Report on Sentencing Trends and Practices

2003-2004

A report of the NSW Sentencing Council pursuant to section 100J (1) (c) of the Crimes (Sentencing Procedure) Act 1999

July 2004

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The views expressed in this report do not necessarily reflect the private or professional views of individual Council members or the views of their individual organisations. A decision of the majority is a decision of the Council.[1]

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[1] See Schedule 1A, clause 12 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

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1. Introduction and overview

The NSW Sentencing Council ("the Sentencing Council") was established by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*[2] ("the amending *Act*"). As prescribed by Section 100J(1)(c) of the *Crimes Sentencing Procedure Act 1999* ("the *Act*") the Sentencing Council is required to:

> "monitor, and to report annually to the Minister on, sentencing trends and practices, including the operation of the standard non-parole periods and guideline judgements."

This is the first such report to the Attorney General. As such it is perhaps more comprehensive and detailed than the reports that will be provided in future years.

The Sentencing Council has been meeting on a monthly basis since 25 March 2003 with Sentencing Council business being conducted at these monthly meetings and out of session. The Chairperson has been closely involved in the conduct of Sentencing Council business including in the research and preparation of Sentencing Council reports. The Chairperson thanks each Sentencing Council member and the Sentencing Council's Secretariat for their assistance over the year.

The Sentencing Council has examined sentencing issues including "attempt" and "accessorial" offences and the standard non-parole sentencing scheme; how best to promote consistency in sentencing in the Local Court; abolishing prison sentences of 6 months or less; firearms offences and the standard non-parole sentencing scheme; and offences involving public property or danger to the public generally. The Sentencing Council has developed relationships with relevant organisations including the Judicial Commission of NSW; The Bureau of Crime Statistics and Research ("BOCSAR"); The NSW Law Reform Commission ("NSW LRC"); the NSW Aboriginal Justice Advisory Council ("AJAC") and the Criminal Law Review Division ("CLRD"). The Council has had a number of guest speakers at its monthly meetings, and with the assistance of the Attorney General's Department, has established its Secretariat.

As part of this report, the Sentencing Council has considered the standard non-parole sentencing scheme. Having regard to the relatively recent enactment of the legislative scheme and the fact that the scheme is indeed a "new concept", this Report outlines the debates leading up to the introduction of the standard non-parole period legislation, and discusses the subsequent commentary. The Government's stated objectives of the scheme are noted, as is the political context in which the scheme was enacted. The prescribed standard non-parole periods have been described as "*substantial*"[3] even when care is taken not to compare them to the median non-parole periods recorded in the Judicial Information Research System ("JIRS").[4] The Sentencing Council also notes that there are several offences with the same maximum penalty, but differing standard non-parole periods. The Sentencing Council however accepts that the standard non-parole periods have in effect been "*deemed*" or by way of statutory presumption to apply to offences in the "*middle of the range of objective seriousness*".

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[2] Assented to on 22 November 2002, Schedule 1[5] and [7] (the provisions establishing the Sentencing Council) commenced on 17 February 2003.
[3] Peter Johnson SC, 'Reforms to New South Wales Sentencing Law: The *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*' (2003) 6 *The Judicial Review* 314 at 331.
[4] Judicial Information Research System, Judicial Commission of New South Wales.

A particular concern raised in this report relates to the standard non-parole period set for item 9A in the table of standard non-parole periods– aggravated indecent assault. The Sentencing Council notes that the standard non-parole period is very close to the maximum available sentence. The standard non-parole period for this offence has been considered in terms of the factors said to underpin its formulation, as well as considered in the light of other factors which would offer some insight in the inclusion of the offence in the table of standard non-parole sentencing periods, and the standard non-parole period set.

