







# SeNt eNCING GUIDeLINEs AND pARoLe RefoRm

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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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# Sentencing Guidelines and Parole Reform

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11 August 2006

*The Hon Mark Burton*  
minister Responsible for the Law Commission  
parliament Buildings  
WeLLINGt oN

Dear minister

I am pleased to present to you Law Commission Report 94, *Sentencing Guidelines and Parole Reform*, which we submit under section 16 of the Law Commission Act 1985.

Yours sincerely

A handwritten signature in cursive script, appearing to read "Geoffrey Palmer", with a horizontal line underneath.

*Sir Geoffrey Palmer*  
president

## FOREWORD

The reference for this report came about in an unusual manner. In December 2005, the Law Commission was discussing potential projects with the Department of prime minister and Cabinet. We suggested that reforms were needed to the sentencing and parole systems in New Zealand. As a result, the government in February 2006 gave the Commission the terms of reference set out in this report.

It was necessary because of other work going on within the government that the project be undertaken relatively quickly. A consultation draft was prepared and discussed with many interested parties concerned with the criminal justice system.

In particular there was extensive consultation with members of the judiciary. This was not designed to secure their support for the recommendations, but rather to ensure that the recommendations were informed by the insights that judges derive from sentencing. These consultations turned out to be extraordinarily valuable. As a result, the consultation proposals were altered significantly.

Many busy people co-operated with the Commission at relatively short notice for which we are very grateful. In particular, many members of the judiciary, too numerous to mention, went beyond the call of duty in assisting us.

The president of the Commission was in the United Kingdom in March and was able to have discussions with the former and present Chairs of the Sentencing Guidelines Council for England and Wales, the Rt Hon Lord Woolf and the Rt Hon Lord Phillips, as well as members of the secretariat and members of the Sentencing Advisory Panel. Discussions were also held with the Home Office. The Deputy president also met with the Chair and staff of the Sentencing Advisory Council in Victoria. The Commission is grateful for the invaluable advice and assistance it received from all these quarters.

The Commission's recommendations in this report make important changes to the structure of both sentencing and parole in the New Zealand criminal justice system. These proposals need to be fully understood by the public whose views are an important ingredient in the system itself. We put these proposals forward in the strong belief that they will improve the administration of justice in New Zealand. They will make punishment fairer and more consistent. They will make both sentencing and parole more transparent and easier for the public to understand.

In making our recommendations, we have been conscious that the independence of the judiciary is an essential bulwark of a democratic society. It is a constitutional principle of the first importance. It is because of our belief in this principle that we make our recommendations. Too often the judges become the meat in the sentencing sandwich. If the sentence is perceived to be too lenient they are blamed. If it is perceived to be too harsh they are also blamed. In this way, judges are unfairly brought into public controversy. Our recommended system will allow them some measure of protection from such controversy, and thus enhance public confidence in their office. At the same time, it will place the judiciary in a better position to exercise their vital judicial functions independently. Our proposals represent a partnership between three branches of our government – the judiciary, whose independence must be fully protected, parliament, who must have the final say, and the executive, which must manage the prison system.

The Commissioners responsible for the reference were Dr Warren Young and Sir Geoffrey Palmer. The researchers and writers were Claire Browning and Susan Hall.



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TERMS OF  
REFERENCE

the Law Commission has been asked to consider:

- the advantages of providing greater guidance to judges on the exercise of their sentencing discretion, and appropriate mechanisms for achieving this (including whether New Zealand would benefit from the establishment of a body such as the UK Sentencing Guidelines Council);
- the extent to which such guidance can serve as an instrument to enable prison master issues to be managed more effectively; and
- whether the parole eligibility component of prison sentences requires adjustment to ensure a closer relationship between the nominal sentence imposed and the actual time served.

# Executive summary

## BACKGROUND

1. In February 2006, the Law Commission was asked to consider whether improvements could be made to the existing sentencing and parole structures.
2. more specifically, we were asked to consider whether New Zealand should establish a Sentencing Council to give greater guidance to sentencing judges, and whether there should be changes to parole to ensure a closer relationship between the sentence imposed in court and the time that a prisoner actually serves.
3. our recommendations are twofold: the establishment of a Sentencing Council in New Zealand, to draft sentencing guidelines; and the reform of parole, so that at least two-thirds of a determinate sentence is served.

