REFORMS TO THE SENTENCING AND PAROLE STRUCTURE

CONSULTATION DRAFT

New Zealand Law Commission
April 2006

Table of contents

Executive summary

1 A SENTENCING COUNCIL AND SENTENCING GUIDELINES

Background

1 In February 2006 the Law Commission received a reference from the government that asked us to examine whether improvements could be made to the existing sentencing and parole structures, and if so how. More specifically, we were 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 United Kingdom Sentencing Guidelines Council);
- the extent to which such guidance can serve as an instrument to enable prison muster issues to be managed more effectively; and
- whether the parole eligibility component of prison sentences requires adjustment to ensure a closer relationship between the sentence imposed and the actual time served.

2 In developing our recommendations, we have identified a number of key long-standing deficiencies in the sentencing and parole structures. In order to address these deficiencies, we have developed recommendations that are designed:

- to make sentencing policy more consistent and more transparent;
- to allow community perspectives to be brought to bear on the development of sentencing policy;
- to improve the effective planning for and management of correctional resources and the prison muster;
- to ensure that the parole system operates in a way that is consistent with "truth in sentencing";
- to clarify that the sole purpose of parole is to effectively manage the risk of reoffending, and to ensure that this is the sole focus of Parole Board decision-making.

The sentencing structure

3 Prior to the Sentencing Act 2002, there were few constraints upon, or guidance as to, the exercise of judicial discretion in sentencing. In the Sentencing Act, the legislature incorporated the major purposes and principles of sentencing, but (apart from minimum terms for homicide) it gave no further guidance as to sentencing levels; that was left to the discretion of judges in the traditional way. In our view, deficiencies remain in the current structure for the following reasons.

- A significant area of sentencing policy is left to be developed by the judiciary without any guidance from the other branches of government. This has several undesirable consequences. First, it does not allow for the range of perspective, expertise and experience that is required for the development of a robust and acceptable sentencing policy. Secondly, it necessarily requires judges themselves to assess the public and political mood about sentencing. Finally, the fact that judges are required to make those assessments exposes them to undesirable criticism, either for being too lenient or for being too severe.

- Because appellate guidance is ad hoc and incomplete, particularly at the lower end of sentencing, there is inconsistency between judges and between regions.

- It makes sentencing practice too unpredictable and therefore the process of planning for and managing penal resources extremely difficult. Changes in judicial approach to the use of imprisonment may have a significant impact on the prison muster. Those changes are largely beyond the control of the government; the executive therefore finds it difficult to forecast the demands upon prison capacity and plan accordingly. The result is a disconnect between supply and demand that would not be regarded as acceptable in other areas of public expenditure.

- Because appellate judges in providing sentencing guidance do not, and cannot be expected to, consider the costs of the punishment and the resources available for implementation, there is no rigorous or effective cost-benefit analysis of particular sentencing policies. In other words, they are set by reference to supposed benefits, but without reference (or at least explicit reference) to costs.

4 In order to address these deficiencies, we consider that greater guidance should be given to judges in the exercise of their sentencing discretion.

Options for providing better sentencing guidance

5 We have considered five options.

- **The provision of better sentencing information and judicial education.** While initiatives of this sort may better inform the public and judges, they merely collate and present data on existing sentencing practices. In other words, they would provide a systematic description of the status quo rather than giving guidance as to what sentencing policy ought to be. For this

reason, while we see significant value in this option, we do not think it is sufficient to address the deficiencies in the current sentencing structure.

- **More legislative guidance.** Past attempts by the legislature to provide more detailed sentencing guidance, both in New Zealand and overseas, have not generally been a success. This is because legislation is a blunt and prescriptive instrument that does not lend itself to provide the nuanced and flexible guidance that is appropriate for the sentencing process.

- **Guidance given by a better resourced and more proactive Court of Appeal or judicial tribunal.** While this model allows for a broader range of guidance than is currently provided, it ultimately leaves the development of the bulk of sentencing policy solely in the hands of the higher judiciary. For the reasons noted above, we consider this inappropriate.

- **The introduction of an independent Sentencing Council with a broad advisory and educative role.** We consider that such models, which have been introduced in Victoria, New South Wales, and Scotland, have a great deal to recommend them. However, their remit is too limited: in effect, such councils advise more than they lead; they do not represent a significant shift in the traditional distribution of responsibility for sentencing policy; and their impact on sentencing practice is therefore somewhat limited. We believe that a Sentencing Council, if established in New Zealand, should have a broader range of functions.

- **The introduction of an independent sentencing council with a mandate to set its own sentencing guidelines.** The fifth and final option is to establish a Sentencing Council along the lines of those that have been established in England and Wales, and in a number of jurisdictions in the United States. Although such a body might have many of the advisory and educative functions of the Councils described above, it would have the major additional task of devising and promulgating a set of sentencing guidelines. The guidelines would address sentencing levels and sentencing principles generally, not the quantum of punishment in individual cases.

A New Zealand Sentencing Council

Purposes and functions

6 We favour the final option and recommend the establishment of a Sentencing Council. Its purposes would be to:

- promote consistency between courts and judges in sentencing practice;

- ensure transparency in sentencing policy;

- enable the development of sentencing policy to be based on a broad range of perspective, experience and expertise;

- ensure that the assessment and management of risk is undertaken by the Parole Board in a consistent and transparent manner;

- facilitate the prioritisation of available correctional resources and enable the effective management of the prison muster;

- inform politicians' and policy makers' understanding of sentencing practice and options for change;

- promote public understanding of the nature and effect of sentencing and punishment processes and outcomes.

7 To enable the Council to carry out these purposes, it would have the following functions:

- to draft a set of presumptive guidelines as to both sentencing levels and custody thresholds for offence types and sentencing principles;

- to draft Parole Board policy guidelines, including guidelines about best practice in the assessment and management of the risk of reoffending;

- to collate and provide information for sentencing judges and to publish and make accessible information about sentencing to the wider public;

- to provide policy advice on sentencing issues at the request of the Minister of Justice and on its own initiative;

- to consider the costs and benefits to the community of proposed sentencing and parole guidelines;

- to analyse and interpret sentencing statistics, publish conviction and sentencing data and be responsible for forecasting prison numbers, and for monitoring and reporting on the impact of the guidelines.

Composition

8 The Council should have a broad membership of 10. There should be 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 should be a member ex officio, because of the Council's additional function of drafting Parole Board policy guidelines. There should be five further members with expertise or understanding in one or more of the following areas:

- criminal justice matters;

- policing;

- the assessment of risk;

- the reintegration of offenders into society;

- the promotion of the welfare of victims of crime;

- the impact of the criminal justice system on minorities;
- community issues affecting the courts and the penal system;
- public policy.

9 One or more appropriate members of the executive (for example, senior Ministry of Justice or Department of Corrections staff) should be appointed as observers to ensure appropriate dialogue and information exchange.

Format of the guidelines

10 The guidelines for offence types should have both narrative and numerical aspects, similar to existing guideline judgments (see the draft examples in Appendix A). Guidelines about sentencing principles would be in a purely narrative form. Guidelines for offences would include numerical ranges and would cover those imprisonable offences coming routinely before the courts that result in a significant number of sentences of imprisonment.

Enforcement of the guidelines

11 Judges should be required to adhere to the guidelines unless it would be manifestly unjust to do so because of special circumstances of the offence or of the offender. Judges should be required to give reasons for departures. As a measure of the efficacy of the guidelines and to encourage compliance, departure rates should be published in the Council's annual report.

Development and introduction of the guidelines

12 We do not consider that the guidelines should be developed incrementally, as in the United Kingdom. Substantial resources should be allocated to an establishment unit prior to the passage of the legislation, and then to the Council itself, to enable a comprehensive set of guidelines to be developed and promulgated within a reasonable space of time (we suggest two years). A small number of potential future Council members could be employed in the establishment unit either full or part-time to undertake the bulk of the work in the initial drafting phase. Following the initial developmental stage, the Council members should primarily act in a governance role, overseeing the work undertaken by a secretariat.

13 The Council would be empowered to consult as it considers appropriate on its draft guidelines and there would be a general requirement that the Council publishes draft guidelines in an accessible form and allows for public submissions.

14 The draft guidelines produced by the Sentencing Council would be forwarded to the Attorney-General for approval, together with the prison forecasts that would result from the adoption of those guidelines. If the Attorney-General approved the guidelines (following, among other things, consideration of resource constraints), he or she would table the guidelines in Parliament. They would be referred to a

select committee for consideration and come into force 30 sitting days after tabling, unless there was a contrary notice of motion from a Member.

2 THE REFORM OF PAROLE

The parole structure

15 The present structure under the Parole Act 2002 provides that, in the absence of a minimum term of imprisonment (which is imposed in only about 11 percent of cases), offenders are eligible to be released on parole after one-third of any sentence exceeding two years.

16 Parole has two rationales, one implicit and the other explicit. The implicit rationale allows the state to satisfy calls for severe sentences, while at the same time mitigating their social and fiscal costs by releasing offenders at an earlier date. The explicit rationale is that parole is a tool for managing the risk of reoffending.

17 The fact that offenders are generally eligible for parole after one-third of their sentence suggests that it is the implicit rationale that dominates the current structure. In our view, that requires fundamental rethinking for the following reasons:

- The implicit rationale only achieves its purpose if the members of the public who demand harsh sentences are deceived into believing that sentences mean what they say. However, we do not believe that the deception works: victims, many members of the public and certainly most of those who takes an interest in sentencing and punishment issues are aware that court-imposed sentences are largely a charade. The very early parole eligibility (sometimes within a matter of months) of offenders who received much longer nominal sentences is one of the principal drivers for public and political calls for "truth in sentencing".

- The fact that an offender is eligible for parole after one-third of their sentence places pressure upon the Parole Board to revisit questions of seriousness and culpability, thus undertaking a function which is properly the province of sentencing judges. This is scarcely surprising, since it does not make intuitive sense that such an extensive period of parole eligibility should exist for the sole purpose of managing risk.

- The long span of parole eligibility leads to repeated Parole Board appearances for offenders who are not released. This undermines victims' attempts to come to terms with the offence, and has resource implications for the Parole Board and the Department of Corrections.

- It also causes problems for sentence management. The Department of Corrections will not offer rehabilitation programmes to inmates early in their sentence, because this is not best practice; the Parole Board may be reluctant to consider release until the inmates have done the programmes.

The retention and reform of parole

18 There is value in retaining a parole system for risk management purposes. The availability of parole may prompt inmates to participate in pre-release rehabilitation programmes. There is also some evidence that it postpones reoffending. More importantly, parole builds flexibility into the system for the purpose of identifying and managing high-risk inmates. It facilitates their longer detention if necessary, and closer management of them if or when they are released.

19 However, if the sole focus of parole is to be the management of risk, its structure should be substantially different from the current regime.

20 We recommend the following changes to the current system.

- An offender should not be eligible to be considered for parole until he or she has served two-thirds of the sentence. This would better achieve the interests of truth in sentencing, and enhance the ability to predict and manage the prison muster.

- Sentences should be calculated and stated in open court in two parts: the minimum period of imprisonment (MPI), plus an additional parole component where the MPI exceeds two years. The nominal sentence would be the sum of those two things.

- The parole component should be an automatic additional 50 percent of the MPI (and thus one-third of the sentence).

- The MPI should be set by reference to the sentencing guidelines previously recommended. Section 86 of the Sentencing Act 2002, which is the current provision empowering sentencing judges to impose a minimum period of imprisonment, should be repealed.

- The sole purpose of the parole component should be the management of risk, and all Parole Board release decisions should be made wholly on that basis.

- In practice, this means that a prisoner whose offending warrants a 4-year MPI would serve four years in prison without exception. An additional two years would be imposed for parole purposes, during which the prisoner may or may not be released, depending upon the Parole Board's assessment of his or her risk. The total sentence would be 6 years.

21 Sentences of two years or less should not have a parole component. The sentence imposed should be served in full.

22 If the Parole Board is to focus solely upon risk, this has implications for victims. In the vast majority of cases victims are not qualified to comment on anything other than the circumstances of the offending; certainly they will rarely be able to inform an assessment of risk. The Parole Board should continue to receive written submissions from all victims. However, it should have a discretion about

whether to hear them in person and should do so only if the victim may be able to contribute to the assessment and management of the offender's risk.

23 It is important to ensure that the Parole Board approaches the assessment and management of risk consistently and properly; in addition, more generally, sentencing policy and parole policy need to be properly integrated. We therefore recommend that the Sentencing Council should also be responsible for formulating parole guidelines.

24 We recommend the following supplementary release arrangements:

- Back-end home detention should only be available after the MPI has been fully served.

- Inmates who are eligible for parole, but serve their full term, should receive 6 months post-release supervision.

25 There would also be value in giving the Parole Board an ongoing role, in selected cases, in reviewing the progress of inmates released on parole. We therefore propose, based on the model of reentry courts in the United States, that the Parole Board should be empowered to require a released inmate to appear before it at regular intervals where it believes that this would contribute to the ongoing management of the offender's risk of reoffending.

The integrated nature of our proposed reforms

26 The reforms that we propose to the sentencing and parole structures need to proceed in tandem for two reasons.

27 First, if the parole component of sentences is reduced, it will adversely affect the prison muster in the absence of sentencing reform. This is because all inmates will be required to serve at least two-thirds; those who would have been released earlier than this under the present regime would therefore be serving longer. There needs to be a corresponding reduction in the length of sentences to compensate for the parole changes, which can be addressed in the development of our proposed sentencing guidelines.

28 Secondly, if sentencing guidelines are put in place without reforms to the parole structure, there is a substantial risk that they will fail to achieve their objectives, because of the scope of the Parole Board's current discretion regarding the amount of time actually served.

SUMMARY OF RECOMMENDATIONS

A sentencing council and sentencing guidelines

R1 A Sentencing Council should be established.

R2 It should have the following purposes:

- promote consistency between courts and judges in sentencing practice;

- ensure that the assessment and management of risk is undertaken by the Parole Board in a consistent and transparent manner;
- ensure transparency in sentencing policy;
- enable the development of sentencing policy to be based on a broad range of experience and expertise;
- facilitate the prioritisation of available correctional resources and enable the effective management of the prison muster;
- inform politicians' and policy makers' understanding of sentencing practice and options for change;
- promote public understanding of the nature and effect of sentencing and punishment processes and outcomes;

R3 To enable it to carry out these purposes, it should have the following functions:

- draft sentencing guidelines;
- draft parole guidelines;
- collate and provide information for sentencing judges;
- publish and make accessible information about sentencing to the wider public;
- provide policy advice on sentencing issues at the request of the Minister of Justice and on its own initiative;
- take account of the costs and benefits of the guidelines to the community;
- analyse and interpret sentencing statistics, publish conviction and sentencing data and be responsible for forecasting prison numbers, monitoring and reporting on the impact of the guidelines;

R4 The guidelines should cover those imprisonable offences coming routinely before the courts that result in a significant number of sentences of imprisonment.

R5 The Council should develop and promulgate one comprehensive set of guidelines before they come into force. These should be continually updated and modified.

R6 The guidelines should address both offence tariffs and general principles of sentencing, and so will be in both a narrative and numerical format.

R7 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 offenders into society; the promotion of the welfare of victims of crime; the impact of the criminal justice system on minorities; community issues affecting the courts and the penal system; public policy;
- in addition, one or more appropriate members of executive government should be appointed as observers to ensure appropriate dialogue and information exchange.

R8 The Head of Council remains undecided, and will be determined in the light of submissions received.

R9 The Chair of the Parole Board should be a member ex officio. We recommend that the judicial members of the Council should be nominated by the Chief Justice, and that all other members should be nominated by the Minister. The appointment process will need to be determined.

R10 Substantial resources will need to be allocated to an establishment unit prior to the passage of the legislation, and then to the Council itself, for the development of a comprehensive set of guidelines. A small number of those who might eventually be appointed as Council members could be employed in the establishment unit either full or part-time to undertake the bulk of the work in the initial drafting phase. Following the initial developmental stage, the Council members should primarily act in a governance role, overseeing the work of a well-resourced secretariat.

R11 The Council should be empowered to consult as it considers appropriate. The form and extent of that consultation should be determined by the Council.

R12 There should be a general requirement that the Council publishes draft guidelines in an accessible form and allows for public submissions.

R13 The inaugural guidelines, and any subsequent iterations of them, should be submitted to the Attorney-General for approval. Once he or she has approved them they should be presented to Parliament and referred by Standing Order to the appropriate select committee for consideration. The guidelines should come into force 30 sitting days after they have been presented to the House, unless the House (on the notice of motion of any Member) disallows them. The select committee should be required to report on the guidelines before the expiry of that period. As soon as practicable after the guidelines come into force, the Attorney-General should ensure that they are published in the *Gazette* and on the internet. The guidelines should be accepted in full or referred back to the Council; piecemeal revisions by the Executive or Parliament should not be allowed. If the draft guidelines are not approved by the Attorney-General or are disallowed by the House, they should be referred back to the Council for revision, subject to any direction about fiscal or other parameters that the Attorney-General may choose to provide.

R14 The guidelines should be presumptive. Judges should be required to adhere to them unless it would be manifestly unjust to do so because of special circumstances of the offence or of the offender.

R15 Judges should be required to give reasons for departures from the guidelines.

R16 As a measure of the efficacy of the guidelines and to encourage compliance, departure rates should be published in the Council's annual report.

The reform of parole

R17 Discretionary early release (parole) should be retained in some form.

R18 Judges need to articulate their sentences in a different way. Sentences should be calculated and stated in open court in two parts: the minimum period of imprisonment (MPI), plus an additional parole component where the MPI exceeds a statutorily specified length. The nominal sentence would be the sum of those two things.

R19 Section 86 of the Sentencing Act 2002 should be repealed.

R20 The proportion of the sentence during which inmates are eligible for parole should be reduced to one-third. However, the parole component should be calculated in a different way: judges should first decide upon the MPI, and parole should be an automatic additional 50 percent of the MPI.

R21 Short-term sentences should not include a parole component. For those sentences, only time served should be stated. By short-term sentences, we mean those with an MPI of less than two years.

R22 Responsibility for notifying victims of parole eligibility should be allocated to Victim Support, not the Parole Board. It may be desirable for Victim Support to take a more proactive role in supporting victims through the parole process. Victim Support will need to be resourced accordingly.

R23 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 inmate should be released and, if so, how that person should be managed.

R24 The Parole Board's release decisions should be informed by both actuarial and individualised risk assessments. The Board will require detailed guidance about the way in which this information can properly be used.

R25 The Sentencing Council should also have responsibility for setting Parole Board policy guidelines, including guidelines about best practice in relation to the risk assessment of inmates and the risk management of parolees.

R26 Parole Board panel members need to be better equipped to independently evaluate the merits of expert submissions in relation to risk. They should be informed and trained on an ongoing basis about risk assessment and risk management best practice.

R27 The Parole Board should be empowered to require regular appearances before it, tailored as necessary to suit the circumstances of the individual case. Some thought would need to be given to resolving the logistical problems; this recommendation would also have significant resource implications for the Parole Board.

R28 The MPI imposed in court should be served without exception. The Parole Board, in determining whether to release eligible offenders, should consider whether a staged release to "back-end" home detention is one option for managing their risk and reintegration needs.

R29 Inmates who are eligible for parole, but serve their full term, should continue to be subject to post-release supervision for a 6-month period, as they currently are under the Parole Act 2002.

R30 Sentencing and parole reform must occur together.

1
A sentencing council and sentencing guidelines

THE PERMISSIVE FRAMEWORK OF THE SENTENCING ACT 2002

1 Prior to the Sentencing Act 2002, there were few constraints upon, or guidance as to, the exercise of judicial discretion in sentencing. The legislature prescribed maximum penalties, typically set at a high level and reserved for the worst hypothetical class of case of its type. It also prescribed the available range of custodial, community-based and monetary penalties and stipulated the proportion of the prison sentence that needed to be served before parole eligibility. Although there were a very small number of statutory presumptions and semi-mandatory orders for specific offences, the judiciary were largely left to their own devices in determining the relevant purposes and principles of sentencing and sentencing levels or tariffs, both as a matter of overall policy and in the individual case.

2 The Sentencing Act 2002 effected a significant change to this traditional approach. For the first time it articulated, in a non-prioritised and non-exhaustive manner, all of the major purposes and principles of sentencing and the relevant aggravating and mitigating factors to be taken into account in the individual case.

3 Some minimal guidance as to the choice of sanction was also provided in four respects:

- Sections 8(c) and (d) stipulated that the maximum penalty was to be used for the worst offence of its type, and a sentence near to the maximum for an offence near to the worst of its type.
- Section 104 prescribed a presumptive 17 year minimum term for an offence of murder accompanied by one or more specified aggravating factors.
- Sections 11–16 established a hierarchy of sanctions.
- Sections 46 and 56 specified the purposes for which the sentences of supervision and community work respectively could be used.

4 These provisions provide little or no assistance in determining the "tariff" custody threshold or sentence length appropriate for the average case of each type coming before the courts. In that respect, the sentencing system remains a highly permissive one, characterised by substantial judicial discretion as to the way in which the purposes and principles of sentencing should be translated into sentencing levels.

