Kirby J at para 96; Callinan J at para 178.

²³⁹ See n 78 for an explanation of a Form 1.

²⁴⁰ The appellant was previously convicted of 20 similar offences in 1996. The connection of those events to the instant offences was explained by Callinan J (at para 166): 'The earlier sentencing proceedings and a subsequent unsuccessful appeal had been accompanied by considerable publicity. Following that publicity, three men, who, as children had been victims of the appellant many years before, came forward and provided information to the police. When the police interviewed the appellant, who was by that time in custody, he made admissions concerning the new allegations, and, in addition informed the police of a large number of other offences and victims.'

9.3 Burden of proof of matters in mitigation: *The Queen v Olbrich*

The respondent, Olbrich, pleaded guilty to one offence of importing not less than a trafficable quantity of heroin, contrary to s 233B of the *Customs Act 1901* (Cth). At sentence, the respondent asserted that he was a ‘courier’ rather than a ‘principal’ in the drug operation and that the Crown bore the burden of proving beyond a reasonable doubt that he was something more than a ‘courier’. The sentencing judge rejected this argument, stating that an offender ‘must prove that he is less culpable than the objective facts would otherwise indicate’. Not satisfied that the respondent was merely a courier, the sentencing judge declined to mitigate the offender’s sentence on that basis. The sentence imposed was 8½ years imprisonment, with a non-parole period of 6 years.

The Court of Criminal Appeal allowed the respondent’s appeal. Spigelman CJ (with whom Newman and Sperling JJ agreed) maintained that the ‘identification of the precise nature of the involvement of an accused in an act of importation of drugs is an essential aspect of the sentencing process’: *R v Olbrich* (1998) 45 NSWLR 538 at 544. The Court found that the Crown must prove beyond a reasonable doubt the role of the offender in the drug scheme and that, in the absence of relevant evidence, an accused is entitled to be sentenced on the basis most favourable to him or her.

The Commonwealth Director of Public Prosecutions appealed to the High Court, which reversed the decision of the Court of Criminal Appeal: *The Queen v Olbrich* (1999) 199 CLR 270. The majority (Gleeson CJ, Gaudron, Hayne and Callinan JJ; Kirby J dissenting) stated (at para 13):

We do not accept that the identification of the precise nature of the accused’s involvement in an act of importation of prohibited imports is an essential aspect of the sentencing process.

Consequently, sentencing judges are not required to inquire about the course of the events before or after an importation of drugs nor, in the absence of evidence about those events, make assumptions that are favourable to the offender: at paras 15-18. Furthermore, there is no statutory requirement for a judge to make such inquiries.²⁴¹

In relation to the onus of proof applicable at sentencing, the majority stated (at paras 24-25):

...we reject the contention that a judge who is not satisfied of some matter urged in a plea on behalf of an offender must, nevertheless, sentence the offender on a basis that accepts the accuracy of that contention unless the prosecution proves the contrary beyond reasonable doubt.

...

Nonetheless, it may be accepted that if the prosecution seeks to have the sentencing judge take a matter into account in passing sentence it will be for the

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Section 16A(2)(a) of the *Crimes Act 1914* (Cth) only required the judge to take into account the nature and circumstances of the offence to the extent ‘relevant and known to the court’.

prosecution to bring that matter to the attention of the judge and, if necessary, call evidence about it. Similarly, it will be for the offender who seeks to bring a matter to the attention of the judge to do so and, again, if necessary, call evidence about it.

As to the standard of proof, the High Court (at paras 27-28) adopted the view of the majority in the Victorian case of *R v Storey* [1998] 1 VR 359 at 369: the prosecution must establish facts beyond a reasonable doubt before a sentencing judge may take them into account in a way that is adverse to the interests of the accused, whereas the accused bears the burden of proving matters raised in mitigation on the balance of probabilities. In the present case, the sentencing judge was entitled to decide that he was not persuaded by the matters contended by the accused.

10. SENTENCING ABORIGINAL OFFENDERS

Aboriginal people are markedly over-represented in the prison population of New South Wales and as offenders in the criminal justice system generally. In 1998, Aboriginal people were almost 10 times more likely than the general population to be imprisoned.²⁴² While it is not possible in this paper to undertake a comprehensive analysis of sentencing options and procedures from an indigenous perspective, several recent developments in sentencing Aboriginal offenders should be examined.

10.1 NSW Law Reform Commission Report on Sentencing Aboriginal Offenders

In October 2000, the Law Reform Commission of New South Wales released Report 96, *Sentencing: Aboriginal Offenders*.²⁴³ The report formed part of a general reference to the Commission in 1995 by the then Attorney-General, Hon. Jeff Shaw QC, to review sentencing law in New South Wales.