## THE NATURE OF THE PROBLEM

4. In our view, one of the core problems with New Zealand's current sentencing and parole arrangements is their highly discretionary nature.
5. the Sentencing Act 2002 codified sentencing purposes and principles; listed aggravating and mitigating factors; required judges to impose the maximum sentence or something close to it in the worst cases; provided for 17-year minimum terms for aggravated murder; and established a hierarchy of sanctions. However, in general judges remain free to determine policy as to sentence levels, both generally and in the individual case, subject only to the constraint of the maximum penalty for the offence.
6. the key problems that arise from the extent of judicial sentencing discretion are:
  - to the extent that guidance as to sentence levels exists, it is provided by the higher court judiciary. Judicial guidance cannot be informed by the range of perspective, experience and expertise that would be beneficial in the development of sentencing policy, including the setting of sentence levels.
  - Guidance is given only in the context of cases that come before the courts on appeal. It is reactive rather than proactive, which may adversely affect its timeliness. For the same reason, guidance tends to be given in relation to offences at the upper end of the spectrum of seriousness, so that the coverage is incomplete.
  - there is significant inconsistency in the sentences imposed between judges and between courts, particularly in relation to lower end offences.
  - there is no mechanism whereby parliament can reliably alter policy as to sentence levels, or reliably predict what sentence levels will flow from particular maximum penalties or other legislative prescriptions.

- the guidance as to sentence levels that currently exists does not adequately take into account the cost-effectiveness of different sentencing options, including their prison population impact.
7. Under the parole Act 2002, most offenders sentenced to a determinate sentence of more than two years are eligible for parole release after serving one-third of their sentence. The sentencing judge can impose a longer minimum period of imprisonment under section 86 of the Sentencing Act 2002, but this rarely happens: figures supplied by the ministry of Justice for 2004 and 2005 indicate that minimum periods of imprisonment are imposed in around 11 percent of eligible cases.
  8. The fact that the current parole structure sets eligibility at one-third has created some problems, chiefly:
    - the potentially large disjunction between the sentence imposed by the judge and the actual time served gives rise to public anger and frustration, particularly on behalf of victims and their supporters. It is one of the principal drivers of calls for “truth in sentencing”, and may fuel the view that the system is unduly lenient.
    - It places pressure upon the parole Board to revisit matters of punishment and deterrence in addition to risk; this is a problem because punishment and deterrence are the province of the sentencing judge and will have already been fully considered at the time of sentence.
    - the wide discretion available to the Board, combined with uncertainty about the effect of the current statutory tests governing release, produces inconsistent decision-making
    - It also results in unpredictability, thus posing a problem for prison population forecasting and Department of Corrections’ sentence planning
  9. These are not new issues. They have been features of New Zealand’s sentencing and parole system for a very long time. This paper considers what might be done to address them.

**A SENTENCING COUNCIL AND SENTENCING GUIDELINES**

10. We recommend the establishment of a Sentencing Council in New Zealand, to draft sentencing guidelines. Such a Council is the only vehicle that can address all of the necessary issues: the sentencing problems that we have identified; and shorter sentences to compensate for our proposed parole reforms, which are predicted to increase the proportion of time served from around 62 percent to over 80 percent of the sentence.
11. First, a Sentencing Council would broaden the base of responsibility for determining sentencing policy. Recommendations directed to this issue include the Council’s mix of judicial and non-judicial membership, and its consultation process.
12. Secondly, it is expected to promote sentencing consistency, because judges would be required to adhere to the guidelines unless satisfied that this would be contrary to the public interest. Furthermore, the Council would be in a position to issue guidelines in relation to the whole range of offences.