The amending *Act* introduced a number of other significant changes to the sentencing law in NSW aside from the standard non-parole sentencing scheme. These included a statutory statement as to the purposes of sentencing,[5] a new statement of the aggravating, mitigating and other factors to be taken into account on sentencing,[6] and a requirement that the sentencing court is first to set a non-parole period and then to set the balance of the term.[7] This Report examines the interrelationship between these other changes and the standard non-parole sentencing scheme, and the continued importance of previously settled sentencing principles in NSW.[8] A number of issues raised in the judgment of *R v. Way*[9] are analysed in this Report, including the continued role to be played by the well-established body of sentencing principles built up prior to the commencement of the standard non-parole sentencing scheme; discussion of the meaning of the phrase "*in the middle of the range of objective seriousness*"; and the sentencing procedure to be applied under the standard non-parole scheme.

This report discusses the recent application for a guideline judgment for the offence of driving with a high range prescribed concentration of alcohol.[10] In this regard, the Sentencing Council notes that it has a legislative function to advise and consult with the Attorney General in relation to guideline judgments.[11] This legislative function was recently amended at the request of the Sentencing Council.[12] The effect of the amendment is considered below, particularly in relation to suspended sentences. The amendment enhances the powers of the Sentencing Council in relation to advice and consultation with the Attorney General on all matters which may arise in the context of guideline judgments. The Sentencing Council notes and records that the Attorney General both made the guideline application, and proceeded to hearing, for the offence of driving with a high-range prescribed concentration of alcohol without consulting the Sentencing Council. The Sentencing Council does, however, acknowledge that this may have been influenced by the fact that the application for such a guideline judgment was first raised in February 2003, prior to the formation of the Sentencing Council.

This Report outlines procedures which have been established for the efficient monitoring of standard non-parole periods and guideline judgements The Sentencing Council has regularly liaised with the Office of the DPP, BOCSAR and the Judicial Commission to ensure that the most efficient and cost effective procedures are in place. Bearing in mind the Sentencing

[5] Section 3A of the *Crimes (Sentencing Procedure) Act 1999.*
[6] Section 21A of the *Crimes (Sentencing Procedure) Act 1999.*
[7] Section 44 of the *Crimes (Sentencing Procedure) Act 1999.*
[8] [2004] NSWCCA 131.
[9] [2004] NSWCCA 131.
[10] The application was heard on May 5 2004, with judgment reserved.
[11] Section 100J(1) (b) of the *Crimes (Sentencing Procedure) Act 1999*.
[12] Amended by the *Crimes Legislation Amendment Act 2004* (no 11), at the request of the Sentencing Council.

Council's budget and statutory functions, the Council will not be directly involved in the primary collection or analysis of sentencing statistics and data. The Judicial Commission has agreed to assist the Sentencing Council to carry out its responsibilities. The Judicial Commission's JIRS database has been modified to incorporate sentences imposed for standard non-parole offences as a distinct set of data, separate to the data collected prior to the commencement of the scheme. Over time, this will allow a meaningful evaluation of the overall impact of the scheme on sentencing trends and practices to take place. In addition, the Judicial Commission will undertake a more detailed analysis of a selection of standard non-parole period offences. This will take place once an appropriate amount of material is available for the Judicial Commission to analyse.[13]

In relation to the monitoring of guideline judgments, the Judicial Commission's JIRS database has similarly been modified to show a distinct set of data for sentences handed down after the promulgation of a relevant guideline judgment. The Judicial Commission is also currently conducting a study into the effect of the Guideline judgment in *R v. Henry*[14] on sentencing for armed robbery offences. In addition, the Office of the DPP has agreed to notify the Sentencing Council of any proposed applications for guideline judgements.

The Council raises an issue regarding the power to provide education to the general public in connection with the Sentencing Council's functions. The Council's power and functions are limited by statute and are by no means as comprehensive as those for example to be found in Victoria under the *Sentencing Act 1991* (Vic). The issue has previously been raised with the Attorney General in July 2003. It was then thought perhaps too early to amend the Sentencing Council's legislative functions. In light of the Sentencing Council's preparation of a number of detailed reports on important sentencing issues, the Sentencing Council feels that it should possess powers to inform the public about its functions and to educate the public on sentencing matters *generally* (subject to being properly resourced). Public confidence in the criminal justice system, and particularly the sentencing process, is an issue raised in various materials used by the Sentencing Council. Having the ability to educate the public on sentencing matters generally will be conducive to addressing this broad issue.