The conclusions and recommendations of the Commission included:

- ***Legislation on sentencing principles for Aboriginal offenders?***
It is not necessary to formalise in legislation the principles that apply to sentencing Aboriginal offenders, such as those enunciated in *R v Fernando* (1992) 76 A Crim R 58. The common law sentencing discretion is sufficiently flexible to allow matters connected with an offender's Aboriginality to be taken into account.²⁴⁴
- ***Customary law***
Legislation is warranted to recognise the relevance of Aboriginal customary law at sentence. Judges should be required to have regard to customary law where there is evidence of its operation in punishing a member of an Aboriginal community. This would promote consistency and clarity in the treatment of Aboriginal offenders. However, taking customary laws into account does not mean incorporating them into a sentencing order (Recommendation 1).²⁴⁵

²⁴² J Baker, 'The scope for reducing indigenous imprisonment rates' (2001) 55 *Crime and Justice Bulletin* 1 at 1. Baker's article contains statistics and other information on indigenous over-representation in prisons and in the court system.

²⁴³ An electronic version of the report is available on the Commission's website at <www.lawlink.nsw.gov.au/lrc.nsf/pages/r96toc>

²⁴⁴ New South Wales Law Reform Commission, Report 96, *Sentencing: Aboriginal Offenders*, October 2000, paras 2.45-2.47. In *R v Fernando* (1992) 76 A Crim R 58 at 62-63, Wood J outlined considerations which may be relevant when sentencing Aboriginal offenders. These included the effects of alcohol abuse, economic deprivation and social disadvantage. For a discussion of the Fernando principles and cases in which they have been applied, see Report 96, paras 2.18-2.25.

²⁴⁵ *Ibid*, paras 3.79-3.89. Aboriginal customary law (sometimes referred to as 'Aboriginal common law' or 'Aboriginal community law') varies between groups and does not appear in a written code. It can be described as a 'fusion of law and religion' and a 'system of rules of

- ***Community-based participation in sentencing***

Pilot schemes for adult conferencing and circle sentencing should be instituted in consultation with Aboriginal communities (Recommendation 2). Circle sentencing is examined in greater detail below at 10.2.

- ***Non-custodial penalties***

The access to and organisation of community service for Aboriginal people needs improvement. Specifically, the Department of Corrective Services should establish more Attendance Centres in rural areas, and courts should be empowered to order that participation in approved, community-based, personal development programs be credited towards community service orders. Aboriginal community councils could also contribute to the selection and supervision of work (Recommendations 4-6, 12).

- ***Aboriginal women offenders***

There should be greater recognition of the separate needs and circumstances of Aboriginal women, who are even more over-represented in the female prison population than Aboriginal men are among male prisoners. Programs to raise judicial awareness of cross-cultural issues should include a component dealing with Aboriginal women offenders. The Department of Corrective Services should reconsider its policies on the geographical location of women prisoners, particularly women serving short sentences (Recommendations 8-11).

10.2 Circle sentencing

A range of community-based initiatives are currently utilised in various common law countries to involve indigenous people in the sentencing process and thereby foster their understanding, compliance with penalties, and rehabilitation. Conferencing schemes, such as family group conferences, mediations between victims and offenders, and circle sentencing, have emerged in recent years as a restorative rather than retributive way of dealing with property and assault offences. The offender is confronted on a personal level with the consequences of the crime for the victim and the broader community, and arrangements to rectify or compensate for the harm caused are made by consensus.²⁴⁶

What is circle sentencing?

Circle sentencing was developed in Canada in 1992 by Judge Stuart of the Yukon Territorial Court, in cooperation with indigenous communities.²⁴⁷

conduct'. Resolution of disputes within Aboriginal communities involves members of both the offender's and the victim's families and tribal elders. Shaming and banishment are frequent penalties, while serious transgressions may result in physical punishment, such as 'payback' by spearing the offender's leg. Although Aboriginal customary law is not prominent in urban New South Wales, the Law Reform Commission acknowledged that it continues to function in subtle ways: para 3.6.

²⁴⁶ NSWLRC, n 244, paras 4.19-4.29.

²⁴⁷ L McNamara, 'Indigenous Community Participation in the Sentencing of Criminal Offenders:

The concept of circle sentencing refers to an informal conference between community members and an adult offender to discuss sentencing options. The usual participants are the offender, judge, victim, prosecutor, defence lawyer, and family members. Elders, social workers and police may also be present.

Procedural aspects

The procedures for circle ‘courts’ may differ in limited ways from community to community, although normally the facts of the case are presented to the circle by the Crown, then the defence is allowed to comment. The discussion that follows takes 2-3 hours and includes the offender addressing the circle and a statement by the victim regarding the impact of the crime.