5 Three reasons have been given for leaving this degree of judicial discretion:

- that wide discretion is essential because sentencing is an "art" rather than a "science";
- that it is required to allow sufficient flexibility to do justice in the individual case;
- that it is required to preserve judicial independence.

Sentencing as an "art"

6 The view that sentencing is an art derives from the belief that it demands the intuitive balancing of a myriad of factors that will vary substantially from case to case. These include the purpose or purposes of sentencing that are most relevant to the individual case; the aggravating and mitigating factors relating to the offence; the personal circumstances of the offender; any circumstances which dictate a sentence that is needed to protect the public; and any particular factors suggesting the need for rehabilitation or mercy. The interplay of these factors, it is said, is so complex and wide ranging that it is not possible, or at least not desirable, to attempt to distil them into a tariff or a range for any individual offence type. This view of sentencing as an "intuitive" or "instinctive" synthesis of competing purposes, principles and factors has been vigorously propounded by a number of courts in Australia, most recently by the majority of the High Court of Australia in 2005.[1]

7 Obviously, the choice of appropriate sentence should be based on a consideration of the complex interplay of a number of factors and should involve the exercise of value judgments. However, we do not agree that it should be a wholly intuitive or instinctive exercise. Nor do we think that its complexity or its reliance on value judgments precludes the development of a structured and systematic sentencing framework. As Professor Arie Freiberg, the Chair of the Victorian Sentencing Advisory Council, has recently argued:[2]

> Sentencing is as much about law as values and, as a product of human behaviour, is amenable to the social sciences. Numerous studies have found that sentencing is not random, that over time, within a jurisdiction, sentencing patterns emerge and can be described statistically in terms of means, medians, averages and ranges. They have found that most of the variations can be accounted for by two factors, the seriousness of the offence and the offender's prior convictions. While not seeking to bind Australian or British sentencers to pre-determined sentencing ranges based on statistical and politically determined values, as is done in the USA, it is, in my view, neither intellectually impossible nor legally or politically undesirable … to make broad statements of policy in relation to sentencing ranges for offences and for the weight to be put on various factors or principles of sentencing in respect of some or many offences.

---

1 See *Markarian v R* (2005) 79 ALJR 1048 (HCA).

2 Arie Freiberg "Twenty Years Of Changes In The Sentencing Environment And Courts' Responses" (Sentencing Principles, Perspectives & Possibilities conference, Canberra, 10–12 February 2006) 9.

Individualised justice

8 There has been a prevailing view that broad and relatively unstructured judicial discretion is necessary to promote individualised justice. The argument is that legislative efforts to structure or constrain judicial discretion would result in undue rigidity that would prevent the judge from tailoring the sentence to the offender and the offence, or giving weight to all of the factors before the court. In other words, there would be insufficient room for account to be taken of legitimate differences between offences and offenders, such as the severity of the crime committed, the degree of contrition of the offender, or the extent of any redress offered to the victim.

9 In our view, this overstates the significance of case-by-case consideration of appropriate sentences, and understates the need for a structured and coherent sentencing policy. It is, of course, important to ensure that the sentencing system is sufficiently flexible to allow relevant differences between cases to be reflected in the choice of sentence, so that dissimilar cases are not treated in the same way. And it must be acknowledged that the experience, both in New Zealand and overseas, is that legislative constraints (in the form of mandatory, semi-mandatory, minimum or presumptive sentences) have usually resulted in undue rigidity. However, it is equally important that the system ensures that offenders committing similar offences in similar circumstances should receive roughly the same sentence, unless some relevant factor that distinguishes them can be found. It is unjust that an offender in Invercargill should be given a significantly harsher or more lenient sentence than an equivalent in Auckland. Yet, the existing structure allows that to occur. Individualised justice can easily become an excuse for inconsistent justice.

Judicial independence

10 Some United Kingdom commentaries contend that constraining sentencing discretion conflicts with the principle of judicial independence. We do not consider this to be a valid argument. There can be no dispute that the legislature possesses constitutional authority to enact laws that prescribe particular sentences, or otherwise fetter judicial discretion, in any way it thinks fit.

11 In our view, judicial independence requires that judges should be able to pass sentence in each case without fear or favour, affection or ill-will – in other words, that they should decide individual cases impartially without interference from the other branches of government.[3] However, it does not follow that it is exclusively for judges to determine the details of the framework within which the quantum of punishment is determined. If the legislature is constitutionally able to prescribe maximum, mandatory or mandatory minimum penalties, it is equally constitutionally able to dictate the nature or the range of penalties that ought to be applied in the ordinary run of cases.

---

[3] See RE McGarvie "The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence" (1992) 1 Jnl of Judicial Administration 236.

DEFICIENCIES OF APPELLATE REVIEW AS A SOURCE OF SENTENCING GUIDANCE

The nature of appellate review

12 The principal mechanism for constraining judicial discretion under the current structure is appellate review. Unlike many American jurisdictions, New Zealand has historically granted both prosecution and defence generous rights of appeal: the former on the basis that the sentence is manifestly inadequate or wrong in principle; and the latter on the basis that it is manifestly excessive or wrong in principle.

13 Over roughly the last 20 years, appellate court decisions have increasingly been relied upon as sources of precedent. They have become more readily available, through the advent of specialised law reports such as the *Criminal Reports of New Zealand*; the publication of the *Sentencing Digest*, which is a regularly updated compilation of sentencing judgments under offence categories, available to judges and counsel; and sentencing texts that collate and synthesise sentencing theory and practice.[4]

14 However, appellate court decisions in individual cases provide only a limited source of guidance. Their outcome is dictated by the facts of the case, and it is relatively easy for a judge who wishes to reach a different decision in a subsequent case, either at first instance, or on appeal, to distinguish the earlier case on the facts. Sentencing precedents in at least some offence categories could arguably be seen as little more than a plethora of cases from which counsel (and perhaps judges on occasion) pick and choose to suit the outcome that they seek.

15 Partly for that reason, the Court of Appeal in New Zealand has developed the practice of issuing guidance for the benefit of lower courts as to appropriate sentencing ranges for particular offence categories. It does this by periodically handing down "tariff" or "guideline" judgments. Guideline judgments are also used as a tool for directing judicial discretion in the United Kingdom,[5] and to a lesser extent in Australia.[6] Guideline judgements give sentencing judges detailed guidance in relation to a particular type of offence by specifying the starting point and sentence range for the offence or for various categories of an offence, and by outlining the aggravating and mitigating factors that should determine the point within the range at which a sentence should fall.

---

4 For example, Hon Bruce Robertson (ed) *Adams on Criminal Law* (loose leaf, Brookers, Wellington) "Sentencing"; and Geoffrey G Hall *Halls Sentencing* (loose leaf, Butterworths, Wellington).

5 The United Kingdom Sentencing Guidelines Council has published a compendium of guideline judgments which can be viewed at http://www.sentencing-guidelines.gov.uk/index.html (last accessed 21 March 2006).

6 See for example *R v Jurisic* (1998) 45 NSWLR 209; *R v Henry* (1999) 46 NSWLR 346 (armed robbery); *R v Wong & Leung* (1999) 48 NSWLR 340 (importing drugs); *R v Thomson* (2000) 49 NSWLR 383 (discount for pleading guilty); and *R v Ponfield* (1999) 48 NSWLR 327 (listing eleven aggravating factors for burglary).

16 There is no statutory basis for the use of guideline judgments in New Zealand.[7] However, their use was recognised and endorsed in a 2003 practice note.[8] They are a creation of the judiciary, devised with the aim of assisting sentencing judges and minimising disparity while leaving room for individual justice. In delivering the judgment of the Court of Appeal in *R v Taueki* O'Regan J said:[9]

> The principal objective of the guidelines set out in this judgment is consistency. Consistency has always been an objective of sentencing policy, and section 8(e) of the Sentencing Act 2002 now gives that statutory backing. We hope that this judgment will provide a single point of reference for sentencing Judges and counsel, and that this will lead to consistency in the sentencing levels imposed on offenders. What we seek to achieve is consistency in the approach adopted by sentencing Judges, which should in turn lead to consistency in sentencing levels. This does not override the discretion of sentencing Judges, but rather provides guidance in the manner of the exercise of that discretion.

17 However, guideline judgments also have significant limitations.

- They are produced by the higher courts and therefore lack not only the input of the District Court judiciary (who are responsible for the vast bulk of sentencing), but also the range of perspective, experience and expertise that would be beneficial in the development of sentencing policy.

- They are largely dependent upon the quality of the information provided by counsel appearing in the particular case that is being used as the vehicle for a guideline judgment; the court itself does not have the resources to undertake systematic research, nor to investigate the effectiveness of different sentencing options and the wider impact of sentencing policy.

- Since guideline judgments have been promulgated within the context of an individual case in which the parties to the appeal are awaiting the outcome, they are subject to time constraints. Even if adequate resources were available, therefore, the sort of research that might be desirable in developing a policy as to sentencing levels cannot feasibly be undertaken.

---

7 This is in contrast with some other jurisdictions. For example, section 143 of the Sentencing Act 1995 (WA) provides that the Full Court of the Supreme Court or the Court of Criminal Appeal may give a guideline judgment containing guidelines to be taken into account by courts in sentencing offenders. A guideline judgment may be given in any proceeding considered appropriate by the court giving it, and whether or not it is necessary for the purpose of determining a proceeding. Section 6AB of the Sentencing Act 1991 (Vic) provides for the Court of Appeal to give or review guideline judgments. Sections 29A and 29B of the Criminal Law (Sentencing) Act 1988 (SA) also provide the Court with a power to issue sentencing guidelines in relation to offences generally or a particular class of offences; and offenders generally or a particular class of offenders. Under section 29B(2), each of the following is entitled to appear and be heard in proceedings in which the Full Court is asked or proposes to establish or review sentencing guidelines: (a) the Director of Public Prosecutions; (b) the Attorney-General; (c) the Legal Services Commission; (d) the Aboriginal Legal Rights Movement Inc; (e) an organisation representing the interests of offenders or victims of crime that has, in the opinion of the Full Court, a proper interest in the proceedings. The evidence is that a legislative basis is not necessarily an indication of a productive guideline judgment system. At 2002 no guideline judgments had been handed down in Western Australia, although they had been sought for sexual relationships; suspended sentences; fraudulent activity; domestic violence; indeterminate sentences of imprisonment; and intellectually disabled offenders. This has provoked criticism: see Kate Warner *Sentencing* (Issues Paper 2, Tasmanian Law Reform Institute, Hobart, 2002) 121.

8 *Practice Note – Sentencing 2003* [2003] 2 NZLR 575.

9 [2005] 3 NZLR 372 at para 10.

- Because guideline judgments are delivered in the context of particular cases coming before the appellate courts, they are purely reactive and therefore yield an unbalanced set of precedents.[10] Since serious crimes and severe sentences predominate in such appeals, guideline judgments are inevitably incomplete, and rarely focus on offences at the lower end of the spectrum of seriousness. Hence, for example, guidance as to the custody threshold for routine offences, such as repeated driving with excess blood alcohol or common assault, is difficult to find. The result is that comprehensive guidance that ensures a coherent sentencing policy across the full range of offences, or even those that result in imprisonment, cannot readily be pursued through the vehicle of guideline judgments.

- They are given as obiter dicta and, as such, do not have the integrity of full legal precedent.

- Their practicality has been called into question: Professor Andrew Ashworth, the Vinerian Professor of English Law at Oxford University, suggests the English judiciary resist guideline judgments for "everyday" sentencing such as theft, since there are so many variations of the offence.[11]

Lack of consistency

18 There is some evidence that the absence of comprehensive guidance from appellate courts, particularly at the lower end of sentencing, results in inconsistency between judges and courts.[12] That may arise from the fact that judges have differing views as to the purposes of sentencing; that they weigh up the aggravating and mitigating factors in a different way; or that some rely on erroneous factors in their decision-making.[13]

19 In 1991, Hall reviewed the evidence of sentencing inconsistency in New Zealand courts.[14] While setting out the limitations of the various studies, he quotes conclusions from two reviews: that "the results indicate that there are significant variations between the district court areas in the proportion of offenders given a

---

10 Andrew Ashworth "The Decline of English Sentencing and Other Stories" in Tonry and Frase (eds) *Sentencing and Sanctions in Western Countries* (Oxford University Press, Oxford, 2001) 74.

11 Ashworth, above n 10, 73.

12 This was also the view of the Canadian Sentencing Commission in its 1987 report. See Report of the Canadian Sentencing Commission *Sentencing Reform: A Canadian Approach* (Canadian Government Publishing Centre, 1987).

13 See *R v Oosthuizen* [2005] EWCA Crim 1978 where the English Court of Appeal criticised the sentencing judge's emphasis on his assertion that on the streets of Guildford, robbery of handbags from women "was prevalent and was becoming increasingly so". There the Court of Appeal reiterated that it was erroneous for a judge to impose a more severe sentence on the grounds of what he or she perceived to be accurate local knowledge, without reliable evidence. *Adams on Criminal Law* states "notwithstanding the general desirability of consistency in sentencing on a national basis, exemplary sentences which increase the severity of punishment in a particular locality may be justified for deterrent reasons if there has been a properly substantiated increase in the prevalence of the offence in that locality": Robertson, above n 4, SA7.05.

14 Geoff Hall "Reducing Disparity by Judicial Self-Regulation: Sentencing Factors and Guideline Judgments" (1991) 14 NZULR 208, 214.

custodial sentence and in the average custodial length imposed";[15] and that "results … suggest that sentencing disparity does exist in New Zealand District Courts".[16] The age of these studies to some extent limits their present relevance. However, there is plenty of anecdotal evidence, including information from judges and others that we have talked to in the course of this project, that significant disparity in sentencing (including the use of imprisonment) between judges and courts persists in New Zealand.

Judicial control of the quantum of punishment

20 One of the most important areas of sentencing policy – the range of punishment that should ordinarily be considered appropriate for particular offence categories – is left in the hands of the judiciary and developed in a non-transparent and non-consultative way. While maximum penalties set the upper threshold, they are set at very high levels to reflect the sentence that is appropriate for the worst class of case in that offence category; they generally bear little relationship to the range of sentences imposed in the normal case of that type to come before the courts; and they are thus of only indirect, and sometimes marginal relevance to general sentencing levels.

21 In our view, it is wrong in principle that such a significant element of sentencing policy should be left in the hands of the judiciary without effective – or indeed any – guidance from other branches of government and other experts. There are a number of reasons for this.

- It results in a policy that is characterised by what Professor Ashworth has described as a "democratic deficit".[17]
- It does not allow for the range of perspective, expertise and experience that is required for the development of a robust sentencing policy that is acceptable to the community.
- It necessarily requires judges themselves to assess the public and political mood about sentencing. Even if they are well placed to do so, it is not desirable that the judiciary undertakes such a task.
- The fact that judges are required to make those assessments exposes them to undesirable criticism, either for being too lenient or for being too severe.

22 When taken together, these reasons suggest that there is a compelling need to find an alternative mechanism for establishing sentencing levels.

---

15 P Spier "An Examination of Regional Differences in the Use of Custodial Sentences in the District Courts" (unpublished report, Policy and Research Division Department of Justice, Wellington, 1989) 49.

16 J Palmer "An Examination of Discretion and Disparity in Judicial Sentencing Behaviour" (LLB (Hons) research paper, University of Otago, 1990).

17 Andrew Ashworth *Sentencing and Criminal Justice* (4th ed, Cambridge University Press, Cambridge, 2005) 57.

Sentencing policy and managing the prison muster

23 The current sentencing framework creates two hurdles to the effective management of the prison muster.

- It makes the system unpredictable and the management of the overall penal estate extremely difficult. Changes in judicial approach to the use of imprisonment may have a significant impact on the prison muster. Since those changes are largely beyond the control of the government, its role in forecasting and planning for prison capacity needs becomes extremely problematic. This is exacerbated by the long lead time required to increase prison capacity. The result is a disconnect between supply and demand that would not be regarded as acceptable in other areas of public expenditure.

- Because judges in providing guidance as to the quantum of punishment do not, and cannot be expected to, consider the costs of the punishment and the resources available to implement it, there is no rigorous or effective cost-benefit analysis of particular sentencing policies. In other words, they are set by reference to supposed benefits, but without reference (or at least explicit reference) to costs.

24 Developing sentencing policy by reference to the issue of correctional resources is commonly done in the United States jurisdictions that have sentencing commissions responsible for formulating sentencing guidelines. For example, the Minnesota Sentencing Commission's statute states that "the commission shall also consider … correctional resources, including but not limited to the capacities of local and state correctional facilities".[18] The Washington statute requires that "[i]f implementation of the revisions or modifications [to sentencing levels] would result in exceeding the capacity of correctional facilities, then the commission shall accompany its recommendation with an additional list of standard sentence ranges which are consistent with correction capacity".[19]

25 In the United Kingdom, too, the Sentencing Guidelines Council when framing or revising its guidelines must have regard to "the cost of different sentences and their relative effectiveness in preventing re-offending".

26 We have carefully considered the arguments for and against overseas approaches that explicitly address the question of resources in the development of sentencing guidance. On the one hand, it is difficult to see why costs should not be regarded as a relevant consideration in determining punishment levels: public resources should be allocated in a rational and cost-efficient manner; and a robust cost-benefit analysis is critical to the assessment of policy choices. On the other hand, it would be undesirable for sentencing policy to be dictated by an arbitrary fiscal ceiling, and even more undesirable for the level of the prison muster to be taken into account in individual sentencing decisions.

---

18 Minn Stat § 244.09 (2005)

19 Rev Code Wash (ARCW) § 9.94A.850 (2006).

27 However, the dangers inherent in the latter approach are not a reason to avoid considerations of cost altogether. Instead a mechanism needs to be found to do it in a principled and transparent way.

Conclusion

28 In short, we think that the current system produces inconsistency; lacks transparency; does not enable a broad range of perspectives to be brought to bear on the development of sentencing policy; and does not enable the effective management of correctional resources in general, or the prison muster in particular.

29 We therefore conclude that an alternative mechanism for providing guidance to the judiciary must be found.

OPTIONS FOR PROVIDING BETTER SENTENCING GUIDANCE

30 Options to provide further guidance to judges in the exercise of their sentencing discretion comprise:

- the provision of better sentencing information (for example, by "Sentencing Information Systems") and judicial education;
- more legislative guidance;
- guidance given by a better resourced and more proactive Court of Appeal or judicial tribunal;
- the introduction of an independent Sentencing Council with a broad advisory and educative role;
- the introduction of an independent Sentencing Council with a mandate to set its own sentencing guidelines.

More sentencing information and judicial education

31 In New Zealand, as noted above, existing information can be found in the *Sentencing Digest* which has been in publication since 1994 and is a resource in hard copy and electronic form for judges and counsel. The digest is updated four times a year and collects together sentence judgments under offence categories. In addition, the Ministry of Justice publishes data on the conviction and sentencing of offenders.

32 While these tools are in widespread use and yield a great deal of information about sentencing practice, it is not generally easy to extract from them accessible information on appropriate tariffs or sentencing ranges by offence type: the Ministry of Justice conviction and sentencing data is aggregated at too high a level to be useful for that purpose, while the *Sentencing Digest* is presented at an individual case level.

33 Resources could be dedicated to the provision of more comprehensive information and to its wider dissemination. For example, the Victorian Sentencing Advisory Council has recently launched an online sentencing monitoring resource.[20] One of the Council's main functions is to provide statistical information on sentencing to the public, the judiciary and the government, including information on current sentencing practices. Its website includes regularly updated data on the number of people sentenced; sentencing outcomes including historical sentencing trend data; trends in the composition of Victoria's adult prisoner and youth detainee population; imprisonment rates and prison receptions; and community correctional statistics.

34 However, while initiatives of this sort may better inform the public and judges, they merely collate and present data on the existing sentencing practices in particular courts. In other words, they would provide a systematic description of the status quo rather than giving guidance as to what sentencing policy ought to be. For this reason, while we see significant value in the functions of the Victorian Sentencing Advisory Council, we do not think they are sufficient to address the deficiencies in the current sentencing structure.

Further legislative direction

35 More guidance could be given by the legislature itself – for example, by stipulating presumptive minima and maxima in statute or regulation. However, as we noted above, past attempts by the legislature to provide such guidance, both in New Zealand and overseas, have not generally been a success. That is because legislation is a blunt and prescriptive instrument that does not lend itself to provide the nuanced and flexible guidance that is appropriate for the sentencing process.

36 The limitations in legislative guidance are demonstrated by sections 5 and 6 of the Criminal Justice Act 1985, which established presumptions in favour of custody for violent offenders and against custody for property offenders. Those provisions were abolished in 2002 because they established presumptive thresholds for and against custody simply on the basis on generic offence categories. To the extent that those presumptions were adhered to, they did not necessarily reflect community perceptions of the relative seriousness of the offending in the particular case, and unsurprisingly judges routinely departed from them.

37 Even section 104 of the Sentencing Act 2002, which establishes a presumptive 17 year minimum term for murder, accompanied by specified aggravating factors, is problematic. The section has caused problems when the aggravating factors that bring a murder within the section are combined with mitigating factors such as guilty pleas, which are routinely present in such cases.[21]

---

[20] See http://www.sentencingcouncil.vic.gov.au (last accessed 22 March 2006). The service was launched on 19 December 2005. And see, generally, A Lovegrove "Statistical Information Systems – As a Means to Consistency and Rationality in Sentencing" (1999) IJL & IT 7(31).

