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***Judicial Discretion in Sentencing: A Justice System that is No
Longer Just?***

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One of the fundamental principles of the criminal law is consistency: like offenders must be treated alike. However, research has shown that when it comes to sentencing in New Zealand there is in fact substantial regional disparity in the penalty imposed on similarly situated offenders. The situation is unacceptable, and undermines the integrity of the criminal justice system. This paper will explore three different mechanisms for guiding judicial discretion in the pursuit of sentencing consistency. It will undertake an analysis of mandatory sentences and the 'instinctive synthesis' approach, both of which will be shown to be unsatisfactory. Instead, the paper will argue that the establishment of a Sentencing Council with a mandate to draft presumptively binding guidelines is the most appropriate way forward for New Zealand. This option finds the correct equilibrium between giving a judge sufficient discretion to tailor a sentence that is appropriate in the circumstances of the individual case, yet limiting discretion enough to achieve consistency between cases.

Key Words:

- Criminal sentencing
- Judicial discretion
- Mandatory sentences
- Instinctive synthesis
- Sentencing Council Act 2007
- Consistency

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I Introduction

Sentencing [...] is founded upon two premises that are in perennial conflict: individualized justice and consistency. The first holds that courts should impose sentences that are just and appropriate according to all of the circumstances of the particular case. The second holds that similarly situated offenders should receive similar sentencing outcomes. The result is an ambivalent jurisprudence that challenges sentencers as they attempt to meet the conflicting demands of each premise.¹

Sentencing is a notoriously difficult component of the criminal justice system. It requires a judge to balance numerous complex and often competing considerations in order to arrive at a penalty that does justice in a particular case. To this end, judges have traditionally enjoyed considerable discretion to be able to tailor an appropriate sentence, subject to the maximum penalties prescribed by Parliament. However, this flexibility comes at the cost of another important principle of the criminal law: consistency. The more discretion a judge is allowed to exercise, the greater the risk of like offenders being treated differently. How to resolve this tension and find a suitable equilibrium is a problem faced by jurisdictions the world over.

This paper will examine the extent of sentencing inconsistency in New Zealand, and investigate various approaches to guiding judicial discretion in the imposition of criminal penalties. It will begin by analysing the importance of the consistency principle itself, with a particular focus on the effect parity has on public confidence in the judiciary. If similar offenders are not treated alike then the community begins to view the courts as unfair, which in turn jeopardises the ongoing legitimacy of the criminal justice system. Ensuring that there are adequate mechanisms in place to achieve sentencing consistency is therefore of fundamental importance to our system of law.

In New Zealand, these mechanisms take two forms: the principles and purposes of sentencing found under the Sentencing Act 2002, and guideline judgments issued by the Court of Appeal. On analysis these will be shown to be inadequate. Studies have revealed that there is still substantial inconsistency in sentencing across geographic locations, particularly in relation to the less serious offences which form the bulk of the cases dealt with by the District

¹ Sarah Krasnostein and Arie Freiberg “Pursuing Consistency in an Individualist Sentencing Framework: If You Know Where You’re Going, How Do You Know When You’ve Got There?” (2013) 76 *Law and Contemp. Probs* 265 at 265.

Courts on a daily basis. The purposes and principles of sentencing set out in the Sentencing Act are too broad, and are simply a restatement of the common law position. Guideline judgments are more effective, but suffer from several systemic and constitutional limitations. Both the Law Commission and the Minister of Justice have called the situation unsatisfactory, which is something of a euphemistic understatement given the aforementioned importance consistency has on the wider legitimacy of the system. Policy adjustments are clearly required, and the paper will examine three different approaches that the legislature could adopt in order to achieve greater consistency in sentencing.

If the amount of discretion a judge enjoys could be placed on a spectrum, at one end would lie mandatory sentences. Mandatory sentences could ensure consistency in sentencing by legislatively removing discretion entirely. However, because the facts of any given case are unique, this approach inevitably comes at the cost of individualised justice. It will become apparent that the practical effect of such an approach would be to remove discretion from judges and place it instead in the hands of police and prosecutors, as it would be their choice of charge laid that determines the offender's sentence. This raises issues around transparency and accountability, leading to the conclusion that the adoption of mandatory sentences would cause more problems than it could potentially solve.

At the other end of the spectrum lies the 'intuitive synthesis' approach, a doctrine that removes constraints on judicial discretion entirely, giving the sentencing judge a wide scope to balance the innumerable factors that make up an individual case and come to a decision that is holistically appropriate in all the circumstances. This approach has been adopted in Australia and Canada, and is underpinned by the belief that there is no objectively 'right' sentence. However, it will be argued that the doctrine would be a retrograde step for New Zealand, because it both masks, and in many respects normalises, disparity.

The appropriate way forward for New Zealand is to adopt a mechanism that falls within the above two extremes. Discussion will therefore turn to the implementation of a Sentencing Council, a body comprised of experts and judges with a mandate to issue presumptively-binding sentencing guidelines. Such a Council exists on the statute books in New Zealand,² but has not been established in practice. Because the body would be in a position to undertake

² Sentencing Council Act 2007.

extensive research and consultation, it can in turn provide coherence to sentencing policy as a whole, as well as give the Government enhanced control of its Corrections budget. Several constitutional issues have been raised about the existence of such a body, including that it impinges on judicial independence and is an affront to the separation of powers, but these will be shown to be overstated. The only real concern is ensuring that it has widespread judicial support, something that is critical to its ongoing success. However, it is unlikely that the implementation of a Sentencing Council would spark widespread revolt within the judiciary, especially amongst the District Court judiciary whom it is particularly aimed to assist. The paper will therefore conclude that the establishment of a Sentencing Council is the most appropriate mechanism for guiding judicial discretion and ensuring consistency within the justice system.

II Importance of Consistency in Sentencing

Consistency in sentencing is of fundamental importance to the criminal justice system, and has accordingly been afforded statutory recognition in New Zealand under s 8(e) of the Sentencing Act 2002. What is needed is parity: like offenders must be treated alike, a maxim that has its origins in the works of Aristotle.³ If offenders are not treated alike, then the Court of Appeal has acknowledged that the resulting disparity “can result in injustice to an accused person and may raise doubts about the even-handed administration of justice”.⁴ Conversely, dissimilar cases should not be treated in a like fashion. Both of these situations would lead to injustice and erode public confidence in the legal system.⁵

The importance of maintaining this confidence cannot be overstated. Victims and witnesses will only co-operate with police and prosecutors if they trust the system and the professionals – including judges – with whom they have contact.⁶ That trust will quickly diminish if the public perceives the system to be inconsistent in its outcomes and thus unfair. On an abstract level, the legitimacy of the criminal justice system more broadly hinges on public support, and this needs to be earned. As Professor Julian Roberts notes, a central part of earning

³ See C.J. Rowe and Darah Broadie (eds) *Aristotle: Nicomachean Ethics* (Oxford University Press, Oxford, 2002).

⁴ *R v Morris* [1991] 3 NZLR 641 (CA) at 645.

⁵ *R v Lawson* [1982] 2 NZLR 219 (CA) at 223; and Niamh Maguire “Consistency in Sentencing” (2010) 2 *Judicial Studies Institute Journal* 14 at 39.

⁶ Julian Roberts “Public Confidence in Criminal Justice: A Review of Recent Trends 2004 – 2005” (Report for Public Safety and Emergency Preparedness Canada, 2004) at 1.

legitimacy is to maintain notions of fairness and integrity.⁷ Sara Benesh characterises the need for confidence slightly differently, saying that in order for the rule of law to remain operative, “citizens need to trust the institution charged with its keeping”.⁸ Parity in sentencing is underpinned by the rule of law, a doctrine which requires both the absence of arbitrary power and the need for fixed and predictable laws.⁹ The existence and imposition of inconsistent sentences indicates that judges may be exercising their discretion in an arbitrary fashion, making it impossible for the citizenry to foresee the consequences of their actions.

Although consistency is an important principle in any jurisdiction that gives weight to the rule of law, its enforcement needs to be given special emphasis in those countries that maintain high levels of incarceration. This includes New Zealand, a nation that has traditionally sat at the more punitive end of the sentencing spectrum. As at 30 June 2014, New Zealand had 6754 people serving a sentence of imprisonment, with a further 1817 inmates on remand,¹⁰ representing an incarceration rate of approximately 190 per 100,000 of population.¹¹ This is higher than a number of comparable jurisdictions, including Australia (170 per 100,000 as at June 2013),¹² Canada (113 per 100,000 as at August 2014) and the United Kingdom (149 per 100,000 as at August 2014).¹³ Indeed, the only major Western nation with a higher incarceration rate than New Zealand is the United States, which tips the scales at an astonishing 707 prisoners per 100,000 of population.¹⁴ Any criminal justice system that is forced to sentence such high volumes of offenders inherently leaves itself exposed to greater levels of inconsistency.

The reason behind this is that consistency is required at two levels: individual consistency for the particular judge dealing with like offenders who appear before them; but also consistency between judges generally in dealing with like cases within the same jurisdiction.¹⁵ The more

⁷ Roberts, above n 6, at 1.

⁸ Sara Benesh “Understanding Public Confidence in American Courts” (2006) 68 *Journal of Politics* 697 at 697.

⁹ Joseph Raz “The Rule of Law and its Virtue” in Aileen Kavanagh and John Oberdiek (eds) *Arguing About Law* (Routledge, Abingdon, 2013) 181 at 183

¹⁰ Department of Corrections “Prison Facts and Statistics – June 2014” <www.corrections.govt.nz>.

¹¹ Statistics New Zealand “National Population Estimates: At 30 June 2014” (14 August 2014) <www.stats.govt.nz>.

¹² Australian Bureau of Statistics “Australian prisoner numbers reach 30,000 for the first time” (press release, 5 December 2013).

¹³ International Centre for Prison Studies “Highest to Lowest – Prison Population Rate” <www.prisonstudies.org>.

¹⁴ International Centre for Prison Studies, above n 12.

¹⁵ Geraldine Mackenzie “Achieving Consistency in Sentencing: Moving to Best Practice?” (2002) 22 *U. Queensland L.J.* 74 at 75

cases being heard in that jurisdiction, the more difficult it is to ensure that the same sentencing practices are being followed. While we can expect a judge to be personally consistent in his or her approach to sentencing, the difficulty arises when trying to achieve consistency between adjudicators. Judges are endowed with significant discretion to tailor a sentence that is appropriate and does justice in the circumstances of the particular case. But what is an appropriate sentence? Opinions will clearly differ. Parliament is therefore left with the “significant challenge” of regulating judicial discretion in such a way that can balance the need for consistency with the reality that cases are unique and require individualised justice.¹⁶

III Guiding Judicial Discretion

Once the legislature has prescribed the maximum penalty for an offence, judges in New Zealand do not have *carte blanche* to impose any sanction they see fit. In order to promote consistency between cases their discretion is guided by two mechanisms: the purposes and principles set out under ss 7 and 8 of the Sentencing Act 2002; and guidelines judgments issued by the appellate courts. In practice, the former provides little practical assistance, and the latter suffers from a number of systemic limitations.

1 Purposes and Principles of Sentencing

In 1997, the Ministry of Justice issued a discussion paper entitled ‘Sentencing Policy and Guidance’, part of which looked specifically at the different possible methods for guiding judicial sentencing discretion.¹⁷ It put forward a number of options ranging from mandatory sentences,¹⁸ right through to a fully comprehensive sentencing information system that would provide judges with empirical sentencing data pertaining to offence subcategories.¹⁹ The drafters of the Sentencing Act chose to implement a general statement of sentencing purposes and principles, along with a non-exhaustive list of aggravating and mitigating factors, all of which can now be found in ss 7, 8 and 9 respectively of the Act. This was the loosest possible form of control on sentencing discretion that the Ministry could implement.²⁰ The Law

¹⁶ Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds) *Principles Sentencing: Readings on Theory and Policy* (3rd ed, Hart Publishing, Portland, 2009) at 229.

¹⁷ Ministry of Justice “Sentencing Policy and Guidance – A Discussion Paper” (Ministry of Justice, Wellington, 1997), at [11].

¹⁸ At [11.3].

¹⁹ At [11.7.1].

²⁰ John Ip “Sentencing Guidelines post-Sentencing Act” [2005] NZLJ 397 at 399.

Commission described it as a “significant change to [the] traditional approach” to sentencing,²¹ although other commentators have been more reserved in their praise.²² John Ip doubts whether the changes have had any significant effect on sentencing discretion at all, saying that:²³

Given the level of generality at which the sentencing purposes and principles are expressed, and given they can frequently suggest contradictory outcomes, it seems naïve in retrospect to have expected anything more.

