

# Briefing Note



## Sentencing Guidelines and Judicial Discretion: A Review of the Current Debate

by

Gareth Griffith

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**SENTENCING GUIDELINES AND JUDICIAL DISCRETION**

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## 1. INTRODUCTION

It is widely acknowledged that the sentencing of offenders is an important and problematic subject capable of generating considerable public interest, debate and concern. The Hon Justice AM Gleeson, Chief Justice of NSW, commented in November 1993

There is no aspect of the administration of justice in which public acceptance of judicial decision-making is more important, or more difficult to sustain, than the sentencing of offenders.<sup>1</sup>

One characterisation of sentencing, taken from the work of Andrew Ashworth, reads

The aims of sentencing are clearly not identical with the aims of the criminal law itself. Sentencing is the stage after the imposition of criminal liability, and may be characterised as a public judicial judgment of the degree to which the offender may rightly be ordered to suffer legal punishment. The conviction establishes that the offender may be subjected to judicial sentencing, within the applicable limits, and so sentencing decisions are concerned with the *degree* of condemnation and with the form of the sentence.<sup>2</sup>

This Briefing Note focuses on one issue within this area of debate, namely, the exercise of judicial discretion in relation to sentencing. For this purpose it discusses the relevant practices and proposals aimed at reducing perceived disparities in sentencing as these have been formulated and developed in selected jurisdictions. The starting point for discussion is the Issues Paper, *Sentencing Review 1994*, released by the NSW Attorney-General's Department in June 1994, plus the recent report of the NSW Bureau of Crime Statistics and Research, *Sentence Disparity and its Impact on the NSW District Criminal Court*. The Attorney-General commented on 24 June 1994 that the Issues Paper highlights a number of areas that will be addressed by the Government in legislation to be introduced into Parliament later this year, including **empowering the Court of Criminal Appeal to establish more comprehensive guidelines to judges and magistrates to ensure greater consistency in sentencing**.<sup>3</sup>

The preliminary sections of this Briefing Note, setting out some of the context for the debate on sentencing issues in NSW, will be followed by a brief discussion of the concept of judicial discretion and then of the various options for reducing sentencing disparities adopted in other jurisdictions.

The terms sentencing *guidance* and *guidelines* are used more or less interchangeably in this Briefing Note.<sup>4</sup>

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<sup>1</sup> Quoted in Attorney-General's Department NSW, *Sentencing Review 1994*, June 1994, p 2.

<sup>2</sup> A Ashworth, "Criminal justice and deserved sentences", [1989] *Crim LR* 340.

<sup>3</sup> NSW Attorney-General, Press Release, 24 June 1994.

<sup>4</sup> K Pease and M Wasik eds, *Sentencing Reform: Guidance or Guidelines?*, Manchester University Press, 1987, p 3. These authors distinguish between the terms "guidelines" and "guidance". Guidance, they say, is the use of judgments made in respect of individual appellants which are used

## 2. SENTENCING REVIEW 1994

The June 1994 Issues Paper has as its primary focus the consolidation and rationalisation of "the widely scattered, and sometimes inconsistent, statutes covering various aspects of sentencing in NSW, and to recommend practical changes that will improve the consistency, comprehensibility and community acceptance of sentences passed by the State's courts". With this in mind, the matters canvassed in the paper are wide ranging. The operation of the *Sentencing Act 1989* is discussed, as is the advisability of consolidating this area of the law into a single Sentencing Act, together with such issues as cumulative sentences, probation, bonds/recognizances and parole.

Recognised at the outset in the Issues Paper is the role played throughout all debates on sentencing by the "basic dichotomy between arguments in favour of extending judicial discretion, and those that seek to restrict it, either generally or in some particular way".<sup>5</sup> It goes on to say the Australian legislatures and commentators on sentencing "have generally been firmly on the side of maximising judicial discretion, and that policy is reflected in many of the proposals raised in this Issues Paper". Three questions posed in the Issues Paper can be noted here

- **Should NSW adopt an American-style "sentencing grid" system to provide consistency in terms of sentences of imprisonment?** The view taken in the Issues Paper is that the use made by the Judicial Commission's Sentencing Information System (SIS) must be given a realistic opportunity to be widely tested before legislation is introduced prescribing any form of sentencing guidelines, whether presumptive or otherwise.
- **Should a Sentencing Policy Advisory Council be established to provide policy guidelines to sentencers suggesting appropriate uses of sentencing options, and appropriate general ranges of penalties for common offences?** The Issues Paper comments that the creation of another body dealing with sentencing matters should not be contemplated until the work of the Judicial Commission in relation to the SIS has been given a substantial trial.
- **Should courts be required to state reasons for imposing any form of custodial sentence, including a sentence of periodic detention or a sentence involving an intensive community supervision order?** The Issues Paper acknowledges that sentencers should articulate their reasons for imposing the most severe forms of sentence and comments, "Whilst the giving of reasons for any sentence is normal practice in all sentencing courts, statutory reinforcement of that practice is suggested".<sup>6</sup>

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as vehicles to enunciate principles of more general application. With guidelines, on the other hand, "each offence/offender combination is classified. This is done in advance, the product of research effort, and not in reference to the adjudication of any particular case". However it seems that that distinction has not found general acceptance in the wider debate on sentencing and is not adopted therefore in this paper.

<sup>5</sup> *Sentencing Review 1994*, p 3.

<sup>6</sup> *Ibid*, p 62.

- **Should the Court of Criminal Appeal be specifically empowered to issue sentencing guidelines that may declare general principles of sentencing applicable to particular offences, and suggest appropriate ranges of penalties?** The attitude of the Issues Paper to the proposal seems to be one of cautious approval, with the comment being made that the Victorian Sentencing Committee's "finding in favour of them deserves serious consideration in this State". The further comment is made that the Court of Criminal Appeal probably already "has sufficient legal powers to give guideline judgments of the type proposed, but it has not apparently done so to any great extent".<sup>7</sup>

The Issues Paper comments that the review does not attempt to undertake "any fundamental philosophical restructuring of the sentencing system", saying this would probably prove to be a "futile task" and that, in any event, certain major principles relating to sentences of imprisonment are already set out in the *Sentencing Act 1989*, notably the concept of "truth-in-sentencing".<sup>8</sup> One disadvantage associated with legislative statements of sentencing principle noted in the report is their "tendency to shift the focus of debate in individual cases from the substance of a principle to the precise language in which it has been expressed in legislation".<sup>9</sup>