[21] For example, see *R v Williams* [2005] 2 NZLR 506.

Guidance given by a better resourced and more proactive judicial body

38 Some of the limitations of current forms of guidance could be overcome by empowering the Court of Appeal (either on its own initiative or at the request of some other party) to issue guidance without waiting for a suitable case to come before it, and by providing it with sufficient resources and access to external expertise to enable it to do so. That would provide the opportunity for better researched and informed guideline judgments across the full range of offence types.

39 A number of overseas jurisdictions have introduced initiatives with the objective of enhancing the range and quality of appellate guidance.

- In Victoria, guideline judgments may be given after an application from a party to the appeal, or by the court on its own initiative.[22] The Victorian Sentencing Advisory Council, established in 2004 and composed entirely of non-judicial members, may provide the Court of Appeal with the Council's written views on the giving, or review, of a guideline judgment.

- In New South Wales, the Attorney-General can request that the Court of Appeal give a guideline judgment on a particular sentencing matter.[23]

- In the United Kingdom, the Sentencing Advisory Panel, a non-departmental public body established under the Crime and Disorder Act 1998 with a broad-based judicial and non-judicial membership, was empowered to propose to the Court of Appeal that guidelines be framed or revised. Moreover, whenever the Court of Appeal decided to draft a guideline judgment, it was required to notify the Panel, which was in turn required to consult on the issue, form a view and provide its advice to the court.[24] Before the structure was changed with the establishment of the Sentencing Guidelines Council in early 2004,[25] the Panel played a significant role in the development of around a dozen guideline judgments.

40 However, all of these models ultimately leave the development of the bulk of sentencing policy solely in the hands of the higher judiciary, albeit on the basis of

---

22 See Part 2AA Sentencing Act 1991 (Vic).

23 Section 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) provides that: "(1) The Court may give a guideline judgment on the application of the Attorney-General. (2) An application for a guideline judgment may include submissions with respect to the framing of the proposed guidelines. (3) An application is not to be made in any proceedings before the Court with respect to a particular offender. (4) The powers and jurisdiction of the Court to give a guideline judgment in proceedings under this section in relation to an indictable or summary offence are the same as the powers and jurisdiction that the Court has, under section 37A, to give a guideline judgment in a pending proceeding in relation to an indictable offence. (5) A guideline judgment under this section may be given separately or may be included in any judgment of the Court that it considers appropriate."

24 Crime and Disorder Act 1998 (UK), s 81(4).

25 See the discussion below, paras 49–56.

a broader range of advice than is currently provided. As noted above,[26] this approach has limitations.

An independent Sentencing Council with a broad advisory and educative role

41 A fourth option is to establish, as a statutory body, an independent Council whose functions are to advise the government or the judiciary on broad matters of policy; to inform, educate and consult the public on sentencing matters; and to monitor and report on sentencing trends and practices.

42 Again, there have been a number of overseas initiatives of this sort in recent years.

- In New South Wales, a Sentencing Council was established in February 2003 under the Crimes (Sentencing Procedure) Act 1999.[27] Its functions are to advise and consult with the Attorney-General on standard non-parole periods and guideline judgment matters; to monitor, and report annually to the Attorney-General on sentencing trends and practices; and, at the request of the Attorney-General, to prepare research papers or reports on particular sentencing matters.

- In Victoria, a Sentencing Advisory Council was established in 2004 by an amendment to the Sentencing Act 1991.[28] Its functions are to provide statistical information on sentencing, including information on current sentencing practices; to conduct research and disseminate information on sentencing matters; to gauge public opinion on sentencing; to consult on sentencing matters; to advise the Attorney-General on sentencing issues; and (as noted above) to provide the Court of Appeal with the Council's written views on the giving, or review, of a guideline judgment.

- In Scotland, the Sentencing Commission was launched in November 2003.[29] It is an independent, judicially-led body, with a temporary remit to review and make recommendations to the Scottish Executive on the use of bail and remand; the basis on which fines are determined; the effectiveness of sentences in reducing reoffending; the scope to improve consistency of sentencing; and the arrangements for early release from prison, and supervision of prisoners on their release. In essence the Scottish

---

26 See paras 21–23 above.

27 The New South Wales Council has 10 members appointed by the Attorney-General, consisting of: a retired judicial officer (to be chairperson), a person with expertise or experience in law enforcement, three people with expertise or experience in criminal law or sentencing (one in the area of prosecution and one in the area of defence), a person who has expertise or experience in Aboriginal justice matters; and four people representing the general community (two are to have expertise or experience in matters associated with victims of crime).

28 Its members must include: one senior academic; two people with broad experience in community issues affecting the courts; one highly experienced defence lawyer; one highly experienced prosecution lawyer; one member of a victim of crime support or advocacy group; people with experience in the operation of the criminal justice system.

29 The Commission has 17 members, four of which are judicial. Its members are appointed by the Scottish Parliamentary Ministers.

Commission is a Law Commission focused upon sentencing matters. It therefore differs somewhat from the Australian models.

43 Again, these models have a great deal to recommend them. However, we consider their remit to be too limited: they strike us as Councils that advise more than they lead; they do not represent a significant shift in the traditional distribution of responsibility for sentencing policy; and their impact on sentencing practice is thus somewhat limited. We believe that, although the goals of these Councils should be incorporated into any reform, more is required.

An independent Sentencing Council with a mandate to set its own sentencing guidelines

44 The fifth and final option is to establish a Sentencing Council or Commission[30] along the lines of those that have been established in England and Wales, and in a number of jurisdictions in the United States. Such a body might have many of the advisory and educative functions of the Councils established in Scotland, New South Wales and Victoria; it would also have the major additional task of devising and promulgating a set of sentencing guidelines to be applied by the judiciary in individual cases.

45 We consider that this model has the most potential to address the deficiencies in the current structure that we have identified. It would enable policy as to sentencing levels to be established in a sufficiently flexible way so as to ensure that justice could be done in the individual case; it would allow a broad range of experience and expertise to be applied to the decisions in that respect; and it would provide a mechanism for taking the costs and benefits of sentencing options to be taken into account systematically and effectively.

46 We therefore turn to consider what can be learned from overseas experience in the development of mechanisms of this sort.

Brief history

47 Sentencing guidelines were first conceived of in the United States in the early 1970s,[31] and are usually devised by a body constituted especially for that task.[32] The first body, the Minnesota Sentencing Commission, began work in 1982 and since then sentencing councils have operated in a number of jurisdictions with the aims of drafting sentencing guidelines and better informing sentencing practice. The primary motivation for guidelines in the United States was to reduce disparity

---

30 The terminology varies.

31 Marvin E Frankel "Lawlessness in Sentencing" 41 Univ Cin LR 1 (1972) and Marvin E Frankel *Criminal Sentences: Law without Order* (Hill and Wang, New York, 1973).

32 By contrast, in some states (for example, Utah) sentencing guidelines were devised by judges, in some cases as a means of deflecting the possibility of further legislative constraint. See Richard S Frase "State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues" (2005) 105 Colum LR 1190, 1198.

in sentencing, but their worth in managing penal resources has become another key driver.[33]

48 Existing sentencing bodies and guidelines differ in their goals, scope of coverage, design and operation; in their duties, staffing and budget; and in the role of the body relative to the legislature.[34] However, similarities between them indicate a high degree of consensus on some issues relating to role and composition. In addition, there is a voluminous body of literature assessing their aims and degrees of success. The models that we consider have the most to offer New Zealand are the Sentencing Guidelines Council operating in England and Wales, and the model proposed by the Canadian Sentencing Commission in its 1987 Report *Sentencing Reform: A Canadian Approach*.

United Kingdom Sentencing Guidelines Council

49 The Criminal Justice Act 2003 created a Sentencing Guidelines Council and retained the Sentencing Advisory Panel. Ostensibly, the introduction of the Council signifies a significant shift in responsibility for sentencing policy, because it has assumed some of the role played previously by the Court of Appeal. The Council commenced business in March 2004 and is responsible for issuing sentencing guidelines for use by the courts for particular offences or groups of offences.

50 The Council consists of the Lord Chief Justice as Chairman, seven judicial members (appointed by the Lord Chancellor after consultation with the Secretary of State and Lord Chief Justice), and four non-judicial members (appointed by the Secretary of State after consultation with the Lord Chancellor and the Lord Chief Justice).[35]

---

33 See Thomas B Marvell "Sentencing Guidelines and Prison Population Growth" 85 J Crim L & Criminology 696 (for example, Marvell notes at 699 that limiting prison population growth was probably the most important reason for creating sentencing guidelines in Oregon); Robin L Lubitz and Thomas W Ross "Sentencing Guidelines: Reflections on the Future" United States Department of Justice – National Institute of Justice *Sentencing & Corrections Issues for the 21st Century* (June 2001) <http://www.ncjrs.gov/pdffiles1/nij/186480.pdf> (last accessed 2 March 2006); Daniel F Wilhelm and Nicholas R Turner "Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration?" (Vera Institute of Justice, 2002) http://www.vera.org/publication_pdf/167_263.pdf (last accessed 26 January 2006); Don Stemen et al "Of Fragmentation and Ferment: The Impact of State Sentencing Policies on Incarceration Rates 1975–2002" (Vera Institute of Justice, August 2005) pp 66–67, 80–81, 142–143; Michael Tonry *Punishment and Politics: Evidence and Emulation in the Making of English Crime Control Policy* (Willan Publishing, 2004) 94; David Boerner "The Role of the Legislature in Guidelines Sentencing in 'The Other Washington'" (1993) 28 Wake Forest Law Review 381, 419.

34 Frase, above n 32, 1191.

35 Criminal Justice Act 2003 (UK), s 167(1). The current membership includes the Lord Chief Justice, the President of the Queen's Bench Division, a Lord Justice of Appeal, a member of the Court of Appeal (Criminal Division), two Recorders, a Senior District Judge, the Chairman of the Wiltshire Branch of the Magistrates' Association, a Recorder of the Crown Court and Director of Public Prosecutions, a Chief Constable, a senior partner and criminal law specialist, the Head of Policy at Victim Support, the Commissioner for Correctional Services, the first Chief Executive of the National Offender Management Service, a Professor of Criminal Justice, and the Director of Offender, Law and Sentencing Policy in the National Offender Management Service as the Home Secretary's nominated observer.

51 It can self-refer matters and must consult the Panel before issuing new or amended guidelines. The Home Secretary and the Panel itself may also propose that the Council should issue a guideline in a certain area.[36] The Council is required to consult about the draft guidelines with the Home Secretary, such persons as the Lord Chancellor, after consultation with the Home Secretary, may direct[37] and such other persons as the Council considers appropriate. In practice, the Council also consults with the Lord Chancellor, the Attorney-General, and the Home Affairs Select Committee.

52 In drafting guidelines, the Council must have regard to the need to promote consistency in sentencing; the sentences imposed by the courts; the cost of different sentences and their relative effectiveness in preventing reoffending; the need to promote public confidence in the criminal justice system; and the views communicated to the Council by the Panel.[38]

53 Once a guideline is published as final by the Council, it is definitive. Unlike in some United States jurisdictions, there is no requirement of legislative approval, or appellate court endorsement. The Council has taken an incremental approach to the creation of guidelines, as anticipated by its founding statute. Since its institution in March 2004, it has finalised four guidelines.[39] It has also issued draft guidelines for consultation in relation to a number of other offences.

54 Courts are required to have regard to the Council's guidelines.[40] They must also give reasons for imposing a particular sentence, and must explain to the offender the effect of the sentence. If the court departs from relevant guidelines, it must give reasons for doing so.[41]

Weaknesses of the English model

55 The Council in England and Wales is in its early days and it is therefore difficult to satisfactorily evaluate its progress and success. On the one hand, it has been criticised for not having learnt sufficiently from the American experience.[42] On

---

36 Criminal Justice Act 2003 (UK), s 170(3).

37 There are 28 statutory consultees: Council of Her Majesty's Circuit Judges, Council of District Judges (Magistrates' Courts), Justices' Clerks' Society, Magistrates' Association, Crown Prosecution Service, Association of Chief Police Officers, Police Superintendents' Association, Police Federation of England and Wales, General Council of the Bar, Law Society, National Offender Management Service, National Probation Service, National Association of Probation Officers, Probation Managers' Association, HM Prison Service, Prison Governors' Association, Prison Officers' Association, Parole Board, Youth Justice Board, Victim Support, Victims Advisory Panel, Justice, Liberty, NACRO, Prison Reform Trust, Penal Affairs Consortium, Howard League for Penal Reform, Commission for Racial Equality, Equal Opportunities Commission, Disability Rights Commission, Law Commission, Centre for Crime and Justice Studies, Association of Directors of Social Services.

38 Criminal Justice Act 2003 (UK), s 170(5).

39 The guidelines relate to manslaughter by reason of provocation; reduction in sentence for a guilty plea; new sentences under the Criminal Justice Act 2003; and overarching principles (seriousness).

40 Criminal Justice Act 2003 (UK), s 172.

41 Criminal Justice Act 2003 (UK), s 174.

42 Tonry, above n 33, 94, 99. See generally, Michael Tonry *Sentencing Matters* (Oxford University Press, Oxford, 1996) ch 2 and Jane Louise Moreland "Is Sentencing Too Important to be Left to the Judiciary? An Analysis of the Sentencing Guidelines Council and its Implications for the Development of Sentencing Policy" (LLM paper, London School of Economics, 2005).

the other hand, Professor Ashworth has defended the framework on the basis that the United Kingdom sentencing climate demands evolutionary reform, instead of a one-off monumental change.[43]

56 While we think it offers a great deal, we have identified the following potential difficulties in the model from the New Zealand perspective. Amendments to the framework in these areas would, we think, better deliver the objectives sought by the introduction of a sentencing body and guidelines in New Zealand.

- Employing two bodies for the task (a Panel and Council) seems unnecessarily bureaucratic. It may be an historical accident that both exist. While the combination of the two memberships provides a broad base of experience for the development of the guidelines, we consider that this should be able to be achieved by one appropriately constituted body.

- In large part as a result of the existence of two bodies, the process of getting guidelines introduced is cumbersome.[44] Separating the consultation duties between the two bodies has introduced unnecessary exchanges and a duplication of process. Perhaps this is the reason why, after two years, the Council has finalised only four guidelines.

- The incremental approach employed by the Council would not achieve the principal purpose for which we believe such a body should exist in New Zealand: the development of a comprehensive set of guidelines based on a rigorous cost-benefit analysis.

- There is an overrepresentation of judges on the Council.[45] We noted above that there are many other valid interests that need to be incorporated into sentencing policy. But perhaps more importantly, a body which has eight judicial members out of a total membership of 12 gives the overriding impression that it is a judicial body. Given that it is making policy decisions which are inherently political and will inevitably be the subject of some public debate and criticism, this is undesirable.

- The format of the guidelines themselves could be improved. The guidelines are long – six pages of text precede the suggested tariff ranges in the Council's manslaughter guidelines. Guidelines in this form for all offences and sentencing matters would constitute a sizeable document which is unlikely to be readily useable by sentencing judges, particularly those working in busy District Courts. We favour a more succinct approach.

- Finally, the Council is not required to take resources into account when devising its guidelines.

---

43 Andrew Ashworth *Sentencing and Criminal Justice* (3rd ed, Butterworths, London, 2000)

44 See, for example, Ashworth, above n 17, 57.

45 Moreland, above n 42.

Canadian Sentencing Commission proposal[46]

57 In 1987, largely driven by a desire to achieve effective management of inherent tensions among the various players in the sentencing process, the Canadian Sentencing Commission proposed the introduction of sentencing guidelines. Its recommendations have not been acted upon. The proposal was for presumptive guidelines to be issued. Judges were expected to sentence within the guideline range, although departures were possible if there were compelling reasons to do so. Judges were to give written reasons for departures. Further, any sentence within the guideline range could be appealed on the basis that there were exceptional circumstances making it inappropriate, for example that the sentence was disproportionate. Provincial Courts of Appeal were to be permitted to locally modify the presumptive custodial ranges set by the Commission if there were "substantial and compelling" reasons to do so. It was suggested that this might create a more equal sharing of power between the Commission and the courts and that a more open and flexible sentencing system might be created, facilitating evolutionary change.

58 The Canadian Sentencing Commission rejected the notion of a grid-based system such as exists in the United States in favour of a hybrid scheme, which incorporated elements of American guideline systems and the more recent United Kingdom Sentencing Guidelines Council approach. The proposal was for every offence in the Criminal Code to be assigned to one of four presumptive categories, reflecting primarily the seriousness of the offence. The most serious crimes were designated "Presumptive In," meaning that unless exceptional and compelling circumstances existed, the offender would be incarcerated; the least serious offences were classified "Presumptive Out," meaning that the offender would almost never be incarcerated for such a crime; and there were two intermediate categories.

59 In addition, judges were to receive guidance about mitigating and aggravating factors, of which criminal record was just one. Judges would also receive information on current sentencing patterns and community treatment programmes for offenders. The information would be furnished and periodically updated by a permanent sentencing commission.

United States

60 The first sentencing commission in the United States was established in Minnesota in 1982. Guidelines are now operating or have operated in 20 American jurisdictions (including the Federal jurisdiction). These guidelines and the bodies creating them have taken different forms and have had varying levels of success. United States sentencing commissions have sometimes been expressly located in the judicial branch of government, have sometimes included

---

[46] Canadian Sentencing Commission, above n 12, ch 12. See generally, Anthony N Doob "The New Role of Parliament in Canadian Sentencing" (1997) 9 Fed Sent R 239; Julian V Roberts "Sentencing Reform: The Canadian Approach" (1997) 9 Fed Sent R 245.

representation from the legislature,[47] and have included a greater or lesser number of members[48] and judges. Different states' guidelines have been expressly stated, or interpreted, as voluntary, advisory, presumptive and mandatory.[49] And they have been subjected to varying levels of review by appellate courts, either because of the wording of their founding statute, or because of the approach taken on appeal.[50]

61 Sentencing guidelines in the United States differ quite substantially from what we advocate here. In most cases, guidelines have been in the form of a two-dimensional numerical grid, with one axis devoted to offence seriousness and the other to criminal history or offender risk score. Within each box on the grid is a sentence range (expressed, for example, as a number of prison months) appropriate for offenders whose offence seriousness and criminal history bring them within that box. Typically the number of levels on each axis of the grid is fairly small. For example, Oregon sets out 11 levels of offence seriousness on one axis, and nine criminal history categories on the other. Thus, many different offence types have been grouped together within the same level of seriousness. While this has made the sentencing task easier, it has created guidelines which are in our judgment too crude and blunt to ensure justice in the individual case. The English model, and the one we envisage in New Zealand, builds upon our history of appellate review of sentences and guideline judgments,[51] and is better suited to our political and legal culture.

62 Nevertheless, the United States' experience is instructive and cannot be ignored. Some commissions are regarded as having been very successful in achieving their aims. Tonry has reported that the experience of Minnesota, Oregon and Washington shows that sentencing commissions can develop guidelines that judges can live with and that demonstrably reduce sentencing disparity; decrease the use of prison sentences for certain offenders; increase use of prison sentences for violent offenders; and tie sentencing policies to correctional resources.[52]

---

47 Four legislators serve on the Washington State Sentencing Guidelines Commission as non-voting members, two appointed by the President of the Senate and two appointed by the Speaker of the House, with one from each party in each house: Sentencing Reform Act of 1981, RCW Chapter 9.94A. The North Carolina Commission includes six members from the legislature.

48 The North Carolina Sentencing and Policy Advisory Commission has 30 members, compared to 11 members on the Minnesota body.

49 Guidelines are voluntary and not subject to appeal in Utah, Maryland, Delaware, Virginia, Arkansas, Missouri, Wisconsin and the District of Columbia. However, in some of those jurisdictions, judges are required to give reasons for departure: Frase, above n 32, 1198.

50 Pennsylvanian appeal has been described as highly deferential to the lower courts. Conversely, the approach in the Federal appeal courts has led to the Federal guidelines being referred to as effectively "mandatory". See Frase, above n 32. See generally, Kevin R Reitz "The Enforceability of Sentencing Guidelines" (2005) 58 Stanford LR 155 and Andrew von Hirsch "The Enabling Legislation" in Andrew von Hirsch, Kay A Knapp and Michael Tonry *The Sentencing Commission: Guidelines for Criminal Sanctions* (1987).

51 See Andrew Ashworth "The Sentencing Guideline System in England and Wales" (unpublished) 1.

52 Michael Tonry "Judges and Sentencing Policy – the American Experience" in Munro and Wasik (eds) *Sentencing, Judicial Discretion and Training* (Sweet and Maxwell, London, 1992) 152, drawing on Michael Tonry *Sentencing Reform Impacts* (1987) and M Tonry "Structuring Sentencing" in M Tonry and N Morris (eds) *Crime and Justice: A Review of Research* (vol 10, 1988). See also Stemen et al, above n 33.

63 Tonry argues that the most successful commissions (and in this, he includes Delaware's voluntary guidelines) were adequately funded and staffed, and undertook ambitious statistical analyses of past sentencing practices in order to inform policy-making, provide a basis for making impact projections and provide a baseline for evaluation of the operation of the guidelines.