This criticism is not unwarranted. Many of the sentencing principles listed in the Act are self-evident. As Roberts rightly notes, “no judge in New Zealand needs to be told, for example, that the maximum penalty should only be imposed for the most serious cases, although that is the direction contained in section 8(c)”.²⁴ Nor do the purposes of sentencing offer any practical assistance in the application of discretion, as judges “remain free to ‘pick and mix’ from among the purposes, according to their pre-existing individual preferences”.²⁵ The result is an unusual situation whereby the sentencing judge has the discretion to choose which principle or purpose to adopt as a means to guide their discretion.

Furthermore, the legislature has codified such an extensive number of sentencing rationales that they often contradict each other in practice. It is not difficult to imagine, for example, there being an inherent difficulty in imposing a sentence that provides for both the interests of the victim²⁶ and the offender’s rehabilitation and reintegration.²⁷ Professor Geoff Hall claims that “the legislature has failed to develop a coherent sentencing policy from the theories of punishment that comprise this country’s penal philosophy and jurisprudence of sentencing”.²⁸ The irony is that the Ministry of Justice explicitly acknowledged the flaws in implementing a range of equally weighted sentencing purposes, and the inevitable problems they would cause in the discretionary environment in which they have to operate.²⁹ The rationale for implementing them anyway was that “no one goal on its own provides a sufficient basis on

²¹ Law Commission *Sentencing Guidelines and Parole Reform* (NZLC R94, 2006) at [30].

²² See Julian Roberts “Sentencing Reform in New Zealand: An Analysis of the Sentencing Act 2002” (2003) ANZ J of Crim 249.

²³ Ip, above n 20, at 10.

²⁴ Roberts, above n 22, at 257.

²⁵ Roberts, above n 22, at 256.

²⁶ Sentencing Act 2002, s 7(1)(c).

²⁷ Sentencing Act 2002, s 7(1)(h).

²⁸ Geoff Hall *Sentencing Law and Practice* (LexisNexis, Wellington, 2004) at [1.3].

²⁹ Ministry of Justice, above n 17, at [3.6].

which to provide a coherent and comprehensive sentencing regime,” because which purpose to invoke is dependent on the individual circumstances of the offence and the offender.³⁰ This may be true, but it incorrectly assumes that there are only two alternatives to choose from: the implementation of a single rationale of sentencing; or the implementation of a range of equally weighted rationales. As Professor Andrew Ashworth notes, there is a middle ground whereby the legislature can “declare a primary rationale, and provide that in certain types of case one or another rationale might be given priority”.³¹ This is the position in Sweden, and was the position in England under the Criminal Justice Act 1991, where desert theory was the primary rationale but with incapacitation having priority in certain types of cases. However, this approach was later abandoned for the same ‘pick and mix’ style currently found in New Zealand.³²

Without a clearly defined hierarchy of sentencing rationales, the current smorgasbord of purposes and principles found under the Sentencing Act are of little practical assistance to sentencing judges.

2 Guideline Judgments

Given the effective failure of the Sentencing Act to guide the application of judicial discretion, commentators such as Ip believe that the sentencing guideline judgments (also known as tariff judgments) issued by the Court of Appeal are a superior means of ensuring discretion is applied consistently in the criminal sentencing context.³³ This view is echoed by the Law Commission which, despite having some sympathy for the Sentencing Act, conceded that ss 7 and 8 “provide little or no assistance in determining the ‘tariff’ custody threshold or sentence length appropriate for the average case of each type coming before the courts”.³⁴

Guideline judgments issued by the appellate courts provide authoritative guidance on how to approach sentencing for particular types of offences. These judgments generally set out sentencing ‘bands’ of escalating seriousness depending on the number and nature of

³⁰ Geoff Hall and Stephen O’Driscoll “The New Sentencing and Parole Acts” (New Zealand Law Society Seminar Paper, 2002) at 17.

³¹ Andrew Ashworth *Sentencing and Criminal Justice* (4th ed, Cambridge University Press, Cambridge, 2005) at [3.3.1].

³² Ashworth, above n 31.

³³ Ip, above n 20, at 10.

³⁴ Law Commission, above n 21, at [32].

aggravating factors relating to the offending. The Court gives examples of the types of aggravated features that fall within each band, and sets a range of sentencing starting points for each.³⁵ Subsequent judges can then slot the case before them into one of the bands of the appropriate guideline judgment, before individualising the sentence with a consideration of the relevant mitigating factors that arise on the facts. Guidelines judgments exist for a range of serious offences, including (but not limited to) aggravated robbery,³⁶ sexual violation,³⁷ grievous bodily harm,³⁸ and various categories of manslaughter cases.³⁹

These Court of Appeal decisions have a number of benefits for the application of judicial discretion. They offer the sentencing judge a single source to refer to as a point of reference, saving them from having to consult “the typical scattered and unrelated source[s] of guidance”.⁴⁰ Indeed, in 2003 the Chief Justice and Chief District Court Judge issued a Practise Note requiring counsel to cite Court of Appeal guideline decisions in their sentencing memoranda where one was available.⁴¹ Assuming there is a guideline decision on point, “references to other decisions will not be of assistance”.⁴² Furthermore, guideline judgments give an indication of how the Court of Appeal might rule should the sentence be appealed, but at the same time leaves the trial judge with sufficient scope to tailor a sentence suitable for the individual circumstances of the case being heard.⁴³

Although guideline judgments are intended to achieve consistency, Miller J has noted that they still need to be flexible enough “not to circumscribe the discretion of the sentencing judge”.⁴⁴ This is why guideline judgments act only as a starting point. Once the starting point is established, the sentencing judge can adjust the sentence depending on the applicable aggravating and mitigating factors of the offence and offender.⁴⁵ O’Regan J in *R v Taueki* went to significant lengths to emphasise this point, highlighting the need to avoid a “rigid or mathematical approach”.⁴⁶ Ip characterises this as a judicial fear of the “pendulum swinging

³⁵ Law Commission, above n 21, at [37].

³⁶ *R v Mako* [2000] 2 NZLR 170 (CA).

³⁷ *R v AM* [2010] NZCA 114.

³⁸ *R v Taueki* [2005] 3 NZLR 372 (CA).

³⁹ For example, *Kepu v R* [2011] NZCA 104 discusses single punch manslaughter.

⁴⁰ Hall, above n 28, at [1.2.2(c)].

⁴¹ *Sentencing Practise Note 2003* [2003] 2 NZLR 575.

⁴² At [2.2(h)].

⁴³ Hall, above n 28, at [1.2.2(c)].

⁴⁴ *R v Patea-Glending* [2006] DCR 505 at [58]; see also *R v Mako* [2000] 2 NZLR 170 (CA) at [60].

⁴⁵ *R v Mako* [2000] 2 NZLR 170 (CA) at [62].

⁴⁶ *R v Taueki* [2005] 3 NZLR 372 (CA) at [16].

from judicial discretion to judicial inflexibility,⁴⁷ but states that guideline judgments strike a balance between consistency and individualised justice.⁴⁸

Despite these advantages, guideline judgments suffer from several major flaws. The first is that such judgments only exist for the most serious offences on the criminal calendar, with the appellate courts providing no guidance on the use of discretion for the mass of less culpable offences dealt with daily in the lower courts.⁴⁹ They almost exclusively deal with offences that warrant a term of imprisonment and as a result, “guidance as to the custody threshold or the use of community-based sentences is very limited”.⁵⁰ This is of particular concern given that inconsistency is more likely to occur at those lower levels of offending. It also means that the Court of Appeal is unable to “give coherence to sentencing as a whole,”⁵¹ because if the Court wishes to issue a guideline on a particular offence, it must wait until an appropriate case reaches it. This problem is compounded by the lack of input and expertise of the District Court judiciary, who are responsible for the vast bulk of sentencing in New Zealand.⁵²

Furthermore, the Court of Appeal is inherently ill-placed to undertake the sort of systematic research required to guide meaningful sentencing policy. It does not have the resources or time to undertake substantive empirical research, nor can it investigate the wider impact of sentencing policy like the legislature can.⁵³ As Dr Warren Young notes, because sentencing severity levels are determined without any consideration of financial costs and benefits, punishment therefore becomes the only item on the government’s agenda that is a “free good” – or in other words, it does not have to compete for funding in the same way other elements of the criminal justice system does (e.g. policing).⁵⁴ This, according to the Law Commission, is an untenable position. They dismissed the argument that it is improper for fiscal considerations to constrain the imposition of an appropriate punishment, asserting that such a theory assumed that there is in fact a “right” punishment in any given case to start

⁴⁷ Ip, above n 20, at 399.

⁴⁸ At 399.

⁴⁹ Hall, above n 28, at [1.2.2(c)].

⁵⁰ Bruce Robertson (ed) *Adams on Criminal Law – Sentencing* (online looseleaf ed, Brookers) at [SAC6].

⁵¹ Hall, above n 28, at [1.2.2(c)].

⁵² Law Commission, above n 21, at [39].

⁵³ Law Commission, above n 21, at [39].

⁵⁴ Warren Young “Sentencing Reform in New Zealand: A Proposal to Establish a Sentencing Council” in Arie Freiberg and Karen Gelb (eds) *Penal Populism, Sentencing Councils and Sentencing Policy* (Willan Publishing, Devon, 2008) 179 at 184.

with.⁵⁵ “In reality,” the Law Commission says, “punishment levels are a matter of values, and costs are one of the relevant factors informing those values”.⁵⁶

Public debate should inform these values, and should not be left to the whim of the unelected judiciary. This highlights the democratic deficit inherent in guideline judgments. If Parliament wishes to alter sentencing levels, it only has recourse to the blunt tool of amending maximum penalties in the hope that this will have a trickle-down effect on the ordinary run of cases.⁵⁷ This is an inherently unusual impediment on Parliament’s supremacy to determine such a critical area of what is essentially social policy. Sentencing should (to at least some minimum extent) be determined by Parliament as an elected body representing the people, not by judges “who must of necessity distance themselves from the political and public debate that swirls around that policy”.⁵⁸

Finally, guidelines judgments are predominantly obiter dicta. It is impossible for an appellate judge to make general sentencing policy without this being so, as only comments relevant to reaching a decision in the case at hand form binding precedent.⁵⁹ In theory, this allows sentencing judges to follow divergent lines of authority, or distinguish their case on the facts to circumvent guideline judgments.

IV Empirical Evidence of Disparity in Sentencing

Disparity is inevitable when judges are endowed with unchecked discretion. This was acknowledged by the architects of the Sentencing Act, with the Justice and Electoral Committee noting that without clear sentencing guidelines there is an increased risk of judges handing down different sentences for like offenders.⁶⁰ Judges are only human, and will analyse a case consistent with their personal beliefs and experiences. Hall aptly articulates this weakness:⁶¹

⁵⁵ Law Commission, above n 21, at [45].

⁵⁶ At [45].

⁵⁷ Young, above n 54, at 182.

⁵⁸ Young, above n 54, at 182.

⁵⁹ Law Commission, above n 21, at [39].

⁶⁰ Sentencing and Parole Reform Bill 2001 (17-3) (select committee report) at 1.

⁶¹ Hall, above n 28, at [2.1].

Sentencing is not a rational mechanical process; it is a human process and subject to all the frailties of the human mind. A wide variety of factors, including the Judge's background, experience, social values, moral outlook, penal philosophy and views as to the merits or demerits of a particular penalty influence the sentencing decision.

This has been proven empirically. Writing in 1991, Hall examined a number of studies that highlight sentencing discrepancies.⁶² For example, a report commissioned by the then Department of Justice found that there were significant regional differences in custodial sentences for seven of the eight offence types analysed, which were “most likely caused by differences in the severity of sentencing by judges in different court areas.”⁶³ This was corroborated by a 1990 study which concluded that “the court at which the charge [is] heard also affects the chance of conviction, the probability of imprisonment and the length of the prison sentence imposed”.⁶⁴ These studies were undertaken before the passage of the principles and purposes of sentencing of the Sentencing Act, and while guideline judgments in New Zealand were still in their infancy.

However, more recent studies also highlight a disparity in sentencing. Although New Zealand-based literature in this area is sparse, a 2003 study shows that sentencing judges exercise considerable leniency towards women in the length of sentences imposed.⁶⁵ The Law Commission itself commissioned a report that investigated regional variations in District Court sentencing,⁶⁶ which showed that across the five offence types selected,⁶⁷ some regions were systematically more severe than others. This study was viewed with trepidation by Priestley J, who indicated that some degree of discrepancy was inevitable if you properly left the judiciary discretion to formulate individualised sentences.⁶⁸ Indeed, the Law Commission's study was methodologically limited and unable to control for other factors that may lead to disparity.

