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APPELLATE SENTENCING GUIDANCE  
IN NEW ZEALAND

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## APPELLATE SENTENCING GUIDANCE IN NEW ZEALAND

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**ABSTRACT:** Hundreds of people are sentenced to terms of imprisonment in New Zealand each year. Sentencing levels are coming under increasing public scrutiny and the question of how to ensure consistency and logic in sentencing for serious crime has become more acute. This paper explores the historical trend away from absolute deference to judicial discretion towards consistency as a predominant sentencing goal. The task of providing guidance in sentencing has fallen in New Zealand, as it has elsewhere, to our intermediate appellate court – the Court of Appeal. Regrettably the guidance provided has been inconsistent and intermittent. This paper examines the handful of genuine “guideline judgments” issued by the Court to assess whether there is consistency in both process and content. The English have decided, and with good reason, that the appeals process is a poor vehicle by which to provide guidance in sentencing. This paper compares the new English Sentencing Guidelines regime with the New Zealand experience and makes proposals for reform.

### I INTRODUCTION

The New Zealand Court of Appeal has issued guideline sentencing judgments on a number of occasions, although there is yet to emerge a consistent approach to the structure and place of guideline judgments within the appellate system. This is unfortunate given that sentence appeals constituted, in 2003, 52% of criminal appeals<sup>1</sup>. This paper examines the history of appeals against sentence in New Zealand and England, and the emergence of the guideline judgment as an appellate tool to promote consistency in sentencing. A revolution in the provision of guidance in sentencing has taken place in England in the last five years. The responsibility for the provision of guidelines is moving from the courts to a statutory body, the Sentencing Guidelines Council. This paper reviews the work of the Council and asks whether similar reforms should be considered in New Zealand.

Further, a proposal is made as to the approach the Court of Appeal should take to the provision of guidance on sentencing. It is argued that the Court of Appeal should adopt a more prescriptive and formal approach to sentencing guidance to improve the quality of decision making at first instance.

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<sup>1</sup> Ministry of Justice “Court of Appeal Report for 2003”.

## II HISTORY OF APPELLATE GUIDANCE IN SENTENCING

The late 19<sup>th</sup> and early 20<sup>th</sup> centuries saw a change from multiple and highly prescriptive definitions of criminal offences, each with mandatory penalties, to fewer more broadly defined offences with universal maxima<sup>2</sup>. Through that process law makers handed over the reins of the detail of sentencing policy to the Courts.

Appeals against sentence are a relatively new phenomenon in New Zealand. It was not until 1923 that the Justices of the Peace Act was amended to allow appeals against sentence from the Magistrates Court, and indeed not until 1939 that the Supreme Court confirmed that the amendment in fact created such a right of appeal<sup>3</sup>. It is remarkable that it took sixteen years for the right of appeal to be used, given that the amendment gave the Supreme Court the power to “confirm, reverse, or modify, within the limits warranted by law, the term of any sentence of imprisonment or the amount of any fine or other some of money ordered to be paid...”<sup>4</sup>.

A right of appeal against sentence in indictable matters was not given to offenders until 1945<sup>5</sup> and not to the Crown until 1967<sup>6</sup>. The Court of Appeal for many years adopted a “pragmatic and individualised”<sup>7</sup> approach to appeals against sentence, strongly resisting any attempts to fetter the discretion of sentencers, or even to recognise that consistency in sentencing was a relevant consideration. In *R v Brooks*<sup>8</sup> the Court of Appeal in 1950 commented:

Counsel for the prisoner brought to the notice of the Court various sentences for manslaughter... The Court does not think that much assistance can be gained from a comparison of sentences; facts vary so much in all cases that it is only by looking at the particular circumstances of the particular case that a true appreciation of the degree of seriousness of the case is obtained. It is on this appreciation that the sentence should be based.

It has to be questioned how a “true appreciation of the degree of seriousness of the case” can be obtained without a comparison with other cases, but such was not the approach of the Court of Appeal until relatively recently.

A decisive factor in the Court’s unwillingness to interfere with the sentence in *Brooks* was deference to the views of the sentencer who had presided over the trial. The case was cited with apparent approval in *R v Radich*<sup>9</sup> four years later. While similarly

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<sup>2</sup> See the discussion of this reform in a New Zealand context in Hall “Reducing Disparity by Judicial Self Regulation” (1991) Vol. 14 NZULR 208, 216 – 217.

<sup>3</sup> *Dickie v Cunningham* [1939] NZLR 1004.

<sup>4</sup> *Ibid* 1006.

<sup>5</sup> Criminal Appeals Act 1945 (NZ).

<sup>6</sup> Section 9(1) Crimes Amendment Act 1966(NZ).

<sup>7</sup> Hall *Sentencing in New Zealand* (Butterworths, Wellington 1987), 4.

<sup>8</sup> [1950] NZLR 658, 659.

<sup>9</sup> [1954] NZLR 86.

rejecting the value of comparison with other sentences the Court nonetheless allowed the appeal and reduced the sentence for manslaughter from ten to two years imprisonment. The Court reasoned that the trial judge had given insufficient weight to two mitigating factors (impulsiveness and previous good character) which rendered the sentence manifestly excessive, commenting that because the judge had presided over a distressing trial for a serious offence his thinking may have been “obscured”<sup>10</sup>.

By contrast the Courts in England and Wales have embraced the need for consistency, and therefore guidance, in sentencing since the right of an offender to appeal against sentence was given in 1907<sup>11</sup>. Even in its earliest decisions the English Court of Appeal<sup>12</sup> recognised that “while...no invariable tariff can ever be fixed” the Court should “harmonise the views of those that pass them [sentences], and so ensure that varying punishments are not awarded for the same amount of guiltiness.”<sup>13</sup> In *James Nuttall*<sup>14</sup> Channell J said:

These cases of reduction of sentence give some little trouble. When there is a trial, the judge who presides at it, and has the advantage of personal observation, has a better opportunity of determining the sentence. This Court will then be reluctant to interfere with sentences which do not seem to it to be wrong in principle, though they may appear heavy to individual judges. The Lord Chief Justice has laid this canon down. But the remark does not altogether apply when a prisoner pleads guilty, though even in that case there may be some especial consideration, such as local circumstances. It is impossible to lay down an [sic] universal principle. But the Court desires, as far as possible, to standardise sentences where it has the facts before it and can judge them as well as the Court below. (emphasis added)

There was, until the 1970’s, still a reluctance to use previous sentencing decisions to set tariffs that were “hard and unvarying” (see for example *R v Gumbs*<sup>15</sup> and *R v Shershewsky*<sup>16</sup>), but the English Court of Appeal was still conscious in a way that its New Zealand counterpart was not, of the importance of consistency in sentencing.

In the 1970’s the approach of appeal courts in England and New Zealand perceptibly shifted. Each jurisdiction moved away from deference to sentencing discretion at first instance towards greater appellate influence. It reflects their different starting points that, at about the time the English Court of Appeal created the first genuine guideline judgments, the New Zealand Court of Appeal first articulated the importance of consistency in sentencing, and the role of that Court in promoting such consistency through the appellate process. The New Zealand Court of Appeal began regularly

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<sup>10</sup> Ibid 88.

<sup>11</sup> The Criminal Appeal Act 1907 (UK).

<sup>12</sup> The term “the English Court of Appeal” will be used in this paper to refer to the Court of Appeal (Criminal Division) and its predecessors.

<sup>13</sup> *R v Woodman* (1909) 2 Cr App R 67.

<sup>14</sup> (1908) 1 Cr. App. R. 180.

<sup>15</sup> (1926) 19 Cr App R 74.

<sup>16</sup> (1912) 28 TLR 364.

comparing individual cases with patterns of sentences established by previous decisions. The development and current position in each jurisdiction will be dealt with in turn.

#### A. New Zealand

Since the 1970's the New Zealand Court of Appeal has placed increasing emphasis on consistency as a sentencing goal, save that in 1973 in *R v Rameka*<sup>17</sup> the Court appeared to signal a retreat: "little help is gained by considering sentences in respect of the same offence (*R v Radich* [1954] NZLR 86)". By the end of that decade consistency with existing sentencing levels was achieving the primacy that it is now accorded. Thus in 1978 in *R v Pawa*<sup>18</sup> the Court expressed the tension between consistency and discretion in this way:

The choice of an appropriate sentence can often be a difficult one. The general purposes and the probable effects of punishment are evaluated in different ways by individual judges just as they are given a varying degree of significance by individual citizens...Thus a sentencing judge must always be left with a reasonable and just area of discretion within which he will be entitled to operate. But there can be no doubt that the objective always must be equal punishment so far as it may be possible. It would be wrong if there were to be marked differences between one judge's sentence and another's for the same crime at the same general level of culpability...It is an important supervisory function of this Court to ensure, within reasonable limits, the even handed administration of justice throughout the country. (emphasis added).

This principle is now taken for granted. The paramount importance of consistency in sentencing is an accepted part of the New Zealand sentencing landscape. The remaining issue is how consistency is to be achieved, and how the "reasonable and just area of discretion" identified by the Court in *Pawa* is to be defined. Although there have been cases that have re-emphasised the importance of judicial discretion in sentencing<sup>19</sup> generally the move has been towards making consistency the paramount goal.

Unlike England, the New Zealand Court of Appeal has never overtly adopted guideline sentencing judgments as a matter of policy<sup>20</sup>. However, there is an assumption that guideline judgments form an important part of the sentencing landscape. The Sentencing Practice Note 2003<sup>21</sup> requires, among other things, counsel for the Crown and for the prisoner to file sentencing memoranda in advance of sentencing. In relation

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<sup>17</sup> [1973] 2 NZLR 592.

<sup>18</sup> [1978] 2 NZLR 190, 191.

<sup>19</sup> See, for example, *R v Lawson* [1982] 2 NZLR 219 at 223 and *Fisheries Inspector v Turner* [1978] 2 NZLR 233, 237.

<sup>20</sup> Which can be compared to the approach in New South Wales where the use of guideline judgments was announced as a policy by the Court of Criminal Appeal: *R v Jurisic* (1998) 45 NSWLR 209; Spigelman CJ, "Sentencing Guideline Judgments", *The Australian Law Journal* Volume 73, 876.

<sup>21</sup> [2003] 2 NZLR 575.

to the extent that counsel are required to refer to earlier decisions the Note records that:

[W]here there is no obvious tariff case and where counsel intends to rely on a Court of Appeal decision or other sentencing decisions, the memorandum should have copies of those cases attached. Generally, where a Court of Appeal guideline decision is available, references to other decisions will not be of assistance.

Two assumptions are apparent in the Note. First that there are readily identifiable guideline judgments from the Court of Appeal and second that a guideline judgment should provide within it all the tools needed by a sentencer. However, a review of many so-called guideline judgments reveals that these two assumptions may be incorrect.

In 1987 the leading New Zealand academic in sentencing law, Associate Professor Hall, noted that the English and New Zealand Courts have differed in their approach to the provision of guidance on sentencing levels<sup>22</sup>. He considered that the New Zealand Courts had “adopted the practice of incorporating into judgments a schedule of penalties imposed in like cases”<sup>23</sup>. To suggest that the Court of Appeal had adopted a ‘practice’ was possibly being generous. The approach taken by the Court of Appeal to providing guidance had been ad hoc and somewhat inconsistent. Although there has been some development in the Court of Appeal from simply scheduling earlier decisions to the provision of more overt guidance, there remains a lack consistency in the approach to the provision of such guidance.

The early forays into the provision of guidance were, in reality, no more than the listing of previous decisions in an attempt to identify a range for a particular type of offence: for example *R v Pu*<sup>24</sup>, *R v Dutch*<sup>25</sup>, *R v Smith*<sup>26</sup>, *R v Ulrich*<sup>27</sup>, *R v Moananui*<sup>28</sup> and *R v Wikiriwhi*<sup>29</sup>. The Court in *Dutch*, *Ulrich* and *Moananui* broke the schedules of previous decisions into categories. Those categories were simply descriptive of the schedules of cases, there being no attempt made to identify what sentencing ranges *should* be for the offences being considered.

The leading texts on current sentencing practice are *Adams on Criminal Law*<sup>30</sup> (“Adams”) and *Sentencing Law and Practice*<sup>31</sup> (“Halls”). Halls provides a list of Court

<sup>22</sup> *Sentencing in New Zealand* n7 above.