### 3. SENTENCE DISPARITY AND ITS IMPACT ON THE NSW DISTRICT CRIMINAL COURT

This NSW Bureau of Crime Statistics and Research report of 1994 arrives at a conclusion which bears directly on the subject of judicial discretion in sentencing. The report considers the magnitude of the sentence disparity problem in the NSW District Criminal Court and says by way of introduction that

Evidence is presented which suggests that there are marked differences between individual District Criminal Court judges in their readiness to imprison convicted offenders. These differences do not appear to be explicable in terms of variations in the profile of cases dealt with by each judge. At the extreme, these differences also appear to affect important aspects of criminal court administration, such as the willingness of defendants to proceed to trial and the rate at which they abscond on bail.<sup>10</sup>

Having noted the difficulties involved in quantifying the extent of sentence disparity, the report then explains its own research strategy. The study identified a number of judges who had each sentenced at least 100 offenders on a plea of guilty over the period 1988-1992 (inclusive). The percentage of persons imprisoned was then calculated for each judge and these results were then used to identify

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<sup>7</sup> Ibid, p 59.

<sup>8</sup> Ibid, p 3.

<sup>9</sup> Ibid, p 9.

<sup>10</sup> D Weatherburn, *Sentence Disparity and its Impact on the NSW District Criminal Court*, NSW Bureau of Crime Statistics and Research, 1994, p 4.

(a) five judges who appeared to sentence an unusually small percentage of offenders to prison

(b) five judges who appeared to sentence an unusually large percentage of offenders to prison.

The report explains that the sentencing practices of each judge in (a) and (b) were then compared for a variety of different offence types to see whether the disparity in the use of imprisonment between judges in the two groups held up within categories of offence.

On this basis, the study found that "there appears to be wide and continuous variation between judges within the District Criminal Court in their willingness to use the sanction of imprisonment" and, further, that these "substantial disparities" are not due to differences in the offences with which the two groups of judges deal.<sup>11</sup> Table 4, which is reproduced below, is said to show that in every category of offence, Judges L1 to L5 imprisoned a substantially smaller percentage of convicted offenders than Judges H1 to H5.

**Table 4: Percentage of convicted persons sentenced to prison by NSW district Criminal Court, by offence and judge group (Cases involving guilty pleas, 1988-1992)**

<i>Offence</i>	<b>L1-L5</b>		<b>H1-H5</b>	
	<i>%impr.</i>	<i>No. of cases</i>	<i>% impr.</i>	<i>No. of cases</i>
Assault	15.8	184	46.0	163
Break, enter and steal	41.2	160	78.3	194
Fraud/misappropriation	21.5	130	39.1	110
Child sexual assault	23.6	72	52.6	59
Robbery	54.2	118	77.2	136

The report also touches on the difficult issue of "judge-shopping", that is, where defendants seek adjournments, either to avoid coming before Judges H1 to H5 or to increase the likelihood of coming before Judges L1 to L5. However, the report offers no firm conclusion on this issue due to a lack of relevant data. The report does suggest that defendants whose cases were dealt with by more lenient judges were more likely to proceed to trial than those who faced the more severe judges; also noted is the greater tendency for the defendant to abscond or die when listed to appear before the harsher judges. The connection between these latter findings and the disparities in sentencing observed earlier in the report remain speculative, however. Doubt has been expressed about this aspect of the report to the effect that its findings do not support the suggestion of a direct causal link between disparities in sentencing, on one side, and the phenomenon

<sup>11</sup> Ibid, pp 7-10.



of "judge-shopping", on the other. Martin Sides, QC, Acting Senior Public Defender, said "This report has been used in the media to suggest that judge-shopping is still occurring, and this explains delays and the high percentage of cases not reached in the District Court...This is not the case: the reason for such a large number of cases not being reached is that the District Court overlists". He proceeded to present the 1994 (to June 17) figures for the Downing Centre District Court as an example and concludes, "The fact that these 171 trials did not proceed on the listed date had nothing to do with accused persons trying to avoid tough judges. To show how hard it is to get an adjournment, only\* 10 per cent - 40 trials - were adjourned in the same period upon application of either the Crown or the accused".<sup>12</sup>

That debate does not of itself disturb the report's central finding that NSW District Court judges differ markedly in their use of imprisonment as a sanction. The Attorney-General commented, "The report justifies community concern and debate about the lack of consistency in sentencing criminals".<sup>13</sup>

The report went on to discuss the establishment of the Judicial Commission of NSW in response to earlier concerns about sentence disparity in this State. The Commission was set up under the *Judicial Officers Act 1986*, section 8 (1) of which permits it, "for the purpose of assisting courts to achieve consistency in imposing sentences", to

- (a) monitor or assist in monitoring sentences imposed by courts; and
- (b) disseminate information and reports on sentences imposed by courts.

Section 8 (2) then adds the crucial qualification that, "Nothing in this section limits any discretion that a court has in determining a sentence".

Of the Commission's computerised sentencing information system the report noted that its penalty statistics and sentencing law components did not come "on-line" until 1990 and 1993 respectively. The report adds

It may be that the effect of the SIS in promoting greater sentencing consistency will improve over time. We cannot ignore the possibility, however, that the scope for reducing sentencing disparity through the SIS is limited; either because judges do not use it sufficiently or because the provision of detailed information on sentencing law and practice is insufficient by itself as a means of promoting reasonable uniformity in the use of imprisonment by NSW District Criminal Court judges.<sup>14</sup>

Having struck this note of scepticism, the report concludes with a brief overview of the various options for reducing sentencing disparity, commenting that they "vary according to the degree by which they seek to constrain the exercise of judicial discretion". The

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<sup>12</sup> *The Sydney Morning Herald*, 6 July 1994.

<sup>13</sup> NSW Attorney-General, Press Release, 14 June 1994.

<sup>14</sup> Weatherburn, *Sentence Disparity and its Impact on the NSW District Criminal Court*, p 16.

report states, "It would be premature to consider the merits of these alternatives from a NSW perspective until some further judgement is made about the extent to which the SIS influences judicial sentencing decisions".<sup>15</sup>

The Attorney-General said in his press release of 14 June 1994 that "In the future the NSW Judicial Commission will undertake a review of the use of the SIS by judicial officers and keep under review the effectiveness of the SIS". It was said that that review would be the "appropriate basis for determining whether further appropriate action needs to be taken to further encourage consistent sentencing". As noted earlier, on 24 June 1994 the Attorney-General said that legislation would be introduced into Parliament later this year "Empowering the Court of Criminal Appeal to establish more comprehensive guidelines to judges and magistrates to ensure greater consistency in sentencing".