64 However, some commissions failed to produce guidelines (commissions in Maine, Connecticut and New Mexico produced reports opposing the adoption of guidelines). Others such as New York, South Carolina and (in the first instance) Pennsylvania developed guidelines that were rejected by their legislatures. And some commissions were instituted only to be abolished, or to see their implemented guidelines overruled or their impact lessened by the legislature or appellate courts.[53] The Federal guidelines have been subjected to the most criticism.

65 Importantly for us, what the United States' experience highlights is that the success of a sentencing council and its guidelines depends on a combination of factors. There is a great deal of literature documenting the various approaches of sentencing commissions and suggesting the lessons to be learned from those failures and successes. It is clear that what works well in one jurisdiction may not in another. The design of any sentencing body needs to be finely balanced and attuned to its particular aims and the system within which it is working. A number of factors have been identified as influential in the likely success of a sentencing body. We have built our recommendations around these vital factors.

A NEW ZEALAND SENTENCING COUNCIL

66 We recommend that a Sentencing Council should be introduced, with the following characteristics.

Clearly stated purposes and functions

67 The Council should have a broad range of purposes and functions which should be clearly set out in legislation.[54] There is no point having a Sentencing Council unless it is going to improve the quality of sentencing in general. So, while the Council could be responsible for drafting guidelines that are merely descriptive of past and current sentencing practice – and are thus essentially an exercise in codification – we favour guidelines which seek to "prescribe values to guide

---

53 Florida's guidelines were repealed in 1998. Commissions in Tennessee, Florida and Michigan were disestablished. See Michael Tonry "Setting Sentencing Policy Through Guidelines" in Sue Rex and Michael Tonry (eds) *Reform and Punishment: The Future of Sentencing* (Willan Publishing, 2002) 80; Reitz, above n 50; Frase, above n 32, 1199.

54 Doob concludes that a fundamental disagreement about the theory and political aims of a body tends to condemn it to failure: Anthony N 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 *The Politics of Sentencing Reform* (Clarendon Press, Oxford, 1995) 200. The problems encountered by the United States Sentencing Commission have been attributed to a "festering problem of misconception within the commission as to its proper role": J Parker and M Block "The Sentencing Commission, PM (post-Mistretta): Sunshine or Sunset? (1989) 27 Am Crim LR 289, 318.

future sentencing and [which are structured] to achieve those values in practice".[55] The former approach seeks to achieve greater consistency in sentencing. The latter goes somewhat further. The Council should have the following purposes.

- **Promote consistency in sentencing practice between different courts and judges.** We are not suggesting that different instances of like offending should each be disposed of in an identical way. However, sentencing guidelines and the provision of information about how they are being applied should aim to ensure that there is, at a minimum, a consistent judicial approach and a predictable pattern in the severity of sentences.

- **Ensure that the assessment and management of risk is undertaken by the Parole Board in a consistent and transparent manner.** We discuss this further in chapter 2.

- **Ensure transparency in sentencing policy.** Guidelines will enable the legal profession and defendants to make informed decisions about how to proceed in their cases. Guidelines, accompanied by reform of the parole structure, will promote "truth in sentencing"; sentencing benchmarks will be transparent to everybody, including the general public.

- **Enable the development of sentencing policy to be based on a broad range of experience and expertise.** A body with a varied membership will be able to take advantage of judicial expertise; provide a conduit by which community sentiment and legislative and governmental priorities can be translated into actual sentencing practice; and accumulate broad specialised expertise in a way that appellate review cannot.[56] In addition, it should reduce public pressure upon and criticism of judicial sentencing decisions.

- **Facilitate the prioritisation of available correctional resources and enable the effective management of the prison muster.** Comprehensive guidelines will enable effective priorities in the use of available correctional resources to be set. To do this, the Council will need to be able to accurately calculate the impact of proposed sentencing policy on the prison population, to enable government to determine whether it should approve the policy, and if so budget accordingly.

- **Inform politicians' and policy makers' understanding of sentencing practice and options for change.** It should be a purpose of the Council to improve understanding about the costs and benefits of different sentencing options (for example, prison, community work, fine) for different categories of offender and offence. This will enable it to give politicians and policy makers a better understanding of the most effective interventions.

---

55 Dale G Parent "What did the United States Sentencing Commission Miss?" (1992) 101 Yale LJ 1773, 1779.

56 Michael Tonry "Setting Sentencing Policy Through Guidelines" in Rex and Tonry, above n 53, 84.

- **Promote public understanding of the nature and effect of sentencing and punishment processes and outcomes.** If public understanding is strengthened, acceptance of and confidence in both the judiciary in general and the sentencing process in particular will be enhanced.

68 To achieve these purposes, legislation should provide for the Council to have the following functions.

- **Draft sentencing guidelines.** It should draft guidelines as to both sentencing principles and sentencing levels in order to ensure three things: that there are appropriate relativities between offences; that so far as is practicable, sentencing policy is aligned with available resources; and that resources are used in an optimally effective way.

- **Draft parole guidelines.** It should also draft Parole Board policy guidelines, including guidelines about best practice in relation to the risk assessment of inmates and risk management of parolees.

- **Collate and provide information for sentencing judges.** It should monitor sentencing practice and provide specific information on adherence to and departures from the guidelines, and the more general application of sentencing principles, on a court by court basis.

- **Publish and make accessible information about sentencing to the wider public.** It should provide more general information about sentencing practice, and the nature and effectiveness of particular sanctions, to the wider public, and should have a role in commenting on sentencing and punishment issues through the media.

- **Provide policy advice on sentencing issues at the request of the Minister of Justice and on its own initiative.** It should provide advice where appropriate on statutory sentencing policy for four reasons.

  - It will have responsibility for guidance on non-statutory sentencing policy. Given the obvious connection between that and statutory sentencing provisions, it should have the ability to advise on how the latter might be developed or amended.

  - It will have a broad base of expertise that would add significant value to the quality of the advice being received by government on sentencing issues.

  - It will provide a means of defusing crisis law and order issues when they arise in the media and of ensuring a more rational consideration of those issues.

  - It will be able to serve as a conduit between the executive, the Parliament and the judiciary on statutory sentencing matters.

- **Take account of the costs and benefits of the guidelines to the community.** In drafting its guidelines, the Council should be required to

undertake a cost benefit analysis of its proposals. This should include modelling of the impact on the prison muster.

- **Analyse and interpret sentencing statistics, publish conviction and sentencing data and be responsible for forecasting prison numbers, monitoring and reporting on the impact of the guidelines.** The Council will need to have access to adequate and reliable sentencing statistics and will need to be sufficiently resourced to analyse and interpret them. At present the Ministry of Justice is responsible for the collection of sentencing data, and this role must remain with the Ministry. But we consider that the extraction, analysis and interpretation should be undertaken by the Council so that it can assume the overall monitoring, analysis and reporting function with regard to sentencing and the guidelines. There will need to be an ongoing dialogue between the Ministry and the Council to ensure that the Council is able to have access to the data necessary for its task, and that the Ministry can obtain from the Council such information as it needs to advise its Minister on sentencing issues as they arise.

Recommendations

R1 A Sentencing Council should be established.

R2 It should have the following purposes:

- promote consistency between courts and judges in sentencing practice;
- ensure that the assessment and management of risk is undertaken by the Parole Board in a consistent and transparent manner;
- ensure transparency in sentencing policy;
- enable the development of sentencing policy to be based on a broad range of experience and expertise;
- facilitate the prioritisation of available correctional resources and enable the effective management of the prison muster;
- inform politicians' and policy makers' understanding of sentencing practice and options for change;
- promote public understanding of the nature and effect of sentencing and punishment processes and outcomes.

R3 To enable it to carry out these purposes, it should have the following functions:

- draft sentencing guidelines;
- draft parole guidelines;
- collate and provide information for sentencing judges;
- publish and make accessible information about sentencing to the wider public;

- provide policy advice on sentencing issues at the request of the Minister of Justice and on its own initiative;
- take account of the costs and benefits of the guidelines to the community;
- analyse and interpret sentencing statistics, publish conviction and sentencing data and be responsible for forecasting prison numbers, monitoring and reporting on the impact of the guidelines.

Scope of guidelines

69 It would be a mammoth task for sentencing guidelines to deal with all offences on the statute book. There are around 50,000 offences in the United Kingdom and the Council there anticipates that guidelines will be produced for only 1,500 to 2,000 of them. Some United States commissions restrict their guidelines to felonies, while others also produce guidelines for misdemeanours. The United Kingdom Sentencing Guidelines Council also produces guidelines on broader sentencing issues such as the factors to be considered when assessing the seriousness of an offence.

70 The offences on the New Zealand statute book include those generally regarded as traditional criminal behaviour and many regulatory offences directed at protecting public safety and obtaining compliance with various standards. It is impractical to think that a New Zealand body could deal with all of these offences. Options for addressing this issue include restricting the Council's work to:

- certain offence types, for example, only Crimes Act or indictable offences;
- certain sanction types, for example, imprisonable offences, offences attracting community-based sanctions, offences attracting a fine;
- a combination of offence and sanction types, subject to other criteria such as the frequency with which they appear before the court.

71 In order to keep the Council's work within manageable bounds, we consider a sentencing body should produce guidelines for only those imprisonable offences coming routinely before the courts that result in a significant number of sentences of imprisonment. This will ensure that its work is focused on offences where there is the greatest need for consistent and cost-effective sentencing. Such offences are likely to include (among others) some but not all Crimes Act offences, Misuse of Drugs Act offences, a small number of Land Transport Act offences, common matters such as tax fraud and some regulatory matters such as Fisheries offences.

Recommendation

R4 The guidelines should cover those imprisonable offences coming routinely before the courts that result in a significant number of sentences of imprisonment.

Scope of inaugural guidelines

72 The United States' approach to guidelines was to dedicate resources and time upfront to the introduction of a sentencing grid.[57] By comparison, the United Kingdom approach has been to introduce guidelines incrementally.

73 We do not think that an incremental approach would achieve the purposes for which guidelines ought to be developed. As has happened in the United Kingdom, it would result in a set of guidelines for some offences which sat alongside, and did not necessarily fit well with, guidelines for other offences being developed by the courts themselves. More importantly, it would not enable the costs and benefits of the guidelines as a whole to be analysed, or their impact on correctional resources to be accurately predicted. We therefore favour a comprehensive approach, necessitating the drafting of a complete set of guidelines before they come into force.

74 Ongoing work will be required to amend the guidelines as and when evidence for the need for amendment arises as a result of a mutual dialogue between the courts and the Council.

Recommendation

R5 The Council should develop and promulgate one comprehensive set of guidelines before they come into force. These should be continually updated and modified.

Narrative and/or numerical guidelines

75 A distinction can be drawn between narrative and numerical guidelines. Numerical guidelines set out the range of fine or imprisonment to be applied. These may or may not be presented in a grid format (as they are in the United States).[58] Numerical guidelines have the benefit of simplicity – both for the comprehension of sentencing judges and the wider public. However, the opposing view is that purely numerical guidelines, particularly as they are presented in the United States, can be overly rigid and restrict judges' ability to adequately achieve the just outcome in the particular case.[59]

76 By comparison, numerical sentence ranges could be accompanied by a commentary that contextualises the guideline. For example, the United Kingdom

---

57 See above, para 61.

58 These guidelines have tended to be accompanied by a greater or lesser degree of narration. For example, Oregon has a grid setting out 11 levels of offence seriousness on one axis, and nine criminal history categories on the other axis. Offence seriousness categories are set out in the Sentencing Guideline rules from r 213-017-0001. Washington employs a grid, accompanied by a 50-page commentary and a 250-page "offence category" document. The Minnesota guidelines are in the form of a simple grid, accompanied by a commentary of more than 50 pages.

59 See S Schulhofer "Excessive Uniformity: How to Fix It" (1992) 5 Fed Sent R 169 at 173, quoted in Doob, above n 54 at 249: "A sentencing system that eliminates unwarranted disparity will nonetheless choke on its rigidity, unless it finds a way to permit appropriate differentiation among differently situated offenders".

guideline on manslaughter by reason of provocation has a two page "guideline" setting out 11 factors to be taken into consideration, the starting points and ranges in numerical form for the sentence for the offence and relevant aggravating and mitigating factors. It is preceded by a five-page commentary.

77 This approach leaves a desirable degree of judicial discretion, but arguably it makes achieving greater consistency and forecasting the prison population more difficult tasks. We have some concerns that lengthy guidelines will be impractical for judges working in busy District Courts, although members of the United Kingdom Sentencing Guidelines Council have defended their format to us on the grounds that the contextualisation is essential and that offence-based guidelines will essentially only require judges to have the two-page "guideline" before them in court.

78 A third alternative is that certain guidelines could be purely narrative.[60] This format best suits guidelines relating to wider sentencing matters such as the general principles of sentencing, sentencing philosophy and the sentencing discount principle.

79 In practice, we consider that guidelines will in fact take on all of these forms. The guidelines should provide sentencing judges with clear direction as to sentencing ranges grouped under offence type such as wounding or burglary (the numerical element) but to also provide context for those ranges (the narrative element). At the lower end of the spectrum, the guidelines are likely to concentrate on the factors relevant to the custody threshold (the in/out decision). The Council should also draft purely narrative guidelines about matters such as the general principles of sentencing, sentencing philosophy and the sentencing discount principle, as it sees fit. Some examples of draft guidelines are attached in Appendix A.

Recommendation

R6 The guidelines should address both offence tariffs and general principles of sentencing, and so will be in both a narrative and numerical format.

Appropriate composition

80 The composition of the Council will have a significant influence on how it is viewed by those outside the Council: the legitimacy of its decisions with the judiciary, executive, Parliament and the public is likely to depend significantly on its membership. Ultimately, its reputation will determine the extent of its success with its task. Legitimacy may also turn on the degree to which it is perceived as independent.

81 Both its composition and size are also important because the members need to be able to work together to reach agreement on the guidelines, and they need to be able to bring a broad base of perspectives and experience to the task.

---

[60] The United Kingdom Sentencing Guideline Council's first two guidelines were purely narrative and set out, respectively, the approach to be taken in relation to new sentences under the Criminal Justice Act 2003 and the factors to be considered when assessing the seriousness of an offence under the Act.

82 The main options we think demand consideration are:

- whether it should be a solely judicial body, (composed of the Court of Appeal, or a "council" or "tribunal" composed of judges from all levels of the criminal court system); or

- whether it should have mixed judicial and non-judicial membership, and if so:

  - who its head should be;

  - whether the proportion of judicial and non-judicial members should be specified, and if so how;

  - whether judicial membership should be specified in terms of levels of hierarchy (Court of Appeal, High Court, District Court);

  - whether the executive government should be represented (for example, through Ministry of Justice or Corrections officials), either as members or as observers;

  - what the nature of the non-judicial membership should be, and in particular, whether it should be on the basis of particular designated positions, required skills, or general community representation;

  - whether there should be political representation.

83 One possible model is the Parole Board, another quasi-judicial body. Members of that body are appointed by the Governor-General on the recommendation of the Attorney-General. The Attorney-General must be satisfied that appointees have knowledge or understanding of the criminal justice system; the ability to make a balanced and reasonable assessment of the risk an offender may present to the community when released from detention; the ability to operate effectively with people from a range of cultures; and sensitivity to, and understanding of, the impact of crime on victims.[61]

84 The Council's composition should obviously be dictated by its purpose and role. It also needs to be carefully balanced in order to be viewed as legitimate by all stakeholders; provide the breadth of perspective and expertise needed to determine sentencing policy issues; and facilitate a constructive dialogue with stakeholders.

85 Overseas literature is divided on the appropriate proportion of judicial members. On one view, Councils composed solely of judges or dominated by them are unlikely to devise guidelines of sufficient rigour and specificity: Tonry argues, for example, that the United States' experience shows that judges are too wedded to the status quo, that they may lack the breadth of policy knowledge required and

---

[61] Parole Act 2002, s 111.

that "it is preferable to make a serious effort and fail than to take half-hearted measures".[62]

86 Moreover, since the Council will, by making policy, inevitably be exposed to the political arena and subject to debate and criticism, it should not be seen as a "judicial body": this would expose the judiciary to undesirable criticism and have the potential to undermine rather than enhance community confidence in them.

87 On the other hand, it makes sense that the people responsible for putting the policy into effect should have direct input to its development and maintenance.[63] Judges, most notably in the trial courts, are at the coalface of the sentencing framework, and will be responsible for implementing the guidelines. Guidance developed with significant judicial involvement is more likely to be workable and to have legitimacy with the judiciary.[64]

88 On balance, we favour a Council that has a broad membership.

89 There are arguments for and against appointing a member of the judiciary to chair the Council. On the one hand, a judicial chair may heighten its legitimacy generally and among the judiciary. On the other hand, it may again overly expose the judiciary to public criticism: the chair would essentially be the spokesperson for the Council and it may be undesirable that he or she gets drawn into public debate on such policy matters. Furthermore, our feedback suggests that in fact the most important characteristic for a chair is the ability to ensure that all members of the Council can work constructively together. This will depend upon the personalities of the Council once it is formed. We have not yet reached a decision on this issue.

90 We do not favour the inclusion of MPs because of the potential risks involved. In particular, we do not want the Council to become a forum for political grandstanding.

91 Nor do we favour the inclusion of officials, such as those from the Ministry of Justice or Department of Corrections, as members on the council since that would cause a potential conflict with its independent status. Nevertheless, we consider that officials should attend as observers. This practice is followed in the United Kingdom. We consider this desirable to enable an ongoing dialogue and exchange of information between government and the Council, both for the purpose of informing the Council's work and ensuring government is kept up to date with the development of the guidelines.[65]

---

62 Tonry, above n 53, 80.

63 See LT Wilkins "Disparity in dispositions: the early ideas and applications of guidelines" in K Pease and M Wasik (eds) *Sentencing Reform: Guidance or Guidelines* (Manchester University Press, Manchester, 1987).

64 A Ashworth *Sentencing and Criminal Justice* (2nd ed, Butterworths, London, 1992) 315.

65 The Director of Offender, Law and Sentencing Policy in the National Offender Management Service is the Home Secretary's nominated observer. Section 167(9) of the Criminal Justice Act 2003 (UK) provides that "The Secretary of State may appoint a person appearing to him to have experience of

92 The Chair of the Parole Board should be a member ex officio given the Council's role in developing parole guidelines which is discussed in chapter 2.

93 All Council members should act in their individual capacity as experts in their field.

Recommendations

R7 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 offenders into society; the promotion of the welfare of victims of crime; the impact of the criminal justice system on minorities; community issues affecting the courts and the penal system; public policy;
- in addition, one or more appropriate members of executive government should be appointed as observers to ensure appropriate dialogue and information exchange.

R8 The Head of Council remains undecided, and will be determined in the light of submissions received.

Appointment process

94 The appointment process for the Council will need to be determined and will, in part, be driven by its status. The method by which members will be selected and put forward for appointment is also still undetermined.

95 By way of illustration, the process adopted for the United Kingdom Sentencing Guidelines Council is that judicial members are appointed by the Lord Chancellor after consultation with the Home Secretary and Lord Chief Justice, and non-judicial members are appointed by the Home Secretary after consultation with the Lord Chancellor and the Lord Chief Justice.

96 We consider the options to be:

- members appointed by Governor-General on the nomination of the Minister;
- members nominated by the head of their organisation and appointed by the Governor-General (for example, judges nominated by the Chief Justice);

---

sentencing policy and the administration of sentences to attend and speak at any meeting of the Council".

- members by virtue of holding a particular office (for example, Secretary for Justice, President of Court of Appeal);

- a combination of one or more of the above options.

97 With the exception of the Chair of the Parole Board, we do not favour the appointment of members on the grounds of holding a particular office. That is not necessarily a good proxy for identifying members with appropriate knowledge and experience. Instead, we consider that judges should be nominated on the basis of particular expertise or interest in the area by the Chief Justice. It is our preliminary view that other nominations should be by the relevant Minister.

Recommendation

R9 The Chair of the Parole Board should be a member ex officio. We recommend that the judicial members of the Council should be nominated by the Chief Justice, and that all other members should be nominated by the Minister. The appointment process will need to be determined.

How should the Council undertake the work?

98 Substantial initial resources will need to be allocated to an establishment unit prior to the passage of the legislation, and then to the Council itself, if a comprehensive set of guidelines is to be developed and promulgated within a reasonable space of time (we suggest two years). We consider it likely that a small number of those who might eventually be appointed as Council members could be employed in the establishment unit either full or part-time to undertake the bulk of the work in the initial drafting phase. They would need to be ably supported in this task by a well-resourced secretariat.

99 Once the guidelines were drafted, less time commitment would be required from Council members for the ongoing review and amendment of the guidelines, and for the oversight of the Council's monitoring and reporting function. The Council would have a governance role, overseeing the work of a well-resourced secretariat.

100 We propose that the legislation should be drafted flexibly to enable the role and time commitments of Council members, both during the initial stages of the Council's work and subsequently, to be determined administratively.

Recommendation

R10 Substantial resources will need to be allocated to an establishment unit prior to the passage of the legislation, and then to the Council itself, for the development of a comprehensive set of guidelines. A small number of those who might eventually be appointed as Council members could be employed in the establishment unit either full or part-time to undertake the bulk of the work in the initial drafting phase. Following the initial developmental stage, the Council members should primarily act in a governance role, overseeing the work of a well-resourced secretariat.