<sup>23</sup> *Ibid* 6.

<sup>24</sup> [1978] 2 NZLR 193.

<sup>25</sup> [1981] 1 NZLR 310.

<sup>26</sup> (CA 31/82 – 13 May 1982).

<sup>27</sup> [1981] 1 NZLR 310.

<sup>28</sup> [1983] NZLR 537.

<sup>29</sup> [1985] 2 NZLR 501.

<sup>30</sup> Robertson (ed) (Brookers, Wellington, 1992, loose leaf).

<sup>31</sup> Hall (LexisNexis, Wellington, 2004).

of Appeal and High Court Judgments which “can be viewed as constituting guideline (principal appellate) judgments”<sup>32</sup>. The list covers 28 offences and 48 judgments. The author notes that the list has come from “The Sentencing Digest”, an electronic database of sentencing decisions maintained by the New Zealand Ministry of Justice primarily for the benefit of the judiciary. Adams provides a similar list under the heading “Authority of Guideline Judgments”<sup>33</sup>, prefacing the list with a statement that the decisions listed offer guidance as to the approach to the sentencing of offenders under the enactments listed. The list covers 22 offences and 32 judgments. There is substantial overlap between the lists of judgments although the list in Adams, while having fewer judgments overall, lists seven that are not on the list in Halls. For a country that has never overtly embraced the concept of the guideline judgment the number of judgments in those lists strikes one as being high.

When is a decision of the Court of Appeal on a sentencing appeal a guideline judgment? The difficulty in answering that question stems from the failure of the Court of Appeal to articulate its philosophy on the use of such judgments, and a lack of consistency of approach in those judgments generally accepted as having a guideline quality.

Returning to the lists in Adams and Halls, a review of all the judgments is revealing, for one finds many are not guideline judgments at all. In fact, the majority are typical cases displaying the orthodox principles of error correction. It appears that many of the decisions are labelled guideline judgments by Adams and Halls if they involve a review of previous sentencing cases. For example In *R v Duckworth*<sup>34</sup> the Court of Appeal heard a prisoner appeal against a sentence of five years imprisonment on a single charge of demanding with menaces. The offending involved blackmailing Coca-Cola with claims that its soft drinks had been contaminated. All that the Court did was to note that this was the first example of this type of offending in New Zealand, make brief reference to an English case highlighting the need for deterrence and note that the offending warranted a starting point at or near to the maximum penalty. However, there is nothing in the judgment to indicate an intention to provide guidance for the offence of demanding with menaces as a whole or any particular category of offending within it. The language of the judgment is directed wholly to the facts of the case.

*R v Misitea*<sup>35</sup>, *R v Morris*<sup>36</sup> and *R v Martin*<sup>37</sup> are listed as guideline judgments for the offence of sexual violation by rape. While the Court of Appeal in each case refers to a number of earlier sentencing decisions, it does so solely in an attempt to establish whether the sentence under review is within an appropriate range or not. These are all

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<sup>32</sup> Ibid, Chapter 1.2.2.

<sup>33</sup> *Adams* n30 above, Chapter SA8.09(5).

<sup>34</sup> [1992] 3 NZLR 322.

<sup>35</sup> [1987] 2 NZLR 257.

<sup>36</sup> [1991] 3 NZLR 641.

<sup>37</sup> [1992] 3 NZLR 129.

examples of the Court determining whether there has been an error in the individual case. In none of the decisions does the Court claim to be issuing guidance.

Few modern judgments appear on the lists. Indeed if every case in which the Court of Appeal had recently reviewed a number of previous sentencing decisions were included, the lists would run to many hundreds of judgments. That simply reflects the increasing emphasis in judicial sentencing policy on consistency as a goal in sentencing. Thus it is arguable that what was seen as the development of ‘an approach’ to giving guidance was really no more than the Court of Appeal more regularly citing previous decisions to reflect the increasing importance of a sentence being ‘within range’.

Of the 55 cases in both lists just four were heard before Courts comprising a full bench: *R v A*<sup>38</sup>, *R v Accused*<sup>39</sup>, *R v Mako*<sup>40</sup> and *R v Rose*<sup>41</sup>, and only twelve of the judgments purport to be providing guidance of application beyond the case being considered.

Cases that were plainly never intended to be guideline judgments have been misinterpreted as such. The result has been a skewing of sentences in certain areas where comments of the Court of Appeal, not intended to be of general application, have been treated as if they were.

Perhaps the best example is in sentencing levels for arson. Both Adams and Halls list *R v Gilchrist*<sup>42</sup> as a guideline judgment. It has consistently been referred to as a guideline judgment in the Court of Appeal. This decision, with the apparent importance that it has in the field of arson sentencing, is not reported in either the New Zealand Law Reports or the Criminal Reports of New Zealand. The decision itself was delivered orally and is relatively short. It reviews previous sentencing decisions only to the extent that such cases were cited by counsel for the appellant. The Court specifically noted that it was unnecessary “for the purposes of this appeal” to undertake a review of the whole field of arson sentencing, noting in reference to an earlier decision<sup>43</sup> that “no readily discernible tariff could yet be said to have emerged”<sup>44</sup>. The Court identified sentences for arson having ranged from probation to eight years imprisonment. On no assessment could *Gilchrist* be described as a guideline judgment and yet that is how it has been treated. Indeed in *R v Heaney & Saunders*<sup>45</sup>, a panel of the Criminal Appeals Division of the Court of Appeal, *Gilchrist* was described as binding on the District Court.

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<sup>38</sup> [1994] 2 NZLR 129.

<sup>39</sup> [1994] 3 NZLR 157.

<sup>40</sup> [2000] 2 NZLR 170.

<sup>41</sup> [1990] 2 NZLR 552.

<sup>42</sup> (CA 429/90, 15 April 1991).

<sup>43</sup> *R v Cupples* (CA 106/88 – 10 August 1988).

<sup>44</sup> *Gilchrist* n42 above, 4.

<sup>45</sup> (CA 251-252/00, 9 November 2000).



It follows that while the Court in *Gilchrist* was not intending to promulgate guidelines, the decision has been interpreted as having that effect. The result appears to have been that sentences for arson have remained low when considered against the maximum penalty of 14 years imprisonment. There is no reported example of the maximum penalty for arson being imposed in New Zealand – indeed the highest sentences considered by the Court of Appeal have been in single figures<sup>46</sup>.

Judgments also appear to make their way on to the lists if they include reference to English authorities. This may well be because of the overt English tradition of guideline judgments – judgments that provide defined categories of offending, starting points or lists of factors. Thus reference in a New Zealand decision to an English case ordinarily involves repetition of the guidelines from that case. Often however the Court of Appeal has referred to such English guidelines by comparison only, without seeking to adopt them. The response of counsel and judges in New Zealand has been to treat the mere reference to English guidelines as the adoption of them. Often the English decisions are not themselves cited but rather the summary of such judgments in an English text by Thomas<sup>47</sup>. See for example *R v Hereora*<sup>48</sup>, *R v B*<sup>49</sup> and *R v B*<sup>50</sup>.

Of these the most interesting is perhaps *Hereora* which has been cited as a guideline judgment for the offence of wounding with intent to do grievous bodily harm. The passage of the judgment said to set categories of sentences is as follows<sup>51</sup>:

For crimes comparable but rather less serious than these, this Court has upheld sentences of imprisonment for from three to five years. (For a five year sentence, see for instance *R v Ruka* (CA 45/85, 16 September 1985.) In England it is said, as to cases of wounding or causing grievous bodily harm with intent, that commonly an impulsive act of violence involving the use of a weapon or intent to inflict serious injury will attract a sentence within the bracket of three to five years; and that from five to eight years is reserved for cases exhibiting a combination of aggravating features. Up to 12 years is imposed there when unusually grave aggravating features are present: Thomas, *Principles of Sentencing* (2nd ed, 1979) pp 93-99; Thomas, *Current Sentencing Practice*, para B2-2.2.

There is nothing in this passage to suggest that the Court intended to set categories for this offence, much less adopt the English categories for a similar offence as set out in an English text book. Nonetheless the ‘Hereora categories’ have become a fixture in sentencing. The upper category referred to in *Hereora* is “up to 12 years”<sup>52</sup>. The maximum penalty in New Zealand is 14 years imprisonment and it is therefore arguable

<sup>46</sup> See for example the review of sentences in *R v Z* (CA138/00 – 27 June 2000).

<sup>47</sup> D Thomas *Principles of Sentencing* (2d ed, London, Heinemann, 1979).

<sup>48</sup> [1986] 2 NZLR 164.

<sup>49</sup> [1984] 1 NZLR 261.

<sup>50</sup> [1986] 2 NZLR 751.

<sup>51</sup> N48 above, 170.

<sup>52</sup> *Ibid*.

that the effect of the inadvertent adoption of the English guidelines has been to reduce the maximum penalty<sup>53</sup>. The irony of the adoption of so-called English categories is that the offence of wounding with intent to do grievous bodily harm has not been the subject of a guideline judgment in England.

Despite repeated comments by the Court of Appeal that the 'Hereora categories' should be considered only as a broad guide, they are still applied rigidly by sentencing judges<sup>54</sup>. This example illustrates the way in which sentencers look to the Court of Appeal to provide guidance, perhaps because the majority of offender appeals against sentence are allowed on the basis the sentence was outside an available and known range.

A feature of the approach of the Court of Appeal is its unwillingness in certain areas to issue guideline judgments because of a claimed infinite variety of factual circumstances encompassed by a particular offence, for example in relation to arson<sup>55</sup> and manslaughter<sup>56</sup>. However it is difficult to see why the range of factual circumstances is any more variable for arson than for wounding with intent to do grievous bodily harm – yet there is a guideline judgment (so-called) for the latter but not the former. Equally, where the circumstances likely to arise under a defined offence are particularly varied, those are precisely the cases in which lower courts need assistance from the Court of Appeal.

The New Zealand Court of Appeal has been reluctant to *prescribe* sentencing guidelines, instead preferring to *describe* patterns emerging from previous decisions. As the Court of criminal Appeal of New South Wales noted in *Henry*<sup>57</sup>: "Guideline judgments in New Zealand are "bottom up" not "top down" guidelines; that is, they purport to describe, rather than prescribe, sentencing practice". Exceptions exist where the maximum penalty for an offence has been increased by Parliament<sup>58</sup>, and in the comment by the Court of Appeal in *R v TeRewa*<sup>59</sup> (having listed a number of relevant factors and scheduled cases into three categories for cultivation of cannabis) that, "It may well be that the penalties imposed in some of the cases listed under category two in the schedule to this judgment would appear very lenient if re-examined bearing in mind these factors". Likewise, in Thomas J's dissent in *R v Leuta*<sup>60</sup> he made clear his view that it was legitimate for the Court of Appeal to prescribe sentencing ranges at a different (in that

<sup>53</sup> This point was repeatedly made by counsel for the Crown in *R v Taueki* [2005] 3 NZLR 372, a guideline judgment which has recently revised the "Hereora categories".

<sup>54</sup> See for example *R v Clotworthy* (CA 114/98, 29 June 1998) and *R v Funaki* (CA 62/02, 9 May 2002).

<sup>55</sup> *R v Honan* (1988) 3 CRNZ 532,533.

<sup>56</sup> *R v Leuta* [2002] 1 NZLR 215, 229.

<sup>57</sup> (1999) 46 NSWLR 346, 376.

<sup>58</sup> For example *R v A* n38 above, in the context of sentencing for sexual violation by rape.

<sup>59</sup> [1999] 3 NZLR 62, at 66.

<sup>60</sup> N56 above, 240.

case higher) level than has previously been the case. William Young J, then a member of the permanent Court (now the President) has commented that<sup>61</sup>:

Since then [the guidance delivered in the 1980's], the Court of Appeal has been prepared to adopt a more prescriptive or "top-down" approach. A recent and obvious example is Mako [2000] 2 NZLR 170...A primary purpose is now consistency in sentencing. This aim is achieved both by reviewing existing patterns of sentencing...and by the Court of Appeal enunciating sentencing guidelines on a prescriptive basis...

The issue of whether guideline judgments should be more prescriptive is examined later.

Of the 55 judgments listed in Adams and Halls, which then are genuinely guideline judgments? In concluding that there are only six the following criteria have been applied:

1. The Court says it is providing guidance.
2. The decision attempts to review sentencing for a whole offence.
3. The decision provides categories, starting points or factors to determine sentences in a particular area.