#### 4. JUDICIAL DISCRETION IN SENTENCING

The concept of discretion is discussed at length in the 1988 report of the Victorian Sentencing Committee where it is said that in the modern context discretion involves a sphere of autonomy in making a judgment or arriving at a decision. Quoting from the work of DJ Galligan, the report then states that discretion characterises powers "delegated within a system of authority to an official or set of officials, where they have some significant scope for settling the reasons and standards according to which that power is to be exercised, and for applying them in the making of specific decisions".<sup>16</sup> Again following Galligan's lead the report notes that the exercise of discretion in the making of a decision generally involves three elements: a finding of facts; settling the standards to be applied to the facts; and applying the standards to the facts. Further, it is said that in the exercise of discretionary powers there is a tension between two competing forces, namely, the formulation of general rules, on one side, and ensuring that particular cases are dealt with on their merits, on the other. Galligan refers in this context to the "idea of an optimum balance" between settled standards and the particular case.<sup>17</sup>

The aims of guiding discretion are defined by the Committee in these terms

- To eliminate arbitrariness in the decision-making process;
- To promote fairness;
- To stabilise relations between the citizen and the state; and
- To enunciate policy where necessary.

These comments apply to the general concept of discretion as this operates in the context of modern administrative law. Their relevance to the exercise of judicial discretion in relation to sentencing is clear enough, though it may be worth pausing at this stage to note that judicial discretion has certain special features. In particular, the constitutional doctrine of the separation of powers would seem to prohibit the fettering of judicial

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<sup>15</sup> *ibid*, p 17.

<sup>16</sup> Report of the Victorian Sentencing Committee, *Sentencing*, Vol 1, April 1988, p 137.

<sup>17</sup> D Galligan, *Discretionary Powers*, Oxford U P, 1986, p 169.

discretion, notably where that discretion is exercised by a judicial officer in relation to what might be described as an inherently judicial function, thus invoking consideration of judicial independence. If sentencing is a function of this sort then a threshold argument could be made against interference by either the legislature or the executive in this area. However, neither constitutional theory nor practice would seem to support an argument of that kind.<sup>18</sup> According to Colin Munro, the classic texts on the separation of powers do not assign sentencing to the judicial branch and he comments that it is neither novel for the legislature to participate in the determination of sentences (by prescribing the sentence or its limits), nor for the executive to influence sentencing in practice. Sentencing, he argues, is not an inherently judicial function of a kind which must be performed by judges without interference, but involves an exercise of discretion of a different kind.<sup>19</sup> Following Ashworth, sentencing decisions are concerned with the degree of condemnation and with the form of the sentence, both matters of legitimate concern to the legislature and the executive. The broader point is that all the players in the constitutional division of powers have an interest in ensuring that sentencing (together with the general administration of the criminal law) conforms with the community's standards of what is fair and just. Thus, Martin Wasik and Ken Pease open their book on the subject of sentencing reform with the assertion, "Unfettered judicial discretion in sentencing exists nowhere in the modern world".<sup>20</sup> That assertion may be read alongside the following comment from Austin Lovegrove

In Australian jurisdictions the judicial sentencing discretion has been largely unfettered, in most cases confined only by broad statutory provisions, the most significant of which cover maximum penalties and avoidable dispositions. Within these wide boundaries the judiciary has enjoyed the freedom of formulating and administering sentencing policy.<sup>21</sup>

Underlying the debate about judicial discretion in this field is the basic aim of eliminating unjustified disparity in sentencing. Disparity in sentencing can be justified only if there are good grounds for differentiating between offences or offenders. According to the Law Reform Commission, consistency in sentencing simply means that the court should impose similar punishment for similar offences committed by offenders in similar

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<sup>18</sup> N Lacey, "Government as Manager, Citizen as Consumer: The Case of the Criminal Justice Act 1991" (July 1994) 57 *The Modern Law Review* 534-554. Lacey states that this debate is an important part of the recent discussion on sentencing, because it "engendered an awareness that the argument which the judiciary cast for maintaining its sentencing autonomy had doubtful constitutional credentials". Lacey comments in addition that the most influential modern jurisprudential theorists of adjudication exclude sentencing decisions from the ambit of their theories. She cites the works of Hart, Dworkin and Raz in this respect, saying they recognise, albeit in different ways, that sentencing decisions simply have not been constrained by legal standards in the way in which 'genuine' judicial decisions are.

<sup>19</sup> C Munro and M Wasik eds, *Sentencing, Judicial Discretion and Training*, Sweet & Maxwell 1992, p 5.

<sup>20</sup> K Pease and M Wasik, *Sentencing Reform: Guidance or Guidelines?*, p 1.

<sup>21</sup> A Lovegrove, "Sentencing Guidance and Judicial Training in Australia", in *Sentencing, Judicial Discretion and Training*, op cit, p 207.

circumstances.<sup>22</sup> In this regard the Victorian Sentencing Committee report cited the observation of Lord Lane, in *R v Bibi*, where he said: "We are not aiming at uniformity of sentencing, that would be impossible, we are aiming at uniformity of approach".<sup>23</sup>

The difficulty is that discretion leaves decision-making open to irrelevant influences. For example, Hood's 1992 study from the United Kingdom showed that at some courts black offenders are significantly more likely to receive custody than similarly situated white offenders.<sup>24</sup> The Victorian Sentencing Committee accepted the widely held view that unjustified disparity in sentencing existed in Victoria.<sup>25</sup> The Law Reform Commission adopted the view that, whatever the position in fact in relation to unjustified disparity in sentencing, the process by which sentences were determined did not promote consistency "in any systematic way". Reference was made to legislation only specifying the maximum period of imprisonment for an offence, or the maximum fine, with the Law Reform Commission commenting that the selection of a level of sentence within the maximum "requires an exercise of discretion by the court which is largely unregulated and which permits very extensive freedom to choose the type and quantum of punishment in individual cases".<sup>26</sup> Commenting on that process, Adam and Crockett JJ in *R v Williscroft* [1975] VR 292, said

...ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive's case (at 300).