The circle sets a sentencing plan for the offender which will aim at addressing the causes of the offence. The sentence may entail a curfew, abstinence from alcohol, anger management, restitution, training, or employment. Some members of the circle will take responsibility for seeing that the offender completes the sentencing plan. The circle will also examine what needs to be done to ‘heal’ the victim. The circle is reconvened several months later, enabling the offender’s support group to report on his or her progress.

Eligibility

Offenders must have pleaded guilty or been found guilty by a court before circle sentencing becomes an option. The process is often administered by a community justice committee. An offender must gain the approval of the community justice committee and usually the active support of other influential community members before they can participate in a circle ‘court’. Offenders need to demonstrate commitment to rehabilitation, for example, by undertaking drug, alcohol or work programs.

The type of offences which are eligible depend on the jurisdiction, although sexual and violent offences commonly seem to be excluded. Some of the literature on circle sentencing refers to a standard restriction of eligibility to offences which carry a term of imprisonment of up to 2 years.²⁴⁸

Benefits and limitations

Overseas experience has demonstrated some of the benefits of circle sentencing.²⁴⁹

Circle Sentencing’ (2000) 5(4) *Indigenous Law Bulletin* 5 at 5. The case before the Yukon Territorial Court was *R v Moses* (1992) 71 CCC (3d) 347.

²⁴⁸ McNamara, *ibid*, p 7.

²⁴⁹ The information on benefits and limitations is derived from: Aboriginal Justice Advisory Committee (AJAC), Discussion Paper, *Circle Sentencing: Involving Aboriginal Communities in the Sentencing Process*, November 1999, Chapter 7. For an electronic version, consult the AJAC website at <www.lawlink.nsw.gov.au/ajac.nsf/pages/circlesentencing>. The AJAC is part of the Attorney-General’s Department and provides advice to the State Government

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- a greater sense of equality between participants due to the lack of formal rules and legal jargon in the proceedings;
 - active involvement of the offender and the victim, which is often minimal in a formal sentencing context;
 - the offender is directly confronted with the effects of their actions on the victim;
 - the court receives information about the community, the background of the offender, and the impact on the victim to an extent rarely possible in conventional proceedings;
 - there is less potential for racial bias, as members of the indigenous community play a significant role;
 - community input improves the prospect of workable solutions and promotes the sharing of responsibility between the community and the criminal justice system;
 - the offender may take the punishment more seriously because their family and community contributed to implementing it;
 - the circle considers the underlying causes of criminal behaviour, which allows the court to address the specific problems unique to each case. On a broader level, the insight gained by community representatives facilitates the development of strategies to prevent similar behaviour.

However, some limitations have been experienced by circle courts:

- the lack of a legislative base in Canada caused problems in consistency from one community to another;²⁵⁰
- the judge retains the responsibility for imposing an appropriate sentence and is obliged to ignore the circle's advice to the extent that it varies from this;
- the cost of the circle process can be substantial, as it may take 4-5 times as long as a regular court session and many are held in remote areas;
- the sentencing plan may depend on the reliability of other people, for example, because

on the impact of the law on Aboriginal people, develops initiatives to make the justice system more responsive to indigenous needs, and monitors the Government's implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody.

²⁵⁰

Luke McNamara, a senior lecturer in law at the University of Wollongong, maintains that the Canadian Criminal Code 1990, c C-46, Part XXIII (commencing on 3 September 1996) does afford some legislative foundation, as it requires judges to take into account an offender's Aboriginality in the procedures adopted for arriving at a suitable sentence: n 247, p 8.

of a condition that the offender is to reside with family, or in an alcohol-free home. Therefore, a sentence may not be completed effectively, through no fault of the offender. In these circumstances, the person who caused the order to be breached could be charged with contempt of court, or the offender could be re-sentenced in an ordinary court.

Pilot program in New South Wales

On 18 October 2001, the Premier, Hon. Bob Carr MP, announced that a trial of circle sentencing would take place at Nowra. The trial is to be conducted for 2 years with the assistance of the Magistrate of the Local Court. This indicates that, at least in the pilot phase, the available offences will be limited to those that can be prosecuted summarily in the Local Court.²⁵¹ In addition to obvious exclusions such as murder, manslaughter and sexual offences, it was reported that domestic violence, stalking and firearms offences would also be ineligible.²⁵² Apart from the reduction of the trial period from 3 to 2 years, the procedural aspects referred to by Mr Carr accorded with those proposed by the working party, as detailed below.

The trial will 'investigate whether circle sentencing is successful in increasing the reporting of crime, in improving confidence in the justice system, in providing a voice for victims, and in reducing crime.'²⁵³ An evaluation of the scheme will be undertaken by the Aboriginal Justice Advisory Committee of the Attorney-General's Department.