The first criterion should be straightforward. It is reasonable to assume that if the Court of Appeal says that it is providing guidance, then it will provide guidance. However in *R v Accused*<sup>62</sup> the Court of Appeal indicated that it intended providing guidance in the area of intra-familial sexual abuse. The decision by a full court reviews sentencing levels in New Zealand and overseas yet does not provide any guidance as to the disposition of future cases.

In identifying just six cases the writer is not to be taken to be diminishing the relevance of many of the other decisions commonly cited in certain areas of sentencing. An example is *R v Rose*<sup>63</sup>, a case which reviews New Zealand and English authorities in the context of 'white collar fraud' at a high level, and provides very useful guidance for sentencers in similar cases. It does not however purport to be a guideline judgment in the sense that the term is now understood.

It is a positive sign that two new guideline judgments have been issued in the past six months<sup>64</sup>.

### *The Six 'Guideline Judgments':*

<sup>61</sup> "Appeals on Sentence" (Unpublished).

<sup>62</sup> N39 above.

<sup>63</sup> N41 above.

<sup>64</sup> Indeed, when this paper was first written the next heading read "*The Four 'Guideline Judgments'*".

*R v A*<sup>65</sup> – Sexual Violation by Rape

This case sets a single starting point of eight years imprisonment for a contested case of rape with no aggravating and mitigating features. The court increased the starting point of five years adopted by the Court of Appeal in *R v Clark*<sup>66</sup>, to reflect the increase in the maximum penalty for rape from 14 to 20 years imprisonment. The Court confirmed that the starting point of eight years was not intended to fetter sentencing discretion, noting that much higher sentences may well be justified in some cases and substantially lower sentences in others. There is very little discussion in the judgment about the way in which sentencing judges should approach the weighing of factors, or the weight to be given to commonly occurring factors. These are weaknesses in the judgment.

Two examples of appropriate sentences are given: *R v Misitea*<sup>67</sup> as an example of bad gang rape legitimately attracting a starting point at or near the maximum penalty, and *R v Brookes*<sup>68</sup>, an English case in which three years imprisonment was appropriate as the offender did not become aware that the victim was not consenting until after intercourse had commenced but continued regardless. The efficacy of reference to an English decision when the Court had just increased the English starting point of five years imprisonment has to be questioned.

The *Clark* starting point of five years was taken directly from the English case of *Billam*<sup>69</sup>. Oddly however, the New Zealand Court of Appeal in *Clark* and in *R v A* made no mention of the fact that the maximum penalty for rape in England is life imprisonment as compared to 14 years in New Zealand when *Clark* was decided and 20 at the time of *A*. Nor was any reference made to the fact that *Billam* adopts three distinct starting points for rape, one of which is the five year starting point for a rape with no aggravating and mitigating features. There is no discussion in either New Zealand decision as to why a single starting point should be used here, when the English preferred three.

*R v Te Rewi*<sup>70</sup> – Cultivation of Cannabis

The Court of Appeal took the opportunity to review the “tariff case” of *R v Dutch*<sup>71</sup> which had divided the offence into three categories based primarily on the number of plants being cultivated. The Court elected to retain the three category approach but to

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<sup>65</sup> N38 above.

<sup>66</sup> [1987] 1 NZLR 380.

<sup>67</sup> N35 above.

<sup>68</sup> (1992) 14 Cr App R (S) 496.

<sup>69</sup> (1986) 8 Cr App R (S) 48.

<sup>70</sup> N59 above.

<sup>71</sup> N25 above.

rework the definitions of them in light of the Court's experience since the earlier decision. A subtle caution about the use of categories was sounded when the Court said, "The division between the categories is merely a means to give a guide to penalty in relation to a particular position on the scale of offending."<sup>72</sup>

While recognising that the use of categories was simply a way of more completely describing the scale of seriousness of the offence, the Court did not seek to give any particular examples within the text of the judgment as to where it would see particular circumstances falling on the scale. Rather it was content to rely on a schedule of decisions provided by Crown counsel and annexed to the decision, although noting that sentences listed under "category two" within the schedule may be considered low. It would have been helpful if the Court had used some of those cases as examples, identified the sentence that should have been imposed and articulated the reasoning process in getting to that sentence. There are very few tools given to sentencers as to how to determine where in a category a particular example of the offence falls.

Although the judgment refers primarily to cultivation of cannabis, offences of dealing in cannabis are also mentioned, and never specifically excluded. The result has been confusion about whether the judgment applies to offences of dealing in cannabis or not. Two contradictory lines of authority, each apparently unaware of the other, have emerged in the Court of Appeal giving rise to significant disparity in sentencing for low level cannabis dealing. In *R v Watson*<sup>73</sup> and *R v Walker*<sup>74</sup> it was held that the *Terewi* categories did not apply to dealing offences, while the contrary view was taken in *R v McLaine*<sup>75</sup> and *R v Leighs*<sup>76</sup>. That disparity highlights the importance of the Court properly delineating the area of sentencing to which it intends a guideline judgment will apply.

### *R v Wallace*<sup>77</sup> – Dealing in Class B Controlled Drugs

The Court of Appeal reviewed sentencing levels for the manufacture of Class B controlled drugs. It again preferred to separate offences into three categories of seriousness. A schedule of cases was provided (within the text of the judgment) as examples of sentences at certain levels. The categories are descriptive of the cases cited in the schedule and the Court notes that: "This judgment and the cases reviewed should in general provide sufficient reference without the need to research and cite earlier cases."<sup>78</sup>

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<sup>72</sup> *Terewi* n59 above, 66.

<sup>73</sup> (CA36/01 – 24 May 2001).

<sup>74</sup> (CA356/01 – 25 July 2002).

<sup>75</sup> (CA355/00 – 30 November 2000).

<sup>76</sup> (CA360/02 – 15 September 2003).

<sup>77</sup> [1999] 3 NZLR 159.

<sup>78</sup> *Ibid* 173.

The categories themselves are imprecisely defined. Unlike guidelines for drug sentencing in England<sup>79</sup> and New South Wales<sup>80</sup>, the categories are not defined by reference to a single factor (such as weight) capable of being articulated numerically. For example the second category refers to a “substantial scale”<sup>81</sup> and “not involving massive quantities”<sup>82</sup>. The breadth and imprecision of those phrases diminishes the effect of the guidance. As with cultivation of cannabis, no examples of how sentences should be arrived at are given, either by way of fictional offences or decided cases.

A series of general principles applicable to sentencing in the area were identified and listed. The list is helpful and likely to be of use to sentencers. It is a feature of the judgment that should be replicated as a matter of course in the provision of sentencing guidance by the Court of Appeal.

### *R v Mako*<sup>83</sup> – Aggravated Robbery

The Court of Appeal in this decision provided the most sophisticated guidance yet given. It was heard by full bench of the Court of Appeal. Notice was given to the counsel for the Crown and the offender that the Court was going to issue guidance for aggravated robbery sentencing. The formality of the approach is reflected in the quality of the judgment.

The Court reviewed the sentencing approach for aggravated robbery provided in *R v Moananui*<sup>84</sup>, which had been the principal appellate judgment since 1983. That judgment had identified (in keeping with the theme of New Zealand guidance in the 1980’s and 1990’s) three categories of aggravated robbery based primarily on the nature of the premises targeted. The Court in *Mako* noted that the categories have been too strictly applied resulting in “an overemphasis on the appropriate category for particular offences and underemphasis on the true criminality”<sup>85</sup>.

The Court reviewed the approaches to aggravated robbery sentencing in New South Wales, England and Canada, but sensibly did not try to draw any comparisons with the actual sentencing levels in those jurisdictions given the different maximum penalties and statutory definitions. The guidance the Court chose to give has two parts. The first is a list of factors which are said to be relevant to an assessment of the seriousness of an aggravated robbery, which includes the nature of the premises targeted, victim impact, risk to members of the public and the amount of money or property taken.

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<sup>79</sup> *Aramah* (1983) 4 Cr App R (S) 407.

<sup>80</sup> *R v Wong* (1999) 48 NSWLR 340.

<sup>81</sup> *Wallace* n77 above, 172.

<sup>82</sup> *Ibid.*

<sup>83</sup> N40 above.

<sup>84</sup> N28 above.

<sup>85</sup> *Mako* n40 above, 174.

The second part of the guidance involves the Court identifying a series of examples of the offence together with the appropriate range of sentences. Of most interest is the discussion, in relation to each example, of the extent to which the sentence might move up or down depending on the presence of certain additional factors. For example the Court gave the following description of the robbery of a small retail shop:<sup>86</sup>

...by demanding money from the till under threat of the use of a weapon such as a knife after ensuring no customers are present, with or without assistance from a lookout or an accomplice waiting to facilitate get away. The shop keeper is confronted by one person with the face covered. There is no actual violence. A small sum of money is taken. The starting point should be around four years. Should the shopkeeper be confined or assaulted, or confronted by multiple offenders, or if more money or other property is taken five years and in bad cases six years, should be the starting point.

The ‘starting point’ is defined in the judgment by reference to the aggravating and mitigating features of the *offence*. From that starting point adjustments are to be made up or down to reflect *personal* mitigating and aggravating features. The Court also included a schedule of selected recent cases designed to reflect appropriate sentencing levels and made comments about the need to approach comparisons with other cases with care because of the nature of the appeal process and the different tests applied to offender appeals versus Crown appeals.

The approach in *Mako* has obvious advantages over the other guideline judgments described. It is designed to provide guidance, without stifling a proper assessment of individual cases, and in large measure achieves that goal. The judgment does not, however, encourage the articulation of the weight to be given to individual factors, as the examples given tend to deal with the addition of aggravating features in groups or pairs and the weight to be given to those groups or pairs en masse. A clearer articulation of the weight given to individual factors, in the context of a greater number of examples, would rectify that deficiency.

### *R v Fatu*<sup>87</sup> – Manufacture of Methamphetamine

This decision followed on the heels of *R v Arthur*<sup>88</sup> which had, on its face, all the hallmarks of a modern guideline judgment. It dealt with the offence of supplying methamphetamine in the context of the relatively recent reclassification of the drug from Class B (maximum penalty 14 years imprisonment) to Class A (maximum penalty life imprisonment). Even though the judgment in *Arthur* reviews and schedules a large number of previous decisions and overseas authorities and sets three distinct categories

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<sup>86</sup> Ibid 183.

<sup>87</sup> (CA415/04 – 18 November 2005).

<sup>88</sup> (CA382/04 – 17 March 2005).



for the offence of supplying methamphetamine, the Court made clear that it did not see itself as giving a guideline judgment.<sup>89</sup>

Until such time as this Court may decide otherwise in a guideline judgment, there may be some advantage if sentencing judges in this country were to adopt the New South Wales bands.

The reluctance to label it a ‘guideline judgment’ may reflect that the Court was sitting as a bench of the Criminal Appeals Division rather than the permanent Court. Given that the Crown in that case was represented by instructed counsel from the Auckland Crown Solicitor’s office rather than Crown Counsel from the Crown Law Office, it seems likely that an intention to provide guidance was not communicated to the parties in advance.

There are positive features to the judgment. The bands adopted in *Arthur* are overlapping, in the same way as those in New South Wales<sup>90</sup>, thus avoiding arguments about the location of the edges of categories, and discouraging over reliance on category identification as opposed to true culpability. The Court also clearly identifies that the guidance is only to be used in relation to supply of methamphetamine, and not for example to cases of manufacture and importation, thus avoiding the difficulties that have bedevilled the application of the *Terewi* categories discussed earlier.

In *Fatu* the permanent court (albeit a bench of three) provided guidelines for the manufacture, importation and supply of methamphetamine. The process had weaknesses in that, while the parties were given notice in advance of hearing of an intention to issue guidance<sup>91</sup>, only one case was considered and therefore only one perspective from the defence bar heard. The quality of the information received was thus limited.

In terms of content the Court generally adopted the *Arthur* bands, although it added a fourth to break down the “large commercial quantities” band further. Rather than adopting general descriptions of culpability, as had been done in *Wallace & Christie*, weight (adjusted for purity) based bands were preferred. The Court maintained the positive overlapping nature of the bands. Interestingly the Court ranked manufacturers, importers and suppliers in terms of general culpability and adopted different bands for each. The Court indicated that the guidelines would signal an increase in sentences where the precise quantity of the drug manufactured could not be ascertained. Beyond that it does not appear designed to be prescriptive.