⁶² Geoff Hall “Reducing Disparity by Judicial Self-Regulation: Sentencing Factors and Guideline Judgments” (1991) 14 NZULR 208.

⁶³ P Spier *An Examination of Regional Differences in the Use of Custodial Sentences in the District Courts* (Unpublished report, Policy and Research Division Department of Justice, Wellington 1989) at 49.

⁶⁴ J Palmer “An Examination of Discretion and Disparity in Judicial Sentencing Behaviour” (Unpublished LL.B (Hons) research paper, University of Otago, 1990).

⁶⁵ Samantha Jeffries, Garth Fletcher and Greg Newbold “Pathways to Sex-Based Differentiation in Criminal Court Sentencing” (2006) 41 *Criminology* 329 at 347.

⁶⁶ Law Commission *Regional Analysis of Variations in District Court Sentencing* (NZLC MP0, 2006); and Law Commission *Sentencing Guidelines and Parole Reform* (NZLC R94, 2006) at Appendix.

⁶⁷ Grievous assault; theft; conversion; breach of community work; and driving under the influence.

⁶⁸ Justice John Priestley “Chipping Away at the Judicial Arm?” (Harkness Henry Lecture, University of Waikato, October 2009) at 33.

In 2013, Wayne Goodall and Russil Durrant published a paper that analysed the regional variations in sentencing for the offence of aggravated drink driving in New Zealand.⁶⁹ It was found that “the circuit in which an offender is sentenced for aggravated drink driving significantly affects the likelihood of incarceration,” even when controlling for factors such as the seriousness of the offence and criminal history.⁷⁰ They concluded that the existing mechanisms to address sentencing variability were flawed,⁷¹ and explicitly disproved Priestley J proposition that individualised sentences inherently required disparity, claiming that unjustified discrepancy still occurred even when controlling for the core sentencing factors that judges need to weigh up in order to achieve individualised justice.⁷² It is interesting to note that Goodall does not think that individual judges should not be blamed for this discrepancy. He says that they are simply working within the boundaries of the inadequate system as it currently exists - “they are left in a vacuum and they have no choice but to form their own rules”.⁷³ This is consistent with the problems identified earlier: the ineffectiveness of sentencing principles and purposes to guide discretion, and a lack of guideline judgments for low-level offending.

How can New Zealand remedy this grossly unsatisfactory situation? There exists a spectrum along which Parliament can circumscribe judicial discretion at greater or lesser levels. The rest of this paper will examine where on that spectrum the legislature should intervene, or to paraphrase Lord Bingham of Cornhill, how short a leash “the dragon of arbitrary discretion” should be given.⁷⁴ At one end of this spectrum lies mandatory sentences, which would circumscribe discretion entirely. At the other, an ‘intuitive synthesis’ approach that gives sentencing judges an almost unfettered ability to impose whatever penalty they see fit to achieve justice in the individual case. The preferred outcome, not surprisingly, can be found somewhere in the middle.

⁶⁹ Wayne Goodall and Russil Durrant “Regional Variation in Sentencing: The incarceration of aggravated drink drivers in the New Zealand District Courts” (2013) 46 ANZ J of Crim 422.

⁷⁰ At 441.

⁷¹ At 444. Note that this study was limited to aggravated drink driving, and does not necessarily reflect sentencing practice more generally.

⁷² At 441.

⁷³ New Zealand Law Society “Stark Difference in Sentencing Identified” *LawTalk* (online ed, 11 October 2013).

⁷⁴ Lord Justice Bingham “The Discretion of the Judge” (1990) 5 Denning L.J. 27 at 28.

V *Mandatory Sentences*

The introduction of mandatory sentences would be a simple way for the legislature to achieve consistency in sentencing. Strictly speaking, this involves setting a fixed penalty for the commission of a criminal offence, effectively removing judicial discretion at the sentencing stage entirely.⁷⁵ New Zealand has several incidences of mandatory penalties, including life imprisonment for treason,⁷⁶ and more recently the implementation of the Sentencing and Parole Reform Act 2010. Known colloquially as the ‘Three Strikes Law’, this Act requires a judge to impose the maximum term of imprisonment prescribed for serious violent offending⁷⁷ if the offender is being sentenced for a stage-3 offence (or, in other words, is on their ‘third strike’).⁷⁸ Variants on the concept of mandatory sentencing can also include the imposition of mandatory *minimum* sentences, from which the court can then impose a more harsh sanction depending on the severity of the offending. While mandatory sentences have historically enjoyed some popularity, their widespread implementation in New Zealand is neither realistic nor desirable.

1 Lack of Individualisation

The first and most significant flaw of mandatory sentencing is that like offenders will not be treated alike. It is a long established principle of the criminal law that all of the circumstances of the offence and the offender should be taken into account in order for a judge to tailor a sentence that is appropriate in the individual case.⁷⁹ A rigid system that removes judicial discretion through the use of mandatory sentences may technically succeed in its goal of achieving consistency, but it would come at the expense of individual justice.

When the Attorney-General vetted New Zealand’s ‘Three Strikes’ legislation for compliance with the Bill of Rights Act, he noted that the regime “may result in gross disproportionality in

⁷⁵ Declan Roche “Mandatory Sentencing” (1999) 138 *Australian Institute of Criminology* at 1.

⁷⁶ Crimes Act 1961, s 74(1).

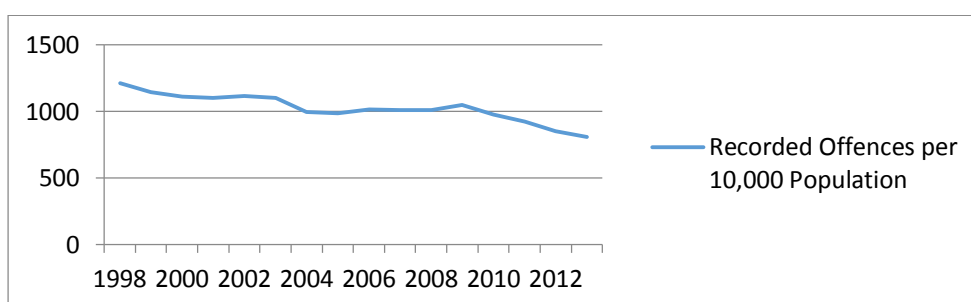
⁷⁷ Section 86A of the Sentencing Act 2002 provides an exhaustive list of what qualifies as a “serious violent offence”.

⁷⁸ Sentencing Act 2002, s 86D.

⁷⁹ James Spigelman, Chief Justice of New South Wales “Consistency and Sentencing” (Keynote address to Sentencing 2008 Conference, National Judicial College of Australia, Canberra, 8 February 2008).

sentencing,”⁸⁰ and on that basis was inconsistent with the right not to be subject to disproportionately severe treatment or punishment.⁸¹ This is an inevitable problem of all mandatory sentences. A wide assortment of conduct can fall within any defined offence, ranging from minimally culpable conduct that may result in a discharge,⁸² right through to conduct that is so serious that it warrants a term of imprisonment at or near the maximum prescribed for the offence. Where then should Parliament set the quantum of any mandatory sentence?

The shape of a criminal justice system will be dependent on the political and social context within which it has to operate, with sentencing in particular being described by one former Minister of Justice as a “social battleground”.⁸³ As a result, the question of quantum cannot be divorced from an analysis of the influence penal populism has had on the country. This has resulted in increasingly punitive rhetoric and policies from successive Governments, and as identified earlier, one of the highest incarceration rates in the Western world. In 1999 New Zealanders voted overwhelmingly in favour (91.75%) of a Citizens Initiated Referendum instigated by Norm Withers, which asked: ‘Should there be a reform of our justice system placing greater emphasis on the needs of victims, providing restitution, and compensation for them, and imposing minimum sentences and hard labour for all serious violent offenders?’ Despite the leading nature of the question and the conflation of several distinct issues, politicians have since used it as a mandate to push for longer sentences,⁸⁴ even though the crime rate had in fact been decreasing since 1991, and has continued to decrease through into the 21st century:⁸⁵



⁸⁰ “Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Sentencing and Parole Reform Bill” (Published by order of the House of Representatives, 2009).

⁸¹ New Zealand Bill of Rights Act 1990, s 9.

⁸² Sentencing Act 2002, s 108.

⁸³ Geoffrey Palmer *Reform: A Memoir* (Victoria University Press, Wellington, 2013) at 323

⁸⁴ John Pratt and Maria Clarke “Penal populism in New Zealand” (2005) 7 *Punishm. Soc.* 303 at 306.

⁸⁵ New Zealand Police “Crime Statistics for calendar year ending 31 December [2000 – 2013]” <www.police.govt.nz>.

The power and influence wielded by hard-line law and order lobby groups such as the Sensible Sentencing Trust (SST) exacerbates the problem of penal populism. Pratt describes politicians as “running to catch up with [the SST’s] demands”,⁸⁶ and in 2010, Prime Minister John Key gave a speech at the SST conference praising the organisation as “courageous advocates for victims of crime” who play a “pivotal role in promoting a safer New Zealand”.⁸⁷ Such dialogue is a blatant attempt by politicians to demonstrate their law and order credentials, and to foster a reputation for being ‘tough on crime’. It results in a situation whereby political parties attempt to outbid each with increasingly punitive policies,⁸⁸ in order to appease a public who grossly overestimates the level of offending in society.⁸⁹ Furthermore, the Mixed Member Proportional electoral system gives significant influence to smaller ‘fringe’ parties, who are able to push through their law and order policies in exchange for giving larger political parties the numbers to govern.⁹⁰ All these factors contribute towards a political culture that would almost certainly lead the Government to take a hard-line approach when determining the quantum of mandatory sentences.

Incredibly, New Zealand’s ‘Three Strikes’ legislation as it currently stands would not achieve consistency anyway – indeed, it actively prevents it. Take for example the current sentencing regime for the offence of sexual violation, as articulated in the guideline judgment of *R v AM*.⁹¹ The first ‘band’ of sentencing for sexual violation set out by the Court of Appeal recommends a sentence of between 6 – 8 years, and is appropriate for offending where there are no aggravating factors.⁹² This is consistent with the sentences imposed in *R v Pehi*⁹³ and *R v Hill*.⁹⁴ However, an offender who commits sexual violation in circumstances similar to the defendants in these two cases, but who happens to be on his or her third ‘strike’, would be sentenced to a term of 20 years, with a presumption that it would be served without parole.⁹⁵ There is clearly no consistency here. While there is some credibility in the argument that a

⁸⁶ At 306.

⁸⁷ John Key, Prime Minister of New Zealand “Speech to Sensible Sentencing Trust Conference” (Parliament Buildings, Wellington, 25 August 2010).

⁸⁸ Palmer, above n 83, at 613.

⁸⁹ See Judy Paulin, Wendy Searle and Trish Knaggs *Attitudes to Crime and Punishment: A New Zealand Study* (prepared for the Ministry of Justice 2003).

⁹⁰ John Pratt “Penal Scandal in New Zealand” in Arie Freiberg and Karen Gelb (eds) *Penal Populism, Sentencing Councils and Sentencing Policy* (Willan Publishing, Devon, 2008) 31 at 38.

⁹¹ *R v AM* [2010] NZCA 114.

⁹² At [93].

⁹³ *R v Pehi* CA86/06, 31 October 2006.

⁹⁴ *R v Hill* CA94/02, 21 October 2002.

⁹⁵ Crimes Act 1961, s 128B; Sentencing Act 2002, s 86D.

person on their third 'strike' has a history of serious violent offending that justifies a more punitive sentence, the court has no discretion to weigh this offending history to arrive at an outcome that is holistically appropriate in the circumstances. In this sense, the imposition of a mandatory sentence is an incredibly blunt, and often unfair, penalty.

2 Reassignment of Discretion to Prosecutors

The implementation of mandatory sentences would not eliminate discretion, it would merely give it to other actors in the criminal justice system, particularly to police and Crown prosecutors. By removing the discretion judges enjoy, these agencies would in effect get to decide who goes to prison and for what length of time, contingent on what charges they decided to lay.⁹⁶

Placing sentencing discretion in the hands of prosecutors causes a number of problems. A prosecutor, when deciding what charge is suitable, is not in a position to take into account all the relevant circumstances of the offence and the offender in the same way a judge can after the benefit of a sentencing hearing. When deciding what charge to lay, and by extension what sentence is appropriate, a prosecutor must rely on the often limited information provided by the police, and perhaps a brief dialogue with the offender's defence counsel. Not only is this process substantively unsatisfactory when it comes to deciding on an appropriate sentence, but it also takes place behind closed doors and thus lacks transparency. In contrast, the sentencing decisions of judges subsequent to the exercise of their discretion are publically available,⁹⁷ and there is legislative requirement that they provide reasons for the sentence they have imposed.⁹⁸ This in turn allows a defendant to appeal their sentence, an important safeguard that is enshrined in the Bill of Rights Act,⁹⁹ whereas a defendant is unable to appeal the prosecutor's choice of charge laid.