At the time of writing, 4 applications had been received from offenders wishing to be sentenced under the circle system. The first sitting of the circle is projected to occur on 5 February 2002, with 2 hearings anticipated per month.²⁵⁴

Model by the working party

In November 1999, the Aboriginal Justice Advisory Committee (AJAC) released a discussion paper entitled *Circle Sentencing: Involving Aboriginal Communities in the Sentencing Process*. The paper proposed that a trial of circle sentencing be established in New South Wales. The AJAC adopted the model developed by a working party which it had convened, consisting of members of the Police Service, Ministry of Police, Attorney-General's Department, Office of the Director of Public Prosecutions, Department of Corrective Services, Department of Juvenile Justice and the Judicial Commission.

The model devised by the working party included the following features:²⁵⁵

²⁵¹ See n 4 for a definition of indictable and summary offences.

²⁵² R Morris, 'Tribal elders to be judge and jury', *The Daily Telegraph*, 19 October 2001, p 18.

²⁵³ *NSWPD(LA)*, 'Circle Sentencing', Ministerial Statement, 18 October 2001, pp 17618-17619.

²⁵⁴ Personal communication, Gail Wallace, Project Officer, Circle Sentencing, Nowra Local Court, 15 January 2002.

²⁵⁵ The description of the model is drawn from Chapter 10 of the AJAC's Discussion Paper, n 249.

- ***Objectives***

Some of the suggested objectives for a trial were: empowering Aboriginal communities in the sentencing process, reducing barriers between Aboriginal communities and courts, providing more appropriate sentencing options for Aboriginal offenders, giving effective support to Aboriginal defendants and Aboriginal victims, reducing offending in Aboriginal communities.

- ***Time frame and locations***

A trial of 3 years was proposed to be conducted in 3 Aboriginal communities. Potential locations needed to fulfil a number of prerequisites, such as support for the trial from the local Magistrate, the local Aboriginal Legal Services and a broad cross-section of the Aboriginal community, and the presence of an Aboriginal Court Liaison Officer in the area.

- ***Management of the process***

The working party advocated that a Community Justice Committee be established to oversee much of the circle sentencing process. The Committee would consist of respected members of the Aboriginal community in each location. Aboriginal Court Liaison Officers would play a vital role in organising the proceedings and facilitating contact with the local Aboriginal community.

- ***Eligibility requirements***

According to the working party, an offence should be eligible if it can be finalised in a Local Court and carries a term of imprisonment, which is judged by the Magistrate as a likely outcome.²⁵⁶ All sexual offences are to be excluded from the trial. Offenders apply to the court after a plea or determination of guilt. The working party suggested 2 tests for admission to the program: firstly, a suitability test by the court and, secondly, an acceptability test by the community. The latter would be assessed by the Community Justice Committee, taking into account the offence; its impact on the victim and the community; the willingness of the offender to participate; the support the offender has in the community; and the potential benefits to the offender, victim and community in using circle sentencing. The Community Justice Committee makes a recommendation, giving reasons, to the Magistrate. An unsuccessful application is returned to the court for ordinary sentencing.

- ***Proceedings***

The circle is presided over by the Magistrate. The participants include the offender, the victim, their respective support people and families, the prosecuting authority, the offender's lawyer, elders from the community, and other community members or service providers affected by the offence. The order of proceedings envisaged by the working party, but flexible to change according to the specific Aboriginal community, is:

²⁵⁶

This appears to confirm the AJAC's assertion that circle sentencing is not explicitly a prison diversion program, and that a term of imprisonment is an option available to the circle: Discussion Paper, Chapter 2, n 249.

- Aboriginal elders welcome all participants;
- Magistrate formally opens the proceedings;
- Participants introduce themselves and declare their interest in the matter;
- Magistrate explains the role of the circle, the order of proceedings, and rules of conduct within the circle;
- Offender makes a statement regarding the offence, their commitment to rehabilitation and so on;
- Victim or their representative may speak about the impact of the offence;
- Circle discussion;
- Magistrate summarises the discussion and decisions reached;
- Magistrate determines the sentence;
- Separate support groups are established for the offender and the victim;
- Date for review is set;
- Magistrate formally closes the circle.

- ***Post proceedings***

The offender's support group reports back to the Community Justice Committee on the offender's progress. The Community Justice Committee keeps the Magistrate similarly informed, and can advise the court of any breaches of the conditions of the sentence. Breaches can also be acted upon in the same manner as for conventional sentences.

Legislative recognition?