Consultation

101 Acceptance and understanding of the guidelines will demand proactive and wide consultation by the Council. One option is for a list of consultees to be specified in primary or secondary legislation. Thus, there could be a requirement that the Council consult with specified people or bodies such as the Chief Executives of specified government agencies, the heads of benches, the New Zealand Law Society, the Chief Executive of Victim Support, etc. However, we consider that specific consultation requirements in the legislation would be problematic; it may unnecessarily give rise to early controversy about the Council's process and indeed may provide fertile ground for legal challenge to the guidelines on the grounds of defects in the consultation process. This would be undesirable.

102 We consider that the Council should consult widely, but that the form and extent of this can be determined by the Council itself. However, we propose that there should be a legislative requirement that the Council publishes draft guidelines in an accessible form that allows for public submissions.

Recommendations

R11 The Council should be empowered to consult as it considers appropriate. The form and extent of that consultation should be determined by the Council.

R12 There should be a general requirement that the Council publishes draft guidelines in an accessible form and allows for public submissions.

Procedure for endorsement of the guidelines

103 The guidelines promulgated by the Sentencing Guidelines Council in England and Wales do not require any political or other endorsement. The Council is required by statute to consult with the Home Secretary; such persons as the Lord Chancellor, after consultation with the Home Secretary, may direct; and such other persons as the Council considers appropriate. However, the comments received are not binding; it is ultimately for the Council to determine the form in which the guidelines are issued. In our view, this is unsatisfactory and creates the potential for conflict and criticism. The guidelines need to have widespread acceptance and credibility, which is more likely to occur if there is a formal procedure for approving them.

104 Because the guidelines would prescribe matters of broad sentencing policy, this formal endorsement should not come from the Court of Appeal or any other judicial body. Rather, it should be achieved through a mechanism that involves the democratically elected representatives of the day. That is where the ultimate responsibility lies.

105 However, the mechanism needs to be a simple and speedy one, otherwise the guidelines will not be able to be modified and updated in a sufficiently timely way to respond to changing sentencing conditions and to fit with budget cycles. It also needs to avoid undue politicisation of the guidelines, which could diminish the value of the Council as an independent body; undermine the goal of insulating the

guidelines from political decision-making; and make the inclusion of judges on the Council unsustainable.

106 It is also important to ensure that the guidelines are rejected in full or not at all. As Tonry has cogently argued,[66] piecemeal acceptance or rejection would undermine respect for the Council's special expertise; prevent the development of a coherent set of interlocking guidelines; and result in anomalies and injustices. Equally, it would jeopardise the Council's ability to provide accurate forecasts as to the effects of its guidelines on correctional resources.

107 The mechanism that we propose is based on section 109 of the Crown Entities Act 2004, which provides that a government direction to a Crown entity must be presented to Parliament, and comes into force after 15 days unless the House resolves within that period to disallow it.

108 If the draft guidelines are not approved by the Attorney-General or are disallowed by the House, they should be referred back to the Council for revision, subject to any direction about fiscal or other parameters that the Attorney-General may choose to provide.

Recommendation

R13 The inaugural guidelines, and any subsequent iterations of them, should be submitted to the Attorney-General for approval. Once he or she has approved them they should be presented to Parliament and referred by Standing Order to the appropriate select committee for consideration. The guidelines should come into force 30 sitting days after they have been presented to the House, unless the House (on the notice of motion of any Member) disallows them. The select committee should be required to report on the guidelines before the expiry of that period. As soon as practicable after the guidelines come into force, the Attorney-General should ensure that they are published in the *Gazette* and on the internet. The guidelines should be accepted in full or referred back to the Council; piecemeal revisions by the Executive or Parliament should not be allowed. If the draft guidelines are not approved by the Attorney-General or are disallowed by the House, they should be referred back to the Council for revision, subject to any direction about fiscal or other parameters that the Attorney-General may choose to provide.

Enforcing the guidelines

109 United States sentencing guideline regimes have been described as "advisory", "voluntary", "presumptive" and "mandatory".[67] Some states have expressly given to their sentencing guidelines statutory authority,[68] usually by making them "presumptive". In other states, guidelines are "voluntary" and not subject to

---

66 Tonry, above n 33, 106.

67 Reitz, above n 50.

68 For example, Minnesota, Washington, Oregon, Tennessee, Kansas, North Carolina, Ohio, Michigan.

appeal,[69] though in some of these states judges are required to give reasons for departure from the guidelines. Despite their voluntary nature, compliance in some of these states is nevertheless high.

110 We consider that if they are to achieve their objectives, the guidelines need to be more than merely exhortatory. At the same time they must not be so prescriptive as to jeopardise justice in the individual case. We therefore favour a presumption that judges are to sentence in accordance with the relevant guidelines unless specified grounds for departure are met.

111 Possible grounds for departure from the guidelines could be:

- in substantial and compelling circumstances;[70]
- where it would be manifestly unjust not to;
- where the interests of justice require it;
- only for reasons not adequately considered by the Council when devising the guidelines.[71]

112 A balance needs to be struck between guidelines that have very limited room for departure and which consequently would have to be drafted to cover very broad sentence ranges; and guidelines with a very loose departure threshold which would thus be formulated in very limited terms. Whatever threshold is chosen must leave room for judicial discretion to depart from the guidelines where the particular circumstances of the case make that appropriate.

113 We therefore propose adoption of a test that allows departure from the guidelines where it would be "manifestly unjust not to do so because of special circumstances of the offence or of the offender".[72] The "manifestly unjust" and "special circumstances" formulations are well understood by the judiciary and should reassure both them and the public that a guidelines system will not turn into a straitjacket that achieves spurious consistency at the expense of justice.

114 Section 31 of the Sentencing Act should be amended to provide that judges should be specifically required to give reasons for departing from a guideline.

115 As part of its reporting function, the Council should publish courts' departure rates in its annual report. This should also have an effect of encouraging compliance.

---

69 For example, Utah, Maryland, Delaware, Virginia, Arkansas, Missouri, Wisconsin.

70 As in Minnesota and Washington.

71 As with the Federal guidelines in the United States: see 18 USC 3553(b).

72 Sections 5 and 6 of the Criminal Justice Act 1985 referred to "special circumstances". The formulation "manifestly unjust" is to be found in sections 102 and 104 of the Sentencing Act 2002 relating to imprisonment for murder.

116 It follows from the model we describe that the appellate role would largely focus on interpreting the guidelines and clarifying the circumstances in which departure from them was permissible. However, their decisions in these respects would obviously be a key factor in considering modifications to the guidelines.

Recommendations

R14 The guidelines should be presumptive. Judges should be required to adhere to them unless it would be manifestly unjust to do so because of special circumstances of the offence or of the offender.

R15 Judges should be required to give reasons for departures from the guidelines.

R16 As a measure of the efficacy of the guidelines and to encourage compliance, departure rates should be published in the Council's annual report.

2
The reform of parole

THE MEANING OF "PAROLE"

117 From the outset, it is important to define what we mean by parole. "Parole" refers to the existence and exercise of a discretionary power about the timing and conditions of an inmate's release. It does not encompass the time that the former inmate subsequently spends subject to supervision and recall (for example, for reoffending or breach of supervision conditions).

118 No consistent terminology is used to describe the latter. We have dubbed it the "supervision period". Supervision can occur with or without the existence of parole. In the absence of parole, it may occur either post-release at sentence expiry,[1] or following mandatory early release to supervision.

THE RATIONALES FOR PAROLE

119 Parole, in theory, has two rationales.

120 The first rationale is no more than implicit. It allows the state to satisfy calls for severe court-imposed sentences, while at the same time mitigating the social and fiscal costs of those sentences by releasing offenders at an earlier date. Not surprisingly, this justification is rarely even articulated,[2] let alone officially documented. However, there is little doubt that it has been the driving force behind many of the changes to the parole structure, particularly expansions in parole eligibility.

121 The second and explicit rationale is that parole is a tool for managing the recidivism risk of former inmates. It achieves this in three ways. First, although parole in general offers a vehicle for the early release of inmates, it is simultaneously a vehicle for identifying those of highest risk and ensuring their selective detention for incapacitative purposes. Secondly, there is a small amount of evidence that the granting of parole reduces, or at least postpones, recidivism.

---

1 For example, under the Parole Act 2002, inmates who serve the full term of their sentence remain subject to six months' supervision upon release: Parole Act 2002, s 18(2).

2 It is articulated in some of the parole literature. See, for example, Kevin R Reitz "Questioning the Conventional Wisdom of Parole Release Authority" in Michael Tonry (ed) *The Future of Imprisonment* (Oxford University Press, New York, 2004) 199–235; Andrew Ashworth *Sentencing and Criminal Justice* (3rd ed, Butterworths, United Kingdom, 2000) 256; Rt Hon Lord Carlisle of Bucklow QC (Chairman) *The Parole System in England and Wales: Report of the Review Committee* (HMSO, London, 1988) paras 22, 45.

This seems to be independent of the supervision effect that could be achieved by mechanisms other than parole. Thirdly, the availability of parole may prompt inmates to engage in rehabilitation programmes.[3]

PAROLE ACT 2002: PRIMARY RATIONALE AND OPERATIONAL ISSUES

122 In our view, the structure of parole under the Parole Act 2002 turns on the implicit more than the explicit justification. The release arrangements for both short-term and long-term sentences illustrate this.

123 All inmates serving sentences of two years or less are automatically released at one-half of the sentence.[4] It is difficult to imagine what other policy justification there could be for such a provision.

124 Inmates serving sentences of more than two years' imprisonment are in general eligible for parole at one-third, unless a longer minimum period of imprisonment (MPI) has been imposed.[5] If parole was being used solely as a risk management tool, this would be difficult to justify. It is counter-intuitive that two-thirds of the sentence should be devoted to considerations of risk; we suggest that both participants in the criminal justice system and members of the general public, if asked, would regard sentencing purposes such as punishment, denunciation and deterrence as the primary purposes of sentencing and thus the primary drivers in determining the proportion of the sentence that is to be served. This again suggests that the implicit rather than the explicit rationale underpins the parole arrangements for long-term sentences.

125 We believe that a parole system which turns on the implicit justification is no longer sustainable. The reasons for this are perhaps best illustrated by a brief description of the problems that have been encountered since the Parole Act 2002 came into force.

A perceived sentencing charade, and calls for "truth in sentencing"

126 It hardly needs to be said that the propriety of the argument that the penalty pronounced in open court will sound much more formidable than the system will actually produce is dubious. It is fundamentally anti-democratic. It has been described, disparagingly, as "bark and bite" sentencing, in which the judge's bark bears little relation to prison's bite.[6]

127 Furthermore, it only achieves its purpose if the public – or at least those who demand harsh sentences – are deceived into believing that sentences mean what they say. However, we do not believe that the deception works: victims, many

---

3 For a full discussion of these issues, see further paras 171–185.

4 Parole Act 2002, s 86(1).

5 Parole Act 2002, s 84; Sentencing Act 2002, s 86.

6 Martin Wasik and Ken Pease (eds) *Sentencing Reform: Guidance or Guidelines?* (Manchester University Press, Manchester, 1987) 23; Reitz, above n 2, 205.

members of the public, and certainly most of those who take a close interest in sentencing and punishment issues, are aware that court-imposed sentences are in large measure a charade.

128 The following example illustrates the stark difference that can occur between the appearance and reality of sentences. Although this is an entirely hypothetical example, the stakeholders with whom we consulted widely agreed that it was neither unrealistic nor uncommon.

> The sentence imposed upon the offender is nine years. This is the sentence stated by the judge in open court. No minimum period of imprisonment (MPI) is imposed. In the absence of an MPI, the offender is eligible for parole at one-third of the sentence – that is, after three years. However, the offender has already spent 18 months remanded in custody. The effect of the 18-month custodial remand is to halve the inmate's pre-parole eligibility custodial time to 18 months. In addition, offenders eligible for parole are also eligible for "back-end" home detention five months prior to their parole eligibility date. In the circumstances of this example, that means 13 months post-sentence. Victims are notified of release eligibility (including eligibility for release to home detention), and their entitlement to attend and contribute to the Parole Board hearing, six months prior to the eligibility date. Therefore, in this hypothetical case, victim notification of an upcoming Parole Board hearing would occur seven months post-sentence – that is, seven months after a nine-year sentence.

129 Of course, the fact that an offender is being considered for back-end home detention or parole does not mean that he or she will be released. Although insufficient time has elapsed to determine long-term patterns in parole decision-making under the Parole Act 2002, it appears that so far, on average, inmates are serving around 62 percent of their sentence. However, that reality does little to mitigate the anger and frustration of victims and others. Victims may not realise that release of the particular offender is unlikely at an early parole hearing; even if they do, it may well be the potential for release that assumes a larger profile. More generally, there probably is no very precise public knowledge about the proportion of sentences served on average; this may in itself lead to a perception that the problem is worse than it is, thus fuelling the view that the system is unduly lenient.

130 This, we suggest, is one of the principal drivers for public and political calls for "truth in sentencing". Truth in sentencing, in the public discourse, has become a synonym for harsher sentencing. More accurately, it means that the prison sentence imposed by a judge in open court should correspond closely with the amount of time that an inmate actually serves. In this latter sense, there is some force to the oft-repeated criticism that New Zealand lacks truth in sentencing, which in turn undermines the credibility of the system and public confidence in it.

Parole Board conservatism

131 Parole Board members are aware of the public frustration – indeed, they cannot escape it in their daily work – and it is a factor driving them to interpret the Parole Act conservatively. The Act provides that the paramount consideration for the Parole Board is "the safety of the community". Offenders must not be detained

any longer than is consistent with that objective, but at the same time the Parole Board may release an offender only if satisfied that he or she will not pose an undue risk.[7]

132 Panel members whom we consulted gave examples of cases in which they considered that, notwithstanding a low risk of reoffending by the individual inmate, social pressures arising from the nature of the case (for example, drunk driving causing death) would make it very difficult for them to agree to release at one-third. Some members of the Board believe that continued detention in such cases can be justified by reference to the "safety of the community" objective – in particular, to considerations of punishment, denunciation, and deterrence. Under the former section 7 of the Criminal Justice Act 1985, it was held that "the safety of the community" did encompass wider deterrent considerations and was not confined to the offender's individual risk.[8]

133 Taking such considerations into account entails a resentencing exercise, and involves the Parole Board in a function that should be the sole province of sentencing judges. The judge who originally imposed the sentence, and elected not to impose an MPI, has already implicitly signalled that a minimum of one-third will suffice for these purposes. However, giving weight to factors other than risk is arguably a position to which the Parole Board has been driven by the long parole eligibility span, from which it might be inferred as a matter of common sense that risk should not be the sole consideration.[9]

134 This issue is currently under consideration by the Court of Appeal.[10] Whatever the outcome of that case, it will pose an insoluble dilemma for the Parole Board. If the Court determines that inmates should be released by reference solely to their risk, it may mean that more are released closer to one-third, which would increase the disjunction between the sentence and actual time served and exacerbate public perceptions of a sentencing charade. If the Court determines that the Parole Board may engage in resentencing, that may have ongoing undesirable practical effects on sentence relativity and prison muster forecasting.

Effects on sentence relativity and prison muster forecasting

135 Two-stage sentencing by the Parole Board has undesirable effects on sentence relativity. Assuming that judges at the sentencing stage are responding to sentencing purposes such as punishment, denunciation, and deterrence in a relatively consistent way (or, to the extent that this is not presently the case, that it can be achieved by sentencing guidelines), relativities between offences and offenders established at the sentencing stage are likely to be upset by subsequent Parole Board decision-making. It also may result in double-counting. Offenders whose sentences were mitigated are likely to receive parole for similar reasons;

---

7 Parole Act 2002, ss 7, 28.

8 *R v Brown* [2002] 3 NZLR 670; (2002) 19 CRNZ 534 (CA).

9 See para 124 above.

10 We understand that the case was set down for hearing on 28 March 2006. As far as we are aware, the judgment has not yet been released.

those whose offending was aggravated or particularly abhorrent in nature are more likely to have parole declined.

136 It also poses a problem for prison muster forecasting. This is partly historical, in the sense that the Parole Board's current approach was not predicted at the time that the Parole Act 2002 was passed. Assuming that the Board, over time, establishes a relatively consistent approach, it may become easier to build that into forecasting. However, the present predicament does illustrate the potential for an ongoing problem with the wide discretion conferred on the Parole Board by the Act. There is no guarantee of consistency and predictability under the current structure; if it remained unchanged, the best that one could do was hope for it.

Other problems associated with a long span of eligibility

137 At a practical level, the present parole arrangements give rise to other problems.

138 First, parole eligibility that spans a period of years leads to repeat appearances for offenders who are not released and, of course, their victims. These are typically annual appearances.[11] The trauma of this for victims is obvious; less obvious is the way in which it makes the Parole Board's task exponentially harder. They have repeated exposure to both protagonists; to some extent they begin to develop a relationship with them; and dispassionate consideration of the issues becomes increasingly difficult.

139 Secondly, repeat appearances have significant resource implications for both the Parole Board and the Department of Corrections. In addition to the hearing itself, the Parole Board is required to notify victims who have requested notification, and go through the process of meeting them and receiving their submissions. The Department of Corrections (more specifically, the Community Probation Service and Psychological Services) prepares and presents a pre-release report for each appearance of an eligible offender.

140 Thirdly, inmates seeking release need to try to make accommodation and employment arrangements before each hearing, which strains the resources and the tolerance of philanthropic community members when release is denied.

141 Finally, it is recognised as best practice by the Department of Corrections for inmates to participate in rehabilitation programmes towards the end of their incarceration time. With a long eligibility period, the Department is left in the awkward position of second-guessing the likelihood of parole release. At present, there is a chicken and egg situation: Corrections will not offer a programme until release seems likely, which translates in practice into the "66 percent" rule; the Parole Board will often not consider release until the offender has participated in the programmes.

---

[11] The Board does have discretion to postpone a hearing for up to three years: Parole Act 2002, s 27.

Sentencing Act 2002 response: minimum periods of imprisonment

142 Section 86 of the Sentencing Act 2002 attempted to mitigate at least some of these problems with the parole structure by providing that a judge imposing a determinate sentence of imprisonment may also specify a minimum period of imprisonment (MPI) of between one-third and two-thirds of the sentence (up to a maximum of 10 years). This empowers sentencing judges to override the general Parole Act policy that all offenders should be eligible for parole after one-third of their sentence, if the prospect of release at one-third would be inappropriate in the circumstances of the case.[12]

143 This is not a sentencing option that has been widely used by judges. Figures provided to us by the Ministry of Justice for 2004 and 2005 indicated that an MPI is imposed in approximately 11 percent of cases where the determinate sentence exceeds two years.[13] It therefore has not significantly assisted in enhancing certainty and transparency around parole eligibility; nor has it mitigated the resulting public anger and frustration.

144 The reasons for the relatively low frequency of MPIs are speculative. It is likely that all of the following are contributing factors.

145 The legislative intention, as expressed in the Parliamentary debates, was that MPIs were: "likely to be used in serious cases only, usually involving violence or sexual offending where a relatively long sentence has been imposed". It was also noted that, since early parole was in any event unlikely for such offenders, MPIs probably would not ensure their longer detention, although they would provide some certainty and security for victims.[14] It is therefore not entirely surprising that judges have chosen to use the measure sparingly, either because that is exactly what was intended, or because it is in effect a redundant safeguard, in light of Parole Board practice.

146 However, it is also widely agreed that there are significant problems in principle with MPIs. They are perceived as requiring judges to "double count". The nominal sentence is set by reference to all of the relevant sentencing considerations. A judge who is considering whether to impose an MPI then must assess whether the offending is sufficiently serious that the ordinary one-third minimum period provided for in the Parole Act would not be long enough, by reference to the same set of considerations that led to the selection of the nominal sentence.[15] However, if he or she reaches that view, it arguably tends to suggest that a longer nominal sentence should have been imposed. The use of MPIs as an

---

12 Hon Phil Goff, Minister of Justice 599 NZPD 15452 (28 March 2002); *R v Brown*, above n 8, paras 23, 28, 35–36.

13 Ministry of Justice, to the Law Commission "Min Non Parole Periods.rtf" (16 March 2006) email.

14 Hon Phil Goff, above n 12.

15 *R v Brown*, above n 8, para 35.

alternative to imposing longer sentences thus has the effect of disrupting sentence relativity:[16]

> Depending on parole expectations, a six year sentence with a three year non-parole period is a more severe sanction than a seven year sentence with no non-parole period fixed. Yet this seems incongruous because, in orthodox sentencing practice, the overall culpability of the offender is primarily reflected in the nominal sentence.

147 It is our understanding, anecdotally, that judges differ widely in their use of MPIs. A few judges impose them relatively frequently, for a wide range of offending including property and drug offending, while others never do. This means that their disruptive effect upon sentence relativity is exacerbated by differences in individual judicial practice. It also tends to suggest that the overall low incidence of MPIs may be driven more by the issues of principle, than by the legislative intent.

SHOULD PAROLE BE RETAINED?