Within that traditional framework, the most important constraint on the exercise of judicial discretion is appellate review. However, the point is made that criminal appeal courts in Australia are reluctant to interfere with sentences and the principles expounded by those courts have tended to maintain a wide measure of individual judicial discretion. There is, in addition, a tendency to restrict consideration to the details of a particular case. Adam and Crockett JJ in *R v Williscroft* referred in this context to the decision of the appeal court resting "upon what is essentially a subjective judgment largely intuitively reached by an appellate judge as to what punishment is appropriate" (at 300).

Neither the Law Reform Commission nor the Victorian Sentencing Committee were opposed in any fundamental sense to the exercise of judicial discretion which was seen to be necessary for a system of individualised justice. Indeed, both in their way favoured the retention of the flexibility inherent in a relatively wide formulation of that discretion. The point is to find the right balance of guidance and flexibility in sentencing.

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<sup>22</sup> Law Reform Commission, Report No 44, *Sentencing*, 1988, p 80.

<sup>23</sup> (1980) 71 Cr App R 360.

<sup>24</sup> R Hood, *Race and Sentencing*, Oxford University Press 1992.

<sup>25</sup> That conclusion was based on a combination of local research undertaken by Austin Lovegrove, the personal experience of Committee members and overseas reports.

<sup>26</sup> Law Reform Commission, *Sentencing*, p 81.

## 5. AN OVERVIEW OF THE AVAILABLE OPTIONS

The methods by which judicial discretion is fettered vary widely across jurisdictions. Some methods are obviously more intrusive than others, reflecting different legal practices, structures and traditions. There follows a brief checklist of some of these

- *Guideline judgments*: These have been adopted in the United Kingdom and involve appeal courts choosing appropriate cases for setting out general principles of sentencing and the range of penalties which may be applied to a given offence. The comment is made that the Court of Appeal's guideline judgments are not binding and in strict terms that is true, since what is said with reference to sentencing guidelines in these cases is not essential to the decision in the particular case.<sup>27</sup> But, as Andrew Ashworth points out, "It is unlikely that such a technical argument would impress. The key is that they are intended and accepted as binding, in a way that ordinary Court of Appeal judgments on sentence are not".<sup>28</sup> One criticism of such guideline judgments as these have operated in England and Wales is that the decisions of the Court of Appeal "are clustered around the top of the 'tariff', with diminishing coverage as one moves down to less serious offences and non-custodial measures".<sup>29</sup> The point is significant when one remembers that in England and Wales, as in Australia, the overwhelming volume of criminal work is dealt with in Magistrates' Courts. Wasik and Turner comment, "magistrates' courts do the bulk of sentencing in England and Wales with little help or direction from the superior courts or any other source".<sup>30</sup>

Under the direction of the then Lord Chief Justice, Lord Lane, the Court of Appeal sought to increase the scope of its guideline judgments, going beyond the particular facts in issue in order to set out broader principles of sentencing as in: *Aramah* (1982) 4 Cr App R (S) 407 (serious drug offences); *Roberts* (1982) 2 Cr App R (S) 8 and *Billam* (1986) 1 WLR 349 (rape); *George* (1984) 6 Cr App R (S) 211 (deferment of sentence). Still the comment is made by Ashworth, "The guideline judgments had been much trumpeted in the areas to which they applied - drug trafficking, rape, incest and so forth. But if one starts by asking for what crimes the courts most frequently pass sentence, and one then enquires what guidance exists there, the picture is much less impressive".<sup>31</sup>

- *Voluntary sentencing guidelines*: As the title suggests there is no statutory power or mechanism to enforce such guidelines. They were introduced in a number of USA jurisdictions, for example, Maryland and Florida but, in the words of the

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<sup>27</sup> Weatherburn, *Sentence Disparity and its Impact on the NSW District Criminal Court*, p 16.

<sup>28</sup> A Ashworth, *Sentencing and Criminal Justice*, Weidenfeld and Nicolson 1992, p 27.

<sup>29</sup> *Ibid*, p 317.

<sup>30</sup> M Wasik and A Turner, "Sentencing Guidelines for the Magistrates' Courts", [1993] *Crim LR*, pp 345-356.

<sup>31</sup> A Ashworth, "The Criminal Justice Act 1991", in *Sentencing, Judicial Discretion and Training*, *op cit*, p 82.

Victorian Sentencing Committee, "without much success". The comment is made that they failed "purely and simply because compliance with them was voluntary".<sup>32</sup>

In England and Wales the Magistrates' Association has taken the initiative in producing its own Sentencing Guidelines in June 1992. The Sentencing Guidelines introduced by the Magistrates' Association of England and Wales are voluntary in nature. Caution is needed in gauging the extent and nature of their application at this stage. Writing in 1992, AJ Turner observed, "it would seem guidelines are widely used, though how they are applied in practice is another subject requiring investigation".<sup>33</sup> The 1992 Guidelines reflect an integration of suggested penalties for road traffic offences, first circulated by the Association in 1966, and its 1989 sentencing guide for criminal offences. That integration was undertaken in the light of the *Criminal Justice Act 1991 (UK)*. Ashworth's comment remains valid: "Yet, important as these developments may be in a practical sense, they have no authority whatsoever".<sup>34</sup> These guidelines have no legal force therefore and the further comment is made that no research has been carried out into their effectiveness.<sup>35</sup>

- **Presumptive sentencing guidelines:** In contrast to voluntary sentencing guidelines these have a legislative mandate and are attached to a system of appellate review. They may be part of a statute or formulated by such a body as a sentencing commission, as in the case of Minnesota, Pennsylvania and Washington. The example of Minnesota is discussed in the report of the Victorian Sentencing Committee. It is said that Minnesota's presumptive guidelines operate "on the basis of a grid built around a just deserts system. The grid has two axes, one of which looks at offence seriousness, and the other which looks at the prior convictions of the offender".<sup>36</sup> Under such schemes a range of acceptable sentencing variation for different classes of case are set out, with the choice of sentence within the range then being determined by the unique features of the particular case. In Minnesota a court is at liberty to depart from the prescribed sentence range for the case but only on giving reasons, which are then subject to appellate review.<sup>37</sup>

Alternatively, the US Sentencing Commission has provided 'base sentences' for

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<sup>32</sup> Victorian Sentencing Committee Report, pp 173-4.