The NSW Law Reform Commission advocates that, if the trial of circle sentencing proves successful, and the Government decides to continue it as an option in the justice system, it should be reinforced by legislation. The anticipated benefits of legislation include greater consistency and procedural safeguards. According to the Commission, the legislation should not be prescriptive but broad and flexible, to allow courts the discretion to refer matters for conferencing or circle sentencing, if considered appropriate in the circumstances.²⁵⁷

Therefore, legislation could bolster circle sentencing, but it might also have a restrictive effect:

On the one hand, the emergence of circle sentencing at a distance from executive government and without a formal legislative framework has allowed the practice to emerge and take shape largely free of the potentially stifling influence of government policy considerations and in a manner adapted to the particular needs of the local community...On the other hand, circle sentencing is vulnerable to the extent that, having no formally recognised authority in its own right (in the absence of a firm legislative foundation), it relies for its survival on judicial goodwill, community motivation and resources and the support of justice system professionals. Striking an appropriate balance between flexibility and stability will be critical...²⁵⁸

²⁵⁷ NSWLRC, n 244, para 4.41.

²⁵⁸ L McNamara, n 247, p 8.

11. CONCLUSIONS

Sentencing is a dynamic, frequently changing area of law, as is apparent from the range and pace of legislative and judicial activity from 1998 to 2001. It can be influenced by current events, public opinion, media debate and political lobbying. The current Government and Opposition have basically maintained a position of being tough on crime, giving prominence to the sentencing ideals of punishment and deterrence. Indicative of this stance in 2001 were the introduction of a new aggravated offence of sexual assault in company, punishable by life imprisonment, and the restricting of eligibility for life sentence redeterminations.

Sentencing in New South Wales has traditionally followed an ‘instinctive synthesis’ approach,²⁵⁹ but this may be changing. Politicians, the media, victims’ groups and others demand greater accountability, consistency, and severity in sentencing decisions. Legislation appears to be increasingly fettering the discretion of judges. Some critics regard these trends as undermining judicial independence and authority.

Sentencing guidelines, in one form or another, are likely to remain in New South Wales. The present system of guideline judgments, introduced in 1998 on the initiative of the Court of Criminal Appeal and reinforced in 1999 by legislation, are less severe than mandatory or grid sentencing. Chief Justice Spigelman heralded guideline judgments as a tool for assisting, not constraining, the sentencing exercise:

The existence of multiple objectives in sentencing – rehabilitation, denunciation and deterrence – permits individual judges to reflect quite different penal philosophies ... Indeed, judges reflect the wide range of differing views on such matters that exists in the community. However, there are limits to the permissible range of variation. The courts must show that they are responsive to public criticism of the outcome of sentencing processes. Guideline judgments are a mechanism for structuring discretion, rather than restricting discretion.²⁶⁰

But the prospect of mandatory minimum sentences was raised by the Premier in November 2001 when the High Court criticised the guideline judgment of *R v Wong; R v Leung* (1999) 48 NSWLR 340. Significantly, the Court considered the guideline too legislative in character. The majority held that the Court of Criminal Appeal had exceeded its jurisdiction by prescribing a table of sentence ranges to be imposed in future cases of drug importation.

²⁵⁹

The term ‘instinctive synthesis’ refers to sentencing on the basis of the individual circumstances of a case, not as a formulaic or mathematical exercise. In *Wong v The Queen; Leung v The Queen* [2001] HCA 64, Gaudron, Gummow and Hayne JJ noted (at para 76) that ‘the weight of authority in the intermediate appellate courts of this country...favours the instinctive synthesis approach.’ Many cases on point are cited at footnotes 79 and 80 of the judgment. In *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, Spigelman CJ (at para 57) maintained that the instinctive synthesis approach ‘does not, however, necessarily mean that there is no element which can be taken out and treated separately, although such elements ought be few in number and narrowly confined.’

²⁶⁰

R v Jurisic (1998) 45 NSWLR 209 at 221.

The consequences of the decision may become clearer when the forthcoming guideline judgment on sexual assault is heard in March 2002.

Sentencing developments in New South Wales since 1998 have not, however, been wholly punitive. Renewed emphasis on alternative penalties is evident. For example, the restructuring of sentencing legislation in 2000, with the commencement of the *Crimes (Sentencing Procedure) Act 1999* and the *Crimes (Administration of Sentences) Act 1999*, included the revival of suspended sentences, and a new requirement that judges imposing short terms of imprisonment give reasons why other penalties were not appropriate. In November 2001, the Legislative Council's Select Committee on the Increase in the Prisoner Population recommended investigating the concept of abolishing prison sentences of 6 months or less, although the Government has not yet responded to the Committee's report.

Diverting more offenders may alleviate the detrimental effects of the rapidly growing prison population, such as financial pressures, overcrowding, and compounding the criminality of some inmates. Non-custodial penalties are regarded by their proponents as facilitating the productive integration of offenders back into society, especially those with special needs. Aboriginal people continue to be over-represented among offenders and prisoners, and may benefit from alternatives to adversarial sentence proceedings and conventional punishments. Circle sentencing, a type of conferencing that enlists community support for offenders and victims, is being trialled for Aboriginal offenders in southern New South Wales at present.