### *R v Taueki*<sup>92</sup> – Serious Violence

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<sup>89</sup> Ibid, paragraph [18].

<sup>90</sup> *Wong* n80 above.

<sup>91</sup> The Crown had in fact sought it.

<sup>92</sup> [2005] 3 NZLR 372



In terms of process *Taueki* is unimpeachable. It was heard by the Full Court, involved multiple cases heard together, and the parties were given notice in advance of the intention to issue guidance.

The primary purpose of the Judgment was to review the categories for serious violence used (or misused) since *R v Hereora*<sup>93</sup>. Regrettably the decision appears to herald a retreat from the *Mako* approach and a return to the comfort of categories<sup>94</sup>:

However, while we have adopted a number of the features of *Mako* in this judgment, we have not followed the *Mako* approach in its entirety. In our view the use of examples, as was done in *Mako*, provides insufficient guidance to sentencing Judges in the present context, where the range of GBH offending is so broad. The *Mako* examples covered the spectrum of aggravated robbery situations in a way which provided strong guidance for sentencing Judges in most aggravated robbery cases. Examples of GBH offending would not, on their own, cover the much broader range of offending with which sentencing Judges must deal. For this reason we have decided to describe bands of offending, similar to the *Hereora* categories, as well as providing a list of factors relevant to setting starting points and some examples as was done in *Mako*. We think this combined approach will provide the most helpful guidance, while preserving the very important discretionary element in sentencing.

This reasoning is contestable on two fronts. First, the assertion that the range of circumstances for offences of serious violence is broader than for aggravated robbery is not supported by reasoning. In fact, the range for both types of offences appears similarly broad. There are common examples of both, and a substantial number of cases falling outside those examples. Second, if the range of serious violence offences is broader then that is an argument against the adoption of categories over examples. Categories (even overlapping ones as the Court used here) rely on broad descriptions and, no matter how well intentioned they are, discourage flexibility. By contrast examples can reflect the broad range of offending and offer real guidance as to how unusual situations should be dealt with. The Court did not appear to consider the simple answer – to provide more (and better reasoned) examples, a suggestion which is explored later.

## B. England

The 1970's saw the emergence of the first guideline judgments under the leadership of Lord Justice Lawton, exemplified in *Taylor, Roberts and Simons*<sup>95</sup> for the offence of unlawful sexual intercourse with a girl under 16. His Lordship noted that the area of sentencing was unclear and issued guidance to attempt to clarify it. Setting a trend that continued for many years the Court did not cite many previous decisions – in fact only

<sup>93</sup> See the discussion circa N51, above.

<sup>94</sup> *Taueki* N92 above, at paragraph [17].

<sup>95</sup> [1977] 3 All ER 527.

one. The guidance incorporated statements of general principle and examples of the types of sentences appropriate in different circumstances:<sup>96</sup>

...When there is a virtuous friendship which ends in unlawful sexual intercourse, it is inappropriate to pass sentences of a punitive nature. What is required is a warning to the youth to mend his ways. At the other end, a man in a supervisory capacity who abuses his position of trust for sexual gratification, ought to get a sentence somewhere near the maximum allowed by law which is 2 years imprisonment.

The judgment notes that between the two extremes are many degrees of guilt, of which five examples are given with general indications as to the appropriate penalty. The judgment gives guidance that attempts to make sense of sentencing as a continuum commencing at the maximum penalty, an approach that will be returned to later in this paper.

By 1978 the Advisory Council on the Penal System in the United Kingdom had endorsed the role of the English Court of Appeal in providing sentencing guidance noting that: “the philosophy of steering a middle course between a narrow and a wide discretion in sentencing was one which most appealed to us.”<sup>97</sup>

The delivery of guideline judgments was continued by Lord Justice Lane, through into the 1980’s. By 1984 Professor Ashworth noted that the Court of Appeal was handing down guideline judgments with “increasing frequency”<sup>98</sup>. He criticised the failure of the judgments to refer to, and attempt to reconcile, earlier decisions of the Court within those guideline judgments. At times the Court appeared to be retreating from the provision of guidance, for example in *de Havilland*<sup>99</sup> where Lord Justice Dunn downplayed the significance of appellate guidance on sentencing, re-emphasising the sanctity of the untrammelled discretion of sentencers.

As Dingwall<sup>100</sup> describes, the Government in the United Kingdom recognised the work of the English Court of Appeal in delivering Guideline Judgments, encouraging greater use of them:<sup>101</sup>

The main guidance on sentencing has come from the Court of Appeal, which has increasingly emphasised the need for the courts to take account of the seriousness of the individual offence, and the aggravating and mitigating circumstances, if justice is to be done and seen to be done. The recent guideline judgments such as those on rape, incest and drug trafficking, have provided much clearer guidance on how sentencing decisions should be reached, as well as advice on sentences suitable for the varying degrees of seriousness of an offence

<sup>96</sup> Ibid 529.

<sup>97</sup> Advisory Council on the Penal System, *Sentences of Imprisonment: A review of maximum penalties* (1978) 8.

<sup>98</sup> *Techniques of Guidance on Sentencing* [1984] Crim L R 519, 521.

<sup>99</sup> (1983) 5 Cr App R(S) 109.

<sup>100</sup> Dingwall, “The Court of Appeal and ‘Guideline’ Judgments” [1997] 48 N.Ir. Legal Q.143,144-145.

<sup>101</sup> Advisory Council on the Penal System (1978), 5.

Whilst there was some academic criticism of the nature of the guidance given by the Court<sup>102</sup>, nonetheless readily identifiable guideline judgments continued to be issued, either at the Court's own initiative or by reference from the Attorney General. It has been suggested that there were, as at 28 February 2005, 89 English Court of Appeal judgments relating to offences rather than general sentencing principles, in which the Court has given some form of general guidance<sup>103</sup>. A much smaller number of judgments in that list are 'guideline judgments' as that concept is now understood. Many give guidance only for sub-categories of offences<sup>104</sup>, while the majority do no more than list aggravating and mitigating features<sup>105</sup>.

The genesis of the current English system in which guidelines are no longer the responsibility of the Courts is found in sections 80 and 81 of the Crime and Disorder Act 1998(UK). Those provisions placed a duty on the English Court of Appeal to frame or revise sentencing guidelines. This was the first statutory recognition of that role by the Court. It also established a Sentencing Advisory Panel ("the Panel") with the ability to make recommendations as to when guidelines need to be promulgated or changed. As a corollary the English Court of Appeal then had an obligation to consider such recommendations. The Panel provided advice to the Court on 12 occasions between 2000 and 2003 on the following areas<sup>106</sup>:

1. Environmental Offences – In *Milford Haven Port Authority*<sup>107</sup> the Court considered the Panel's advice but elected not to issue guidelines.
2. Offences Weapons Offences – In *Polton and Cellaire*<sup>108</sup> the Court adopted guidelines based on the Panel's advice.
3. Importation and Possession of Opium – In *Mashaollahi*<sup>109</sup> the Court substantially adopted guidelines recommended by the Panel.
4. Racially Aggravated Offences – In *Kelly and Donnelly*<sup>110</sup> the Court substantially adopted guidelines recommended by the Panel.
5. Handling Stolen Goods – In *Webbe and Others*<sup>111</sup> the Court substantially adopted guidelines recommended by the Panel.

<sup>102</sup> *Dingwall* n100 above.

<sup>103</sup> "Guideline Judgments Case Compendium", Guideline Sentencing Council, March 2005 (preface).

<sup>104</sup> For example see: *R v Harwood* (1979) 1 Cr App R (S) 354, providing guidance for "glassing" a victim; *AG's Ref No.59 of 1996 (Grainger)* [1997] 2 Cr App R (S) 250 providing guidance for "stomping" on a victim's head.

<sup>105</sup> For example see *R v Feld* [1999] 1 Cr App R (S) 1, in relation to fraud by company managers; *R v Gould and Others* (1983) 5 Cr App R (S) 72, in relation to armed robbery.

<sup>106</sup> *Court of Appeal Guidelines Using Panel Advice* at <[www.sentencing-guidelines.gov.uk/advice/guidelines/index.html](http://www.sentencing-guidelines.gov.uk/advice/guidelines/index.html)>.

<sup>107</sup> [2000] 2 Cr App R (S) 423.

<sup>108</sup> [2002] EWCA Crim 2847.

<sup>109</sup> [2001] 1 Cr App R (S) 330.

<sup>110</sup> [2001] 2 Cr App R (S) 341.

<sup>111</sup> [2002] 1 Cr App R (S) 82.

6. Extended Sentences – In *Nelson*<sup>112</sup> the Court adopted guidelines recommended by the Panel.
7. Minimum Terms in Murder Cases – The Lord Chief Justice issued a practice statement<sup>113</sup> based on the Panel’s advice.
8. Domestic Burglary – In *McInerney and Keating*<sup>114</sup> the Court substantially adopted guidelines recommended by the Panel.
9. Rape – In *Millberry and Others*<sup>115</sup> the Court essentially adopted guidelines recommended by the Panel.
10. Offences Involving Child Pornography – In *Oliver and Others*<sup>116</sup> the Court substantially adopted guidelines recommended by the Panel.
11. Causing Death by Dangerous driving – In *Cooksley and Others*<sup>117</sup> the Court adopted four starting points rather than three, but otherwise adopted the guidelines recommended by the Panel.
12. Alcohol and Tobacco Smuggling – In *Czyzewski*<sup>118</sup> the Court adopted guidelines recommended by the Panel.

As can be seen, the English Court of Appeal welcomed the Panel’s assistance. In *Mashaollahi* the Court acknowledged its indebtedness to the Panel, and in *Kelly and Donnelly* the advice was described as “very helpful”.

Section 172 of the Criminal Justice Act 2003(UK) created a new body, the Sentencing Guidelines Council (“the Council”). The Council was created to take the responsibility from the English Court of Appeal for framing and revising sentencing guidelines. A two-tier system has been created with the Panel still retaining responsibility for researching and proposing draft guidelines and facilitating public and professional discussion on the draft. The Council then issues guidelines to which all courts must have regard. The Council itself can initiate the provision of a guideline, or a request for one to be considered can be made by the Home Secretary.

At the time of writing this paper formal guidelines had been issued on four topics: *Reductions in Sentence for a Guilty Plea*, *New Sentences: Criminal Justice Act 2003*, *Overarching Principles: Seriousness* and *Manslaughter by Reason of Provocation*. The focus of the Council’s endeavours in the short term will be matters of general principle rather than offence specific guidelines. A table of proposed future work<sup>119</sup> for the

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<sup>112</sup> [2002] 1 Cr App R (S) 565.

<sup>113</sup> [2002] 2 Cr App R 287.

<sup>114</sup> [2002] EWCA Crim 3003.

<sup>115</sup> [2002] EWCA Crim 2891.

<sup>116</sup> [2003] 1 Cr App R (S) 463.

<sup>117</sup> [2003] EWCA Crim 996.

<sup>118</sup> [2003] EWCA Crim 2139.

<sup>119</sup> “Table of Future Work”, Sentencing Guidelines Council at <http://www.sentencing-guidelines.gov.uk/about/schedule/future.html> (as at 26 February 2006).

Council confirms that focus, with the next eight guidelines set to relate to issues rather than offences.

In March 2005 the Council issued a compendium<sup>120</sup> summarising the applicable guidance given by the English Court of Appeal over the last 30 years. The foreword by the Deputy Chairman of the Council, Lord Justice Rose<sup>121</sup> records that:

Those consulting the compendium should bear in mind that, even now, it is unlikely to be exhaustive. For the future new offences, new penalties and changing public and parliamentary perceptions of gravity will require a steady flow of further guidance from the Court of Appeal until such time as the Sentencing Guidelines Council is able to produce and maintain replacement guidelines.

The extent to which sentencers are entitled to depart from guidelines issued by the Council will not become clear for some time. It is likely however that the guidelines will be treated as being effectively binding. The enforcement of the guidelines will fall to the English Court of Appeal which has indicated its strong support for the new system. In *AG's Reference No's 35,37,38,40,42,43,44,51,53 & 54 of 2003*<sup>122</sup> Lord Justice Kay said:

It is...the clear responsibility of sentencers to be fully aware of the guidance given...and faithfully apply it to cases even though the sentencing exercise may be both difficult and painful.