There is also clear evidence that prosecutors will change their behaviour in light of mandatory sentences in order to mitigate against unduly harsh outcomes. In the United States, in the context of mandatory minimum sentences, studies have shown that prosecutors are often reluctant to prosecute some offences due to the penalty being disproportionate to the

⁹⁶ Rob White "10 arguments against mandatory sentencing" (2000) 19 Youth Studies Australia 22 at 23.

⁹⁷ Roche, above n 75, at 5.

⁹⁸ Sentencing Act 2002, s 31.

⁹⁹ New Zealand Bill of Rights Act 1990, s 25(h).

gravity of the offending.¹⁰⁰ Due to the inflexibility of mandatory sentences, they will instead file charges for different, but roughly comparable, offences that are not subject to the mandatory sentencing regime.¹⁰¹ As a result, inconsistency will occur in not only the quantum of the sentence, but also in what charge is laid in the first place. Distortions in prosecutorial practice would be a real issue in New Zealand, as the Prosecution Guidelines issued by the Solicitor-General only require a prosecutor to ensure that the “charges filed adequately reflect the criminality of the defendant’s conduct.”¹⁰² This very broad and subjective discretion provides plenty of scope for prosecutors to engage in the same attempts at mitigation as their American counterparts.

3 Statutory Presumptions

It is clear that the widespread implementation of mandatory sentences would be detrimental to the criminal justice system. The pursuit of consistency would come at the expense of fairness and proportionality, and would merely give greater discretion to prosecutors. However, another option would be for the legislature to create statutory presumptions as to what a sentence should be, with the ability of a judge to rebut that presumption and impose a shorter sentence if necessary.

Such an approach currently exists for the offence of murder, where there is a legal presumption requiring a court to impose a sentence of life imprisonment unless, given the circumstances of the offence and the offender, such a sentence would be “manifestly unjust”.¹⁰³ During the first reading of the Bill, the Minister of Justice said that the inclusion of a rebuttable presumption in s 102 would reduce the likelihood that a jury, in order to compensate for a lack of flexibility at sentencing,¹⁰⁴ would return a verdict of manslaughter rather than murder. Once the court considers it manifestly unjust to impose a life sentence and accordingly rebuts the presumption, the full range of sentencing options under the

¹⁰⁰ David Bjerk “Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion under Mandatory Minimum Sentencing” (2005) 48 *Journal of Law and Economics* 591 at 594.

¹⁰¹ Michael Tonry *Sentencing Matters* (Oxford University Press, New York, 1996) at 147

¹⁰² Crown Law Office “Solicitor-General’s Prosecution Guidelines as at 1 July 2013” (Crown Law Office, June 28 2013) at [8.1].

¹⁰³ Sentencing Act 2002, s 102. The sentencing regime is different if the murder is a stage-2 or stage-3 offence under s 86E of the Sentencing Act 2002.

¹⁰⁴ The Criminal Justice Act 1985 made life imprisonment for murder mandatory. The sentencing judge had no discretion to impose a lesser sentence.

Sentencing Act become available.¹⁰⁵ The court will therefore have recourse to any sentence it thinks appropriate to fulfil the principles and purposes of sentencing.

Rebuttable statutory presumptions would go some ways to achieving consistency in sentencing, whilst leaving judges with sufficient residual discretion to impose a lesser sentence when necessary. The key would be establishing a fair threshold at which the presumption can be displaced. In relation to murder, the threshold of manifest injustice is incredibly high, with Elias CJ indicating that it “is a conclusion likely to be reached in exceptional cases only”.¹⁰⁶ Distinctions around culpability must instead be made when determining what minimum non-parole period to impose. However, this approach is less persuasive in relation to minor offences where the need to denounce the conduct is not as strong, and other principles and purposes of sentencing, such as the need to assist in the offender’s rehabilitation, are of greater importance. Nor does it remedy the underlying problem: impose a high threshold before a judge is authorised to depart from the presumption and the sentences imposed will not be able to reflect the varying culpability levels; impose a low threshold before and the same problems around the use of discretion apply.

VI “Instinctive Synthesis” – An Individualised Approach to Sentencing

If mandatory sentences sit at one extreme of any spectrum on how to guide judicial discretion, then the instinctive synthesis approach surely sits at the other. During the twentieth century, senior judges around the British Commonwealth began to adopt the view that sentencing was not an area that could be regulated by Parliament with mathematical precision or formulae, and that “all [...] well-experienced judges could do was to agree on a range of sentences that could respectably be said to fit all the circumstances of the case”.¹⁰⁷ On this line of thinking, particular rules and mechanisms as to how judges should exercise their discretion are unnecessary and unhelpful, because there is no inherently ‘right’ sentence to impose. Indeed, Jordan CJ mused that “the only golden rule is that there is no golden rule”.¹⁰⁸

¹⁰⁵ *R v Law* (2002) 19 CRNZ 500 (HC) at [52].

¹⁰⁶ *R v Rapira* [2003] 3 NZLR 794 (CA) at [121].

¹⁰⁷ Justice Grant Hammond “Sentencing: Intuitive Synthesis or Structured Discretion?” (2007) NZ L. Rev. 211 at 213.

¹⁰⁸ *R v Geddes* (1936) 36 SR (NSW) 554.

This liberal and individualist style of sentencing has found extensive support from the senior judiciary in both Australia and Canada. The Victorian Supreme Court in *R v Williscroft* first coined the notion of an “instinctive synthesis” approach to sentencing in 1975,¹⁰⁹ a concept which has been cited and refined multiple times since,¹¹⁰ and which now refers to an exercise whereby “all relevant considerations are simultaneously unified, balanced and weighed by the sentencing judge”.¹¹¹ The Australian High Court has explicitly said that there is no single correct sentence in any given case,¹¹² and the Supreme Court of Canada has held that the act of sentencing is a “profoundly subjective process”.¹¹³ To this end, a judge does not need to explicitly lay out the reasons behind the sentence he or she arrives at, because all that matters is the sentence itself.¹¹⁴ It is the intuitive weight that a sentencing judge decides to place on the circumstances of the offence and the offender, after the benefit of hearing all the evidence, which is important – not the process of jumping through formulaic hoops set by the legislature. As a result, the instinctive synthesis approach to sentencing has been characterised as “more art than science”.¹¹⁵

However, other judges and commentators have viewed this approach with a degree of consternation, noting a number of significant flaws. Kirby J of the Australian High Court felt that the approach lacked transparency and was a “retrograde step”,¹¹⁶ because disclosure around how a particular sentence has been formulated and the reasons for that sentence should not be hidden by judicial reference to instinct or intuition, “which does little to provide any useful insight or engender public confidence in the task of sentencing”.¹¹⁷ Kirby took particular issue with the instinctive synthesis approach in the context of legislatively mandated discounts for guilty pleas, saying that without explicit judicial reasoning it is not possible to know whether the statutory discount provisions have been applied at all, and it becomes impossible to for appellate courts to check the sentence for consistency with like

¹⁰⁹ *R v Williscroft* [1975] VR 292 at 300.

¹¹⁰ See *R v Markarian* (2005) 215 ALR 213; *Hili v The Queen* (2010) 242 CLR 520; *R v Morton* (1986) 23 A Crim R 433.

¹¹¹ Sarah Krasnostein and Arie Freiberg “Pursuing Consistency in an Individualist Sentencing Framework: If You Know Where You’re Going, How Do You Know When You’ve Got There?” (2013) 76 *Law and Contemp Problems* 265 at 268.

¹¹² *R v Markarian* (2005) 215 ALR 213 at [27].

¹¹³ *R v Shropshire* [1995] 4 SCR 227 at [48].

¹¹⁴ Hammond, above n 107, at 214.

¹¹⁵ Krasnostein and Freiberg, above n 111, at 269.

¹¹⁶ *Wong v The Queen* (2002) 76 ALJR 79 at [102] per Kirby J dissenting.

¹¹⁷ Sally Traynor and Ivan Potas “Sentencing Methodology: Two-tiered or Instinctive Synthesis?” (2002) *Sentencing Trends and Issues* 25 at [4.2].

cases.¹¹⁸ Indeed, consistency itself is not of primary importance under the instinctive synthesis approach. In *Wong v The Queen*, Gleeson CJ noted that although criminal sentencing should not be seen as a “multiplicity of unconnected single instances”, a certain level of inconsistency is acceptable and inevitable.¹¹⁹ Because the approach eschews the use of any mechanisms that may guide discretion, Krasnostein and Frieberg go as far as to say the approach conceals and normalises disparity. They conclude that because judges do not need to explicitly set out the weight they give to certain factors when formulating their ‘intuitive’ decision, it becomes virtually impossible to assess whether like offenders are routinely treated in the same way. This in turn means that “sentences can be inconsistent within a (potentially vast) margin of error yet still legal”.¹²⁰

A further problem around the instinctive synthesis approach is the underlying need for a clear rationale of sentencing. Ashworth says that:¹²¹

It is one thing to agree that judges should be left with discretion, so they may adjust the sentence to fit the particular combination of facts in the individual case. It is quite another to suggest that judges should be free to choose what rationale of sentencing to adopt in particular cases or types of case. Freedom to select from among the various rationales is a freedom to determine policy, not a freedom to respond to unusual combinations of facts.

According to Ashworth, one of the major reasons for sentencing disparity are the different penal philosophies amongst judges and magistrates.¹²² This problem would be magnified exponentially in a situation whereby sentencing judges had unlimited discretion to impose a sentence according to their subjective intuition. Intuitions will invariably differ, and can be plagued by bias, ignorance and prejudice.¹²³ A single, clearly defined sentencing rationale – such as rehabilitation or retribution – would ensure that judges are exercising their discretion in the pursuit of a common goal. However, in New Zealand (as in other jurisdictions) the Sentencing Act does not set out any single rationale of sentencing. It instead lists eight, equally weighted purposes of sentencing.¹²⁴ As was identified earlier in

¹¹⁸ *Cameron v The Queen* (2002) 76 ALJR 382 at [70].

¹¹⁹ *Wong v The Queen*, above n 116, at [6].

¹²⁰ Krasnostein and Frieberg, above n 111, at 269.

¹²¹ Andrew Ashworth *Sentencing and Criminal Justice* (4th ed, Cambridge University Press, Cambridge, 2005) at [3.3.1].

¹²² Ashworth, above n 121, at [3.3.1].

¹²³ Mirko Bargaric “Sentencing: The Road to Nowhere” (1999) 21 Sydney L. Rev. 597 at 609.

¹²⁴ Sentencing Act 2002, s 7(1).

the paper, this is an unsatisfactory mechanism for guiding judicial discretion, because sentencing judges are free to choose whatever purpose they like to justify their imposed penalty depending on their pre-existing penal preferences. Hammond J has said that:¹²⁵

Before a judge can impose an appropriate sentence, that judge must be properly apprised of the purpose or purposes to which sentence is directed. And there should be some directions as to how to achieve that purpose. In the absence of a body of case law, or such legislation, gross disparities in sentence are inevitable.

If New Zealand were to adopt the intuitive synthesis approach as a means of achieving consistency, it would therefore need to amend ss 6 and 7 of the Sentencing Act by making it clear what the primary or overriding purpose of sentencing is.

There is nothing in the empowering legislation of New Zealand's sentencing regime that restricts the adoption of the intuitive synthesis approach,¹²⁶ subject to the repeal of certain mandatory provisions of the Sentencing Act. That said, the country lacks the appetite for such a method. New Zealand has to date followed the regulated approach of England, which is in sharp contrast to the individualised style found in Australia and Canada. There would need to be some major catalyst – possibly in the form of public discontent with the status quo – to overhaul the system in such a drastic fashion. However, public sentiment in the field of sentencing generally yearns for the twin aims of greater consistency and harsher sentences – both of which are brought about by less judicial discretion, not more.¹²⁷ This in turn will hamper the political appetite to deregulate the sentencing sphere in the same way Australia and Canada have.

The intuitive synthesis approach would lead to greater disparity in sentencing, make it more difficult for defendants to appeal their sentence, and would require the legislature to undertake the difficult task of settling on a clear purpose of sentencing. Furthermore, there is no discernible appetite for its implementation in New Zealand. While it would undoubtedly be popular amongst those judges who view their sentencing discretion as sacrosanct, its only real benefit lies in its ability to give judges a wide ability to impose whatever sentence is necessary to achieve justice in a particular case. This, however, can be done without

¹²⁵ Hammond, above n 107, at 226.