APPENDIX A

STATISTICS ON SENTENCES OF IMPRISONMENT, 1990-2000

Source: J Fitzgerald, 'Trends in sentencing in the New South Wales Criminal Courts: 1990-2000' *Crime and Justice Bulletin*, Number 62, November 2001, NSW Bureau of Crime Statistics and Research

Table 1: Percentage of convicted offenders imprisoned, by principal offence, NSW Higher Courts, 1990 to 2000

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	Trend
Murder	90.3	96.9	100.0	100.0	100.0	95.5	100.0	100.0	100.0	100.0	100.0	stable
Manslaughter	72.9	69.4	78.4	87.5	92.9	73.9	78.9	92.9	88.9	81.3	73.7	stable
Assault	27.9	33.0	38.2	42.8	42.9	44.6	54.1	52.4	42.9	51.2	49.4	upward
Sexual assault	40.6	49.3	58.1	66.6	62.0	67.9	68.3	65.3	66.5	66.7	64.8	stable
Sexual offences against children*	45.3	45.5	57.0	62.8	59.7	64.7	69.2	61.4	65.2	63.0	64.8	upward
Robbery	64.3	69.2	70.3	72.1	74.3	74.6	75.5	76.4	77.9	83.5	82.8	upward
Break and enter	65.9	62.5	59.7	61.5	59.2	66.7	72.8	64.7	71.5	73.0	74.4	upward
Fraud, forgery, false financial instruments	29.2	34.6	25.3	28.3	30.5	33.5	38.9	51.0	36.4	46.4	55.4	upward
Deal or traffic in opiates	65.7	81.1	80.4	74.9	72.1	77.0	79.2	69.7	76.9	73.8	73.9	stable

* Overlap exists between the category 'sexual offences against children' and 'sexual assault'.

i.e. the figures for sexual offences against children are also included in the general sexual assault category.

Table 2: Average length of prison sentence (months) imposed against convicted offenders by principal offence, NSW Higher Courts, 1990 to 2000

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	Trend
Murder*	165.0	134.4	151.3	140.8	154.5	150.3	134.9	145.0	158.9	154.9	188.1	stable
Manslaughter	57.1	48.0	54.2	47.1	60.8	48.6	55.2	58.0	54.5	47.2	44.1	stable
Assault	16.5	18.2	14.9	22.1	18.6	17.3	22.5	18.1	20.1	19.4	18.4	stable
Sexual assault	30.4	29.6	29.9	32.2	29.7	27.5	32.9	34.1	33.5	28.8	31.7	stable
Sexual offences against children*	30.1	27.9	31.3	29.1	30.9	24.4	31.7	32.3	31.5	28.2	25.3	stable
Robbery	40.2	38.5	32.6	31.1	27.3	26.9	27.5	26.3	26.6	28.6	25.2	downward
Break and enter	20.6	19.9	20.5	20.3	16.8	19.5	20.1	18.7	20.4	20.3	19.8	stable
Fraud, forgery, false financial instruments	17.4	19.4	15.6	19.4	22.8	19.0	21.8	20.6	25.8	18.8	19.2	stable
Deal or traffic in opiates	28.5	37.4	28.6	32.9	28.0	24.8	24.9	30.7	27.5	25.5	27.4	stable

* Note that life sentences are excluded from this calculation.

Table 3: Percentage of convicted offenders imprisoned, by principal offence, NSW Local Courts, 1993 to 2000

	1993	1994	1995	1996	1997	1998	1999	2000	Trend
Assault	7.5	8.0	9.0	8.1	7.9	8.9	9.2	8.0	stable
Sexual assault	18.6	14.8	18.1	17.8	16.2	15.7	17.6	17.7	stable
Sexual offences against children*	18.9	18.4	20.7	21.1	19.4	20.4	19.6	20.2	stable
Break and enter	33.7	33.8	37.2	39.8	39.9	42.8	44.6	41.4	upward
Fraud, forgery or false financial instruments	8.8	9.2	9.7	7.8	7.8	11.5	10.3	10.2	stable
Deal or traffic in opiates	46.3	40.2	50.8	46.5	44.0	38.4	42.7	33.1	stable

Table 4. Average length of prison sentence (months) imposed against convicted persons by principal offence, NSW Local Courts, 1993 to 2000.