148 Our analysis of the problems with the current parole structure leads to the conclusion that substantial reform of our parole arrangements is required.

149 Many – perhaps all – of the above problems with parole could be addressed by treating it solely as a tool for managing the risk of reoffending (the explicit rationale) and designing its operation accordingly. The current two-thirds parole component of the sentence is greater than can be justified by the risk factor. As a minimum, therefore, the scope of parole needs to be curtailed, so that it operates within a significantly smaller proportion of the sentence, and is confined to considerations of risk.

150 However, the total abolition of parole for determinate sentences is also an option worthy of serious consideration. It is certainly an option that has some support amongst stakeholders, although those who advocate abolition vary in their opinions about desirable alternative release arrangements.

151 The focus of this part of the chapter is on whether parole should be replaced by a different kind of release arrangement for those serving determinate sentences. The conditions under which parole might operate if it was retained are discussed in a subsequent part.[17]

Arguments in favour of some form of early release

152 The alternative to having some form of early release is, of course, no early release – that is, the sentence means entirely what it says. We have given serious consideration to this option. It appears to us to be politically attractive: it wholly aligns with the goal of truth in sentencing; it is immediately comprehensible; and

---

16 Hon Justice William Young, President of the Court of Appeal "Judicial Implementation of Legislative Policy: Ruminations on the Impact of the Sentencing Act 2002 on Sentencing Practice and Prison Musters" (paper for Legislation Advisory Committee seminar, Wellington, 3 April 2006).

17 See paras 186–212.

it might well be perceived as an acceptable trade-off against a move towards some shorter or non-custodial sentencing.

153 However, against that must be weighed the arguments in favour of early release.

Early release as a disciplinary tool

154 The first argument in favour of early release is that it is a disciplinary tool that facilitates better prison management: provision for early release builds in room for time to be added as a punishment for in-prison criminal offending or breaches of prison discipline.

155 It may well be that early release is one possible incentive to better inmate behaviour. That is certainly the view taken in a number of overseas jurisdictions. For example, in the United States, jurisdictions that have abolished parole and advocate truth in sentencing generally do so by reference to the definition of truth in sentencing that brings them federal funding for their prison building programmes. Remission (known in the United States as "good time") of up to 15 percent is permissible. In the United Kingdom, inmates who would otherwise have been automatically released at one-half may have additional days added to their custodial time for punishment purposes.[18]

156 However, we doubt whether early release is required, or can be justified, for this purpose. Early release is not in practice used as a disciplinary tool in New Zealand prisons at the present time. Those serving short-term sentences are released automatically after one-half of the sentence, whether or not they have behaved badly or have been model prisoners. Similarly, while the in-prison behaviour of inmates serving long-term sentences may, in theory, be the subject of submissions to the Parole Board, there is no evidence that this systematically occurs in practice; it was also said to us that even if such submissions are made, they are unlikely to be an effective conditioning device so long after the event, because the cause-and-effect relationship will not be brought home to the inmate.

157 There is no evidence that any adverse effects flow from the absence of an early release behavioural incentive. Other avenues for the discipline of inmates exist in the Corrections Act 2004 (including confinement, forfeiture of earnings and removal of privileges) and these appear generally to suffice for the purpose of behaviour management. It should also be noted that any behaviour that amounts to a criminal offence may be the subject of prosecution and punishment through the court; a prison sentence imposed as a result may be cumulative and render the inmate liable to extra time.

158 On the basis of the evidence provided by the status quo in New Zealand, we do not believe that disciplinary purposes offer a sufficiently sound justification for early release.

---

[18] Criminal Justice Act 2003 (UK), s 257.

Early release as a risk management tool

159 The remaining arguments in favour of early release are broadly encompassed by the objective of risk management. The first argument is that the prospect of early release may prompt inmates to participate in pre-release rehabilitation programmes. Rehabilitation is, of course, one way (the most successful way) of managing former inmates' risk. However, over and above that, there is a need for risk management in relation to all offenders – those who will not or cannot rehabilitate, in addition to those who have enjoyed some success in this regard.

160 In principle, risk management is a highly desirable goal. Its desirability in principle is such that one should be extremely cautious about abandoning it, as long as any hope exists that it can be achieved in practice.

161 The following section explores the relative merits of two early release options from a risk management perspective, bearing in mind also their ability to address two other key problems: the public demand for truth in sentencing; and the ability to better predict and manage the prison muster. The options are automatic early release and discretionary early release (parole).

Option 1: automatic early release

162 By "automatic early release", we mean a release arrangement whereby all inmates are automatically released at a fixed point of their sentence (for example, one-half or two-thirds). The remainder of their sentence is served in the community, subject to release conditions and recall for breach of those conditions.

163 Automatic early release offers one kind of truth in sentencing, in the sense that the sentence has a custodial component and a community component, and at all times until sentence expiry the former inmate is in jeopardy of being returned to custody. However, in this limited sense we already have truth in sentencing in New Zealand; it is a semantic form of truth in sentencing which does not please the public, and which can also be achieved by parole.

164 It ensures absolute certainty about the point of release, for all offenders, which is desirable for both sentence management and prison muster forecasting. It is preferable to parole in this regard.

165 **Targeting of resources.** One arguable advantage of automatic early release from a risk management perspective is that it does not waste resources on discretionary release decisions; they can all be devoted to post-release reintegration and risk management. Except for very long sentences, discretionary release decisions make a relatively small difference to the amount of time served and it is arguably better to redirect the resources. However, a decision to manage the release of determinate sentence offenders by way of automatic rather than discretionary release would not remove the need to resource a Parole Board. The Board would still need to be involved in setting release conditions. Overall, it seems to us that involving the Parole Board in discretionary release decision-making as well as setting conditions would have negligible resource implications – particularly if the Board was to modify its practice and conduct more unattended hearings.

166 **Reintegrative benefits of the risk of recall.** The risk of recall for reoffending, or failure to comply with conditions, may act as a reintegrative incentive for offenders. In any event, it offers a lever by which the state can quickly intervene – albeit sometimes too late – when things go wrong. In this respect, automatic early release is vastly preferable to release on supervision at sentence expiry (that is, no early release). However, it does not differ from parole in this regard.

167 In risk management terms, automatic early release has two significant disadvantages relative to parole. It offers no incentive for inmates to attempt to rehabilitate while in custody; and it does not offer the flexibility to differently manage high-risk offenders.

168 **No incentive for inmates to attempt to rehabilitate while in custody.** The evidence about whether this objective can be achieved by parole is equivocal. However, it is self-evident that automatic early release offers no such incentive.

169 **No differentiation between high-risk and low-risk offenders.** The effect of a universally applicable automatic release date would be that the worst offenders would serve shorter sentences than is currently the case for those who stay full term. For both a neutral prison population effect, and reasons of principle, the universal standard would need to be set at the average time served, or perhaps even the time served by the lowest risk offenders (since otherwise these offenders would be detained for longer by reason solely of the risk of others). In our view, it would be difficult to convince the public of the merits of this approach.

170 The recently reformed parole arrangements in the United Kingdom are an example of an automatic early release regime that attempts to resolve this difficulty. Under the Criminal Justice Act 2003, offenders sentenced after 4 April 2005 to a prison sentence of 12 months or more will be automatically released at one-half. Automatically released offenders will remain on licence until the end of their sentence, subject to conditions set by the Parole Board, and recall for breach of those conditions. However, there is an exception for offenders classified as "dangerous" by reference to a schedule of specified sexual and violent offences; these offenders will continue to be paroled.[19] It therefore appears that the United Kingdom has attempted to manage the above problem by a bifurcated approach. This kind of approach, whereby different release arrangements apply depending chiefly upon the nature of the instant offence, was tried in New Zealand over approximately a 10-year period between 1993 and 2002, and abandoned in light of empirical evidence that there is no correlation between the risk that an inmate

---

[19] Criminal Justice Act 2003 (UK), ss 224, 227, 244–247, 249–251, 254, Schedule 15; Commencement Order SI2005/950; http://www.paroleboard.gov.uk/Law1.htm (last accessed 3 March 2006). Those termed "dangerous offenders", who have been convicted of Schedule 15 offences with a maximum prison term of less than 10 years, will be given an extended sentence. This is a determinate sentence served in custody until the halfway point; the inmate is eligible for release thereafter at the discretion of the Parole Board; and may also be subject to extended supervision following sentence expiry for up to five years for violent offenders and eight years for sexual offenders.

The new United Kingdom parole framework is largely consistent with the recommendations in the Halliday report: John Halliday *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* (Home Office, London, 2001) http://www.homeoffice.gov.uk/documents/halliday-report-sppu/ (last accessed 3 March 2006).

poses to the community, and the nature of their instant offending.[20] We therefore do not advocate the United Kingdom approach, and we consider this disadvantage of automatic early release to be virtually insurmountable – particularly in light of the fact that, relative to parole, its only merit is certainty about the point of release.

Option 2: discretionary early release (parole)

171 We believe that parole can be reformed to achieve a high degree of truth in sentencing, and facilitate prison muster management. As will be discussed, we propose to achieve this by recommending a shorter parole eligibility span, and a different sentencing practice.[21]

172 From a risk management perspective, we believe that the advantages of parole make it clearly preferable to either automatic early release, or no early release.

173 **Parole may be an incentive for rehabilitation while in custody.** There are mixed views, both in the literature and amongst stakeholders, about whether the prospect of parole – that is, a discretionary release arrangement that chiefly turns upon risk – offers an effective incentive to rehabilitate. Some say that the best one can hope for is reasonable prison discipline; prisons do not and cannot rehabilitate; and those prisoners who do achieve rehabilitation largely do so under their own steam, not by being offered carrots. Inmates therefore should simply serve their time. Others say that the prospect of parole acts as a carrot for inmates to try to rehabilitate, or at least to participate in prison programmes. Even if their participation is not entirely genuine, they may gain something from it, and we should continue to offer them this opportunity. We are not in a position to definitively answer this issue; however, we believe that at this stage, parole should be given the benefit of the doubt.

174 **Parole may have a beneficial effect upon recidivism.** There is some, albeit slender and equivocal, evidence that the mere fact of parole may have a beneficial effect upon recidivism. For offenders judged to be an acceptable risk who are released early from custody, parole itself may therefore be regarded as a rehabilitative tool. Some of the literature on this issue is briefly reviewed below.

175 Stephen Shute has recently reviewed the United Kingdom literature spanning several decades, with a view to establishing whether there is a "parole effect" – that is, whether the early release by a parole board of a prisoner on licence has a beneficial impact on the probability of recidivism.[22] A fairly clear trend emerges from the literature that parolees are, on average, less likely to be reconvicted than non-parolees (at least in the short term); less clear is the reason why. Questions explored in the literature reviewed by Shute include whether it is the selection process around release, or post-release supervision. If the former, what is it about

---

20 See further paras 211–212 below.

21 See further paras 187–191, 201–207 below.

22 Stephen Shute "Does Parole Work? The Empirical Evidence from England and Wales" (2004) 2 Ohio State Journal of Criminal Law 315.

the selection process? Are Parole Boards able to accurately discern which prisoners are more likely to succeed on release? Alternatively, do paroled prisoners respond positively to the faith that the Board places in them? There are no clear answers to any of these questions. Shute concludes that:[23]

> After thirty-five years of research, can it now be said with confidence that parole either does or does not have a beneficial effect on recidivism? Sadly, at least as far as England and Wales are concerned, the answer is no.

176 However, he also quotes Professor Keith Bottomley, writing in 1990, whose conclusion in our opinion remains apt:[24]

> It would seem unwise to dismiss out of hand the claim that parole release might have some positive effects on those to whom it is granted – certainly during the period of supervision, if not beyond. To disentangle the particular aspects of parolee status that might be responsible for these effects is very much more challenging …

177 In Joan Petersilia's discussion of comparable Canadian and American literature, the positive correlation between parole and lower (or later) recidivism is clear; the reasons, again, remain largely a matter for speculation:[25]

> Important new data also show that, in every year between 1990 and 1999, state prisoners released by a parole board had higher success rates than those released through mandatory parole … more than half (54 percent) of those released on discretionary parole successfully completed their parole terms, compared to one-third (33 percent) of mandatory releases.
>
> [These results] may be interpreted in two ways. Perhaps those released discretionarily are less serious in their crimes or criminal record to begin with, and hence are released early in states using discretionary parole release. Or, it may mean that having to earn and demonstrate readiness for release and being supervised postprison have some deterrent and rehabilitation benefits.
>
> The second interpretation seems to have merit. Using logistic regression, which controlled for offense type, prior record, age, ethnicity, education, and gender, Stivers (2001) discovered a consistent and significant relationship between parole success and method of release. She found that those released from prison via discretionary parole were more than twice as likely to complete their parole period successfully than those released mandatorily. This finding was consistent across all offense types.
>
> These scientific findings buttress the arguments made by advocates of parole. They argue that discretionary release ultimately leads to greater public safety, since it encourages both inmates and prison officials to focus more heavily on reintegration programs. Further

---

23 Shute, above n 22, 321.

24 A Keith Bottomley "Parole in Transition: A Comparative Study of Origins, Developments, and Prospects for the 1990s" in Michael Tonry and Norval Morris (eds) 12 Crime and Justice 319, 338; cited by Shute, above n 22, 320.

25 Joan Petersilia *When Prisoners Come Home: Parole and Prisoner Reentry* (Oxford University Press, New York, 2003) 69–71, referring to Connie Stivers *Impacts of Discretionary Parole Release on Length of Sentence Served, Percent of Imposed Sentence Served, and Recidivism* (Masters thesis, University of California, 2001). Petersilia also discusses (at 68–69) findings by Stivers and others that, on average, the length of prison time served is greater in states with discretionary parole than in states where parole release is mandatory. Discretionary parole release therefore better facilitates the detention of dangerous offenders than a blanket statutory threshold; it is not, as commonly supposed, a mechanism for going soft on offenders or letting them out early.

research on the effects of discretionary versus mandatory parole release should be given highest priority.

178 Petersilia and some of the related literature have been critiqued by Kevin Reitz.[26] Like Petersilia, Reitz concluded that further research in this area is essential. Unlike her, he was not yet prepared to conclude that the beneficial effects of parole are sufficiently established to justify its retention; he concluded that: "we should not design entire sentencing systems on unsupported hopes". However, he does not address the literature relied upon by Petersilia, nor any of the other literature we have canvassed. Furthermore, the quoted sentence can equally well be used to support the opposite conclusion. We should not design entire sentencing systems on unsupported hopes; but nor should we be hasty about abolishing existing systems when the evidence is marginally positive, even if we cannot be precise about the reason.

179 Mark Brown monitored the outcomes for a cohort of inmates either released early on parole, or automatically released to supervision that was similar in scope to that experienced by the parolees.[27] The inmates were matched for risk; in other words, the confounding factor of the higher likelihood of low risk inmates being paroled was catered for. Brown found some evidence to suggest that the early release aspect of parole was more important for its impact on recidivism than supervision alone. Parole appeared to have a postponement effect on both reconviction and reimprisonment – that is, inmates who were automatically released to supervision were both reconvicted and reimprisoned significantly earlier than parolees. However, in the long-term, reconviction and reimprisonment rates for the two groups did not significantly differ. Parole, according to this finding, does not terminate reoffending; it simply delays its onset. Further analysis also revealed that this effect was being produced by the offenders actuarially assessed as high-risk; this therefore was the only group upon whom parole was having a beneficial effect. Brown's findings raise the important question of whether a postponement effect amongst a small group (albeit the highest risk group) is sufficient to make the parole exercise worthwhile. However, although his thesis is a key piece of New Zealand research in this area, it is a single study. In this regard, it can be distinguished from the conclusions of Shute, and to a lesser extent Petersilia, which are the result of literature reviews.

180 In summary, it seems fairly clear from the literature that parole at least postpones recidivism; however, it may not prevent it. The reason for the postponement effect is unclear. It is debatable whether this is enough to justify retaining parole, particularly in light of Brown's findings that the only inmates who benefit significantly from early release are those least likely to receive it (the high risk inmates). However, we believe that the evidence is sufficient to warrant caution about abandoning it.

---

26 Reitz, above n 2, 208–210.

27 Mark Brown "Serious Offending and the Management of Public Risk in New Zealand" (1996) 36(1) BJ Crim 18, 27–29, 30; Mark Brown *Decision Making in District Prisons Boards* (Department of Justice, Wellington, 1992).

181 **Parole is a vehicle for identifying and managing high-risk offenders.** This, in our opinion, is the chief reason to retain parole. As well as being a rehabilitative tool, parole is simultaneously an incapacitative tool for inmates whose risk is judged to be too high to justify release, and who therefore remain in prison for the full term of their sentence. It builds flexibility into the system for the purpose of managing high-risk offenders. The quid pro quo of flexibility is that it makes the timing of release less predictable. However, on balance, we believe that flexibility within narrow confines is preferable to no flexibility at all.

182 This approach – whereby some inmates are detained for longer than others for reasons other than punishment – is somewhat controversial but, we believe, sustainable.[28] It is undeniable that error is unavoidable with predictive judgments. This in turn means that some inmates and former inmates will unnecessarily be subjected to coercion, whether in the form of longer detention, or the nature of their supervision conditions; conversely, some other inmates will be erroneously released or inadequately supervised, to the detriment of the safety of the community. In practice, an inability to make robust predictions in a sufficient proportion of cases may fundamentally undermine both the propriety of the approach and the purpose of recommending the retention of parole.

183 However, philosophical objections to punishing people for crimes that they have not committed and might not commit largely turn on the protagonists' different sentencing theories.[29] On one view,[30] it does not follow that those individual offenders have been erroneously and thus unjustly judged. They have been correctly identified as a member of an empirically dangerous group. The risk of reoffending within the group is known; the individual members in whom the risk will manifest remain unknown. Protective sentencing (including parole) is society's response to the management of the group. It is a proper moral choice between the risk of harm to potential victims, as against the risk of unnecessarily detaining offenders judged to be dangerous. This is the approach that has recently been taken in New Zealand with the Parole (Extended Supervision) Amendment Act 2004.

184 If risk is to be taken into account at all, it needs to happen relatively close to release, particularly for inmates serving longer sentences. It is neither fair nor

---

28 We are told that an appeal is pending on this issue, challenging the propriety of extended supervision orders.

29 Michael Tonry "Prediction and Classification: Legal and Ethical Issues" in Don M Gottfredson and Michael Tonry (eds) *Prediction and Classification: Criminal Justice Decision Making* (University of Chicago Press, Chicago, 1987) 367 canvasses some of the different sentencing philosophies. For example, "retributivism" which permits only the punishment that is deserved for the instant crime, with some room to take into account recidivist offending; "utilitarianism" whereby punishment can be a means to an end, so that deterrent and incapacitative effects are appropriate; and "limiting retributivism" which considers that within the scope of deserved punishment, which is an imprecise concept, there is room to take into account other essentially utilitarian sentencing goals. Those who subscribe to either "limiting retributivism" or "utilitarian" sentencing philosophies, as opposed to a purely retributivist philosophy, would be satisfied to varying degrees that predictions of dangerousness for sentencing purposes are not improper, because serving incapacitative ends is acceptable to a greater or lesser extent.

30 Jean Floud and Warren Young *Dangerousness and Criminal Justice* (Heinemann, London, 1981) 38–49.

realistic to make final determinations as to offenders' risk at the time of their sentence, because the individual circumstances of those offenders may change (for example, some may rehabilitate). Parole is a vehicle for making these decisions at the appropriate time.

185 To sum up, the availability of parole may prompt inmates to participate in pre-release rehabilitation programmes, and may have a beneficial effect upon recidivism. More importantly, parole builds flexibility into the system for the purpose of identifying and managing high-risk inmates. It facilitates their longer detention if necessary, and closer management of them if or when they are released. These are advantages that the other options under consideration – automatic early release and no early release – cannot offer. We therefore recommend the retention of parole, although not in its current form.

Recommendation

R17 Discretionary early release (parole) should be retained in some form.

OUR RECOMMENDATIONS FOR PAROLE REFORM

186 If parole is retained, it needs to operate quite differently than it does at present. Specifically, the period during which the inmate is eligible for parole needs to be a smaller component of the sentence. This part discusses our proposed reforms.

Different sentencing practice

187 At present, only the nominal sentence is stated in open court, which does nothing to inform the victim, the offender, and the general public about what the sentence means in practice.

188 We recommend that judges should articulate their sentences in a different way. Sentences should be calculated and stated in open court in two parts: the minimum period of imprisonment (MPI), plus an additional parole component where the MPI exceeds a statutorily specified length.[31] The nominal sentence would be the sum of those two things.

189 The MPI would be determined by reference to the sentencing guidelines.[32] Although the terminology is the same, this approach differs significantly from the current provision for MPIs, which we recommend should be repealed.[33] The MPI would be instrumental in determining the length of the total sentence, whereas currently the MPI is a second-stage consideration that is perceived as double-counting.[34]

---

31 Warren Young and Neville Trendle "Developing the Sentencing Framework: The Sentencing Act and Beyond" in JB Robertson (ed) *Essays on Criminal Law: A Tribute to Professor Gerald Orchard* (Brookers, Wellington, 2004).

32 See further chapter 1.

33 Sentencing Act 2002, s 86.

34 See further paras 142–147 above.

190 The ways in which the additional parole component might be determined are outlined below, with a brief discussion of their advantages and disadvantages. The sole purpose of this additional component would be to manage risk.