¹²⁶ Hammond, above n 107, at 220.

¹²⁷ For example the 'Three Strikes' legislation.

removing guidance in the field of sentencing entirely. The implementation of a Sentencing Council is an effective compromise between the extremes of the instinctive synthesis approach and mandatory sentences, achieving an equilibrium which harnesses the benefits of both.

VII *The New Zealand Sentencing Council*

In February 2006, the Law Commission was asked by the Labour-led Government to examine the existing parole and sentencing structures in New Zealand. There were two major catalysts behind this project: the disparity of outcome between like offenders due to the highly discretionary nature of New Zealand's sentencing and parole arrangements;¹²⁸ and the immense public dissatisfaction with the lack of 'truth in sentencing', or in other words, the perception that the system was unduly lenient because offenders were only serving a fraction of their sentence before being released on parole.¹²⁹ This latter point was an issue of particular political sensitivity, especially given the political traction and media attention being enjoyed by the Sensible Sentencing Trust at this time.¹³⁰ The significant difference between the head sentence imposed and the actual time served created a situation that the President of the Law Commission, Sir Geoffrey Palmer, said bordered on deception.¹³¹

On 11 August 2006 the Commission presented their findings to the Government, recommending (amongst other things) the establishment of a Sentencing Council with a mandate to draft sentencing guidelines.¹³² On 25 July 2007, by a majority of 70 to 51, the Sentencing Council Bill was read a third time in Parliament.¹³³ It received royal assent within the week,¹³⁴ with a date for the Council's implementation in practice to be determined by Order in Council.¹³⁵ To date, the Government has declined to establish the Sentencing Council, and has indicated that it will not be doing so in the future.¹³⁶ For now, the Sentencing Council Act 2007 sits impotent on the statute books.

¹²⁸ Law Commission, above n 21, at [5]

¹²⁹ Law Commission, above n 21, at [8].

¹³⁰ See "Trust calls tougher parole plan 'a con'" *The New Zealand Herald* (online ed, April 26, 2006).

¹³¹ "Law Commission looks at doubling parole threshold" *The New Zealand Herald* (online ed, April 25, 2006).

¹³² Law Commission, above n 21, at 13.

¹³³ (24 July 2007) 640 NZPD 10652.

¹³⁴ Sentencing Council Act 2007.

¹³⁵ Sentencing Council Act 2007, s 2.

¹³⁶ Parliamentary Counsel Office "PCO table of legislation waiting to be brought into force by Order in Council (as at 1 July 2014)" <www.pco.parliament.govt.nz>.

The Law Commission's report and its recommendations involved intertwined amendments to both the sentencing and parole system. In many respects, it was the changes to parole that were of the most practical importance to the Government and interest to the public. These changes required an offender to serve two-thirds of their nominal sentence before becoming eligible for parole, up from what was universal parole eligibility after just one-third served.¹³⁷ The recommendations would also require the judge to make it clear in open court how much of a sentence would need to be served before the offender became eligible for parole.¹³⁸ That said, this paper is interested in how the recommendations will effect consistency in sentencing, and as a result, the focus will be predominantly on the Sentencing Council and the guidelines it can issue.

A Sentencing Guidelines

The Sentencing Council has a mandate to draft sentencing guidelines, the purposes of which have been enshrined under s 8 of the Sentencing Council Act 2007 and include the need to promote consistency in sentencing practice between different courts and judges. Indeed, consistency was a prominent concern of the Law Commission's when constructing their report, noting from the outset the need to ensure "that there is, at a minimum, a consistent judicial approach and a predictable pattern in sentence severity".¹³⁹

In order to achieve consistency, the Sentencing Council could issue either narrative or numerical guidelines. Numerical guidelines would set out the nature and range of applicable penalties for an offence, indicating for example a range of appropriate fines or prison term length based on the severity of the offending. This is similar to the function of tariff judgments, which often set out sentencing bands that propose numeric starting points for judges to begin their sentencing analysis.¹⁴⁰ While numerical guidelines have the benefit of simplicity, both for the comprehension of sentencing judges and the wider public, the Council will need to be careful to ensure that they do not become overly rigid, in turn restricting judges' ability to achieve justice in a particular case. This is what has occurred in the United States. The Federal sentencing guidelines implement a numeric, two dimensional grid

¹³⁷ Law Commission, above n 21, at [178].

¹³⁸ At [175].

¹³⁹ Law Commission, above n 21, at [74].

¹⁴⁰ See *R v Taueki* [2005] 3 NZLR 372 (CA) at [34].

through which a judge must calculate the appropriate sentence, with each axis of the grid having regard to offence seriousness and criminal history. This approach has been criticised at length by academics, lawyers and judges alike, all of whom argue that the system is fundamentally unable to take into account the complex array of factors that make up sentencing.¹⁴¹

To ameliorate the risk of numerical guidelines becoming unduly restrictive, the New Zealand Sentencing Council would also be able to issue conjunctive narrative guidelines. Narrative guidelines offer a textual commentary, and in many respects would be an embellishment of the statutory commentary that already exists under the purposes and principles of the Sentencing Act.¹⁴² This sort of contextualisation has been considered essential in overseas jurisdictions, and is the approach that has been taken in the United Kingdom.¹⁴³ At the lower end of the spectrum, these guidelines are likely to focus on and discuss the factors that are relevant to the custody threshold.¹⁴⁴

Any guidelines issued by the Council would have to work within the existing legislative framework.¹⁴⁵ This means that the Council must adhere to the maximum penalties found in legislation, as well as the existing provisions of the Sentencing Act 2002, such as the purposes and principles of sentencing. It is not the role of the Council to recommend changes to maximum penalties, although theoretically it could tender advice to the Minister on such matters under s 25 of the Sentencing Council Act. Such advice would need to fall under the legislatively prescribed ambit of advice “on any sentencing or parole issue that relates to the development and use of sentencing guidelines”.¹⁴⁶

B Implementation of the Guidelines

¹⁴¹ See Judge Jed Rakoff “Why the Federal Sentencing Guidelines Should be Scrapped” (2013) 26 Federal Sentencing Reporter 6.

¹⁴² Law Commission, above n 21, at [96].

¹⁴³ Law Commission “Reforms to the Sentencing and Parole Structure: Consultation Draft” (Wellington, April 2006) (Obtained under Official Information Act 1982 Request to the Law Commission).

¹⁴⁴ Law Commission, above n 21, at [96].

¹⁴⁵ Sentencing Council Act 2007, s 9(1)(a).

¹⁴⁶ Sentencing Council Act 2007, s 25.

The Sentencing Council Act sets out a unique method of giving Parliamentary endorsement of the recommended guidelines.¹⁴⁷ Once the Minister of Justice has been presented with the guidelines (as well as the statement of their likely effect on the prison population), he or she must table them in Parliament.¹⁴⁸ They will then be referred to the appropriate select committee (almost certain to be the Law and Order committee), who have 15 days to table a report.¹⁴⁹ From there, if Parliament then determines that the guidelines should not come into force, it has 15 days to disallow them by way of a negative resolution on a notice of motion.¹⁵⁰ If this is not done then the guidelines would come into force 20 working days after the expiry of the specified disallowance period.¹⁵¹ If the guidelines are disapproved, they must be sent back to the Council for reconsideration.

This negative resolution procedure ensures appropriate Parliamentary involvement in the imposition of guidelines, a mark of democracy that the Law Commission felt was important to ensure the guidelines' legitimacy.¹⁵² To this end the President of the Law Commission sought input from David McGee QC, the Clerk of the House of Representatives.¹⁵³ McGee broadly agreed with the Commission's proposed negative resolution procedure, but suggested some minor changes. For example, it was originally suggested that the Leader of the House would move a motion referring the guidelines to an appropriate select committee for consideration, but McGee felt that this was unnecessary and that the Standing Orders could provide for the guidelines to automatically stand referred to a committee.¹⁵⁴ In a submission to the Justice and Electoral Select Committee, McGee also expressed concern that the Criminal Justice Reform Bill explicitly set out the nature of the negative resolution process, even though it is an internal parliamentary process that does not need to be legislated for. He argued that:¹⁵⁵

¹⁴⁷ Although the process is broadly similar to the provisions found under s 109 of the Crown Entities Act 2004.

¹⁴⁸ Sentencing Council Act 2007, s 17.

¹⁴⁹ Law Commission, above n 21, at [113].

¹⁵⁰ Sentencing Council Act 2007, s 19.

¹⁵¹ Sentencing Council Act 2007, s 21.

¹⁵² Law Commission, above n 21, at [112].

¹⁵³ Letter from Sir Geoffrey Palmer (President of the Law Commission) to David McGee (Clerk of the House) regarding the Criminal Justice Reform Bill (5 April 2006) (Obtained under Official Information Act 1982 Request to the Law Commission).

¹⁵⁴ Letter from David McGee (Clerk of the House) to Sir Geoffrey Palmer (President of the Law Commission) regarding the Criminal Justice Reform Bill (26 April 2006) (Obtained under Official Information Act 1982 Request to the Law Commission).

¹⁵⁵ Letter from David McGee (Clerk of the House) to the Justice and Electoral Select Committee (15 May 2007) (Obtained under Official Information Act 1982 Request to the Law Commission) (emphasis original).

All that is required is to make provision for the legal consequences if the House agrees – that is, *resolves* – on disallowance. How the House reaches the point of resolving (it might not employ a notice of motion at all, for example) is a matter for its internal procedures, its Standing Orders, not for legislation.

This advice was broadly adopted by the committee, and distinct changes have been made between the Criminal Justice Reform Bill and the eventual Sentencing Council Act.

In the original Bill, there was a statutory direction requiring the Sentencing Council to vary guidelines that were disallowed by Parliament, as opposed to their simply reconsidering them.¹⁵⁶ Although there were no submissions on this point, the Law Commission later felt that the Council ought to retain the prerogative to refuse to alter its guidelines. This would likely only occur in rare circumstances, but it is important in maintaining the independent status of the Council, especially in light of the extensive judicial involvement.¹⁵⁷ Similarly, Parliament does not have the power to amend the guidelines that are tabled before it. To do so would be to assume the role of the expert body it has already set up. If Parliament is dissatisfied with the guidelines, “the negative resolution procedure allows it to express this by rejection, but not by becoming the Sentencing Council itself”.¹⁵⁸

C The Council’s Role in Managing Penal Resources

Consistency was not the only purpose of introducing sentencing guidelines. Under s 8(a)(iv), the guidelines must also “facilitate the provision of reliable information to enable penal resources to be effectively managed,”¹⁵⁹ and the broader functions of the Council are to “assess and take account of the overall costs and benefits of the guidelines,”¹⁶⁰ as well as provide a statement on the guidelines’ likely effect on the prison population.¹⁶¹ As discussed earlier, one of the major flaws with the current sentencing system is that the Court of Appeal is ill-equipped to undertake the comprehensive empirical research necessary to guide sentencing policy. The Court issues guideline judgments, but it is unable to weigh up the

¹⁵⁶ Criminal Justice Reform Bill (93-1), clause 24.

¹⁵⁷ Law Commission “Criminal Justice Reform Bill: Law Commission Departmental Report” (presented to the Justice and Electoral select committee, 9 May 2007) (Obtained under Official Information Act 1982 Request to the Law Commission) at [148].

¹⁵⁸ David McGee, above n 155.

¹⁵⁹ Sentencing Council Act 2007.

¹⁶⁰ Sentencing Council Act 2007, s 9(1)(c).

¹⁶¹ Sentencing Council Act 2007, s 9(1)(d).

relative costs and benefits of its recommended sentencing levels and their corresponding impact on the prison population. Punishment, in effect, becomes a ‘free’ good.