<sup>33</sup> AJ Turner, "Sentencing in the Magistrates' Courts", in *Sentencing, Judicial Discretion and Training*, op cit, p 205.

<sup>34</sup> A Ashworth, *Sentencing and Criminal Justice*, op cit, p 51.

<sup>35</sup> A Ashworth, "Sentencing", in *The Oxford Handbook of Criminology* edited by M Maguire, R Morgan and R Reiner, Clarendon Press 1994, p 836.

<sup>36</sup> Ibid, p175.

<sup>37</sup> For a detailed discussion of Minnesota's sentencing guidelines see - D G Parent ed, *Structuring Criminal Sentences*, Butterworths 1988.

different offences, leaving it then to the courts to make variations on those base sentences in order to reflect a range of aggravating and mitigating factors. Andrew Ashworth comments, "This may appear to be no more than an attempt to formalise certain familiar judicial patterns of reasoning, but in practice the approach has been found to be complex to operate, a feature emphasised by a lack of an overall scheme for the guidelines, and by the intrusion of certain mandatory minimum sentences created by Congress".<sup>38</sup> Of the US federal sentencing guidelines, the NSW Attorney-General Department's paper on sentencing reform states

...the grid is strictly two dimensional, with seriousness of offence being the vertical axis, and the offender's prior criminal conviction history being the horizontal axis. At the intersection of these two axes the sentencer finds a sentencing range in months. That range is presumptive only, so that the sentencer can depart from the range, but reasons must be given for such departure. These guidelines have been the subject of swingeing criticism and it seems that they have not been noticeably successful in reducing unwarranted sentence disparity.<sup>39</sup>

- **Mandatory sentencing laws:** These represent the greatest attempt on the part of the legislature to exercise sentencing authority. It is explained that mandatory sentencing schemes usually take the form of the legislature prescribing both the disposition, usually imprisonment, and a minimum term for that disposition. The Victorian Sentencing Committee noted the escalation of mandatory penalties in that State, notably in respect to penalties for driving offences. The Committee recommended the abolition of these mandatory penalties, stating, among other things, that they do not work and that they presuppose either that Parliament believes the courts cannot be trusted to apply sentencing policy or that Parliament believes that general mitigating factors ought to be ignored in the consideration of the culpability of offenders who commit the targeted offence.<sup>40</sup>

A less rigid variation on this theme is the "fixed-point" system of sentencing adopted in California under the *Determinate Sentencing Act* of 1976. The legislation provides a choice of three sentences for each grade of crime, namely, a

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<sup>38</sup> A Ashworth, *Sentencing and Criminal Justice*, op cit, p 316.

<sup>39</sup> Sentencing Review 1994, p 46. For further discussion of the US federal guidelines see - DJ Freed, "Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers" (1992) 101 *Yale Law Journal* 1681-1754. Freed comments that more and more sentencers are consciously avoiding the perceived injustice of the guidelines through informal noncompliance.

Other sources include: Judge Breyer, "The Key Compromises of the Federal Sentencing Guidelines" and M Tonry, "Judges and Sentencing Policy - The American Experience" in *Sentencing, Judicial Discretion and Training*, op cit; DJ Sears, "Sentencing Guidelines - Shifting Discretion from the judge to the prosecutor?" (1988) 17 *The Colorado Lawyer* 1; CJ Ogletree Jr, "The death of discretion? Reflections on the Federal Sentencing Guidelines" (1988) 101 *Harvard Law Review* 1938-60; SG Breyer, "The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest" (1988) 17 *Hofstra Law Review* 1-50; RJ Henham, "Evaluating the United States Federal Sentencing Guidelines", (1992) 21 *Anglo-American Law Review* 4, 399-414.

<sup>40</sup> Victorian Sentencing Committee Report, pp 168-171.

standard, aggravated or mitigated sentence. The Californian model is discussed by the Victorian Sentencing Committee as a form of "statutory determinate sentencing" in which there is no parole component as previously practiced. The effect of this aspect of the legislation is that the actual term served by the offender is set by the courts. The Victorian Sentencing Committee noted a resulting "dramatic increase in prison populations".<sup>41</sup>

Altering the focus of analysis a little, Andrew Ashworth poses the question, "Through which authoritative medium should sentencing guidance be promulgated?". This leads towards a slightly different perspective on the balance of statutory as against non-statutory methods used to guide judicial discretion. Ashworth offers the following alternatives by way of example

- *Primary legislation:* California is an example of where sentencing guidance has been set out in detailed primary legislation. Ashworth comments, "This approach is as democratic as the political system itself, but it opens the way to a multitude of individual amendments which may impair the overall scheme". A further comment is that the system may prove unduly vulnerable to "moral panics".
- *Primary and delegated legislation:* The main principles of sentencing may be set out in primary legislation which would delegate to some other body the task of formulating detailed guidance. Those guidelines would then become law with the agreement of the legislature. Ashworth offers the example of the US federal system "where the Sentencing Commission drew up the guidelines which, after being laid before Congress for six months, took effect".
- *Primary legislation and the judiciary:* The approach adopted recently in England and Wales and in Sweden is for the legislature to set out the main principles of sentencing in primary legislation whilst leaving it to the judiciary to develop detailed guidelines.<sup>42</sup> The advantage, Ashworth says, is that guidance developed *by judges for judges* is probably much more likely to be followed faithfully by the judiciary".<sup>43</sup>

Several of these points are elaborated on in the next section. Here it is enough to note that judicial discretion can be guided and/or fettered by a combination of methods. Not to be neglected in this context are those voluntary means of facilitating consistency in sentencing based on the provision of information and training for the judiciary. The NSW Judicial Commission's Sentencing Information System is a notable example of the provision of information in relation to sentencing practices. In England and Wales judicial training has been undertaken by the Judicial Studies Board which was established in 1979. The present Board was created in 1985 when its responsibilities were extended to the provision of training for judges in criminal, family and civil matters and training for magistrates. The establishment of a Judicial Studies Board was one of the

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<sup>41</sup> Ibid, p 164.

<sup>42</sup> A von Hirsch and N Jareborg, "Sweden's Sentencing Statute Enacted", [1989] *Crim LR* 275.