191 This approach will promote truth in sentencing. This is because both parts of the sentence are spelt out in open court: both the minimum time that the inmate must serve, without exception; and the time that they may or may not be required to serve, depending upon the Parole Board's subsequent assessment of their risk.

Recommendations

R18 Judges need to articulate their sentences in a different way. Sentences should be calculated and stated in open court in two parts: the minimum period of imprisonment (MPI), plus an additional parole component where the MPI exceeds a statutorily specified length. The nominal sentence would be the sum of those two things.

R19 Section 86 of the Sentencing Act 2002 should be repealed.

192 The two parole options that follow build upon this different sentencing practice. For both options, the parole component would be an additional proportion of the MPI – either a variable proportion for option 1, or a fixed proportion for option 2.

Option 1: minimum period of imprisonment plus variable parole component

193 Under option 1, the parole component would be a variable proportion of the MPI, depending upon the circumstances of the individual case. There is room for a great deal of further debate around the best way to assess exactly what proportion is appropriate. Some possibilities, which are not intended to be exhaustive, follow.

- There might be a presumption (as opposed to a requirement) that the parole component should be an additional 50 percent of the MPI. However, sentencing judges would have discretion to depart.

- The discretion to depart might be "all or nothing" – for example, the ability to determine in an exceptional case that no additional parole component is required.

- Judges might be permitted to decrease the standard parole eligibility period whenever they chose and by an amount of their choosing. They might also be permitted to increase it (perhaps subject to a stipulation that the total sentence, including its parole component, must not exceed the statutory maximum for the offence in question).[35]

---

[35] This is the model recently recommended by the Scottish Sentencing Commission: Sentencing Commission for Scotland *Early Release from Prison and Supervision of Prisoners on their Release* (2006) http://www.scottishsentencingcommission.gov.uk/publications.asp (last accessed 3 March 2006) paras 5.19–5.22.

- Instead of leaving departure entirely to judicial discretion, the amount of any increase or decrease could be regulated by legislation or guidelines.

- If the variations were prescribed, for example in guidelines, they might be prescribed by reference to particular factors such as the offender's actuarial risk. Actuarial risk is defined and discussed more fully later in the chapter.[36] Briefly, it is a statistical measure of the risk of the group to which the offender belongs. For example, 50 percent of the MPI might be added for high risk offenders, with reducing percentages for those of lesser risk (perhaps 50/40/30, or 50/35/20).

194 Option 1 permits consideration and recognition of the circumstances of individual offenders. It therefore may better serve, and be perceived to better serve, the interests of justice than option 2 which is discussed below. It is also the closest to genuine truth in sentencing that can be achieved within the constraints of parole, because it is explicit about offenders' variable risk. It would more accurately inform the public, and it would offer greater certainty for victims and offenders. It seems unfair to leave low-risk offenders with the perception that they are in jeopardy of an additional one-third, when the reality is that they will probably be released by the Parole Board at or shortly after the MPI.

195 However, this approach does have some significant practical disadvantages.

196 It is widely accepted in the criminological literature, based on empirical evidence, that intuitive assessments of risk are extremely unreliable. This raises the question of how judges would then determine whether and/or what parole component is required.

197 Actuarial risk assessment tools would mitigate this difficulty.[37] However, the use of these tools at the time of sentence has not been widely supported by the stakeholders we have spoken to so far. At first sight this is a little surprising, given that their use does appear to be reasonably well accepted in parole decision-

---

The Scottish recommendations are that every prison sentence of more than 12 months should be imposed in two parts: a custodial part, and a community part. The custodial part would be the minimum term that, in the opinion of the court, the prisoner should serve in custody for the purposes of punishment, deterrence, and public protection. The community part, in general, would then be a fixed proportion of the custodial part. However, the court would have discretion to impose a longer community part, or a shorter one, or none at all, depending upon the prisoner's reintegration needs and risk of reoffending. On completion of the custodial minimum term, Scottish Ministers would determine the need for continuing detention of the prisoner for some or all of the community part, by reference to that person's risk of reoffending and consequential risk to the public. The Sentencing Commission did not make specific recommendations about "the test by which the unacceptability of the risk to the public would be determined"; it did not, for example, discuss the extent to which actuarial and individual risk assessments should be relied upon or taken into account.

An agency called the Risk Management Authority (RMA) has recently been established in Scotland, for the purpose of servicing the new sentence of preventive detention for high risk sexual and violent offenders. It seems reasonable to assume that, if the recommendations of the Scottish Sentencing Commission in relation to risk-focused parole are adopted, the RMA could assist. The RMA is in the process of developing its risk assessment protocols, which are currently out for consultation: http://www.rmascotland.org (last accessed 6 March 2006).

36 See paras 224–229 below.

37 See further para 225.

making. There is a great deal more at stake with parole decisions: they determine actual liberty, whereas a parole component imposed at the time of sentence would state only the maximum additional time to which the offender may be subject.

198 However, our discussions have led us to conclude that the use of actuarial tools to determine a variable parole component would cause major practical difficulties. It would increase the complexity of pre-sentence reports, the time taken to prepare sentencing submissions, the length of the sentencing hearing, and perhaps also the number of appeals. Although, in theory, considering and acting upon an actuarial risk assessment should not be a resource-intensive exercise, this may not be a realistic assumption in practice; alternatively, if it could be achieved in a relatively mechanical way, it may fuel impropriety complaints. The overtly mathematical nature of the exercise is an approach that looks more like maths than justice, and it would not be surprising if all participants to proceedings reacted badly to it.

199 In practice, a variable component (decreasing from one-third dependent upon risk) would have marginal impact anyway except for very long sentences. For example, if the MPI is four years, the variable additional parole component might be 24 months for high risk offenders, 19 months for medium risk offenders, and 14 months for low risk offenders.

200 Overall, we consider it debatable whether greater clarity around the prospect of a few months' incarceration justifies "buying the fight" that would ensue around these disadvantages.

Option 2: minimum period of imprisonment plus fixed parole component

201 Under option 2, the parole component would be a smaller proportion of the sentence than the present proportion of two-thirds; it would instead be one-third of the total sentence. However, because of the different sentencing practice described above, it would be calculated in a different way. Judges would first determine the MPI, and parole would be an automatic additional 50 percent of the MPI.[38]

202 This will be easy to administer and understand. It offers a middle ground between radical change, and the now relatively familiar Parole Act 2002 notion of a universal parole eligibility period, with the relative risks of inmates differentiated only by the Parole Board's release decision.

---

[38] The Sentencing Act 1989 (NSW) established a similar regime. The Act abolished remission, and provided for a minimum term that had to be served in custody, plus an additional term during which the inmate might be released on parole. The minimum term was decided first and the additional term was a fixed proportion of it; both components of the sentence thus determined the length of the total sentence. The effect of the legislation was to increase the New South Wales' prison population: see Angela Gorta "Truth in Sentencing in New South Wales" and Arie Freiberg "Sentencing and Punishment in Australia in the 1990s" in Michael Tonry and Kathleen Hatlestad (eds) *Sentencing Reform in Overcrowded Times* (Oxford University Press, New York, 1997) 153–163. However, this was attributed to the abolition of remission without corresponding reform to adjust sentence length. This supports our assertion in paras 247–249 below, that parole reform cannot occur without sentencing reform.

203 It has one disadvantage, relative to option 1. For cases in which it is highly likely that the inmate will be released at or shortly after the MPI, because it is obvious that they are a negligible risk, it would arguably be in everybody's better interests to make that absolutely clear at sentencing (as opposed to imposing an automatic additional 50 percent).

204 However, it is not a formulaic approach. The additional parole component of 50 percent is only a statement of the maximum additional time for which the inmate is in jeopardy; it does not preclude the recognition of the circumstances of individual cases, which can occur at the back end of the sentence via the Parole Board.

205 From a prison muster perspective, a variable component that sets a lower maximum or omits the parole component altogether for low risk cases would offer some guarantee against unduly conservative Parole Board practice. However, we believe that a similar objective could be achieved if there were independently promulgated presumptive guidelines relating to parole.[39]

206 Option 2 is therefore our preferred option.

207 We estimate that as a result of this change to parole eligibility, the average time served by inmates will increase from approximately 62 percent to approximately 80 percent of the sentence. If a neutral prison population effect is desired, sentences will need to be reduced accordingly.

Recommendations

R20 The proportion of the total sentence during which inmates are eligible for parole should be reduced to one-third. However, the parole component should be calculated in a different way: judges should first decide upon the MPI, and parole should be an automatic additional 50 percent of the MPI.

Short-term sentences

208 For short-term sentences, we recommend that there should be no parole and only the actual time served should be stated, for two reasons. First, parole is logistically unworkable in shorter timeframes. Secondly, because of the small differences in custodial time involved, the benefits would be negligible and far outweighed by the costs of additional Parole Board resources.

209 We recommend the imposition of an additional parole component for all sentences with an MPI of two years or more. Although there is no bright line, a two-year MPI plus the recommended additional 50 percent (one year) allows a sufficiently long parole span to make the exercise workable and worthwhile.

---

[39] See paras 230–235 below.

Recommendation

R21 Short-term sentences should not include a parole component. For those sentences, only time served should be stated. By short-term sentences, we mean those with an MPI of less than two years.

Should any other category of case be excluded?

210 Having excluded short sentence cases, it does not necessarily follow that parole should be available for every other category of offence and/or offender. For example, some types of offending might be excluded from parole (as in the United Kingdom, where parole is only available for sexual and violent offenders). However, an offence-based method of differentiating cases has already been tried and abandoned in New Zealand.[40]

211 The parole provisions in the Criminal Justice Act 1985, which were amended in 1993 and abandoned in 2002, comprised an offence-based classification of dangerousness.[41] Offenders were designated as either "ordinary", or "serious violent", depending upon the offending for which they were currently before the court – that is, whether it was one of a list of specified statutory offences, and if so, whether a sentence of more than two years' imprisonment was imposed.[42] Serious violent offenders were not eligible for parole; they were automatically released at two-thirds, with some detained for the full term of their sentence on application by the Chief Executive of the Department for Corrections.[43] Implicit in this approach was the idea that future harmful behaviour is best predicted by the current offending, which in turn justifies a more robust state intervention in the interests of community protection, by way of more restrictive release arrangements.

212 This approach has been discredited. It assumed that offending patterns followed a standard trajectory and that serious offenders, having reached that point in their "careers", would continue to specialise. In practice, Mark Brown demonstrated that serious violent offenders were generally not specialists; they participated in a wide range of offending behaviour and thus tended to move in and out of the serious offender classification. He also established that serious offences tended to be followed by ordinary ones (and vice versa): most of the serious offending was committed by offenders originally imprisoned for relatively minor offending (either by reference to its category or, where the offending was of a prima facie more serious kind, the penalty that had actually been imposed). In short, therefore, the Criminal Justice Act approach did not do a good, or even an adequate, job of accurately targeting those offenders who pose the greatest future risk to public safety.[44]

---

40 Another method might be to exclude some offenders by reference to their predicted risk; the problems associated with this have already been discussed: see paras 197–198 above.

41 The United Kingdom dangerous offender regime is another example: see para 170 above.

42 Criminal Justice Act 1985, ss 2 "serious violent offence", 89, 90.

43 Criminal Justice Act 1985, s 105.

44 Mark Brown "Serious Violence and Dilemmas of Sentencing: A Comparison of Three Incapacitation Policies" [1998] Crim LR 710, 712–715; Brown (1996), above n 27, 24–25.

Decision-making criteria

213 The current debate amongst Parole Board members about whether they should be resentencing inmates (or, to put it less pejoratively, taking into account considerations of punishment, denunciation, and deterrence in making their release decisions), or making those decisions solely by reference to the individual inmate's risk, has been noted earlier.[45] We believe that the latter is the appropriate approach. Two things should be made explicit: first, that the Parole Board's focus is on risk alone, more specifically the risk posed by the individual offender; and secondly, that since early release may be beneficial, release decisions require any risk of reoffending to be balanced against the benefits of early release.

214 The current test for release is expressed in the Parole Act 2002 as follows:[46]

> **28 Direction for release on parole**
>
> (1) The Board may, after a hearing at which it has considered whether to release an offender on parole, direct that the offender be released on parole.
>
> (2) The Board may give a direction under subsection (1) only if it is satisfied on reasonable grounds that the offender, if released on parole, will not pose an undue risk to the safety of the community or any person or class of persons within the term of the sentence, having regard to—
>
> (a) the support and supervision available to the offender following release; and
>
> (b) the public interest in the reintegration of the offender into society as a law-abiding citizen.

215 We have considered whether the release criteria in section 28(2) of the Parole Act 2002 need to be revised, by reference to the following two alternative models.

- The United Kingdom Parole Board is directed to consider the following:[47]

  … primarily the risk to the public of a further offence being committed at a time when the prisoner would otherwise be in prison and whether any such risk is acceptable. This must be balanced against the benefit, both to the public and the offender, of early release back into the community under a degree of supervision, which might help rehabilitation and so

---

45 See paras 131–134 above.

46 Parole Act 2002, s 28.

47 The Home Secretary, under section 239(6) of the Criminal Justice Act 2003 (UK), is permitted to issue directions to the Board. The direction quoted was issued in 2004: see Nicola Padfield "The Parole Board in Transition" [2006] Crim LR 3, 10; "Comprehensive Review of Parole and Lifer Processes" 419 UKPD HC 29–31WS (18 March 2004) http://www.publications.parliament.uk/pa/cm200304/cmhansrd/vo040318/wmstext/40318m02.htm#40318m02.html_sbhd1 (last accessed 22 February 2006).

Essentially this is the same test that has been in place for some years in the United Kingdom; it was recommended by the Carlisle Committee, above n 2, para 321, and implemented in the Criminal Justice Act 1991 (UK). The directions also require the assessment to be informed by an actuarial risk predictor tool where such a tool is available.

lessen the risk of re-offending in the future. The Board shall also take into account that safeguarding the public may often outweigh the benefits to the offender of early release.

- This can be recast more briefly, as follows:[48]

  … subject to the prisoner's willingness to comply with any proposed conditions, release on parole should be determined by a careful evaluation of the risk of reoffending, as against the potential benefits of early release in reducing that risk.

216 Ultimately, we are not convinced that either model improves upon the present drafting. However, depending upon the outcome of the Court of Appeal case that is currently under consideration,[49] legislative intervention might be required to overrule the common law.

Implications for victims

217 If, in making its release decisions, the Parole Board is required to confine its considerations to risk, this may mean that the role of victims at Parole Board hearings is marginalised. They will inevitably want to relitigate the circumstances of the offending; indeed, in the vast majority of cases they are not really qualified to comment on anything else.

218 This poses a problem about the extent to which such contributions should be allowed, if at all. Victims will feel slighted and frustrated if they perceive that their input is not being given sufficient weight; however, they will also feel slighted and frustrated if they are excluded. The Victims' Rights Act 2002 provides that victims may participate in the process for making decisions about home detention and parole if the offending involved sexual violation, serious injury, or death.[50] The Parole Act 2002 provides that where the Board elects to conduct an attended hearing, every victim of the offender is entitled to appear and make oral submissions, and where the Board elects to conduct an unattended hearing, every victim must be given the opportunity to have a prior interview with a member of the panel.[51] Victims can be expected to have a sense of grievance if these opportunities are removed from them.

219 We have consulted with Victim Support on this issue. They responded that the biggest issue for victims is clarity about their role, which could be achieved, for example, if Victim Support were able to take a more proactive approach to educating and supporting victims pre-parole, as it does at the front end of criminal cases.

220 Victim Support also felt that our proposals offer significant advantages for victims, which outweigh the arguable disadvantages. The "truth in sentencing" aspect of our sentencing and parole recommendations will do a great deal to

---

48 Warren Young and Neil Cameron (unpublished briefing to the Department of Justice, Wellington, 1990–1991) para 3.4.

49 See para 134 above.

50 Victims' Rights Act 2002, ss 29, 47.

51 Parole Act 2002, ss 47(1), 49(4).

achieve greater clarity for victims. There will also be fewer repeat parole appearances: only inmates with an MPI of four years or more would have a parole span of two years or more.

221 There may be room to explore other avenues for victim involvement, such as pre-parole restorative justice. This is beyond the scope of our project; however, we understand that some work has recently been initiated in this area.

222 In the opinion of Victim Support, victim participation in Parole Board hearings should not be ruled out altogether; the capacity of victims to contribute may vary, depending on the circumstances of the case (for example, domestic violence is one category of case in which the victim can be expected to know a great deal about the triggers of violence). We agree.

223 We recommend that the Parole Board should continue to receive victim submissions in writing, as it does currently,[52] but 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 inmate should be released and, if so, how that person should be managed. We note that the Parole Act 2002 went significantly further than the Victims' Rights Act 2002, in the entitlements that it conferred on victims, and will still do so even if it is amended as we suggest.

Recommendations

R22 Responsibility for notifying victims of parole eligibility should be allocated to Victim Support, not the Parole Board. It may be desirable for Victim Support to take a more proactive role in supporting victims through the parole process. Victim Support will need to be resourced accordingly.

R23 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 inmate should be released and, if so, how that person should be managed.

Informing Parole Board assessments of risk

Actuarial and individualised risk assessments

224 Broadly speaking, there are two methods of risk assessment: actuarial and individualised.

225 **Actuarial.** An actuarial risk assessment describes the recidivism risk of the group to which the offender belongs, based upon empirical information about recidivism outcomes for offenders with similar characteristics. It is expressed as a percentage and/or a categorisation of high/medium/low risk. Factors incorporated

[52] Parole Act 2002, s 43(5).

in this kind of assessment vary depending upon the instrument being used, but typically include factors such as current age; age of first offending; the number of prior convictions; their nature (for example, sex or violence); prior custodial experience; and history of substance abuse. These are static factors, so-called because they are descriptive of history and will not change. In large part, they are drawn from the offender's criminal record.[53]

226 **Individualised.** An individualised assessment is typically undertaken by a clinician (for example, by way of interview) and is essentially an expert assessment of the risk posed by the particular offender, taking into account all relevant factors. This approach has at least one advantage relative to an actuarial assessment: it can take into account dynamic factors. Dynamic factors are circumstances of the offender that are liable to change over time. Examples include home environment; other social support; employment and education prospects; the successful completion of treatment programmes (for example, to address substance abuse or criminal lifestyle/attitude factors); newfound religious belief; and the natural maturation process. However, although it seems counter-intuitive, it has been repeatedly empirically proven that individualised assessments are less reliable than actuarial assessments, even when undertaken by an expert.

Is the use of actuarial tools defensible and desirable?

227 There is some debate about whether the use of actuarial tools, which are essentially statistical and group-based, is defensible and desirable in the criminal justice context. Michael Tonry puts the pragmatic case for their use as follows:[54]

> Judges, parole boards, and correctional administrators have always taken an offender's apparent dangerousness into account in making critical decisions, although, of necessity, they have done so in an intuitionist way with wide divergence in the decisions reached; it is far better explicitly to rely on general predictive rules that are based on the best available evidence and that are systematically applied than to go on as before; so long as the resulting penalties do not exceed what the offender deserved, he has no ground for complaint, and the rest of us will be better off because crime will be incrementally reduced by virtue of the incapacitation of offenders predicted to be dangerous. If the accuracy of predictions can be significantly improved, we may be able to target resources on dangerous offenders, to extend greater leniency to nondangerous offenders, to reduce prison populations, and thereby to achieve greater crime control at less financial cost. Thus the public's interests in crime control and economy will be served, sentencing (or bail release or parole release) disparities will be diminished, and offenders will suffer punishments that are not undeserved. It is not the best of all possible worlds, but it is better than what now exists.

---

53 Two examples of actuarial risk prediction instruments in regular use in New Zealand are the Static-AS for sex offenders, and the more generic RoC*RoI. The Static-AS is the New Zealand variant of the North American Static-99; RoC*RoI is an acronym for "Risk of Conviction Risk of Imprisonment". For a discussion of these and other tools in use, see Nick Wilson and Leon Bakker "The National Parole Board Structured Decision Making Instrument: A Five Year 'Tune-Up'" (Department of Corrections Psychological Service, Wellington, 2000); Alexander Skelton et al "Assessing Risk for Sexual Offenders in New Zealand: Development and Validation of a Computer Scored Risk Measure" (manuscript submitted for publication).