13. Thirdly, it would give the executive greater input into sentencing policy. Avenues for executive input include provision for a formal request by the minister of Justice for consideration of a particular issue; official observers to the Council; informal dialogue channelled through the Chair; and ultimately the need for the Council to satisfy parliament that its guidelines should proceed. In essence, the recommended process enables contributions to the development of sentencing policy from all three branches of government – the judiciary, parliament, and the executive.
14. Finally, sentencing guidelines coupled with parole reforms are a proven mechanism for managing penal resources. We recommend that this should be a key consideration for the Council and for parliament: the Council should undertake prison population modelling to assess the effect of its recommendations, and attach a forecast to each set of draft proposals. The need for compensatory sentencing changes in the light of our proposed parole reforms has already been noted; this is an issue with which a Sentencing Council can assist, and from our perspective is a strong argument in favour of the establishment of such a body. However, it should also be noted that the establishment of a Council in itself will not guarantee or even indicate this outcome. Whether there is increased or decreased demand for penal resources will be wholly dependent upon the nature of the resulting sentencing guidelines.

#### THE REFORM OF PAROLE

15. In relation to parole, we recommend the retention of parole for the purpose of reducing the risk of reoffending; parole can achieve this purpose in three ways. First, its availability may prompt prisoners to participate in prison treatment programmes. Secondly, it is a tool for managing prisoners' release and reintegration: there is some evidence that parole postpones reoffending. Thirdly, it builds flexibility into the system for the purpose of identifying and differently managing high-risk prisoners.
16. However, substantial reform to the present parole arrangements is required. Prisoners serving long-term determinate sentences (sentences with a prison term of more than 12 months) should serve at least two-thirds. Those whose sentence is short (12 months or less) should not be eligible for parole and should serve their whole time.
17. In addition to the higher proportion of time served, we recommend a slightly different sentencing practice. For long-term sentences, offenders should be told when the sentence is imposed that the total sentence is (for example) six years; at least four years of the six must be served in custody; and there will be a further two years during which the offender may or may not be released, depending upon the parole Board's assessment of his or her recidivism risk.
18. Both aspects of the parole reforms are intended to promote "truth in sentencing", and thereby enhance public confidence and alleviate discontent. Greater public confidence, coupled with a coherent legislative framework for parole, is expected to reduce the pressure upon the parole Board to revisit sentencing considerations of punishment and deterrence. If the Board's task and approach are more focused, there will be smaller variation in release outcomes; this will in turn facilitate prison population forecasting and Corrections' sentence planning.

THE INTEGRATED  
NATURE OF OUR  
PROPOSED  
REFORMS

19. Our proposed reforms to the sentencing and parole structures should not be undertaken unless they proceed in tandem, for two reasons.
20. If, as predicted, the parole changes increase the proportion of time served from around 62 percent to over 80 percent of the sentence, the sentences imposed in court will need to be around 25 percent shorter to ensure that the length (as opposed to proportion) of time served is the same and avoid substantial growth in the prison population. Sentencing guidelines can achieve this in a way that the present mechanism of amending maximum penalties cannot, because maximum penalties have little impact on sentencing in the average case: they address only the worst cases.
21. Conversely, the efficacy of sentencing guidelines would be fundamentally undermined in the absence of parole reform – that is, if the parole Board was to retain its current discretion spanning two-thirds of the total sentence.

PARALLEL WORK  
ON MAXIMUM  
PENALTIES

22. Maximum penalties have emerged historically in an ad hoc fashion. They arguably contain a number of relativity problems and other anomalies. They have also been generally left untouched despite significant changes to the sentencing structure, including changes in remission and parole eligibility.
23. Sections 8(c) and (d) of the Sentencing Act 2002, respectively, codify the presumptions that the maximum penalty should be imposed in the most serious cases, and a penalty near to the maximum should be imposed for offending that is near to the most serious. If the development of guidelines was based upon the existing structure of maximum penalties – as sections 8(c) and (d) require – and if that structure remained untouched, the levels at which guidelines were set and the relativities between one offence and another would be likely to reflect the existing maximum penalty problems.
24. This would create something of a dilemma for the Council: it could seek to draft guidelines that were coherent and defensible by reference to all of the other relevant considerations, but then, in all likelihood, would be accused of acting contrary to law.
25. We therefore have asked for a reference to review the role, format and structure of maximum penalties in parallel with the development of the inaugural guidelines. As a corollary of this review, we recommend that sections 8(c) and (d) of the Sentencing Act 2002 should be repealed.