<sup>43</sup> A Ashworth, *Sentencing and Criminal Justice*, op cit, p 315.



recommendations of the Victorian Sentencing Committee. This was followed by the *Judicial Studies Board Act 1990*, section 5 of which sets out the functions of the Board to include the provision of seminars for judges and magistrates on sentencing matters. The Act was proclaimed in 1992 and is discussed in more detail in the next section of the paper.

## 6. SENTENCING GUIDANCE IN SELECTED JURISDICTIONS

### (i) *Victoria*

Austin Lovegrove, in his review of the Victorian Sentencing Committee's report, comments that "disparity in sentencing has been an inevitable result of three obvious characteristics of the sentencing system". The first is that sentencing policy - the principles governing the exercise of the sentencing discretion - is neither set out comprehensively nor articulated clearly. Lovegrove says the solution to the problem is of course a more detailed statement of sentencing policy. The second characteristic identified by Lovegrove is that the judges do not have a structure or framework for their decisions: "no method or approach has been set out for them to follow when deciding the appropriate goal or mix of penal goals in view of the case facts and how to give effect to these goals in the circumstances of the particular case". Obviously enough the solution is found in the creation of a decision framework. The third characteristic concerns the complexity of the sentencing decision, the solution to which lies in a "device of some sort, perhaps an information system, designed to assist the judge to classify, weigh and aggregate case information".<sup>44</sup>

Following Lovegrove again, the recommendations of the Victorian Sentencing Committee reflected these various concerns. It proposed that three bodies have a role to play in the provision of guidance in sentencing: the Parliament by way of legislation; the courts through guideline judgments of the Full Court (Court of Criminal Appeal); and a Judicial Studies Board for information, education and additional guidelines. The Committee saw the function of Parliament in the sentencing process as:

- The articulation of policies to govern the sentencing process;
- The delegation of power to give effect to such policies, and the allocation of resources to ensure that they are carried out; and
- The general overseeing of the exercise of the powers delegated, and the use of resources through the usual democratic processes.<sup>45</sup>

The articulation of policy in primary legislation should include aggravating and mitigating factors, a hierarchy of sanctions, the circumstances in which the various sentencing options are to be used, plus the statement of general policy considerations. The legislation should further provide for guideline judgments by the Court of Criminal Appeal which should be binding on sentencing judges and magistrates unless, that is, the particulars of the case are so materially different as to require departure from them. The functions of

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<sup>44</sup> A Lovegrove, "Sentencing Guidance and Judicial Training in Australia", *op cit*, pp 208-9.

<sup>45</sup> Victorian Sentencing Committee Report, Volume 1, p 213.

the proposed Judicial Studies Board have been noted. The Committee considered it necessary for the proposed Board to establish a system of numerical guidelines, in part on the grounds that guideline judgments cannot provide detailed guidance on the weighting of aggravating or mitigating factors.

The legislature's response to the Committee's report is found in the *Judicial Studies Board Act 1990* and the *Sentencing Act 1991* (both were proclaimed to commence in 1992). Lovegrove comments, "The provisions of the Sentencing Act regarding guidance are in general less detailed, less prescriptive and less comprehensive than the form of guidance envisaged by the Sentencing Committee".<sup>46</sup> Notably, the *Sentencing Act* does not provide for guideline judgments, nor is any reference made of the Committee's aggravating and mitigating factors beyond a bare mention of them as factors to be taken into account by the court in sentencing an offender (section 5 (2) (g)). According to RG Fox, the Act will produce improvements in three main areas. First, by providing more detailed statutory guidance on the hierarchy of sanctions and the sentencing principles to be applied by courts. Secondly, by creating new sentencing options, such as the intensive corrective order, and by rationalising older ones. Thirdly, by providing a new scale of maximum penalties.<sup>47</sup> Elaborating on the first of these, the Act sets out the purposes of sentencing, as recommended by the Committee, with sections 5 (1) and (2) providing

- (1) the only purposes for which sentences may be imposed are -
  - (a) to punish the offender to an extent and in a manner which is just in all of the circumstances; or
  - (b) to deter the offender or other persons from committing offences of the same or of a similar character; or
  - (c) to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated; or
  - (d) to manifest the denunciation by the court of the type of conduct in which the offender engaged; or
  - (e) to protect the community from the offender; or
  - (f) a combination of two or more of those purposes.
  
- (2) In sentencing an offender a court must have regard to -
  - (a) the maximum penalty prescribed for the offence; and
  - (b) current sentencing practices; and
  - (c) the nature and gravity of the offence; and
  - (d) the offender's culpability and degree of responsibility for the offence; and
  - (e) whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so; and
  - (f) the offender's previous character; and
  - (g) the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances.

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<sup>46</sup> A Lovegrove, "Sentencing Guidelines and Judicial training in Australia", op cit, p 225.

<sup>47</sup> RG Fox, "Order Out of Chaos: Victoria's New Maximum Penalty Structure", (1991) 17 *Monash University Law Review* 106.

In 1993 the *Sentencing Act* was amended as part of what Fox describes as "the Victorian Government's law and order agenda". The *Sentencing (Amendment) Act 1993* allowed for extended custodial sentences for "serious sexual offenders" and "serious violent offenders" and introduced the indefinite prison sentence for "serious offenders".<sup>48</sup> This legislation will be discussed in more detail in a forthcoming Briefing Note on the subject of habitual criminals.

Section 5 of the *Judicial Studies Board Act 1990* provides

The Board has the following functions:

- (a) To conduct seminars for judges and magistrates on sentencing matters;
- (b) To conduct research into sentencing matters;
- (c) To prepare sentencing guidelines and circulate them among judges and others;
- (d) To develop and maintain a computerised statistical sentencing database for use by the courts;
- (e) To provide sentencing statistics to judges, magistrates and lawyers;
- (f) To monitor present trends, and initiate future developments, in sentencing;
- (g) To assist the courts to give effect to the principles contained in the *Penalties and Sentences Act 1985*;
- (h) To consult with the public, government departments and other interested people, bodies or associations on sentencing matters;
- (i) To advise the Attorney-General on sentencing matters.

It seems that the work of the Judicial Studies Board remains at a formative stage. The Board has not prepared any sentencing guidelines to date.

## (ii) *The Commonwealth*

The Law Reform Commission's report on Sentencing was released in 1988. It recommended that a non-exhaustive list of 24 factors relevant to sentencing should be incorporated in legislation. These included the level of participation in the offence, the offender's cultural background, the extent and nature of harm to victims and whether a weapon was used. It further recommended that there be a list of 12 factors to which a court may not have regard, including the defendant's choice to plead not guilty and the prevalence of the offence.