The use of the sentencing guidelines would entirely rectify this situation. Because the Sentencing Council would be required to undertake prison population modelling to assess the effect of its recommendations, the executive would in turn attain a significantly enhanced control of its Corrections budget.¹⁶² For the first time the Government (as opposed to the Court of Appeal) would be able to determine where sentencing levels should be set, giving it the opportunity to implement only those guidelines that are consistent with its broader aims in the law and order sector and with reference to budgetary constraints. Not only will this result in better informed policy, but the greater influence of Parliament also ensures that sentencing levels are democratically legitimate. It is worth noting too that in the United Kingdom, resource considerations and cost-effectiveness are not explicitly taken into account by the Sentencing Council. However, the Lord Chief Justice and the President of the Queen’s Bench Division have both indicated that the system “would be improved if resource consideration were a more explicit part of the process”.¹⁶³

Some of the submissions on the Criminal Justice Reform Bill were concerned that the Council itself had a vested interest in reducing the imprisonment rate in New Zealand. This was in part due to the Bill’s explanatory note, which asserted that the purpose of the legislation was to “arrest the sharp increase in prison population” and “contribute to a reduction in the imprisonment rate over time”.¹⁶⁴ One submission reasoned that such an intention is inappropriate, because there is the potential that the Council would issue guidelines that increases sentences, depending upon the composition and inclination of its members.¹⁶⁵ This is entirely correct. The Law Commission later accepted that the explanatory note was “over-generalised,”¹⁶⁶ and that in reality the Council’s role is more nuanced. Although overseas literature indicates that “when legislatures are required to make law and order choices in light of their predictable fiscal effects, prison population expansion tends to

¹⁶² Law Commission, above n 21, at [74].

¹⁶³ Sentencing Guidelines Establishment Unit “Report on visit to English Sentencing Council, 6 – 17 November 2006” (Wellington, 2006) at [19].

¹⁶⁴ Criminal Justice Reform Bill 2007 (93-1), explanatory note.

¹⁶⁵ Michael Bott “Submission to the Justice and Electoral Select Committee on the Criminal Justice Reform Bill”.

¹⁶⁶ Law Commission, above n 157, at [49].

be curbed or muted,” in practice the Council is able to produce guidelines that would maintain or even increase the number of people incarcerated.¹⁶⁷

D Composition of the Council

The Council would comprise of ten members: one Judge of the Court of Appeal; one Judge of the High Court; two District Court Judges; the chairperson of the Parole Board;¹⁶⁸ and five lay members.¹⁶⁹ The Sentencing Council in the United Kingdom has twelve members, but the Director of Public Prosecutions has said that this is too big and is difficult to manage.¹⁷⁰ According to the Law Commission, ten is the optimum number to guarantee the Council is representative, but also small enough to ensure that it is cohesive, efficient and publicly credible.¹⁷¹

Whether there needed to be a judicial majority on the Council was a key issue, and overseas commentators were divided as to the appropriate ratio for such bodies. For example, Michael Tonry believed that senior English judges would not co-operate with any issued guidelines unless the judiciary had control over the Council, but the United States experience showed that a purely judicial body would not create guidelines with “sufficient rigour” to achieve consistency.¹⁷² Consultation with the New Zealand judiciary indicated that a judicial majority would be unnecessary, in part due to the significant policy function of the Council, but that its membership needed to ensure that the guidelines are “tailored to the range of circumstances that confront sentencing judges on a daily basis”.¹⁷³ It was decided that four judges plus the chairperson of the Parole Board, who by statute is also a judge,¹⁷⁴ would ensure that the Council can fully appreciate the realities of sentencing in practice, and would instil wider judicial confidence in the system.¹⁷⁵

¹⁶⁷ Law Commission, above n 157, at [51].

¹⁶⁸ The chairperson of the Parole Board gets a seat because of the Council’s function of also drafting parole guidelines, see s 9(1)(b). This aspect of the Sentencing Council’s jurisdiction falls outside the ambit of this essay.

¹⁶⁹ Sentencing Council Act 2007, s 10.

¹⁷⁰ Sentencing Guidelines Establishment Unit, above n 163, at [9].

¹⁷¹ Law Commission, above n 21, at [81].

¹⁷² Michael Tonry “Setting sentencing policy through guidelines” in Sue Rex and Michael Tonry *Reform and Punishment: The Future of Sentencing* (Willan Publishing, New York, 2002) 75 at 80.

¹⁷³ Law Commission, above n 21, at [83].

¹⁷⁴ Parole Act 2002, s 112.

¹⁷⁵ Warren Young and Andrea King “Sentencing Practice and Guidance in New Zealand” (2010) 22 Federal Sentencing Reporter 254 at 258.

The input of District Court judges in particular allows the Council to draw on experience from those at the forefront of sentencing in New Zealand, rectifying one of the major problems associated with tariff judgments as a means of guiding judicial discretion. It is interesting to note that there is no restriction on the lower court judge from taking on the role of Chairperson, effectively placing him or her in a more senior position on the Council to their superior Court colleagues.¹⁷⁶ However, the Chairperson would be appointed by the Chief Justice, who has already indicated her preference that a senior judge take the role.¹⁷⁷ The Criminal Justice Reform Bill originally required the Chairperson to be one of the non-judicial members, but this was amended by the Justice and Electoral Select Committee after consultation with the judiciary, stating that “the appointment of a judicial chairperson would encourage judicial confidence in the Council, and would also be more likely to help the Council achieve one of its core purposes, consistency in sentencing”.¹⁷⁸

The judicial members would be appointed by their respective Head of Bench in consultation with the Chief Justice,¹⁷⁹ presumably based on expertise or interest in the area.¹⁸⁰ The remaining members would be appointed by the Governor-General on the recommendation of Parliament,¹⁸¹ with the Minister of Justice emphasising that their selection “is not an area where partisan considerations have any place”.¹⁸² Whether partisan preferences can be avoided in a political system blighted by penal populism is uncertain, with the Law Society expressing concern that the “membership of the Council could become politically contentious”.¹⁸³ However, schedule 1(1) of the Act sets out the criteria Parliament should consider when recommending an appointment. This includes experience in: criminal justice matters, policing, the assessment of risk of reoffending, the effect of the criminal justice system on Maori and minority cultures, the promotion of the rights and welfare of victims of

¹⁷⁶ The role of Chairperson is appointed by the Chief Justice, and is restricted to one of the judicial members of the Council, see s 10(2).

¹⁷⁷ Letter from Dame Sian Elias (Chief Justice) to Lynne Pillay (Chairperson of the Justice and Electoral Select Committee) regarding the Criminal Justice Reform Bill (24 April 2007) (Obtained under Official Information Act 1982 Request to the Law Commission) at [7].

¹⁷⁸ Criminal Justice Reform Bill (93-2) (select committee report) at 2.

¹⁷⁹ Sentencing Council Act 2007, s 10(1).

¹⁸⁰ Law Commission, above n 21, at [90].

¹⁸¹ Sentencing Council Act 2007, s 10(1)(e).

¹⁸² (24 July 2007) 640 NZPD 10633.

¹⁸³ New Zealand Law Society “Submission to the Justice and Electoral Select Committee on the Criminal Justice Reform Bill” at [4(e)].

crime, and public policy.¹⁸⁴ In the original version of the Bill these were mandatory considerations that had to be taken into account by Parliament, but this was changed after the select committee felt it was too proscriptive and inhibited the ability of the House to regulate its own procedures.¹⁸⁵

During submissions on the Bill, various interest groups claimed that they should have mandatory representation on the Council. For example, the Royal Federation of New Zealand Justices' Association argued that they should have a representative due to the "heavy involvement of Justices of the Peace [...] at the lower end of the Court structure".¹⁸⁶ However, if the Council is to remain at a workable size it is simply impractical to ensure that every interested party in the criminal justice system has a say. Appointments based on expertise in the area is flexible enough to ensure that a broad cross-section of lay people can contribute to the guidelines. Assuming that expressions of interest are widely publicised using a range of media, the system as it stands would also ensure that there is healthy competition to fill the vacant positions, in turn increasing the calibre of expertise on the Council. This was aptly articulated by the Law Commission, who said that "the quality of appointees to the Council and the resulting community confidence in them is a more important consideration than a desire for 'representativeness'".¹⁸⁷ In any event, the Council is required to undertake extensive public consultation anyway,¹⁸⁸ which is an appropriate mechanism to ensure that all interested parties have their views heard.

Members would hold office for a term of five years,¹⁸⁹ which can be extended to a term not exceeding seven years.¹⁹⁰ If necessary, members of the Council can be removed or suspended. For the judicial members this is done via the same process that is required to remove them from office as a Judge.¹⁹¹ The lay members can be removed or suspended by

¹⁸⁴ It is interesting to note that expertise in sentencing is not on this list. It was thought that the expertise of the judicial members of the Council would be sufficient in this respect. However, this may preclude experienced academics who have specialised knowledge of criminal sentencing from becoming members.

¹⁸⁵ Criminal Justice Reform Bill (93-2) (select committee report) at 3.

¹⁸⁶ Royal Federation of NZ Justices Association "Submission to the Justice and Electoral Select Committee on the Criminal Justice Reform Bill" at 3.

¹⁸⁷ Law Commission, above n 157, at [89].

¹⁸⁸ Sentencing Council Act 2007, s 13.

¹⁸⁹ Not including the Chairperson of the Parole Board.

¹⁹⁰ Sentencing Council Act 2007, Schedule 1(3).

¹⁹¹ Sentencing Council Act 2007, Schedule 1(6).

the Governor-General “on address from the House of Representatives, for inability to perform the functions of office, neglect of duty, or misconduct”.¹⁹²

E Departure from the Guidelines

Although the guidelines exist to achieve greater consistency in sentencing across New Zealand, there will always be a risk that a judge may need to depart from the guidelines to achieve justice in a particular case. The Law Commission acknowledged this, stating that “the threshold beyond which judges passing sentence in individual cases would be permitted to depart from sentencing guidelines is clearly integral to their success”.¹⁹³

The Law Commission recommended a public interest test for departure, which requires a sentencing judge to “impose a sentence that is consistent with any sentencing guidelines that are relevant in the offender’s case, unless the court is satisfied that it would be contrary to the interests of justice to do so”.¹⁹⁴ A judge would need to justify their reasons for departing from a guideline,¹⁹⁵ but it was forecast that departures would occur in no more than 20 percent of cases.¹⁹⁶ This test can now be found in the legislation.

However, the Justice and Electoral Committee did not immediately adopt the Commission’s recommendation, finding virtue instead in the United Kingdom’s formulation of the departure test. This merely requires the court to “have regard to any guidelines which are relevant to the offender’s case,”¹⁹⁷ which is a much looser form of control over discretion. The Acting Chief Justice gave oral evidence to the Committee on this point, and said that judges’ (perhaps surprisingly) preferred the Commission’s more stringent approach. This view was echoed by the Chief High Court Judge, but who added that so long as the guidelines were flexibly drafted, either formula would be acceptable. The Law Commission was less ambivalent, arguing that “a guideline that is purely advisory may not carry sufficient weight to effect a substantial change,” particularly given the levels of inconsistency present at the lower levels

¹⁹² Sentencing Council Act 2007, Schedule 1(5)(1).

¹⁹³ Law Commission, above n 21, at [115].

¹⁹⁴ Sentencing Amendment Act 2007, s 12.

¹⁹⁵ Sentencing Amendment Act 2007, s 15.

¹⁹⁶ Young and King, above n 175, at 258.

¹⁹⁷ Criminal Justice Act 2003 (UK), s 172.

of criminal sentencing.¹⁹⁸ Furthermore, the implementation of guidelines that are merely advisory may be a regressive step, because at the moment the guideline judgments issued by the Court of Appeal are binding (by convention; despite being obiter dicta) on the lower courts. The Commission rightly indicated that replacing this position with the United Kingdom's approach "could thus weaken the relative consistency that currently exists in sentencing for the most serious offences".¹⁹⁹ In other words, if the test for departure was too loose, or if the guidelines were only advisory in nature, the practical effect of the Sentencing Council may be to inadvertently create further inconsistency in the sentencing sphere.

F Constitutional Uncertainties

The Sentencing Council faced vehement criticism from opposition parties during its passage through Parliament. The National Party made it clear that it would repeal the legislation should it win the pending 2008 general election,²⁰⁰ with its concerns falling under two broad categories: that the Council impinged on judicial independence; and that its existence offended the doctrine of separation of powers.

1 *Judicial independence*

Underpinning National Party sentiment was the notion that constraining judicial discretion in sentencing with guidelines was an affront to judicial independence.²⁰¹ This was echoed by organisations such as the Howard League for Penal Reform, who submitted that the Council "represents a departure from the convention of judicial independence [...] its deliberations – sentencing guidelines – will inevitably curtail judicial discretion".²⁰²

¹⁹⁸ Warren Young "Criminal Justice Reform Bill: Supplementary Briefing No 1" (presented to the Justice and Electoral Select Committee, 16 May 2007) (Obtained under Official Information Act 1982 Request to the Law Commission) at [20].

¹⁹⁹ At [21].

²⁰⁰ See "National to scrap sentencing council" (2008) *The National Business Review* <www.nbr.co.nz>; National Party "National will Cut Bureaucracy and give Funds to Victims of Crime" (press release, 2 August 2008).

²⁰¹ (19 June 2007) 640 NZPD 10003.