There are a number of advantages to the English system. Most obviously it allows for guidelines to be considered in a thoughtful and unhurried way. Guidance is issued by Appeal Courts in the context of individual cases, with prisoners and their counsel awaiting the results for personal reasons. Liberty, or at least the length of a period incarceration, will often be at stake. Appeal Courts have to deliver decisions which determine individual rights promptly, whereas sophisticated guidance on sentencing takes time.

The English system changes the forum. Rather than a single hearing with parties taking adversarial roles, the new process is more inquisitorial. That is appropriate given that the process of promulgating guidelines is quasi-legislative. A model which enhances the quality of that process, and moves it out of an adversarial environment, is appropriate. The non-judicial nature of the process has broadened the type and quality of the information available to those whose task it is to promulgate guidelines. Untrammelled by traditional rules as to what material can be referred to on an appeal, the Panel has sought a wide range of information and a wide range of views.

<sup>120</sup> *Guideline Judgments Case Compendium*, n103 above.

<sup>121</sup> Also the Vice President, Court of Appeal (Criminal Division).

<sup>122</sup> [2004] 1 Cr App R (S) 84.

The process adopted by the Panel before it provides advice either to the Council or the Court of Appeal involves the preparation of a comprehensive discussion paper which is then distributed for discussion. The Panel is obliged by virtue of section 81(4)(a) of the Crime and Disorder Act 1998 to ensure that appropriate consultation occurs. There are 27 statutory consultees and the Panel also routinely sends discussion papers to the Resident Judges of the Crown Court Centres, and publishes the paper on its website<sup>123</sup>. The success of the consultation process is evidenced by the number of formal responses to the Panel's discussion paper on rape. Copies of the discussion paper were sent to more than 100 individuals and organisations and responses received from 29 of them. Respondee included those who would have traditionally had a say such as the Crown Prosecution Service, as well as those who were not traditionally involved, including the Rape Crisis Federation of England & Wales, the Probation Manager's Association, the Law Society, the Royal College of Psychiatrists and the United Kingdom Men's Movement. Individual responses were received from academics and from some who had been victims of rape. The breadth of input is reflected in the sophistication of the reasoning in the final advice of the Panel that went to the English Court of Appeal.

The Panel also commissioned research into public attitudes in relation to aspects of the offence of rape and incorporated that into the discussion paper and the final advice to the Court. An issue of interest to the Panel was whether a distinction should be drawn between rape by a stranger and rape by an acquaintance or a person in a relationship with the victim. The research was commissioned to look at public opinion on that issue. The Panel concluded that the Courts may have underestimated the impact of acquaintance rape or relationship rape on victims and thus wrongly treated the presence of such a relationship as a mitigating feature<sup>124</sup>.

The level of consultation and research undertaken in relation to rape is consistent with that undertaken in other areas, such as domestic burglary and possession of child pornography. The overwhelming impression gained from reading the materials produced by the Panel is that the quality of the discussion is substantially enhanced by the diversity of opinion available.

The Panel, as at 2 May 2005, had fourteen members including academics and judges. One of the members of the panel, Professor Ashworth, has been advocating better guidance in sentencing for many years. The Chair of the Panel also sits in consultation with the Council. By contrast, the Council has a more judicial look. It is chaired by the Lord Chief Justice, and seven more of its members are Judges of the English Court of Appeal, the Crown Court and the Magistrates Court. The remaining members include the Director of Public Prosecutions, the Chief Constable of the Thames Valley Police, the head of policy at Victim Support and a Justice of the Peace.

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<sup>123</sup> "Rape: The Panel's Advice to the Court of Appeal", Sentencing Advisory Panel, May 2002 (Annex B).

<sup>124</sup> Ibid 6.

One of the impressive aspects of the approach the Panel has taken is that it sees its role as building on, rather than reforming, the work already done by the English Court of Appeal. The Panel takes as its starting point the existing guidelines, if any, for an offence and assesses them by reference to the results of the consultation process and actual sentencing levels. Its advice to the English Court of Appeal on rape included a summary of the current sentencing levels taken from Crown Court statistics for the year 2000. The advice given to the Court recommended that the structure of the existing guideline judgment in *Billam*<sup>125</sup> be retained with some modifications to modernise the decision by bringing it into line with contemporary thinking as to the comparative seriousness of different examples of the offence. The recommendations were adopted, subject to some minor adjustments and additional guidance, by the Court in *Millberry and Others*<sup>126</sup>.

An advantage of guidance by the Council rather than a Court is that guidance can be given for offences dealt with in the Magistrates Court. The English Court of Appeal was limited to appeals from the Crown Court and thus magistrates did not have the benefit of appellate guidance, when arguably it is they who need it the most. Guidance can be given on sentencing issues such as the appropriate reduction for guilty pleas or the approach to be taken to assessing the seriousness of any offence. The ability to deal with issues of general application may well improve consistency in the philosophy underpinning the sentencing process.

So, is there any discernible pattern to the type of guidelines issued by the English Court of Appeal, the Council or both?

The guidance of the English Court of Appeal since the 1970's has predominantly been by way of listing factors relevant to a particular offence, together with a general indication as to the range in certain circumstances. That approach has been criticised as only being of limited help to sentencers, as it does not indicate the weight to be given to commonly occurring factors nor the process used to arrive at the example sentences<sup>127</sup>. In *Billam*, for example, the Court identified three starting points for rape: five years for a neutral example of the offence; eight years for rape committed by two men, or by a man who has broken into a home or by a person in a position of responsibility or by a man who abducts his victim; and 15 years for a 'campaign of rape' against a number of different women or girls. The Court then listed eight factors which aggravate the offence noting that "Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested by the starting point."<sup>128</sup>

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<sup>125</sup> N69 above.

<sup>126</sup> N115 above.

<sup>127</sup> *Sentencing Law and Practice* n31 above, Chapter 1.2.2(a)(i).

<sup>128</sup> *Billam*, n69 above, 50-51.



The starting figures in *Billam* were used as the basis of the guidance given in *Millberry* after advice had been given to the Court by the Panel. Neither the Panel nor the Court provides any real guidance as to the weight to be given to the listed factors, or the process of arriving at the starting points.

In early decisions, when the English Court of Appeal was prepared to provide ranges or starting points, the guidance was, at times, so vague as to be unhelpful. For the offence of kidnapping, for example, the Court of Appeal gave guidance in *R v Spence and Thomas*<sup>129</sup> that can be summarised in the following table<sup>130</sup>:

<i>Circumstances</i>	<i>Guideline Sentence</i>
1. Violence or firearm used, exacerbating features such as detention of victim over long period	More than 8 years' imprisonment
2. Carefully planned abductions, victim used as hostage, or ransom money demanded	Seldom less than 8 years' imprisonment
3. Scarcely kidnapping, perhaps the sequel to a family tiff or lovers dispute	Up to 18 months imprisonment

This sort of guidance creates more questions than answers in leaving, as it does, significant holes in the ranges described to be filled by sentencers.

An example of the English Court of Appeal listing factors is *Brewster*<sup>131</sup>, a guideline judgment in relation to domestic burglary. The Court identified the aggravating features of domestic burglaries but was not prepared to attempt to quantify the effect of those individual factors on sentencing because of the difficulties inherent in that process. Lord Bingham said in respect of an earlier decision of the Court: "It places too much emphasis on past cases and seeks to establish categories where none is possible or desirable". However, the Panel in its advice to the Court subsequent to *Brewster* was prepared to attempt the task of providing more detailed guidance. It recommended a series of four fictional examples of offences and offenders, with proposed starting points incorporated, designed to indicate the weight to be given to the various combinations of factors. The Panel showed a regard for proportionality in sentencing generally noting that:<sup>132</sup>

While the suggested starting points in paragraphs (b) to (d) above would indicate a substantial increase in the length of the custodial sentences each time the offender commits a further qualifying burglary, the Panel proposes that this incremental increase in sentencing levels should slow significantly after the third qualifying conviction in order to retain a degree a

<sup>129</sup> (1983) 5 Cr App R (S) 413.

<sup>130</sup> *Guideline Judgments Case Compendium*, n103 above, 26.

<sup>131</sup> [1998] 1 Cr App R (S) 181.

<sup>132</sup> "Domestic Burglary: The Panel's Advice to the Court Of Appeal," May 2002, 12.



proportionality between sentencing levels for domestic burglary and those for other serious offences.

The Panel's advice was substantially adopted in *McInerney and Keating*<sup>133</sup>.

The approach of giving examples of offences, listing factors that aggravate or mitigate the offence and then providing some guidance as to the weight to be applied to those factors, seems to be the process most favoured by the Panel in the advice given by it to date. That approach is also emerging from more recent decisions of the English Court of Appeal which show an increased willingness to provide more detailed discussion of how combinations of aggravating and mitigating features should be weighed.

The use of categories for certain offences is also evident, particularly for drugs offending. That trend started with *Aramah*<sup>134</sup> in which categories were identified for offences involving Class A controlled drugs with the street value of the particular drugs being the factor that determined into which category an offence was placed. Although categories have continued to be used in England for drugs offending, the principal factor is now the weight of the drug once converted into pure form<sup>135</sup>. This avoids the vagaries of the black market determining sentencing levels, although street value remains a useful cross-check on sentencing levels based on quantity alone.

Categories have also been recommended by the Panel, and adopted by the Court of Appeal, in sentencing for making and distributing child pornography<sup>136</sup>. In a detailed scheme the Court adopted five levels related to the nature of the images, and six aggravating features. A set of seven categories from non-custodial options to the maximum penalty were identified, each defined by reference to an interplay between the selected level of seriousness of the images, the nature of the distribution (if any) and the number of images. The range of imprisonment at each level does not overlap.

In summary the nature of the guidance given in the English Court of Appeal, with Panel input, has become more sophisticated and detailed in recent times. However there is not yet a discernible, consistent approach to the type of guidance given.

### III. NEW ZEALAND: PROPOSED REFORMS

New Zealand has lacked the debate on the place and nature of guideline judgments that has taken place in the United Kingdom.

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<sup>133</sup> N114 above.

<sup>134</sup> N79 above.

<sup>135</sup> See, for example, *R v Aranguren and Others* [1995] 16 Cr App R (S) 407 and *R v Billinski* (1987) 9 Cr App R (S) 360.

<sup>136</sup> *R v Oliver and Others* n116 above.

By contrast, we have seen a slow evolution of the role of the Court of Appeal in providing sentencing guidance. Typically that still takes the form of schedules of previous decisions. Those that have purported to provide guidance are few and have taken inconsistent approaches. To be fair the recent cases represent a substantial improvement, although the decisions remain descriptive rather than normative.

This paper advocates the adoption by the Court of Appeal of a consistent policy on the practice of delivering guideline judgments, and the structure that should underpin them. It is argued that the Court seek, over a period of time, to deliver more guideline judgments for a greater number of offences. The current climate is ideal for change. With the establishment of the Supreme Court the Court of Appeal will become a more conventional intermediate appeal court. There are encouraging signs of the ‘new’ Court of Appeal adopting a more structured approach to guidance in sentencing. In *R v Taueki*<sup>137</sup> the Court advised counsel by memorandum that it wished to review sentencing for wounding with intent to do grievous bodily harm, and would here a number of appeals together for that purpose.

The role that the Supreme Court will adopt is still unknown. Conventionally, final appeal courts have generally left the provision of guidance to intermediate appeal courts.

The criteria for leave to appeal to the Supreme Court are set out in section 13 of the Supreme Court Act 2003 which provides:

- (1) The Supreme Court must not give leave to appeal unless it is satisfied that it is in the interests of justice for the Court to hear and determine the proposed appeal.
- (2) It is necessary in the interests of justice for the Supreme Court to hear and determine a proposed appeal if –
  - (a) the appeal involves a matter of general or public importance; or
  - (b) a substantial miscarriage of justice may have occurred; or
  - (c) ...

Leave has only been given to appeal against sentence in one case to date on an issue of pure statutory interpretation<sup>138</sup>. There are also signs in the decisions refusing leave that the Supreme Court is reserving its ability to hear appeals against sentence in limited circumstances. In *R v Greer*<sup>139</sup> the Supreme Court noted that the starting point for sentencing upheld by the Court of Appeal appeared within range and that “no issue of sentencing principle is raised”. Similarly in *R v Teepe*<sup>140</sup> leave to appeal against sentence was refused and the point made that “This is in reality the question of the fixing of a

<sup>137</sup> N92 above.