The *Crimes Legislation Amendment Act (No 2)* of 1989 reflected these recommendations in part. Division 2 sets out General Sentencing Principles, starting in section 16A (1) with the provision that a court is to impose a sentence "that is of a severity appropriate in all the circumstances of the offence". A list of 14 relevant factors in sentencing is then provided, not all of which were recommended by the Commission. For example, the likely deterrent effect of a sentence on the offender is included.

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<sup>48</sup> RG Fox, "Legislation Comment: Victoria Turns to the Right in Sentencing Reform: The Sentencing (Amendment) Act 1993 (Vic)" (1993) 17 *Crim LJ* 394.

The Law Reform Commission also recommended that more extensive requirements for the giving and recording of reasons for sentencing be introduced. As noted, that proposal finds support in the NSW Attorney-General's Department *Sentencing Review 1994*.

**(iii) Queensland**

In Queensland the *Penalties and Sentences Act 1992* consolidated and amended the law relating to sentencing. Included in the preamble is the statement that "Society may limit the liberty of members of society only to prevent harm to itself or other members of society". The Governing Principles of sentencing are set out in Part-2 of the Act, including in section 9 a list of sentencing guidelines. The purposes for which sentences may be imposed are similar to those in the Victorian legislation. The factors which a court must have regard to include the principles that a sentence of imprisonment should only be imposed as a last resort and that a sentence that allows the offender to stay in the community is preferable ( sections 9 (2) (a) (i) and (ii) respectively).

**(iv) England and Wales**

The starting point now for any discussion of sentencing practice in England and Wales is the *Criminal Justice Act 1991*. That Act followed on from the 1990 White Paper, *Crime Justice and Protecting the Public: Proposals for Legislation*. The point was made in the White Paper that "So far, Parliament has given little guidance to the courts on sentencing, beyond setting the maximum penalties for offences". Reference was made to the guideline judgments of the Court of Appeal, in particular such recent judgments as those on rape, incest and drug trafficking which, it was said, had provided much clearer guidance on how sentencing decisions should be reached, as well as advice on the sentences suitable for the varying degrees of seriousness of an offence". However, the need for coherence and comprehensive consistency of approach in sentencing remained,<sup>49</sup> as did the fact that the system of appellate guidance covered only a small part of the area of judicial discretion.

The key limitations of the appellate system of issuing guideline judgments, as this operates in England and Wales, were discussed earlier in this Briefing Note. Noted, too, was the role of the Judicial Studies Board in this jurisdiction, plus the voluntary guidelines formulated by the Magistrates' Association. Essentially, the *Criminal Justice Act 1991* is grafted onto this existing system of guidance and guideline judgments. The new regime has been described as a partnership between Parliament and the judiciary, with the Act basically setting out the principles and structure underlying sentencing, but leaving it still to the courts to work out the details of their application. The White Paper stated

The legislation will be in general terms... The courts will properly continue to have the wide discretion they need if they are to deal justly with the great variety of crimes which come before them. The Government rejects a rigid statutory framework, on the lines of those introduced in the United

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<sup>49</sup> White Paper, *Crime, Justice and Protecting the Public*, Cm 965 (1990), para 2.3.

States, or a system of minimum or mandatory sentences for certain offences. This would make it more difficult to sentence justly in exceptional cases.<sup>50</sup>

Also rejected in the White Paper was the idea of a sentencing council to develop sentencing policies or guidance. Instead, the work of training sentencers and of developing more detailed interpretation of the Act's sentencing policies was to be left to the Judicial Studies Board. As to the development of coherent sentencing practice, the White Paper looked to: maximum penalties for each offence; the guidance from the Court of Appeal; and the Attorney-General's new power (since 1989) to refer over-lenient sentences for very serious offenders to the Court of Appeal.<sup>51</sup>

A central feature of the *Criminal Justice Act 1991* is the principle that sentences should be kept in proportion to the seriousness of the offence. The Act states at several points that "the seriousness of the offence" should determine what type of sentence is justifiable, and how long or restrictive that sentence should be. As in the Swedish model, therefore, the Act sets out the primary factors or principles to be considered in deciding the sentence, as against the actual sentencing outcomes, with the main emphasis placed on the seriousness of the crime. For example, section 2 (2) (a) provides that a custodial sentence shall be "commensurate with the seriousness of the offence, or the combination of the offence and other offences associated with it". The one exception to this is that of violent or sexual offences where, as in section 2 (2) (b), a longer sentence might be given if it is judged to be necessary for public protection from serious harm. The White Paper referred to a legislative framework for sentencing in which the severity of the punishment matches the seriousness of the crime together with the need for a sharper distinction in the way the courts deal with violent and non-violent crimes.<sup>52</sup> It is generally agreed that "offence seriousness" has two elements: (i) the degree of harm caused (or risked) by the offender; and (ii) the extent of the offender's culpability.<sup>53</sup> Presented in the Act is a pyramidal sentencing structure, with custody at the top, then community orders, then fines and with discharges at its base.

Underlying this approach, though not mentioned in the Act itself, is the concept of proportionality and the "just deserts" theory of sentencing (as against rehabilitation and deterrence).<sup>54</sup> The White Paper asserted

If the punishment is just, and in proportion to the seriousness of the offence, then the victim, the victim's family and friends, and the public will be satisfied that the law has been upheld and there will be no desire

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<sup>50</sup> Ibid, para 2.16.

<sup>51</sup> Ibid, para 2.20.

<sup>52</sup> See for example section 2 (2) (b).

<sup>53</sup> A von Hirsch, *Past or Future Crimes*, Manchester University Press, 1986, p 64.