²⁰² The Howard League for Penal Reform "Submission to the Justice and Electoral Select Committee on the Criminal Justice Reform Bill" at [2.4].

However, this represents a fundamental misunderstanding of the nature of judicial independence. Justice Pankhurst, writing extra judicially, posited that:²⁰³

Judges must maintain responsibility for the imposition of sentences in individual cases. In doing so, the constitutional independence of the judiciary is of fundamental importance. It provides the best assurance that sentences are not influenced by political or other considerations. But, the sentencing policy, or sentencing environment, under which individual sentences are imposed, is another matter. I would argue that sentencing policy is a concern of the entire community.

Judicial independence extends simply to deciding cases “without fear or favour, affection or ill will”.²⁰⁴ Its importance in constitutional terms lies in the fact that judges need to be able to decide cases without interference from the other two branches of government.²⁰⁵ To this end, there exists constitutional protections around judicial tenure²⁰⁶ and remuneration.²⁰⁷ Judicial independence does not mean that it is exclusively for judges to determine the overarching sentencing framework.²⁰⁸ While historically judges have indeed had a broad and unregulated discretion in the field of sentencing,²⁰⁹ Parliamentary sovereignty makes it clear that such discretion can be constrained by the legislature setting maximum, mandatory or minimum sentences. It therefore follows that Parliament must have the power to implement sentencing guidelines of the kind in question, which simply further dictate the nature or range of penalties that can be implemented.²¹⁰ The fact Parliament has not done so before this “is a matter of preference rather than constitutional principle”.²¹¹ It is interesting to note that consultation with the judiciary indicates that judges themselves do not view the Council as infringing on judicial independence in the way described.²¹²

²⁰³ Justice Graham Pankhurst “A Sentencing Council: Enlightened or Folly?” (2007) 14 Canterbury Law Review 191 at 200.

²⁰⁴ To quote the judicial oath. See Oaths and Declarations Act 1957, s 18.

²⁰⁵ See Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at [20.3.1].

²⁰⁶ Constitution Act 1986, s 23.

²⁰⁷ Constitution Act 1986, s 24.

²⁰⁸ Law Commission, above n 21, at [43].

²⁰⁹ Hammond, above n 107, at 213.

²¹⁰ Law Commission, above n 21, at [43].

²¹¹ Young and King, above n 175, at 258.

²¹² Warren Young “Sentencing Reform in New Zealand: A Proposal to Establish a Sentencing Council” in Arie Freiberg and Karen Gelb (eds) *Penal Populism, Sentencing Councils and Sentencing Policy* (Willan Publishing, Devon, 2008) 179 at 188.

Of perhaps greater concern to the National opposition was the impact the Sentencing Council may have on the separation of powers. Christopher Finlayson MP opined that “from time immemorial the separation of powers has been seen to be essential to our democracy, and this Parliament must zealously safeguard the separation of powers”.²¹³ His reservations, *prima facie*, have some legitimacy.

It was Finlayson’s contention that the Council would have members of the judiciary undertaking functions that are more properly the role of the executive. For example, s 8(c) of the Sentencing Council Act requires the Council to produce guidelines “to inform members of Parliament and policymakers about sentencing and parole practice,” s 8(a)(iv) would have judges facilitating the provision of information to enable penal resources to be effectively managed, and s 9(d) requires them to give statements on the guidelines’ likely effect on the prison population. These, according to Finlayson, “are not legitimate functions of the judiciary”.²¹⁴ The judiciary also expressed a level of concern, with the Chief Justice saying that what is proposed is a significant collaboration of the three separate branches of government to produce law, and that this is “right at the edge of what is constitutionally appropriate”.²¹⁵ She viewed the Council as having two distinct purposes: to promote consistency in sentencing, but also in the “setting of wider social policies through sentencing guidelines and the provision to the Executive of estimates about their impact on prison population”.²¹⁶ While the judiciary was well placed to assist in the former, the Chief Justice indicated that the judiciary had much less to contribute in relation to the latter.

The judiciary²¹⁷ recommended that the Bill therefore be modified to assuage concerns around the separation of powers. These included: making it clear that the executive cannot give directions to the Council; making it clear that it is still the role of the government, not the Council, to manage penal resources; ensuring that the guidelines would indeed act as simply guidance, and would not dictate the outcome in a particular case; and to provide for a senior judge to chair the Council, who can ensure that judges are not co-opted into policy making

²¹³ (19 June 2007) 640 NZPD 10003.

²¹⁴ (19 June 2007) 640 NZPD 10003.

²¹⁵ Dame Sian Elias, above n 177, at [4].

²¹⁶ At [4].

²¹⁷ 30 of the 41 Judges who participated in a session discussing the Criminal Justice Reform Bill.

beyond that which is consistent with the judicial function.²¹⁸ All of these recommendations have since been adopted and are present, either implicitly or explicitly, in the Sentencing Council Act 2007.

Any lingering concerns that the Council would require its judicial members to be engaged in social policy functions that are more properly the role of the executive have been addressed by Dr Warren Young, who headed the project at the Law Commission. He claims that judges have always had a role in developing social policy through the common law, and that the existence of the Council “merely makes the role of judges in developing social policy more transparent”.²¹⁹ The contention that the Council will force judges to tackle fiscal issues is overstated, as their role is one step removed from *actually* implementing fiscal policy. The Council’s consideration of prison populations and fiscal policy merely accompanies the proposed guidelines, and aims to ensure that public debate around their implementation can be fully informed. The decision over whether or not to approve the guidelines is ultimately Parliament’s,²²⁰ and there is no suggestion that the guidelines would have to conform to prison population or budgetary constraints determined by the Government.²²¹

The Attorney-General also received advice from the Crown Law Office which concluded that a Sentencing Council would not be an affront to the separation of powers.²²² Weight was placed on overseas jurisprudence,²²³ particularly the United States Supreme Court decision in *Mistretta v United States*,²²⁴ where the Court held that the guidelines issued by the federal Sentencing Commission were not unconstitutional and that the Commission did not breach the principle of separation of powers. Justice Blackmun, who delivered the opinion of the Court, said that:²²⁵

²¹⁸ Dame Sian Elias, above n 177, at [7].

²¹⁹ Young and King, above n 175, at 258.

²²⁰ Mark Andrew Shaw, “Consistency versus Discretion – A Matter of Judgment? *Hessell v R* and Judicial Sentencing Guidelines” (unpublished LLB (Hons) research paper, Victoria University of Wellington, 2011) at 10.

²²¹ Young, above n 54, at 189.

²²² Crown Law Office “Legal Advice - Consistency with the New Zealand Bill of Rights Act 1990: Criminal Justice Reform Bill” (ATT395/22, 20 November 2006).

²²³ Whilst rightly noting that care should be taken in drawing comparisons with overseas jurisdictions, especially given the varied constitutional contexts that any Council would need to operate in.

²²⁴ *Mistretta v United States* 488 U.S. 361 (1989).

²²⁵ At 385.

Congress' decision to create an independent rulemaking body to promulgate sentencing guidelines and to locate the body within the Judicial Branch is not unconstitutional unless Congress has vested in the Commission powers that are more appropriately performed by the other Branches or that undermine the integrity of the Judiciary.

It was held that the integrity of the judiciary was not undermined, nor were the Commission's functions more appropriately that of another branch of government, despite them not being strictly judicial. Similarly, the functions of the New Zealand Sentencing Council have an executive "tinge," because they involve the "provision of policy advice, informing Members of Parliament and policy makers, and informing and educating the public".²²⁶ Whilst skirting close to the margins of the separation of powers, the Council is not unconstitutional as it remains an independent statutory body, and allows the judicial members to withdraw from participation in any of the Council's functions if they consider them to be incompatible with their judicial office.²²⁷

3 *Should the guidelines have retrospective effect?*

It is a long held principle of the criminal law that where a penalty has been increased between the commission of an offence and sentencing, the offender is entitled to the lesser of the two penalties.²²⁸ This is underpinned by various other fundamental tenets of the criminal law: the principles of strict construction, minimum criminalisation, maximum certainty, and even the rule of law itself.²²⁹ The New Zealand judiciary has strived to uphold this principle of non-retrospectivity. The Court of Appeal has held that it is "at the forefront of a criminal justice system which is fair and just",²³⁰ and Williams J in the High Court has said that non-compliance with the principle is "repugnant to justice".²³¹ The legislature has enshrined the principle in both the Sentencing Act 2002²³² and the Bill of Rights Act 1990,²³³ the provisions of which are identical and guarantee the offender "the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the

²²⁶ Crown Law Office, above n 222, at [44].

²²⁷ Sentencing Council Act 2007, Schedule 1 2(2).

²²⁸ Bruce Robertson *Adams on Criminal Law – Sentencing* (online looseleaf ed, Brookers) at [SA6.01].

²²⁹ For an analysis of all of these principles, see Andrew Ashworth and Jeremy Horder *Principles of Criminal Law* (7th ed, Oxford University Press, Oxford, 2013) at 57.

²³⁰ *R v Poumako* [2000] 2 NZLR 695 (CA) at 706.

²³¹ *R v Pora* (2000) 18 CRNZ 258 (HC) at 265.

²³² Sentencing Act 2002, s 6(1).

²³³ New Zealand Bill of Rights Act 1990, s 25(g).

offence and sentencing, to the benefit of the lesser penalty”. This is consistent with New Zealand’s international obligations, particularly under the International Covenant on Civil and Political Rights.²³⁴ Indeed, Parliament has given primacy to this principle by legislating that it applies despite any other enactment or rule of law.²³⁵

However, the Law Commission recommended, and Parliament subsequently agreed, that the guidelines of the Sentencing Council be given retrospective effect.²³⁶ The Sentencing Amendment Act 2007 requires the sentencing judge to take into account an applicable guideline “whether or not the guideline was in force when the offence was committed”.²³⁷ This is prima facie a contravention of the principle of non-retrospectivity, and means that offenders may be given a more punitive sentence under the guidelines than they would have received at the time they committed the offence.

The matter was considered by the Crown Law Office when tendering advice to the Attorney-General on the Criminal Justice Reform Bill’s consistency with the Bill of Rights Act.²³⁸ They determined that there was no issue around the retrospective nature of the guidelines, basing their conclusion on the Supreme Court decision of *Morgan v Superintendent of Rimutaka Prison*.²³⁹ In *Morgan*, the majority of the Court had held that the protections found under s 25(g) of the Bill of Rights Act concerning retrospective penalties only relate to the variation of maximum penalties, and not to the individual sentence that might have been imposed on a particular offender. As such, the Crown Law Office said that “the retrospective nature of the sentencing and parole guidelines [...] do not breach s 25(g) of the BORA because the provisions do not change the maximum penalty able to be imposed for any offence”.²⁴⁰

It is interesting to note that the Chief Justice, in a letter to the Justice and Electoral Select Committee, implored the members “to ensure that no adverse retrospective effect results from the adoption of any guidelines”.²⁴¹ The Law Commission, in a supplementary briefing paper

²³⁴ See Article 15(1).

²³⁵ Sentencing Act 2002, s 6(2).

²³⁶ Law Commission, above n 21, at [218].

²³⁷ Sentencing Amendment Act 2007, s 5.

²³⁸ Crown Law Office, above n 222.

²³⁹ *Morgan v Superintendent of Rimutaka Prison* [2005] NZSC 26.

²⁴⁰ At [10].

²⁴¹ Dame Sian Elias, above n 177.

to the Committee, acknowledged the comments of the Chief Justice, but pointed out that she had dissented in the *Morgan* case, and that her views are therefore inconsistent with the leading New Zealand decision on the issue.²⁴² In the same paper, the Commission argued that the principle against the retrospective application of the criminal law is only triggered when offenders are prejudiced, and that in practice the guidelines would benefit a large number of offenders.²⁴³ This was in part due to the simultaneous reforms being recommended for parole. A lower head sentence would be imposed, but a greater proportion of that sentence would need to be served before the offender would become eligible for release, thus achieving the desired ‘truth in sentencing’. For those offenders who would still suffer a detriment from the imposition of an issued guideline, the Commission emphasised that a sentencing judge can still depart from the guidelines as necessary on a case by case basis.²⁴⁴

As such, it seems that the default position favours retrospectivity on the basis that in most situations the new guidelines will benefit offenders anyway. In those cases where it does not, the sentencing judge has discretion to depart from the guideline in the interests of justice.