54 Tonry, above n 29, 388.

228 Floud and Young argue that the interests of justice are served only if actuarial information is combined with an individualised assessment:[55]

> A predictive judgment takes the form of a statement of probability but it may not be arrived at by purely actuarial means, for it is not just to take preventive measures against an offender solely on the strength of his being a member of a statistical class of high-risk offenders. The assessment of the risk he presents must rest not only on evidence of a propensity to cause wilful harm, but the evidence must be specific to him and this precludes the determination of dangerousness by purely actuarial methods, whatever may be their advantages in other respects. For though a high proportion of right judgments is a necessary condition of justice, it is not a sufficient condition: it is also a necessary condition that each case should be adjudicated on its merits.
>
> It is often implied, when methods of assessing dangerousness are being compared, that all that matters is that predictive judgments shall be as exact and consistent as possible and that the probability of their being right shall be maximised by whatever method can be devised; that to secure the highest proportion of right predictive judgments is not merely a necessary condition of doing justice generally but is a sufficient condition of doing justice in the individual case. This, however, is not so, for the right judgment must be reached by the right means, which is to say by individual adjudication. There is a world of difference in principle between applying preventive measures in individual cases on the basis of predictive judgments, even if we know that some of them, despite all precautions, are bound to be mistaken; and deliberately incurring mistakes, to an extent calculable in advance, by applying preventive measures indiscriminately to all of a group of offenders at risk, so as to be sure of capturing a certain number known statistically to be hidden within it who will commit further serious harm. The distinction is between necessarily imperfect justice and unnecessarily rough justice; and though there may be times and circumstances when the distinction does not seem to hold up well in practice, because the number of mistakes yielded by either method is much the same, or because rough justice by some rule of thumb yields fewer mistakes on average, individual assessment is as crucial to the making of just predictive judgments as it is universally recognised to be to the making of just retrospective judgments.

229 This approach is also fairly well recognised as best practice amongst the psychiatric profession and in criminological literature.[56] However, it is an exercise that needs to be approached with some care. The Parole Board will require detailed guidance about the way in which actuarial and individualised information can properly be used. We do not have the expertise to address this issue. We instead recommend that the Sentencing Council should do so, via the parole guidelines that are recommended below.[57]

---

55 Floud and Young, above n 30, 27–28. See also Brown (1992), above n 27, 140 who briefly reviews literature to the effect that parole decision makers will tend to ignore or work around guidance that excludes or is perceived to exclude important individuating information; because such an approach differs from their natural inclination about how to approach these matters, it tends to undermine their confidence in and willingness to comply with the process.

56 For example, see Hazel Kemshall *Risk Assessment and Management of Serious Violent and Sexual Offenders: A Review of Current Issues* (Scottish Executive Social Research, 2002) 21 http://www.scotland.gov.uk/cru/kd01/green/raam.pdf (last accessed 6 March 2006); Petersilia, above n 25, 71–72, 190–191; Skelton, above n 53, 14–16; Sandy Simpson "The Role of the Mental Health Professional in the Sentencing Process" (Sentencing Principles, Perspectives and Possibilities conference, Canberra, 10–12 February 2006).

57 See paras 230–235 below.

Recommendation

R24 The Parole Board's release decisions should be informed by both actuarial and individualised risk assessments. The Board will require detailed guidance about the way in which this information can properly be used.

Parole guidelines

230 At present, detailed parole policy is set by the Parole Board itself. We believe that the Sentencing Council should also have responsibility for setting parole guidelines. This is a recommendation that is supported by the Parole Board. There are a number of compelling reasons for it.

231 First, it will ensure that sentencing policy and parole policy are properly integrated.

232 Secondly, it will strike a balance between informed parole policy development, and policy that is independently set. The latter may address the distortions that can arise when those setting the policy are also responsible for decision-making in individual cases and are therefore more likely to be thinking anecdotally.

233 Thirdly, it should increase the likelihood of parole policy being executed consistently. Although it was intended that the 2002 establishment of a national Parole Board (as opposed to the former District Prisons Boards) would achieve this, anecdotal feedback suggests that this has not occurred. The difference of opinion currently before the Court of Appeal, about whether the Parole Board should consider solely individual risk or is entitled to take broader deterrent considerations into account, is only one example.

234 Finally, even with a shorter parole span, one key disadvantage of parole is the uncertainty about the precise point at which inmates will actually be released. However, if parole policy is both consistently executed, and executed in accordance with guidelines, it can be expected to facilitate both prison muster modelling, and other decisions around parole, such as inmate eligibility for rehabilitation programmes.

235 In particular, best practice guidelines formulated and issued by the Council would assist the Parole Board in making proper decisions about the risk assessment of inmates and the risk management of parolees.

Recommendation

R25 The Sentencing Council should have responsibility for setting Parole Board policy guidelines, including guidelines about best practice in relation to the risk assessment of inmates and the risk management of parolees.

Parole Board capability and methods

236 If the sole function of the Parole Board is risk assessment (using risk prediction expertise to inform their release decisions) and risk management (setting release conditions appropriate to the individual inmate in light of what is known about their risk), this may greatly change the scope and nature of its deliberations. The

implications for victims have already been discussed; in addition, there will be implications for the capability and methods of the Parole Board.

237 We considered whether it might assist the Board to have more people on the panels who are expert in these matters. We suggest that this need can be addressed by who the Parole Board hears from, rather than who sits upon it. However, Parole Board members do need to be better equipped to independently evaluate the merits of expert submissions in relation to risk. We recommend robust regular training for panel members, in addition to the parole guidelines that have already been discussed.

238 We note that, if there are presumptive guidelines relating to the proportion of the sentence that a particular category of inmate should generally serve, and if inmates are generally classified and treated in accordance with risk assessment protocols, the Board may be able to make more frequent use of the unattended hearing procedure in the Parole Act 2002.[58]

Recommendation

R26 Parole Board panel members need to be better equipped to independently evaluate the merits of expert submissions in relation to risk. They should be informed and trained on an ongoing basis about risk assessment and risk management best practice.

SUPPLEMENTARY RELEASE ARRANGEMENTS

Extent of Parole Board involvement: monitoring post-release?

239 There is some support internationally for the provision of ongoing post-release management that is judicially administered.

240 The United Kingdom Halliday report proposed that offenders completing the custodial portion of their sentence should be brought back before the court to determine their release conditions, on advice from the prison and probation service:[59]

> The probation service would put proposals, developed jointly with the Prison Service, to a review hearing of the appropriate court … The court would decide whether to endorse them or commission advice on further options. Once satisfied, the court would explain the effects of the programme to the offender, the importance of compliance with the requirements, and the likelihood of return to prison for non-compliance. If necessary, the court could order a further review hearing, to review progress, at a fixed interval after release. The intensity of the 'package' could vary during the remainder of the sentence, if the offender's behaviour justified modification of it. Good progress by the offender should enable the probation service to apply for a review hearing for the purpose of lifting sanctions no longer needed. Low levels of compliance should result in applications for tougher sanctions, unless the failures were so serious as to justify immediate recall to prison.

---

58 Parole Act 2002, ss 45, 48.

59 Halliday, above n 19, paras 4.14–4.17.

241 The United Kingdom has now largely implemented the Halliday report, in the Criminal Justice Act 2003. However, release conditions will be set by the United Kingdom Parole Board instead of a court. This is similar to the current New Zealand position: the Parole Board sets release conditions;[60] the Community Probation Service may apply to the Board for variation or discharge of parole conditions,[61] and may also apply for recall of the former inmate to prison.[62]

242 Reentry courts are a post-release option being explored in the United States. A reentry court is in essence a court-centred supervision system, with a greater focus on follow-up than our Parole Board is presently in a position to provide:[63]

> Reentry courts use judicial authority to apply graduated sanctions and positive reinforcement and to marshal community resources to support the prisoner's reintegration. Some believe the judge is in a unique position, given the prestige of the office, to confer public and official validation on the offender's reform efforts.
>
> …
>
> Judges use a case management approach to track and supervise offenders upon release. In a sense, the judge becomes a reentry manager, as she identifies and coordinates local services that will help offenders reconnect with their families and community, including employment, counseling, education, health, mental health, and other essential services …
>
> Upon reentry, a "contract" is drawn up between the court and the offender. The contract lists the conditions the offender must follow, and the offender is required to appear in court every month to demonstrate how well the contract is working. These court appearances would not necessarily be long, but rather are designed to remind the offender of the conditions in the contract. Should the judge feel the offender needs more help, she can quickly mobilize the necessary resources. Should the offender fail to abide by the contract, the judge is also able to utilize a variety of intermediate sanctions to encourage compliance.

243 The United States reentry court model, adapted to the New Zealand context, would require regular Parole Board appearances.[64] Although this level of intervention would not be necessary for all former inmates, and depending upon the circumstances of the case may not even be necessary monthly, it would nonetheless have significant resource implications. Some thought would also need to be given to resolving the logistical problems: specifically, the fact that Parole Boards currently sit in prisons, and former inmates in many instances will not live locally.

---

60 Parole Act 2002, s 29(1).

61 Parole Act 2002, s 56(2).

62 Parole Act 2002, s 60.

63 Petersilia, above n 25, 204; Magistrate Michael King "Problem Solving Court Programs in Western Australia" (Sentencing Principles, Perspectives and Possibilities conference, Canberra, 10–12 February 2006).

64 If, in the New Zealand context, the Parole Board was used as the "reentry court" vehicle there would be some similarities: the Parole Board is essentially a judicial body and certainly each panel is convened by a judge, so that if judicial authority is thought to be the crucial thing, that requirement would be satisfied. However, the Parole Board of course does not convene in the court forum, and therefore may to some extent lack the mana of a reentry court, which arguably may in turn affect offender compliance. It is beyond the scope of this project to properly explore these issues; there is a whole separate piece of work that could usefully done about the merits of using courts as a vehicle for rehabilitative work.

244 However, we are nonetheless attracted to the idea, if it could be developed in a workable way. We encountered a number of stakeholders who felt that the present risk management and reintegration arrangements are deficient. It may be that a more hands-on role for the Board would provide greater peace of mind for the Board and the community, and thereby make release decisions both more likely and more acceptable; the gravitas of regular appearances before the Board might also positively affect parolees.

Recommendation

R27 The Parole Board should be empowered to require regular appearances before it, tailored as necessary to suit the circumstances of the individual case. Some thought would need to be given to resolving the logistical problems; this recommendation would also have significant resource implications for the Parole Board.

Back-end home detention

245 At the moment, eligibility for back-end home detention accrues five months prior to the parole eligibility date.[65] It is therefore perceived as a late-stage alternative to prison, rather than a staged release on parole. It is hard to distinguish home detention from parole release with residential conditions; it is just a particular kind of residential condition. We therefore recommend that the arrangements for back-end home detention should be tweaked slightly. The MPI imposed in court should be served without exception. The Parole Board, in determining whether to release eligible offenders, should consider whether a staged release to home detention is one option for managing their risk and reintegration needs. The difference would be that this would occur during the parole part of the sentence.

Recommendation

R28 The MPI imposed in court should be served without exception. The Parole Board, in determining whether to release eligible offenders, should consider whether a staged release to "back-end" home detention is one option for managing their risk and reintegration needs.

Post-release supervision for inmates who serve their full term

246 We recommend that inmates who are eligible for parole, but serve their full term, should continue to be subject to post-release supervision for a 6-month period, as they currently are under the Parole Act 2002.[66]

Recommendation

R29 Inmates who are eligible for parole, but serve their full term, should continue to be subject to post-release supervision for a 6-month period, as they currently are under the Parole Act 2002.

---

65 Parole Act 2002, s 33(2).

66 Parole Act 2002, s 18(2).

THE IMPORTANCE OF CONTEMPORANEOUS SENTENCING AND PAROLE REFORM

247 A review of jurisdictions illustrates that reforms to ensure better sentencing guidance often go hand in hand with parole reforms, and vice versa.[67] For New Zealand purposes, this will be essential, for the following reasons.

248 A shorter parole component will adversely affect the prison muster in the absence of sentencing reform. This is because inmates will be required to serve a greater proportion of their sentence (at least two-thirds, and on average probably approximately 80 percent). There needs to be a corresponding reduction in the length of sentences to compensate for the parole changes.[68]

249 Similarly, sentencing reform on its own will be pointless, and a failure. There is no point in proposing presumptive sentences in particular offence categories, with a view to ensuring consistency and predictability, if the Parole Board retains a substantial and unfettered discretion to determine the proportion of those sentences that will be served in practice.

Recommendation

R30 Sentencing and parole reform must occur together.

---

67 In the United Kingdom, the desirability of this kind of contemporaneous reform was discussed in the Report of the Carlisle Committee, above n 2, paras 231–235, 295–298. Ultimately, because it did not have a remit to consider wholesale sentencing reform, the Carlisle Committee was forced to pin its hopes on less formal methods of adjusting sentencing tariffs to take into account the practical effect of its parole reforms: see Lord Taylor of Gosforth CJ *Practice Note (Sentence: Early Release of Prisoners)* [1992] 1 WLR 948. For a similarly informal approach, see also the recommendations of the Sentencing Commission for Scotland, above n 35, and section 10 of the Sentencing Act 1991 (Vic).

The United Kingdom Sentencing Guidelines Council was established in the same legislation that contains the parole reforms – that is, the Criminal Justice Act 2003 (UK). However, the extent to which the two parts of the reform were approached as a package is unclear; for example, the Council is not explicitly directed to consider either prison capacity, or the implications of the parole reforms for the time that offenders will actually serve, in formulating sentencing guidelines.

The Association of Paroling Authorities International conducts a wide-ranging annual survey of parole jurisdictions and practices, which in recent years has included most United States jurisdictions including the armed forces, some Canadian provinces, the Australian states of New South Wales and Victoria, and the United Kingdom (England and Wales). This shows that, of the 20 United States jurisdictions that had abolished parole by 2004, 13 were, or had previously been, jurisdictions that also have a Sentencing Commission or equivalent body. In short, slightly more than half of the states that have abolished parole are guideline states; and likewise slightly more than half of all guideline states have chosen to abolish parole: Association of Paroling Authorities International "Parole Board Survey 2003" http://www.apaintl.org/Pub-ParoleBoardSurvey2003.html (last accessed 3 March 2006); Association of Paroling Authorities International "Parole Board Survey 2004" http://www.apaintl.org/Pub-ParoleBoardSurvey2004.html (last accessed 3 March 2006); "National Association of State Sentencing Commissions Contact List" http://www.ussc.gov/states/nascaddr.htm (last accessed 3 March 2006).

Some years ago the Canadian Sentencing Commission (a body temporarily established for the purpose of reviewing Canada's sentencing and parole arrangements) recommended the establishment of an equivalent permanent body to provide ongoing sentencing guidance. In conjunction with this, the Commission recommended the abolition of parole: Report of the Canadian Sentencing Commission *Sentencing Reform: A Canadian Approach* (February 1987) ch 10. The Commission's recommendations were not taken up.

68 In New South Wales, when remission was abolished in 1989 without corresponding sentencing reform, the muster expanded dramatically: see above n 38.

Appendix A
Draft sentencing guidelines

These guidelines are illustrative only. The sentence ranges suggested in them do not necessarily reflect the view of the Law Commission or current sentencing practice.

EXAMPLE 1: EXCESS BREATH OR BLOOD ALCOHOL – OFFENDERS OVER 20 YEARS OF AGE

Introduction

1 Pursuant to the Land Transport Act 1998 (LTA) it is an offence to drive a motor vehicle on a road with a breath alcohol level of over 400 micrograms of alcohol per litre of breath, or over 80 milligrams of alcohol per 100 millilitres of blood.

Penalties

2 The penalty for first and second offences is:

- Maximum three months imprisonment or a fine of $4,500.00;
- Mandatory minimum disqualification from holding or obtaining a drivers licence for six months.

3 The penalty for third and subsequent offences is:

- Maximum two years imprisonment or a fine of $6,000.00;
- Mandatory minimum disqualification for more than one year.

Other matters

4 In some circumstances a disqualification can be replaced by a community-based sentence (s 94 LTA).

5 In some cases the Court is required to disqualify an offender indefinitely (s 65 LTA).

First offence

Starting point ……..	Fine
Level of fine ……...	at blood level x 5
……...	at breath level
Disqualification	
Up to levels of 800/160 ……..	6 months
Over 800/160 ……..	9 months

Second offence

If previous offence more than 7 years before …….	Fine
Level of fine ……...	at blood level x 10
…….	at breath level x 2
If previous offence less than 7 years before ……	Community work
Level of community work ……..	at blood level
……..	at 20% breath level
Disqualification	
If previous offence more than 7 years before …….	up to 800/160 – 6 months
…….	over 800/160 – 9 months
If previous offence less than 7 years before ……	up to 800/160 – 9 months
……..	over 800/160 – 1 year

Indefinite disqualification where applicable

Third offence

If more than 10 years since first offence ……	Community work at 1.5 x blood level
…….	at 30% breath level
If less than 10 years since first offence ……..	3 months' imprisonment
Disqualification	
In all cases ……..	1 year

Indefinite disqualification where applicable

Fourth offence

If last conviction more than 10 years ago ……..	minimum 250 hours community work if level below 800/160 and no driving fault
If last conviction less than 10 years ago, or if level over 800/160, or if there is driving fault ……	6–9 months' imprisonment

Disqualification

In all cases ……..	1 year

Indefinite disqualification where applicable

Fifth offence

If last conviction more than 10 years ago ……..	6–9 months' imprisonment
If last conviction less than 10 years ago ……	9–15 months' imprisonment

Disqualification

In all cases ……..	1 year

Indefinite disqualification where applicable

Notes

1 Unless disqualifications are mandatory, all forms of sanction (fine; community work, imprisonment and disqualification) are subject to standard deductions for guilty plea, depending on the timing of that plea.

2 In considering penalty, the following factors will be considered:

- presence/absence of driving fault;
- actual level of breath/blood alcohol (it is a particularly aggravating feature if the breath level is over 1,000, or the blood level is over 200);
- any damage to property including ability to make reparation;
- cooperation with enforcement authorities;
- any independent steps taken by defendant to address any alcohol problem, including treatment and counselling;
- if the distance driven or where the driving took place could not in the circumstances have resulted in risk of injury to, or the death of any person;

- if the distance driven or where the driving took place could not in the circumstances have caused damage to any property;

- in appropriate cases whether disqualification should be replaced by a community-based sentence (s 94 LTA);

- whether the amount of any fine, or community work imposed should be reduced to take account of any medical or analysts fees an offender is ordered to pay.

EXAMPLE 2: REDUCTION IN SENTENCE FOR GUILTY PLEA

Statement of purpose

1 It is accepted that a reduction in sentence is appropriate because a guilty plea avoids the need for trial, allows the case to be disposed of expeditiously, shortens the gap between charge and sentence, saves considerable costs and saves victims and witnesses from concern about having to give evidence.

2 A reduction in sentence for a plea of guilty is a separate issue from aggravating and mitigating factors generally.

3 The sentencer should address the issue of remorse and any other mitigating features separately when deciding the appropriate length of sentence before calculating the reduction for the guilty plea.

4 A reduction in sentence for a guilty plea must be applied to any and all the punitive elements of a penalty (e.g. fine, community based sentence, imprisonment and discretionary disqualifications) but would have no impact on sentencing decisions in relation to ancillary orders (e.g. confiscation, proceeds of crime and reparation).

5 Where an offence crosses the threshold for imposition of a community based sentence or a custodial sentence a plea of guilty at an early stage may properly form the basis for imposing a sentence less than a community based sentence where that would otherwise be appropriate or less than a custodial sentence where that would otherwise be appropriate.

6 When pronouncing sentence the Court should usually state what the sentence would have been if there had been no reduction as a result of the guilty plea.

Determining the level of reduction

1 The level of the reduction will be gauged on a sliding scale ranging from a maximum of one-third (where the guilty plea is entered at the first reasonable opportunity in relation to the offence/offences for which sentence is being imposed) reducing to a maximum of one-quarter where a status hearing date or a depositions date has been set, to a maximum of one-fifth where a summary fixture date or jury trial date has been set and to a maximum of one-tenth for a guilty plea entered prior to the commencement of the summary fixture or the jury trial.

2 The level of reduction should reflect the stage at which the offender indicated a willingness to admit guilt to the offence/s for which he is eventually sentenced.

(a) The maximum reduction will be given only where the offender indicated willingness to admit guilt at the first reasonable opportunity. When this occurs will vary from case to case.

(b) Where the admission of guilty comes later than the first reasonable opportunity, the reduction for guilty plea will be less than one-third.

(c) Where the plea of guilty comes very late it is still appropriate to give some reduction.

(d) If after pleading guilty there is a s 24 hearing and the offender's version of the circumstances of the offence is rejected, this should be taken into account in determining any level of reduction.

(e) If the not guilty plea was entered and maintained for tactical reasons (such as being able to remain on bail in the interim when a custodial sentence was almost certain), a late guilty plea should attract very little, if any, discount.

(f) Since the purpose of giving credit is to encourage those who are guilty to plead at the earliest opportunity, there is no reason why credit should be withheld or reduced on the grounds that the offender has been "caught red-handed". The normal sliding scale should apply.

(g) The sentencer is bound to sentence for the offence/s with which the offender has been charged and to which he has pleaded guilty. The sentencer cannot remedy perceived defects (e.g. an inadequate charge or maximum penalty) by refusal of the appropriate discount.

What amounts to "first reasonable opportunity"?

1 The critical time for determining the maximum reduction for a guilty plea is the first reasonable opportunity for the defendant to have indicated a willingness to plead guilty. This opportunity may vary with a wide range of factors and the Court will need to make a judgment on the particular facts of the case before it.

2 The key principle is that the purpose of giving a reduction is to recognise the benefits that come from a guilty plea both for those directly involved in the case in question but also in enabling Courts more quickly to deal with other outstanding cases.

3 Where a defendant is convicted after pleading guilty to an alternative (lesser) charge to that which he/she had pleaded not guilty the extent of any reduction will have to be judged against how early the defendant indicated a willingness to plead guilty to the lesser charge.