# Summary of recommendations

- R1 A Sentencing Council should be established with a mandate to draft sentencing guidelines.
- R2 The Council should have the following purposes:
- promote consistency in sentencing practice between different courts and judges;
  - ensure transparency in sentencing policy;
  - promote consistency and transparency in Parole Board practice;
  - foster the development of sentencing and parole policy, informed by a breadth of experience and expertise;
  - facilitate effective management of penal resources;
  - inform politicians and policy makers about sentencing and parole practice and reform options;
  - inform the general public about sentencing and parole policies and decision-making, and thereby promote public confidence in the criminal justice system.
- R3 The Council should have the following functions:
- draft sentencing guidelines;
  - draft parole guidelines;
  - assess and take account of the cost-effectiveness of the guidelines;
  - provide advice on sentencing and parole issues that relate to the development and use of the guidelines, either at the request of the Minister of Justice, or on its own initiative;
  - collate and provide information about the extent of compliance with the guidelines for sentencing judges and the Parole Board;
  - publish and make accessible information about sentencing and parole to the general public.
- R4 The purposes and functions listed above should be set out in legislation.
- R5 The Council should have a membership of 10, comprising:
- four judicial members: two from the District Court; one from the High Court; one from the Court of Appeal;
  - the Chair of the Parole Board;
  - five members with expertise or understanding in one or more of the following areas: criminal justice matters; policing; the assessment of risk; the reintegration of prisoners into society; the promotion of the welfare of victims of crime; the impact of the criminal justice system on Māori and minorities; community issues affecting the courts and the penal system; public policy.

- R6 In addition to the 10 members, one or more appropriate officials should be appointed to the Council as observers to ensure appropriate dialogue and information exchange.
- R7 EITHER the Head of the Sentencing Council should be a judge appointed from the Court of Appeal or the High Court; OR the Head of the Sentencing Council should be one of the non-judicial members.
- R8 The Council should be an independent statutory body, not a Crown entity.
- R9 Relevant provisions of the Crown Entities Act 2004 can and should be adapted accordingly when drafting the legislation that constitutes the Council, because the Council should have many of the characteristics of a Crown entity.
- R10 Appointments to the Council should be made as follows:
- the Chair of the Parole Board should be a member ex officio;
  - the judicial members of the Council should be appointed by the relevant Head of Bench, without executive involvement;
  - the five non-judicial members should be appointed by the Governor-General on the recommendation of the Minister of Justice.
- R11 For both judges and Ministerial appointees, the initial term of office should be either three or five years, with the option of one renewal, up to a total maximum term of seven years.
- R12 Accountability requirements upon the Council should include:
- it should be listed in the Fourth Schedule to the Public Finance Act 1989;
  - it should be required to file an annual report in Parliament;
  - it should be audited by the Auditor-General; and
  - it should be subject to the Official Information Act 1982.
- R13 The format of the sentencing guidelines should be either numerical or narrative or a combination of both, depending upon the objectives of the particular guideline.
- R14 The guidelines should apply only to sentences imposed in the District Court and High Court; they should not apply to the Youth Court.
- R15 The Council should draft one comprehensive set of inaugural sentencing guidelines before they come into force.
- R16 The inaugural sentencing guidelines should target imprisonable offences coming routinely before the courts that result in a significant number of sentences of imprisonment, to ensure that priority is initially given to offences where there is the greatest need for consistent and cost-effective sentencing.
- R17 An establishment unit should be set up prior to the passage of the legislation, attached to the Law Commission and responsible for presenting the draft inaugural sentencing guidelines to the Council, once established, for consideration and endorsement, so that the Council can present them to the Minister of Justice for tabling in Parliament within two years.
- R18 Once the Council is formally established, its first function should be to review and endorse the inaugural sentencing guidelines drafted by the establishment unit; after that the Council should contribute to the ongoing maintenance and development of guidelines generally, by governing the work of a secretariat (which should undertake the bulk of the work).