<sup>138</sup> *R v Mist* [2005] NZSC 29.

<sup>139</sup> (SC CRI 6/2004 – 9 September 2004), paragraph [7].

<sup>140</sup> (SC CRI 9/2004 – 14 October 2004), paragraph [5].

particular sentence and raises no point of sentencing principle.”. More of an indication is given in *Bennett v R*:<sup>141</sup>

Appeals against sentence will only infrequently raise questions of general principle. In this case the applicant asserts no more than that the facts of his offending differed in character from those in the case from which the Court of Appeal principally obtained guidance, i.e. that that facts of his case did not reveal offending as serious as that in the precedent case.

In *Trotter v R*<sup>142</sup> a desire to limit the number of leave applications in relation to sentence is apparent. The Court held that where there is not a question of law, a question of general sentencing principle, or a question as to whether the sentencing process has seriously miscarried, the statutory criteria will not have been met and leave will be refused. The Court went on to compare its approach to the grant or refusal of leave with other commonwealth jurisdiction, claiming it to be similar in general approach to that taken by the House of Lords, the Privy Council, the Supreme Court of Canada and the High Court of Australia.

It will be interesting to see whether the Supreme Court will be prepared to review either the efficacy of prescriptive guideline judgments from the Court of Appeal or the guidance contained in any one decision. If the Court of Appeal is prepared to be more prescriptive in its guideline judgments, as this paper advocates, then the Supreme Court may well be asked, by way of a leave application, to review that approach<sup>143</sup>. What amounts to a ‘sentencing principle’ will be interesting. Only time will tell.

An important issue for the Court of Appeal will be the extent to which it recognises and adopts guidelines issued by the English Sentencing Guidelines Council, and whether it chooses to advocate through its judgments a similar reform being adopted here. The first and only reference to date to the English model in a New Zealand decision came on 13 April 2005 in *R v Edwards*<sup>144</sup>, an appeal against a sentence of nine years imprisonment for manslaughter when the Jury had acquitted the appellant of murder by reason of provocation. The Court extensively reviewed the Panel’s consultation paper and used the material in it, and the guidelines proposed, to assist in concluding that the sentence imposed at first instance was within the range available to the sentencing judge. The Court made brief reference to the English system noting that: “It would certainly seem to have a number of attractive features that are not easily replicated in a court-based tariff system.”<sup>145</sup>

<sup>141</sup> (SC CRI 16/04 – 10 December 2004), paragraph [6].

<sup>142</sup> [2005] NZSC 7.

<sup>143</sup> As the High Court of Australia was in *Wong v The Queen* (2002) 207 CLR 584.

<sup>144</sup> (CA 371/04 – 13 April 2005).

<sup>145</sup> *Ibid*, paragraph [28].

In relation to the offence of manslaughter by provocation the Court noted the possibility of future guidance in the area by “a similar exercise to that which the British are undertaking”<sup>146</sup>.

In the short term the Court of Appeal must use the English advice and guidelines with real care. The risks of adopting overseas guidance without proper modification to reflect New Zealand conditions are apparent from recent experience. The ‘Hereora categories’ have caused difficulties in sentencing, while the adoption of the five year starting point for rape from *Billam* was carried out without reference to the difference in maximum penalties. The English sentencing landscape also has statutory features not present here. There are a large number of provisions that provide mandatory or presumptive sentences for second and subsequent offences, the most significant of which is section 109 of the Powers of Criminal Courts (Sentencing) Act 2000 (re-enacting section 2 of the Crime (Sentences) Act 1997) which provides that, unless exceptional circumstances exist, a second conviction for a serious offence will attract a mandatory sentence of life imprisonment.

It is imperative therefore that the Court of Appeal does not, tempting as it may be, simply adopt the results of the English process without a critical assessment of both the legal and cultural differences between the two jurisdictions. That does not mean that the *approach* taken in England should not inform the approach to be taken here, indeed we have much to learn from it. Care must be taken though to ensure that we do not simply adopt the English guidelines rather than formulate our own.

#### A. *More Guideline Judgments?*

The benefits of a system incorporating guideline judgments are seen by Ashworth as being threefold<sup>147</sup>:

1. It forces the Court of Appeal to consider “the interrelationships of sentences for the different forms of an offence”; and
2. Sentencers in lower courts are given a specific framework to operate within rather than a series of potentially conflicting appellate decisions; and
3. Guidance is found in one judgment rather than a number of disparate sources.

A decision whether to increase the use of guideline judgments, and what they should look like, cannot be divorced from a decision about the extent to which an appeal court should defer to the discretion of sentencers. On an analysis of sentencing appeal history, the New Zealand Court of Appeal has traditionally placed significant weight on

<sup>146</sup> Ibid, paragraph [37].

<sup>147</sup> Ashworth, “Techniques of Guidance on Sentencing” [1984] Crim LR 519, 521.

deferral to a sentencer's discretion. Why then should it defer? The reasons most often given are:

1. That the factual matters dealt with on sentencing are so diverse that no meaningful guidance can be given, therefore each sentencing should be left to an "intuitive synthesis"<sup>148</sup> by the sentencing judge; and
2. That an appeal court will not have before it all the multiple factors that have been assessed by the first instance judge, or at least will not appreciate their significance as well as he or she.

Both justifications require close scrutiny. The first is essentially to place sentencing decisions in the 'too hard basket'. It is all too easy to say that the factors that arise in each case are unique and therefore it is not possible to provide guidance in the form of general rules that will meaningfully assist in achieving better outcomes. As Hall put it:

<sup>149</sup>

Recourse is often had to the old adage that 'no two cases are the same; each case depends on its own facts'. Therefore, it is said, each case should be given individualised treatment, and that what is portrayed as unjustified disparity is indeed nothing more than a fine appreciation of the salient facts of a particular case. This is the final bastion of those who support unfettered sentencing discretion. It should be assailed.

The reality is that most aggravating and mitigating factors do repeat again and again. There is very little new. There is no valid reason why different judges should be entitled to give different weight to an identical feature. The importance of consistency in sentencing has become, and with one reservation properly so, the paramount consideration in sentencing. The reservation is that striving for such consistency has led the New Zealand Court of Appeal to place undue weight on its own previous decisions to the exclusion of policy discussion as to what the appropriate range of sentences *should* be for any particular offence. The use of properly structured guideline judgments to attempt to reverse this tendency is discussed later.

The extent to which there is inconsistency in sentencing is difficult to gauge. A study in Canada in 1986<sup>150</sup> involved providing 266 judges of the Canadian Provisional Courts (Criminal division) five fictional cases involving six offenders. They were given extensive written material about each case including a pre-sentence report on each 'offender'. They were asked to pass sentence. The results showed major and

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<sup>148</sup> See the defence of intuitive synthesis in *Williscroft* [1975] VR 292 discussed in Lovegrove "Intuition, Structure and Sentencing: An Evaluation of Guideline Judgments" (2002) Vol 14, No 2, Current Issues in Criminal Justice 182, 185-187.

<sup>149</sup> *Hall* n2 above, 208.

<sup>150</sup> T Palys and S Divorsky, "Explaining Sentencing Disparity", (1986) 28 Canadian Journal of Criminology 347, 362 as cited in P Doherty "Guideline Sentencing in New Zealand" (1993, unpublished LLB Honours dissertation, University of Auckland), 19.

concerning disparity. As an example an offender convicted of assault causing bodily harm was given a \$500 fine and six months probation by one judge while another sent the poor fellow to prison for five years.

This is an extreme example of what those who practice criminal law know intuitively: that one of the most important variables in determining the length or type of sentence is which judge is presiding<sup>151</sup>. The Court of Appeal recognised this phenomenon, and the risks associated with it in *R v Pui*:<sup>152</sup>

If sudden marked fluctuations of that sort were permitted, up or down, it could be said that the system of criminal justice was prepared to provide random answers to criminal violence by depending upon the individual attitude to penal policy of individual judges.

The justification that a judge at first instance is better able to assess the factual basis for sentencing is relevant only in the minority of cases that have not resulted from a guilty plea. Where a prisoner has pleaded guilty the appeal court will have an identical ability to assess the culpability of the prisoner as the sentencer. As noted earlier this point was not lost on the English Court of Appeal in 1908 in its comments in *James Nuttall*<sup>153</sup>. Where sentence is imposed after trial an appeal court should defer to a sentencer's findings of fact, which should be clearly articulated in the sentencing notes. That does not require, however, an appeal court to defer to the weight given to those facts or to the reasoning process adopted.

The alternative to the promulgation of more genuine guideline judgments is the assessment in every case of the appropriate range by reference to previous decisions of the Court of Appeal. As well as being time consuming this process is also difficult. As Robertson J said in delivering the judgment of the Court of Appeal in *R v Curry*:<sup>154</sup>

We are not attracted by an approach which involves a minute dissection of the factual circumstances of previous cases analysing exhaustively the particular circumstances of the offence and the offender. Such an exercise is frequently skewed as there is not a consistency as to whether what are being compared are starting points or eventual affective sentences. What can be important is the principle which emerges from previous cases in assisting with a determination of the true culpability in the instant case.

The passage is a criticism of the approach taken by counsel in that case. However, the process under criticism is essentially that which the Court itself embarks upon when it refers to previous decisions to identify ranges. The difficulty in interpreting previous sentencing decisions was commented on by Thomas: "the decision to uphold a sentence

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<sup>151</sup> For a discussion of inconsistency in an Australian context see Sully J "Trends in Guideline Judgments" (2001) 20 Aust Bar Rev 250.

<sup>152</sup> [1978] 2 NZLR 193, 197.

<sup>153</sup> N14 above.

<sup>154</sup> (CA272,273,326/00, 28 September 2000), paragraph [11].

of imprisonment does not necessarily mean that the sentence was correct, but merely that it was not excessive”<sup>155</sup>.

Most appeals against sentence in New Zealand are argued, and allowed, on the basis that the sentence fell outside the range available to the sentencing judge<sup>156</sup>. In order to assess the appropriate range a first instance judge needs to review a potentially large number of Court of Appeal decisions. This carries with it the risk that the time-consuming process of identifying a range will distract from the making of a proper assessment of culpability. The lack of sophisticated sentencing statistics in New Zealand, coupled with the limited quality of searchable databases of sentencing decisions make the process of assessing a ‘range’ dependent on which, often inconsistent, Court of Appeal decisions are cited to the sentencer by counsel.

As long as the Court of Appeal retains the use of schedules of previous decisions as its primary tool, New Zealand guideline judgments will remain fundamentally descriptive<sup>157</sup>. The approach of scheduling previous decisions relegates the Court of Appeal to the role of a research clerk – compiling and describing cases without engaging in a critical analysis of the overall picture that those decisions create. In the absence of Parliament taking an interest in the detail of sentencing, there is no body, judicial or legislative, making decisions as to sentencing policy for particular offences. As a result anomalies are missed. For example, when the offence of sexual violation was created<sup>158</sup>, the effect was to remove serious sexual assaults from the ambit of the less serious offence of indecent assault<sup>159</sup>. Given that the maximum penalties for indecent assault remained the same, an adjustment of sentences within that area was necessary to place the most serious examples of indecent assault at or near the maximum penalty, and thus move sentencing levels generally upwards. The failure to do so has resulted in extremely low sentencing levels for indecent assault, when compared to the maximum penalties.

A descriptive approach also places a high premium upon consistency at the expense of the articulation of principle. There is at times a blind acceptance that where a pattern emerges from previous decisions then it is necessarily right. It is illustrated by the response of the High Court to sentencing for methamphetamine dealing offences after the reclassification of that drug from Class B (14 years imprisonment) to Class A (life imprisonment). Miller J in *R v Faulkner*<sup>160</sup> referred to a Crown submission that

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<sup>155</sup> N47 above, 5.

<sup>156</sup> See *Sentencing Law and Practice* n31 above, chapter 5.4.4.

<sup>157</sup> The Australian High Court has questioned whether intermediate appeal courts are entitled to restrict discretion prescriptively; see for example *Wong v The Queen* (2002) 207 CLR 584 (per Cullinan J). See also Warner “The Role of Guideline Judgments in the Law and Order Debate in Australia” (2003) 27 Crim LJ 8.

<sup>158</sup> As from 1 February 1986 by s2 Crimes Amendment Act (No 3) 1985.