	1993	1994	1995	1996	1997	1998	1999	2000	Trend
Assault	4.2	3.9	4.1	4.0	4.2	4.2	4.1	4.6	stable
Sexual assault	6.8	5.5	7.6	5.3	8.1	6.4	6.3	8.9	stable
Sexual offences against children*	7.5	5.3	7.0	5.5	8.8	6.7	7.3	8.3	stable
Break and enter	7.8	7.8	7.5	7.2	7.8	7.5	7.4	7.3	stable
Fraud, forgery or false financial instruments	4.6	5.0	5.1	5.5	5.1	5.2	5.1	5.4	stable
Deal or traffic in opiates	5.3	5.6	6.4	5.3	6.8	6.5	6.9	6.7	upward

APPENDIX B

**COMPARATIVE TABLE OF MANDATORY SENTENCING PROVISIONS FROM
NORTHERN TERRITORY AND WESTERN AUSTRALIA**

**QUICK GUIDE TO MANDATORY SENTENCING PROVISIONS
IN WESTERN AUSTRALIA AND NORTHERN TERRITORY**

WESTERN AUSTRALIA

Age of offender	Type of offence	Offence number	Penalty
Adult (18 years)	Home burglary	Third or subsequent offence	12 months prison
Juvenile (under 18 years)	Home burglary	Third or subsequent offence	12 months prison or detention; <i>or</i> Intensive youth supervision order

NORTHERN TERRITORY (repealed on 22 October 2001)

Age of offender	Type of offence	Offence number	Penalty
Adult (18 years)	Wide range of property offences	First offence	Minimum 14 days prison unless exceptional circumstances
		Second offence	Minimum 90 days prison
		Third offence	Minimum 12 months prison
Juvenile (from 15 years to under 18 years)	Wide range of property offences	First offence	Variety of options under s 53(1) of <i>Juvenile Justice Act</i>
		Second offence	Minimum 28 days detention; <i>or</i> Diversionary program
		Third offence	Minimum 28 days detention

APPENDIX C

SELECTED BIBLIOGRAPHY ON MANDATORY SENTENCING

SELECTED BIBLIOGRAPHY ON MANDATORY SENTENCING

Sentencing principles and judicial discretion

N Morgan, 'Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?' (2000) 24(3) *Criminal Law Journal* 164

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L Schetzer, 'Mandatory Sentencing of Juvenile Offenders' (1999) 8(a) *Human Rights Defender* 15

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M Flynn, 'International Law, Australian Criminal Law and Mandatory Sentencing: the Claims, the Reality and the Possibilities' (2000) 24(3) *Criminal Law Journal* 184

R Piotrowicz, 'Mandatory Sentencing and international law: no logic and too many question marks' (2000) 74(6) *Australian Law Journal* 363

APPENDIX D

SENTENCING GRID OF MINNESOTA, USA

Source: Minnesota Sentencing Guidelines Commission, *Minnesota Sentencing Guidelines and Commentary*, 14 September 2001, p 49.

IV. SENTENCING GUIDELINES GRID
Presumptive Sentence Lengths in Months

Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure. Offenders with nonimprisonment felony sentences are subject to jail time according to law.

SEVERITY LEVEL OF CONVICTION OFFENSE (Common offenses listed in italics)		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
<i>Murder, 2nd Degree</i> (intentional murder; drive-by-shootings)	X	306 299-313	326 319-333	346 339-353	366 359-373	386 379-393	406 399-413	426 419-433
<i>Murder, 3rd Degree</i> <i>Murder, 2nd Degree</i> (unintentional murder)	IX	150 144-156	165 159-171	180 174-186	195 189-201	210 204-216	225 219-231	240 234-246
<i>Criminal Sexual Conduct, 1st Degree</i> ² <i>Assault, 1st Degree</i>	VIII	86 81-91	98 93-103	110 105-115	122 117-127	134 129-139	146 141-151	158 153-163
<i>Aggravated Robbery 1st Degree</i>	VII	48 44-52	58 54-62	68 64-72	78 74-82	88 84-92	98 94-102	108 104-112
<i>Criminal Sexual Conduct, 2nd Degree (a) & (b)</i>	VI	21	27	33	39 37-41	45 43-47	51 49-53	57 55-59
<i>Residential Burglary</i> <i>Simple Robbery</i>	V	18	23	28	33 31-35	38 36-40	43 41-45	48 46-50
<i>Nonresidential Burglary</i>	IV	12 ¹	15	18	21	24 23-25	27 26-28	30 29-31
<i>Theft Crimes (Over \$2,500)</i>	III	12 ¹	13	15	17	19 18-20	21 20-22	23 22-24
<i>Theft Crimes (\$2,500 or less)</i> <i>Check Forgery (\$200-\$2,500)</i>	II	12 ¹	12 ¹	13	15	17	19	21 20-22
<i>Sale of Simulated Controlled Substance</i>	I	12 ¹	12 ¹	12 ¹	13	15	17	19 18-20

Presumptive commitment to state imprisonment. First Degree Murder is excluded from the guidelines by law and continues to have a mandatory life sentence. See section II.E. **Mandatory Sentences** for policy regarding those sentences controlled by law, including minimum periods of supervision for sex offenders released from prison.