- R19 The Council should in general be empowered to consult as it considers appropriate on its draft guidelines; however, it should be required to publish draft guidelines in an accessible form with a prison population forecast attached, and seek public submissions.
- R20 Prior to the commencement of each set of guidelines, the Council should ensure that they are notified in the *Gazette* in a similar manner to regulations; published in hard copy; and made available on the internet.
- R21 The Council should collaborate with the Ministry of Justice and other justice sector agencies in relation to prison population forecasting and statistical analysis of sentencing and parole decisions; and should adhere to interagency protocols to ensure common data standards and consistent messages.
- R22 Guidelines should be endorsed by Parliament by way of the following process:
- the guidelines would be tabled in Parliament by the Minister of Justice and referred to the appropriate Select Committee;
  - for the inaugural guidelines the Select Committee would have 30 sitting days to table any report on the guidelines that it chose to make, and for subsequent iterations of the guidelines the Committee would have 15 sitting days;
  - if Parliament determined that the guidelines should not come into force, it would need to disallow them by way of a negative resolution on a notice of motion, within 30 sitting days in relation to the inaugural guidelines, and 15 sitting days in relation to subsequent iterations of the guidelines;
  - if this did not occur, the guidelines would automatically come into force 20 working days after the expiry of the specified disallowance period;
  - if the guidelines were disallowed, they would be sent back to the Council for revision; and
  - the guidelines would need to be accepted or rejected as a whole by Parliament.
- R23 Judges and the Parole Board should be required to adhere to the guidelines unless they are satisfied that it would be contrary to the public interest to do so; and should also be required to give reasons for departures from the guidelines.
- R24 As a measure of the efficacy of the guidelines and to encourage compliance, departure rates from the sentencing guidelines for each court district, and Parole Board departure rates from the parole guidelines, should be published in the Council's annual report.
- R25 There should be provision for Heads of Bench or the Minister of Justice to request consideration by the Council of a particular issue relating to the sentencing guidelines; and for the Chair of the Parole Board or the Minister of Justice to request consideration by the Council of a particular issue relating to the parole guidelines. The Council in revising the guidelines should be required to take into account such a request and the reasons for it.
- R26 Discretionary early release (parole) should be retained for the sole purpose of reducing the risk of reoffending.
- R27 Judges should articulate long-term sentences (to be defined as sentences with a prison term of more than 12 months) in a slightly different way: both the nominal sentence and its parole component should be stated in open court.
- R28 The parole eligibility date for long-term sentences should be 12 months, or two-thirds of the nominal sentence, whichever is the greater.

- R29 Section 86 of the Sentencing Act 2002, which currently provides for judges to impose a minimum term of imprisonment of up to two-thirds, should be repealed.
- R30 Short-term sentences (to be defined as sentences with a prison term of 12 months or less) should not include a parole component; the sentence should be served in full.
- R31 The “exceptional circumstances” threshold in section 25(1) of the Parole Act 2002 should be lowered very slightly, to “special circumstances relating to the offender”.
- R32 The Parole Board should continue to receive victim submissions in writing, as it does currently. However, it should have and exercise discretion about whether to hear them in person. Victims should only be heard in person if their written submissions indicate that they may be able to contribute to a risk-focused discussion about whether the prisoner should be released and, if so, how that person should be managed.
- R33 Prisoners who serve the full term of a long-term sentence should continue to be subject to conditions for a six-month period, as they currently are under section 18(2) of the Parole Act 2002.
- R34 Prisoners who are paroled within six months of their release date should also be subject to a six-month period of parole conditions.
- R35 Prisoners released from short-term sentences should be subject to conditions imposed at the discretion of the sentencing judge; if a judge chooses to impose conditions, it must be for a minimum of six months and may be for up to 12 months.
- R36 Upon releasing a prisoner, the Parole Board should be empowered to request a three-month progress report.
- R37 The provisions relating to back-end home detention should be amended, to provide that back-end home detention is only available after the parole eligibility date.
- R38 Sentencing and parole reform must occur together.
- R39 The inaugural sentencing guidelines, ongoing revisions to the guidelines, and changes to parole eligibility should apply to all offenders sentenced post-commencement; however, prisoners serving existing sentences will not be affected.
- R40 Section 6 of the Sentencing Act 2002 should be amended by inserting a subsection to provide that, for the avoidance of doubt, a sentencing guideline is not a penalty for the purposes of the section.
- R41 The Law Commission should be asked to review the role, format and structure of maximum penalties in parallel with the development of the inaugural guidelines, and recommend any changes that are required to correct existing anomalies and ensure consistency with the purposes and framework of a guidelines system.
- R42 As a corollary of this review, sections 8(c) and (d) of the Sentencing Act 2002 should be repealed.