<sup>159</sup> Sections 133-135 Crimes Act 1961 (NZ).

<sup>160</sup> (HC Palmerston North, CRI 2004-054-2090, 23 July 2004).



judgments in the High Court had clustered around five to six years, which was too low in light of the increase in the maximum penalty. The Judge expressly deferred to the pattern of judgments and suggested that any correction of it should come from the Court of Appeal:

[23] I will adopt a starting point of seven years in your case. I acknowledge that it falls within the range given for category 2 offences in *R v Wallace*, and to that extent might be thought lenient, but it is broadly comparable to the starting points chosen in *R v Bradley & Galvin*, *R v Macdonald* and *R v Morell*.

[24] [Counsel for the Crown] contended that there is limited guidance to be had from the High Court decisions because starting points have tended to cluster around five to six years for offending that is quite dissimilar, and there is force in that submission. He also submitted that the approach of basing starting points on *Wallace* rather than sentences imposed for other Class A drugs is erroneous. However, any change in approach may have to await a decision of the Court of Appeal.

*Faulkner* is an illustration of the deference that New Zealand courts pay to the emergence of a pattern; it also demonstrates the way in which patterns in sentencing become self-fulfilling prophecies. The prophecy was fulfilled when the Court of Appeal in *R v Arthur*<sup>161</sup> scheduled nearly all of the decisions of the High Court since reclassification, including *Faulkner*, and overtly used the trends apparent in the judgments to set categories (describing it as a “bottom-up”<sup>162</sup> approach) without reference to the comments made in *Faulkner* about the possible inappropriateness of the pattern that was emerging. The bands in *Arthur* were then adopted, with only minor amendments, in the judgment of the permanent court in *Fatu*.

This is not to say that previous decisions of the Courts and the patterns that emerge from them are not relevant. The wisdom of sentencing judges collected over many years is a valuable resource. Indeed guideline judgments should use previous sentencing patterns as a first reference point in considering what guidance to issue. However such patterns should not be allowed to dominate the provision of guidance. It is difficult to put it better than Ashworth did in 1984:<sup>163</sup>

For so long as the Court of Appeal confines itself to the facts of each case, any guidance issuing from its judgments is likely to lack coherence and consistency. The guideline judgment can supply the former and encourage the latter.

While guideline judgments *can* lead to coherence and consistency in sentencing, this can only be achieved if a consistent practice is adopted as to their promulgation, and

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<sup>161</sup> N88 above.

<sup>162</sup> *Ibid*, paragraph [15].

<sup>163</sup> *Ashworth* n98 above, 521.



they are structured with those twin goals in mind<sup>164</sup>. In adopting guideline judgments as a vehicle to promote consistency in sentencing, intermediate appellate courts are taking on an important responsibility to answer fundamental questions about sentencing for serious crime.

However progress will not be made while the Court of Appeal continues to maintain that there are many areas of sentencing in which the factual circumstances of the offence are so varied that guidance cannot be given. Sexual violation other than by rape is a useful illustration. As we have seen the Court of Appeal has adopted the most restrictive form of guideline judgment for the offence of rape – a single starting point of eight years. Yet the Court has been unwilling to mirror that approach for sexual violation by other common forms; with an object, by digital penetration and by oral sexual connection, claiming that the circumstances of such offences vary so much that there is no value or purpose in attempting to nominate a benchmark: *R v Talatana*<sup>165</sup> and *R v Jackson*<sup>166</sup>. Logically digital penetration can be committed in no greater variety of circumstances than rape. The difference in approach is therefore difficult to justify. The Court of Appeal should take a fresh look, as is happening in England<sup>167</sup>, at those areas that for no good reason have been off limits to the provision of guidance.

Appropriate discretion tailored to culpability is not necessarily lost by a guideline approach. Indeed, it is arguable that properly structured guideline judgments allow sentencing judges to exercise discretion in a substantially more meaningful way than would otherwise exist.

## B. Guideline Judgments: The Appeal Process

As the earlier review of New Zealand judgments reveals, the *process* of delivering guideline sentencing judgments has been inconsistent. The following simple set of practice rules would enhance the process significantly:

1. Guideline Judgments should not happen by accident. They should be identifiable as such in the first few lines of the judgment.
2. Guideline Judgments should only be given when there has been notice to the Crown and the offender of the intention of the Court to review an area.

<sup>164</sup> In Australia guideline judgments are said to have had the effect of avoiding draconian reforms such as sentencing matrices. See for example Morgan and Murray “What’s in a Name? Guideline Judgments in Australia” (1999) 23 CLJ 90.

<sup>165</sup> (1991) 7 CRNZ 33, 36.

<sup>166</sup> (1997) 14 CRNZ 573, 576.

<sup>167</sup> See, for example, sentencing for burglary in *McInerney and Keating* n114 above.

3. Where possible a number of appeals in the same area should be heard together to increase the range of views and quality of the materials provided to the Court. Where appropriate, briefs from interveners should be encouraged.
4. Guideline Judgments should only be issued by a panel, or full bench, of the permanent Court to ensure consistency.
5. Guideline Judgments should clearly delineate the area of sentencing that they relate to, as was done in *R v Edwards* but not done in *R v Terewi*.

At present guidance is given at the initiative of the Court, or at the request of the Solicitor-General. While it is possible for an offender to seek a guideline judgment, it is difficult to imagine circumstances in which that would happen. It may well be appropriate for a request for guidelines in a particular area to be made other than by the Court or the Crown. If the Public Defender pilot scheme being operated in the Manukau District Court were adopted nationally then that office could fulfil the role, as its counterpart in New South Wales does<sup>168</sup>. In the absence of that development, it is difficult to identify an organisation or person who could appropriately seek guidance from the Court.

### *C. Guideline Judgments: General Principles*

If the Court of Appeal is to increase the use of guideline judgments in a more formal way it will need to decide how they should be structured. There are a number of different models for providing guidance on sentencing; for example categories, starting points or lists of factors.

Should the Court of Appeal apply a single approach to providing guidance regardless of the offence? Adopting one model across the board has advantages in encouraging consistency of approach by sentencers. If guideline sentencing judgments always identify, for example, a starting point from which to move up or down, then sentencers will acquire a familiarity with that approach, which should be reflected in the quality and transparency of the reasoning. However, the advantages of consistency may be outweighed by the reality that certain models are better suited to particular types of offences.

In choosing between types of guidance the Court needs to balance the sometimes opposing principles that sentences should be consistent, but that they should also be tailored to individual offenders. As a matter of logic then guideline sentencing

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<sup>168</sup> Crimes (Sentencing Procedure) Act 1999 (NSW).

judgments should encourage a two-stage process<sup>169</sup>. First to consider the seriousness of the offence in isolation from the personal circumstances of the offender (the ‘offence stage’) to arrive at a nominal sentence, and second either to increase or decrease that sentence to reflect aggravating and mitigating factors relevant to the prisoner which are not relevant to the offence (the ‘offender stage’). This process has the advantage of articulating the seriousness score of the offence itself while still allowing sentences to be tailored to the needs and circumstances of individual offenders. There will of course be debate as to factors on the borderline; however so long as a clear decision is made as to whether a factor falls into the ‘offence’ stage or the ‘offender stage’ there will be no risk of double counting.

There has been an inconsistent approach to the definition of a ‘starting point’. Very recently in *R v Te Whata & Others*<sup>170</sup> the Court of Appeal sitting as a Criminal Appeals Division said, in relation to the offence of conspiracy to sell cannabis:

The expression “starting point” can be a little slippery. For present purposes we use it as referring to a sentence appropriate to the culpability of the offending in relation to all factors other than those which are personal to the offender.

In *R v Eruera*<sup>171</sup>, delivered the same day by the same bench of the Court of Appeal, the Court also said:

We add that it is desirable for sentencing judges to identify a starting point which includes aggravating features of the offending but does not allow for mitigating factors. From that starting point, a distinct deduction should then be made as appropriate for guilty pleas and any other identified mitigating factors.

The Sentencing Guidelines Council (UK) has not adopted the clear offence/offender distinction advocated in this paper. In its guidance *Overarching Principles: Seriousness*<sup>172</sup> the Council adopts a two-stage process, first to identify the seriousness of the offence, including reference to offender related aggravating features, and second to apply personal mitigating features and an appropriate discount for a guilty plea to reduce it to a final sentence<sup>173</sup>:

1.27 When the Court has formed an initial assessment of the seriousness of the offence, then it should consider any offender mitigation.

Thus aggravating features personal to the offender, such as being on bail at the time of commission of the offence and previous convictions, are taken into account in the initial seriousness score given to the offence, whereas as personal mitigating factors are

<sup>169</sup> See the discussion on this topic in Lovegrove n148 above, 194-196.

<sup>170</sup> (CA 473, 476, 478-488/04 – 8 April 2005), paragraph [5].

<sup>171</sup> (CA 454/04 – 8 April 2005) at paragraph [33].

<sup>172</sup> Sentencing Guidelines Council, December 2004.

<sup>173</sup> Ibid 7.

dealt with discretely. This approach risks compromising transparency in sentencing, and it does not facilitate a proper assessment of the continuum of culpability for an offence type.

A major advantage of structuring guideline judgments into two distinct stages is transparency. Too often sentencing judges and appeal courts identify the factors, aggravating and mitigating, in a particular case and then move directly to declaring the final sentence. There is no articulation of the weight given to the factors individually or collectively. What has been called “intuitive synthesis”<sup>174</sup> appears at times to be an unwillingness to articulate a reasoning process. If a factor is important enough to be listed as either aggravating or mitigating then presumably it is important enough to be given weight, or if it is not to be given weight then the reasons for that should be explained. If the victim of a rape is a three year old child then that is an aggravating feature of the offence. Its weight should be articulated and consistently applied. There is no good policy reason why one judge should be entitled, in the exercise of his or her discretion, to give that aggravating feature different weight than another sentencing judge. It is difficult to understand why the weight to be attached to a guilty plea (as expressed by a percentage discount) should be capable of such clear mathematical expression while other commonly encountered factors are not.

Guideline judgments for offences should be primarily focussed on the ‘offence stage’, when the Court of Appeal should engage in an assessment of what the continuum of sentences for the particular offence should look like. This picture of criminal offending was recognised implicitly by the Court of Appeal in 1987:<sup>175</sup>

The gravity of a person’s offending depends not only on the gravity of the class of offence, but also on the facts of the particular case. The spectrum of offending will range from the least case of offending to the very worst.

In other words each assessment at the ‘offence stage’ should result in a score that could theoretically be placed on a continuum, in that more serious examples would be placed nearer the maximum penalty and vice versa. The recognition of sentencing as a continuum is explicit in the judgment of Hammond J in *Norris v Police*<sup>176</sup> and implicit in the reasoning in *R v Taueki*<sup>177</sup>. The risk of guideline judgments that do not seek to create such a continuum is that proportionality in sentencing is lost.

It is not the task of this paper to assess the competing goals of sentencing at a criminological level. However the importance of proportionality in sentencing stems from the increasing prominence of the ‘just deserts’ theory of sentencing. A useful

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<sup>174</sup> N148 above.

<sup>175</sup> *R v D (an accused)* [1987] 2 NZLR 272, per McMullin J.

<sup>176</sup> (Hamilton High Court AP 67/00 – 8 August 2000). See the discussion of this case in *Sentencing Law and Practice* n31 above, chapter 5.4.4.

<sup>177</sup> N92 above at paragraph [24].

summary of the implications of the ‘just deserts’ theory on the importance of proportionality is given by Harvey and Pearce:<sup>178</sup>

The goal of retributive sentencing is proportionality. The word proportionality is the strongest word in a range of synonymous words or phrases, like commensurability, commensurate desserts, just deserts and so on. It is the strongest word because it suggests a calculated relationship between one variable and another. The variables thus linked are generally thought of as culpability and sentence length, when one considers sentences of imprisonment.

Although the Sentencing Act 2002 does not expressly prefer proportionality as the paramount goal in sentencing, sections 8(c) and 8(d) appear to require sentencing to be viewed as a continuum commencing at the maximum penalty. The sections read as follows:

In sentencing or otherwise dealing with an offender the court—

- (a) ...
- (b) ...
- (c) must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
- (d) must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and

The above sections simply describe the beginning of a continuum of seriousness. It would follow as a matter of logic that sentencing is to be seen in that way, and that sentences would need to be adjusted (probably up) as a result. While this approach was initially adopted by the High Court the Court of Appeal saw it differently. In *R v Afamasaga*<sup>179</sup> the Court disagreed with the High Court Judge's observation that the enactment of sections 8(c) and (d) would lead to a general increase in tariff and other sentences. The Court considered that the new provisions did not represent any departure from sentencing practice prior to the passage of the Sentencing Act.