<sup>54</sup> White Paper, *Crime, Justice and Protecting the Public*, para 2.9.

for further retaliation or private revenge.<sup>55</sup>

For the present, analysis of the *Criminal Justice Act 1991* and the system of sentencing operating in England and Wales is limited to the following comments

- The aim of the legislation to encourage consistency in sentencing practice, at least in Lord Lane's sense of uniformity of approach. This was to be achieved by adherence to the principle that sentences should be kept in proportion to the seriousness of the offence. This was to be the primary rationale behind sentencing practice. The difficulty lies of course in the interpretation of that principle. Thus, Ashworth and others have considered at length the problems involved in determining proportionality between offences (this refers to "ordinal" proportionality as against "cardinal" proportionality).<sup>56</sup> Ashworth has written of the need for a theoretical framework with which to gauge the seriousness of different offences.<sup>57</sup> Wasik and Turner have commented in a similar vein on the guidelines for magistrates formulated in response to the 1991 Act. Their concern is not so much with determining a comparative proportionality between offences as with assessing the relative seriousness of each case and arriving at a commensurate penalty. They cite the "Obtaining by Deception" guideline which provides:

If too serious for fining, consider a community sentence. If offence is serious enough to warrant a community sentence, consider what restrictions are appropriate. If too serious for a community sentence, consider custody. If offence is so serious that only custody can be justified, decide the length of the sentence. If so serious that more than six months custody would be commensurate, commit for sentence.

The point is made that, whilst this is an accurate statement of the position under the 1991 Act, it does not take the sentencer very far. Wasik and Turner ask, "When is this offence too serious for a fine? When is it too serious for community service? What makes it so?"<sup>58</sup>

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<sup>55</sup> Ibid, para 3.2.

<sup>56</sup> The distinction is discussed in A Ashworth, "Criminal Justice and Deserved Sentences", [1989] *Crim LR* 340. Ordinal proportionality concerns how a crime should be punished compared to similar criminal acts and compared to other crimes of a more or less serious nature; cardinal proportionality, on the other hand, requires that the absolute level of the penalty scale, both maximum penalties and actual sentence ranges, be not disproportionate to the magnitude of the offending behaviour. Ashworth explains that the latter is a much looser notion of proportionality, often linked to what is current in the thought-patterns of a particular country at a particular phase in its history.

<sup>57</sup> A Ashworth, *Sentencing and Criminal Justice*, op cit, p 118.

<sup>58</sup> M Wasik and A Turner, "Sentencing Guidelines for the Magistrates' Courts", [1993] *Crim LR* 345.

- The White Paper contemplated a more interventionist role for the Court of Appeal in the new scheme; the Court would "give further guidance, building on the legislative framework".<sup>59</sup> This, it has been said, calls for a new approach by the higher judiciary which traditionally has given little guidance relevant to non-custodial sentencing and magistrates' sentencing. Ashworth doubts whether these gaps will be filled by the Court of Appeal in the future. In support of that view he cites *Mussell* (1990) 12 Cr App R (S) 607, a case involving the offence of burglary in a dwelling, where Lord Lane CJ apparently regarded the task of deriving guidance from the mass of conflicting precedents as impossible, declaring "Each case has to be judged individually. We respectfully doubt the value of reported decisions in the area or attempts to distinguish between different decided cases...., not least because the judgments contain no more than a summary of the relevant facts" ( at 612). Ashworth's point is that there is a particular need for guidance in offences of this sort which arise most frequently on the custody borderline (crimes such as theft, deception, burglary and handling stolen goods).<sup>60</sup> He queries whether a court composed of a few senior judges is the most suitable body for the task of offering detailed guidance to the lower courts and wonders, among other things, whether these judges know enough about the 'ordinary' crimes which constitute the bulk of Crown Court and magistrates' court sentencing. The question of the need for a sentencing council is raised again in this context.<sup>61</sup> As things stand, the key concept of seriousness will remain open to diverse interpretations.
- In the 1991 Act desert or "just deserts" is given precedence over deterrent and rehabilitative sentencing objectives. One corollary is that in the sentencing decision, less weight than before is to be accorded to the defendant's previous convictions. In other words the basic principle of the Act is that sentences should be kept in proportion to the seriousness of the *current* offence. That principle seems to have been eroded by the *Criminal Justice Act 1993* which, among other things, provides that "in considering the seriousness of an offence the court may take into account....any failure of [the offender] to respond to previous sentences".<sup>62</sup>
- Nicola Lacey comments that the subsequent amendments to the Act were largely the result of a failure to enunciate clearly the central rationale or goals underlying the statutory scheme, combined with the poor drafting of some of the Act's central provisions. These and other difficulties were reflected in early judicial decisions implementing the Act and, according to Lacey, in public reaction to it. By way of example, she states that the lack of clarity with which the central rationale was

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<sup>59</sup> White Paper, *Crime, Justice and Protecting the Public*, para 2.17.

<sup>60</sup> A Ashworth, "The Criminal Justice Act 1991", in *Sentencing, Judicial Discretion and Training*, op cit, pp 92-3.

<sup>61</sup> A Ashworth, "Sentencing" in *The Oxford Handbook of Criminology*, op cit, p 853.

<sup>62</sup> The new Act is discussed in A Ashworth, "Altering the sentencing Framework", [1994] *Crim LR* 101. As noted, issues relating to habitual offenders will be discussed in more detail in a forthcoming Briefing Note.

articulated and the lack of mandatoriness with which it was enforced enabled the Court of Appeal to subvert, in *Cunningham* [1993] 2 All ER 15, the principle of desert by introducing the idea of deterrence as a factor.<sup>63</sup>

## 7. COMMENT

The foregoing discussion indicates the complexities involved in sentencing and suggests very strongly that, whilst it is an area generating intense public concern and sometimes the call for decisive Government intervention, the problems it raises are not conducive to definitive solutions. In NSW, as elsewhere, the perceived difficulties have been tackled by a combination of strategies. Unique to this State is the Judicial Commission's computerised sentencing information system which has the potential to place sentencing on a sound empirical footing. In addition, certain major principles associated with the concept of "truth-in-sentencing" are embodied in the *Sentencing Act 1989*. However, that Act is not without its critics. Also, as the recent report of the NSW Bureau of Crime Statistics and Research shows, the issue of sentence disparity remains as contentious as ever.

As noted a comprehensive review of sentencing policy is now underway. One proposal in this respect is that the Court of Criminal Appeal should be empowered to establish more comprehensive guidelines to judges and magistrates to ensure greater consistency in sentencing. Alternative approaches to sentencing guidelines have been discussed in this Briefing Note together with aspects of the experience in England and Wales with the kind of guideline judgments apparently proposed for NSW. The implication of recent developments in England and Wales is that the system of guideline judgments has its own limitations which require careful scrutiny. The more general point to emerge from this Briefing Note is that all the approaches discussed here have their own advantages and disadvantages.

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<sup>63</sup> N Lacey, "Government as Manager, Citizen as Consumer", op cit, p 546.



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