Presumptive stayed sentence; at the discretion of the judge, up to a year in jail and/or other non-jail sanctions can be imposed as conditions of probation. However, certain offenses in this section of the grid always carry a presumptive commitment to state prison. These offenses include Third Degree Controlled Substance Crimes when the offender has a prior felony drug conviction, **Burglary of an Occupied Dwelling** when the offender has a prior felony burglary conviction, second and subsequent Criminal Sexual Conduct offenses and offenses carrying a mandatory minimum prison term due to the use of a dangerous weapon (e.g., Second Degree Assault). See sections II.C. **Presumptive Sentence** and II.E. **Mandatory Sentences**.

¹ One year and one day

² Pursuant to M.S. § 609.342, subd. 2, the presumptive sentence for Criminal Sexual Conduct in the First Degree is a minimum of 144 months (see II.C. **Presumptive Sentence** and II.G. **Convictions for Attempts, Conspiracies, and Other Sentence Modifiers**).

**Examples of Executed Sentences (Length in Months) Broken Down by:
Specified Minimum Term of Imprisonment and Specified Maximum Supervised Release Term**

Offenders committed to the Commissioner of Corrections for crimes committed on or after August 1, 1993 will no longer earn good time. In accordance with Minn. Stat. § 244.101, offenders will receive an executed sentence pronounced by the court consisting of two parts: a specified minimum term of imprisonment equal to two-thirds of the total executed sentence and a supervised release term equal to the remaining one-third. This provision requires that the court pronounce the total executed sentence and explain the amount of time the offender will serve in prison and the amount of time the offender will serve on supervised release, assuming the offender commits no disciplinary offense in prison that results in the imposition of a disciplinary confinement period. The court shall also explain that the amount of time the offender actually serves in prison may be extended by the Commissioner if the offender violates disciplinary rules while in prison or violates conditions of supervised release. This extension period could result in the offender's serving the entire executed sentence in prison. The court's explanation is to be included in a written summary of the sentence.

Executed Sentence	Term of Imprisonment	Supervised Release Term	Executed Sentence	Term of Imprisonment	Supervised Release Term
12 and 1 day	8 and 1 day	4	88	58 $\frac{2}{3}$	29 $\frac{1}{3}$
13	8 $\frac{2}{3}$	4 $\frac{1}{3}$	98	65 $\frac{1}{3}$	32 $\frac{2}{3}$
15	10	5	108	72	36
17	11 $\frac{1}{3}$	5 $\frac{2}{3}$	110	73 $\frac{1}{3}$	36 $\frac{2}{3}$
18	12	6	122	81 $\frac{1}{3}$	40 $\frac{2}{3}$
19	12 $\frac{2}{3}$	6 $\frac{1}{3}$	134	89 $\frac{1}{3}$	44 $\frac{2}{3}$
21	14	7	146	97 $\frac{1}{3}$	48 $\frac{2}{3}$
23	15 $\frac{1}{3}$	7 $\frac{2}{3}$	150	100	50
24	16	8	158	105 $\frac{1}{3}$	52 $\frac{2}{3}$
27	18	9	165	110	55
28	18 $\frac{2}{3}$	9 $\frac{1}{3}$	180	120	60
30	20	10	190	126 $\frac{2}{3}$	63 $\frac{1}{3}$
33	22	11	195	130	65
36	24	12	200	133 $\frac{1}{3}$	66 $\frac{2}{3}$
38	25 $\frac{1}{3}$	12 $\frac{2}{3}$	210	140	70
39	26	13	220	146 $\frac{2}{3}$	73 $\frac{1}{3}$
43	28 $\frac{2}{3}$	14 $\frac{1}{3}$	225	150	75
45	30	15	230	153 $\frac{1}{3}$	76 $\frac{2}{3}$
48	32	16	240	160	80
51	34	17	306	204	102
57	38	19	326	217 $\frac{1}{3}$	108 $\frac{2}{3}$
58	38 $\frac{2}{3}$	19 $\frac{1}{3}$	346	230 $\frac{2}{3}$	115 $\frac{1}{3}$
60	40	20	366	244	122
68	45 $\frac{1}{3}$	22 $\frac{2}{3}$	386	257 $\frac{1}{3}$	128 $\frac{2}{3}$
78	52	26	406	270 $\frac{2}{3}$	135 $\frac{1}{3}$
86	57 $\frac{1}{3}$	28 $\frac{2}{3}$	426	284	142

APPENDIX E

FEDERAL SENTENCING GRID, USA

Source: United States Sentencing Commission, *Guidelines Manual*, 1 November 2001, p 335.

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life