4 *Hessell v R* – Supreme Court attack on the guidelines

In 2009, the New Zealand Court of Appeal took the opportunity to issue a guideline judgment on the appropriate level of discount that sentencing judges should apply for an early guilty plea.²⁴⁵ Until that point the Court had been reluctant to lay down any specific quantum for a discount,²⁴⁶ a situation which Chambers J described as “symptomatic of the courts’ general approach to sentencing, which vested judges with broad discretions”.²⁴⁷ Although there had been a slow shift towards more definitive guidelines on the issue since 2005,²⁴⁸ spurred on by s 8(e) of the Sentencing Act 2002,²⁴⁹ as well as a relevant guideline issued by the Sentencing

²⁴² Young, above n 198. It should be noted that the Chief Justice was not speaking in a personal capacity, but on behalf of a number of judges that had been consulted on the Bill.

²⁴³ At [9].

²⁴⁴ At [13].

²⁴⁵ *Hessell v R* [2010] 2 NZLR 298 (CA).

²⁴⁶ See *R v Mako* [2000] 2 NZLR 170 (CA) at [14].

²⁴⁷ *Hessell v R*, above n 45, at [2].

²⁴⁸ See *R v Hannagan* CA396/04, 9 June 2005; *R v Growden* CA67/05, 25 October 2005.

²⁴⁹ This section requires the Court to “take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances”.

Guidelines Council in the United Kingdom,²⁵⁰ in practice this had only served to muddy the waters even further. Chambers J said that a guideline judgment clarifying the position in New Zealand would have been issued earlier, but the Court was expecting the situation to be remedied by the Sentencing Council instead. However, as it was apparent that the National-led Government was not going to establish the Council in practice, the Court of Appeal resolved to resume their programme of issuing guideline judgments.²⁵¹

In constructing their judgment, the Court of Appeal placed considerable weight on the draft Guilty Pleas Guideline that had been formulated by the Sentencing Establishment Unit at the Law Commission as part of the inaugural guidelines.²⁵² It also looked at the equivalent guideline that had been implemented by the Sentencing Guidelines Council in the United Kingdom, which Chambers J noted as having the same methodology as the New Zealand draft iteration.²⁵³ The full bench of the Court of Appeal decided that the Law Commission's recommended approach (and, by extension, the approach in the United Kingdom) was "most desirable",²⁵⁴ and implemented it accordingly.²⁵⁵ This was based in part on the assumption that Parliament, through its implementation of the Sentencing Act, had sought to curtail discretion in favour of a more structured approach to sentencing. An intricate analysis of the guideline falls outside the scope of this paper. It is enough to say that the Court of Appeal adopted a sliding scale of discount which turned on when the guilty plea was delivered; subsumed remorse as a mitigating factor into the guilty plea discount; and held that the strength of the prosecution case was an irrelevant consideration when determining the quantum of reduction.

The decision was subsequently appealed, with the Supreme Court granting leave on the grounds of "whether the discount for the applicant's guilty plea was appropriately given in accordance with sentencing principles and the Sentencing Act 2002".²⁵⁶ The judgment of McGrath J, on behalf of a unanimous bench, was scathing of the Court of Appeal's guideline

²⁵⁰ Sentencing Guidelines Council "Reduction in Sentence for a Guilty Plea: Definitive Guideline" (United Kingdom, July 2007).

²⁵¹ At [5].

²⁵² Sentencing Establishment Unit Confidential Draft Guideline "Guilty Pleas" (July 2008) (Obtained under Official Information Act 1982 Request to the New Zealand Law Commission).

²⁵³ At [8].

²⁵⁴ At [10].

²⁵⁵ At [22].

²⁵⁶ *Hessell v R* [2010] NZSC 40.

judgment.²⁵⁷ Although it did not attack the Law Commission guideline directly, for all intents and purposes an attack on the guideline judgment is an attack on the validity of the draft guideline itself. McGrath J said that the Court of Appeal had “underestimated the complexity of the issue” before them,²⁵⁸ noting that the approach adopted “would put pressure on an accused to plead guilty for reasons that are unprincipled,” thus creating an “unacceptable risk” that innocent persons will pleading guilty.²⁵⁹ Indeed, all aforementioned aspects of the guideline judgment were criticised and revised by the Supreme Court.

Mark Shaw says that this is a reflection on the efficacy of the Sentencing Council, and indicates that (at least in the Supreme Court’s view) the “sentencing council may produce guidelines that are incompatible with basic criminal justice principles”.²⁶⁰ This may be unduly strong language, especially considering the significant input from the High Court judiciary at the Law Commission’s Sentencing Establishment Unit (who drafted the guideline in question). Nevertheless, it is proof that not all of the issued guidelines will be accepted by the judiciary, despite there being judicial input in their development. This is a major blow to any future attempts at establishing the Sentencing Council in practice, because it may be indicative of a lack of judicial “buy in” from the top levels of the New Zealand judiciary - something the Law Commission considered to be essential to the Council’s success.²⁶¹ In light of this decision it seems that the Supreme Court would have no reservations about attacking those guidelines that it considers to be inconsistent with the Sentencing Act, which was the “ultimate difficulty” they had with the Court of Appeal’s approach.²⁶² This problem would be exacerbated by the statutory requirement that the guidelines produced by the Council be consistent with the Sentencing Act.²⁶³ This could turn into a soft form of judicial strike down of unacceptable guidelines, whereby the upper levels of the judiciary interpret the guidelines so narrowly that they lose their effect, or alternatively, they encourage lower courts to depart from the ‘flawed’ guideline on a consistent basis.

That said, the guidelines are primarily aimed at achieving consistency amongst the mass of less serious offences that are dealt with by the District Court. One would think that the judges

²⁵⁷ *Hessell v R* [2010] NZSC 135.

²⁵⁸ At [67].

²⁵⁹ At [60] and [72].

²⁶⁰ Shaw, above n 220, at 14.

²⁶¹ Law Commission, above n 21, at [83].

²⁶² At [67].

²⁶³ Sentencing Council Act 2007, s 9(1)(a).

at this level are more likely to welcome guidance than their superior court brethren. However, this may not be the case. It is interesting to note that the affidavit evidence of several Crown Solicitors indicated that the Court of Appeal's guideline judgment was not being evenly applied in the District Courts. McGrath J said that in some regions "considerable latitude" is extended to defendants to receive the full discount of 33%, irrespective of where they fall on the Court of Appeal's sliding scale, so long as the plea is entered before committal.²⁶⁴ More substantive research to establish the veracity of these claims would clearly be necessary, but it prima facie indicates that the implementation of the draft guideline prepared by the Law Commission would have little effect in ensuring consistency in sentencing, which was overriding purpose of a Sentencing Council in the first place.

5 *Fitzgerald v Muldoon* – A modern day breach?

The Sentencing Council Act has been on the statute books for over seven years, but the Council itself has yet to be established in practice. It is still awaiting the Executive Council to tender advice to the Governor-General, so that he can bring the body into force through Orders in Council.²⁶⁵ This situation raises "serious constitutional issues".²⁶⁶ It is possible that the Government's failure to make the Act operative is illegal, relying on the authority of *Fitzgerald v Muldoon*.²⁶⁷ At its most basic, the situation may amount to the executive refusing to implement laws passed by the legislature.

In *Fitzgerald v Muldoon*, the Supreme Court held that the Prime Minister had acted unlawfully when he unilaterally abolished the New Zealand Superannuation Scheme established by the Superannuation Act 1974. His actions contravened s 1 of the Bill of Rights Act 1688, which says that "the pretended power of suspending of laws, or the execution of laws, by regal authority without consent of Parliament, is illegal". Only Parliament has the ability to make or unmake laws, and the executive does not have the power to override or set aside the legislation of Parliament.²⁶⁸

²⁶⁴ At [68].

²⁶⁵ Sentencing Council Act 2007, s 2.

²⁶⁶ Palmer, above n 83, at 614.

²⁶⁷ *Fitzgerald v Muldoon* [1976] 2 NZLR 615.

²⁶⁸ *Fitzgerald v Muldoon*, above n 267, at 622.

Can the current Government's inaction in implementing the Sentencing Council fall under this precedent? It is difficult. The precedent can immediately be distinguished on its facts: in *Muldoon*, the Prime Minister was suspending a law that was already functioning; here, the executive is failing to bring an Act into force. Indeed, the legislature has bestowed upon the executive a degree of discretion as to when the Sentencing Council will actually be implemented, as s 2 of the Act dictates that it is to be brought into force through Orders in Council. This is consistent with Standing Orders,²⁶⁹ thus adding a degree of legislative legitimacy. Alec Samuels agrees, saying that it is constitutionally acceptable for a statute not to have been brought into force after a very long delay, because "subject to any express provision to the contrary, the minister has a discretion whether or not to make an order but, nonetheless, he is under a duty to keep the situation under review".²⁷⁰

However, there is no indication that the Government has reviewed the need for a Sentencing Council in New Zealand, having issued no statement around the Council's existence since its election campaign in 2008. The legislature would not pass legislation simply to have it languish indefinitely in abeyance between royal assent and Order in Council. If the Government was not happy with the Act and had no intention of implementing it, it should introduce a Bill to Parliament to repeal it. It has not done so. There is therefore an arguable case for saying that the Government has *in effect* suspended the law without proper authority.

VIII Conclusion

Criminal sentencing is one of the most difficult and complex components of the legal system. This was aptly articulated by McArdle J, who said that "trying a case is as easy as falling off a log. The difficulty comes in knowing what to do with an accused once they have been found guilty".²⁷¹ Underlying this difficulty is a fundamental tension between individualised justice and consistency. Judges must be given some degree of discretion to tailor a sentence that is appropriate on the facts of the particular case, but at the same time, mechanisms need to exist to ensure that like cases are treated alike. Finding the correct equilibrium is of fundamental importance, as it ensures both the integrity and legitimacy of the criminal justice system.

²⁶⁹ Standing Orders of the House of Representatives 2014, SO 256.

²⁷⁰ Alec Samuels "Repealing or Amending Legislation by Non-Legislative Means" in Constantin Stefanou and Helen Xanthaki (eds) *Drafting Legislation: A Modern Approach* (Ashgate Publishing Ltd, Hampshire, 2008) 107 at 109.

²⁷¹ Geoff Hall *Sentencing: 2007 Reforms in Context* (Lexis Nexis, Wellington, 2007) quoting McArdle J, at 1.

New Zealand has not yet found this equilibrium. There is a growing body of evidence highlighting extensive regional variations in sentences imposed, indicating that appellate guideline judgments and the principles and purposes of sentencing are insufficient to ensure consistency. The “dragon of arbitrary discretion” clearly needs a shorter leash.²⁷² This would not be achieved by the intuitive synthesis approach to sentencing, which amounts to removing the leash entirely. Although this is the method used in Australia and Canada, it should not be followed in New Zealand as it removes much of the transparency in sentencing and in many ways normalises disparity. The approach also requires the existence of an overriding purpose of sentencing, or at least a clearly defined hierarchy thereof, of which New Zealand has neither. An alternative mechanism would be to introduce mandatory sentences, which would swiftly slay the dragon. Mandatory sentences may technically achieve consistency, but they come at the cost of individualised justice. The result would be for dissimilar cases to be treated alike, which is no better than the original problem that required fixing. Such an approach would also merely transfer discretion from judges to police and prosecutors, effectively giving less accountable bodies a greater role in the imposition of sentences. Furthermore, research in the United States suggests that prosecutors will lay less severe charges in order to mitigate against what could otherwise be an incredibly punitive system.

It is clear then that the solution to the problem of inconsistent sentencing does not lie at the extremities. Indeed, the answer has been in plain sight since 2007, when the Sentencing Council Act was passed. The implementation of a Sentencing Council with a mandate to draft guidelines is the best way forward for New Zealand’s criminal justice system. The expertise and resources of the Council would ensure that coherence could be given to sentencing as a whole, leaving behind the piecemeal approach that currently exists in the form of appellate guideline judgments. Furthermore, the Council can fully cost all of its recommendations and forecast their likely effect on the prison population, which in turn would give the Government increased control over the Corrections budget. While there is a presumption that the guidelines would be followed, the proposed public interest test for departure would ensure that there is flexibility for sentencing judges to depart from the guidelines as necessary – finally achieving the desired equilibrium between individualised justice and consistency.

²⁷² Bingham, above n 74, at 28.

That said, the fate of the Sentencing Council looks dire. With the re-election of the centre-right National Party, the Act is likely to continue to wallow on the statute books or find itself repealed entirely. This would be a bold move, as sentencing councils are becoming the norm in a range of comparable overseas jurisdictions. Furthermore, significant consultation went into the Act's creation, receiving support from both the Law Commission and members of the wider judiciary. If the Sentencing Council Act is not implemented then careful consideration must be given by the Government around what to replace it with, because the sentencing regime in New Zealand as it stands is unsatisfactory. A justice system that fails to ensure fairness and consistency will not long be worthy of the name.

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