However sections 8(c) and (d) were not intended to be declaratory of existing practice. In the third reading of the Act before Parliament it was clear that the sections were intended to change the status quo, and that they were reforms designed to increase sentences for serious offenders. The Honourable Paul Swain (Acting Minister of Justice) in moving the Sentencing Bill and Parole Bill, began his speech by saying that “The Bills respond to public concerns about the criminal justice system that were reflected in the outcome of the referendum at the last election.”<sup>180</sup>

<sup>178</sup> L Harvey and K Pease, “Guideline Judgments and Proportionality in Sentencing” [1987] Crim L.R. 96, 96-97.

<sup>179</sup> (CA 271/02 – 21 November 2002), paragraph [13].

<sup>180</sup> Hansard 1 May 2002.

The referendum had resulted in 92% of voters supporting a statement (albeit a broad and poorly drafted one) advocating sterner penalties for violent offenders.

In relation to what became sections 8(c) and (d) the Associate Minister said:<sup>181</sup>

...the Sentencing Bill has a number of provisions to ensure tougher punishment for the worst offenders. Sentences near the maximum must generally be imposed for very serious crimes, and the maximum penalty must now be imposed in the worst cases.

It is therefore argued that in choosing between different models of guidance, those which allow a continuum of offending to be described, commencing at the maximum penalty, should be preferred.

#### *D. Types of Guidance*

Four distinct forms of guideline judgment have been tried in New Zealand:

1. The single 'starting point' approach found in *R v A*.
2. The 'categories' approach found in, for example, *R v Taueki*, *R v Wallace* and *R v Te Rewi*.
3. The 'factors and examples' approach found in *R v Mako*.
4. The 'case scheduling' approach seen in a large number of cases.

The English Court of Appeal has approached guidance by listing factors, creating categories and describing multiple starting points or examples. In New South Wales categories have been used for drug importation<sup>182</sup>, while predominantly the Court has attempted to identify a single example of an offence<sup>183</sup> and then listed the aggravating features that may alter the starting point or range for that example.

For reasons already discussed the 'case scheduling' approach is more an historical phenomenon rather than an overt approach to the provision of guidance.

In choosing between the techniques available the following goals should be borne in mind:

1. Ensuring consistency in sentencing.
2. Maintaining and enhancing proper levels of discretion.
3. Encouraging transparency in reasoning by sentencers.
4. Creating a coherent picture of sentencing for a particular offence.

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<sup>181</sup> Ibid.

<sup>182</sup> *R v Wong* n80 above.

<sup>183</sup> *R v Henry* n57 above.

The approach of creating categories of sentences that cover the whole range of penalties must be approached with caution. The provision of bare categories does not necessarily encourage transparent reasoning. Rather, it encourages sentencers to reason at a level of generality. Once a judge has determined that a case falls within a particular category, that tends to be the end of the process beyond a statement that the case falls to the bottom, middle or top of the category chosen. The concern that categories or ranges were inhibiting the proper assessment of culpability was one of the principal reasons for the Court of Appeal moving away from categories for aggravated robbery and towards the more flexible approach adopted in *R v Mako*<sup>184</sup>. The Court of Appeal echoed that concern, in the context of manslaughter sentencing in *R v Leuta*<sup>185</sup>. Categories are a blunt tool in identifying culpability because they tend to be differentiated by a single dominant factor. For example the pre-*Mako* categories for aggravated robbery were based on the nature of the premises involved. It is not difficult to imagine an aggravated robbery of a small shop by, for example, four masked men armed with machine guns, being more serious than the aggravated robbery of a bank involving one mentally disabled offender using a knitting needle as a weapon, yet that kind of differentiation is extremely difficult within the construct of categories.

Categories do however have a place where the seriousness of an offence is determined primarily by a single factor or proxy<sup>186</sup>, for example the weight of drugs in importation cases, or the level of blood alcohol in cases of driving under the influence. Even then guideline judgments need to explain the process by which categories are to be used with care because there may well be factors justifying a departure from the categories. Examples of the sorts of departures that are appropriate in particular circumstances should be included in guideline judgments to assist sentencing judges with the weight to be given to factors other than the principal one. Even where a single proxy for culpability exists there can be problems with the use of categories, particularly at the edges<sup>187</sup>. A sensible way of minimising those problems is to have overlapping categories.

The approach taken in *R v A*<sup>188</sup> of identifying a single starting point for a neutral example of the offence of rape (eight years) and then directing sentencers to move up or down from that starting point, does require a sentencer to justify a final sentence, by reference back to the starting point of eight years. Normally an increase is made to reflect aggravating features and then a decrease to reflect mitigating features. *R v A* provides that the starting point reflects a contested rape (that is a conviction after trial) for an adult offender. That approach has the benefit of requiring transparency as the aggravating and mitigating features must be given a 'score' which is identifiable. This

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<sup>184</sup> N40 above.

<sup>185</sup> *R v Leuta* n56 above, 229.

<sup>186</sup> *Harvey and Pease* n178 above, 96.

<sup>187</sup> See text at n72 above.

<sup>188</sup> N38 above.

single starting point approach is also the basis of the New South Wales guideline judgment in *Henry*<sup>189</sup> which describes a single fictional example of the offence of aggravated robbery.

While the single starting point approach is sound in promoting transparency, the most important issue is how the starting point is decided upon. The eight year starting point for rape is an historical anomaly. As earlier discussed the five year starting point in *R v Clark*<sup>190</sup> was adopted from part of the English case of *Billam*<sup>191</sup>. The Court of Appeal then increased it to eight years to reflect an increase in the maximum penalty from 14 to 20 years imprisonment.

What then should be the neutral starting point? One approach is to take half the maximum penalty, reflecting the understandable view that a neutral example of an offence will be half way between the least and most serious examples of that offence. Another approach is to recognise that for serious crimes such as rape there will be in practice a nominal minimum. It would be a truly exceptional case in which the penalty for rape fell below two years. It would then be possible to take a starting point of half of the difference between the nominal minimum penalty and the statutory maximum. For rape an 11 year starting point would follow.

But these mathematical approaches are flawed. The neutral example of an offence requires the creation of a fictional set of circumstances. That set of circumstances may well not be the mid point on the continuum of seriousness for a particular offence. A neutral example of rape is still an extremely serious offence. Sexual intercourse with an adult woman, unknown to the offender, without her consent and only involving a level of violence inherent in the act itself, is still highly culpable. When sentencing is properly viewed as a continuum of seriousness commencing at the maximum penalty where does a neutral example of rape fall? What is required is not a mathematical approach to the neutral starting point, but rather an assessment of where that example of the offence should be placed on the continuum of seriousness, a starting point, in other words, that makes sense of the whole field of sentencing for that offence. As we are still in the 'offence stage' of the process the offender in our fictional example of the offence must also be known. He or she should be an adult without previous convictions who has been convicted at trial.

The limitation of a single starting point is that it requires the sentencer to do all the work in determining how far from the starting point, and how far from the maximum penalty, an offence falls. There is no reason why more than one, indeed many more than one, fictional example cannot be created. That is what the English Court of Appeal did in the context of rape and it is not clear why the New Zealand Court of

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<sup>189</sup> N57 above.

<sup>190</sup> N66 above.

<sup>191</sup> N69 above.



Appeal elected to adopt only one of the three English starting points. This moves logically to the ‘factors and examples’ approach taken in *R v Mako*<sup>192</sup> and apparent in some of the recent proposals of the English Sentencing Guidelines Panel. The provision of multiple starting points by the description of examples is consistent with the view of the Supreme Court of Canada in *McDonnell v The Queen*<sup>193</sup>, in which the Court adopted with approval the practice of the Alberta Court of Appeal of examples of offences, and describing the basis upon which the starting point for the examples could be departed from<sup>194</sup>.

By the process of identifying and describing a series of examples, as it did in *Mako*, the Court would, in effect, describe the continuum of seriousness, by plotting fictional examples upon it. Regrettably the approach in *Taueki* appears to herald a retreat into the historical comfort of categories.

However it is possible to do more with the examples than the Court did in *Mako* when it described the addition of numbers of aggravating factors and gave them a value en masse. If the Court wants sentencers to give weight to factors on an individual basis, and articulate the weight given, then the Court could itself demonstrate that approach. That is not to turn sentencing into a mathematical process but to encourage sentencers to reason in a transparent way<sup>195</sup>. As Lovegrove puts it, “The framework and process, while not mathematical, must provide a mechanism for numerical relationships, and be numerically sound”<sup>196</sup>.

It is fruitless to attempt to identify *all* factors, and combinations of factors likely to arise in practice. As Kirby J noted in *Dinsdale*<sup>197</sup>, factors will have different weight depending on the other factors present and the relationship between them. So the aim should not be to identify all possible factors and provide each with a score, as some commentators suggest<sup>198</sup>, but instead providing indications as to weight, and more importantly to identify, and provide examples of legitimate reasoning processes<sup>199</sup>.

This proposal is not new. It accords with the comments of Ashworth in 1984 when he said:<sup>200</sup>

Although attempts to list factors relevant to each decision may be a valuable first step, it is widely agreed that the weight attributed to various factors is likely to differ not only according

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<sup>192</sup> N40 above.

<sup>193</sup> (1997) 114 CCC (3d) 436.

<sup>194</sup> Ibid.

<sup>195</sup> See for example the discussion in Lovegrove, “Writing Quantitative Narrative Guideline Judgments: A Proposal” [2001] Crim L R 265.

<sup>196</sup> N148 above, 187.

<sup>197</sup> (2000) 202 CLR 321.

<sup>198</sup> Lovegrove n142 above.

<sup>199</sup> See the discussion in Hall *Reducing Disparity* n2 above, 209.

<sup>200</sup> Ashworth n98 above, 530.

to the case but also according to the decision-maker...whilst all combinations of factors cannot be predicted it is possible to give examples which will provide both direct guidance to decision-makers in some cases and relevant points of reference for more unusual cases...The notion that complete guidance on all combinations of factors cannot be provided, most attempts at guidance are not worthwhile, must be discarded as a pernicious fallacy.

Having given a series of examples, and articulated the way in which additional factors will justify a departure from the sentence or range nominated for that example, a guideline judgment will then turn to the 'offender phase'. In this phase factors personal to an offender, which will impact on the sentence imposed, can be described and direction given as to whether they are to be given particular weight in the context of the offence being considered. The approach to some personal factors, such as guilty pleas<sup>201</sup>, may be of general application and not need repetition in each guideline judgment.

The lists of principles in judgments such as *Mako*<sup>202</sup> and *Wallace*<sup>203</sup> are extremely useful and should be a hall-mark of guidance given by the Court of Appeal. Such lists can include identifying preferred or prohibited patterns of reasoning<sup>204</sup>, and relevant aggravating and mitigating factors. It is in this part of a guideline judgment that threshold guidance can be given as to the choice between sentencing options at the lower end of the scale of seriousness, a topic not addressed in this paper.

#### IV CONCLUSION

England and New Zealand have taken different approaches to the place of appellate guidance in sentencing. In England the responsibility for guidance has been handed willingly to a specialist body that appears to be flourishing without the restrictions – philosophical and practical – of the appellate system.

The New Zealand Court of Appeal has not shown a lack of willingness to provide guidance; it simply has not done so in a consistent way. The writer submits that the time has come for the New Zealand Court of Appeal to adopt an overt policy for the delivery of sentencing guidance. The current relative absence of guidance leaves sentencers to wade through many, often irreconcilable, decisions of the Court of Appeal in order to identify an 'available range'. The proposals made in this paper do not claim to be a complete answer to the myriad of issues that arise in sentencing practice; it does however suggest some simple steps, based on experience both here and in England, to improve consistency, while preserving and enhancing discretion.

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<sup>201</sup> As has been done in New South Wales in *R v Houlton* [2000] NSWCCA 309.

<sup>202</sup> N40 above.

<sup>203</sup> N77 above.

<sup>204</sup> *Ashworth* n98 above, 526 – 528.