This Report discusses the current debate surrounding whether the correct approach to sentencing should involve a staged approach, or an instinctive synthesis. Recent judgments of the High Court and NSW Court of Criminal Appeal show contention as to the correct approach to sentencing, but most recently, the Court of Criminal Appeal has held that an instinctive approach is to be preferred.[15] The High Court is expected to address and consider the issue in *Markarian v The Queen*.[16]

The Sentencing Council also raises in this report, a concern regarding the use of suspended sentences. This issue is also being addressed in connection with the Sentencing Council's

[13] It is expected that this may not be for some months. Indeed, the "Caselaw NSW" database for the Supreme Court of NSW presently contains very few reasons for sentence for standard non-parole offences committed after 1 February 2003.
[14] [1999] NSWCCA 111, (1999) 46 NSWLR 346.
[15] *R v. Way* [2004] NSWCCA 131. See recently criticism of an instinctive approach in *R v. Markarian* [2003] NSWCCA 8 at [33]. The matter has recently been considered in the judgment of Kirby J in *Johnson v. The Queen* [2004] HCA 15 at [40] – [44].
[16] See transcript to special leave application: *Markarian v. The Queen* [2003] HCA Trans 505 (2 December 2003).

terms of reference on abolishing prison sentences of 6 months or less.[17] A recent report of the Judicial Commission suggests that the re-introduction of suspended sentences may have resulted in "sentence escalation".[18] Further, the Sentencing Council's research indicates that there has been a degree of uncertainty regarding the circumstances in which a suspended term of imprisonment is legally and factually justified, and in recent times, there have been a large number of Crown appeals against suspended sentences.

Another issue related to suspended sentences is the approach to be adopted upon breach. In drawing attention to this issue related to breach, the Sentencing Council suggests that legislative amendment could clarify the operation of a suspended sentence once it takes effect. These and other issues related to suspended sentences could be further considered once the Sentencing Council has finalised its report on the issue of abolishing prison sentences of 6 months or less. Further or alternatively the issue of suspended sentences could be considered as one suitable for a guideline judgment, again, after the Sentencing Council has reported on the issue of abolishing prison sentences of six months or less.

2. Background and review of Council's operations to date

The establishment of the Council was "a first for Australia" and a most significant innovation for sentencing policy in NSW. The Council's diverse membership,[19] including four community representatives, gives the community an opportunity to contribute to the development of sentencing law, policy and practice in NSW. The inaugural members of the Sentencing Council are listed in **Annexure A**, along with a brief biography on each. The Sentencing Council has been meeting on a monthly basis since 25 March 2003, and a list of meeting dates is attached at **Annexure B**.

Over the past year the Council has prepared a number of reports and made recommendations on particular sentencing issues as requested by the Attorney General, and developed relationships with other relevant organisations. The Council views such professional relationships as essential bearing in mind the Council's limited capacity to conduct its own research and monitoring.[20]

2.1 Professional relationships

The Council has established relationships with bodies such as the Judicial Commission, BOCSAR, the NSW LRC, AJAC, and CLRD. The Council has had a number of guest speakers at its monthly meetings including:

- His Honour Judge Price, Chief Magistrate of the Local Court;
- Dr Don Weatherburn, Director of BOCSAR;

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[17] Discussion Paper of the Committee assisting the Sentencing Council specifically raises an issue concerning the abolition of partially suspended sentences. The Sentencing Council expects to report on the issue in August 2004.

[18] Brignell and Poletti (November 2003) "*Sentencing Trends and Issues Number 29: Suspended sentences in NSW*" Sydney: The Judicial Commission.

[19] The constitution of the Sentencing Council is specified in section 100 I(2)(a) – (e) of the *Crimes (Sentencing Procedure) Act 1999.*

[20] Section 100 J(4) of the Act provides that "*In the exercise of its functions, the Sentencing Council may consult with, and may receive and consider information and advice from, the Judicial Commission of New South Wales and the Bureau of Crime Statistics and Research of the Attorney General's Department (or any like agency that may replace either of those agencies).*"

- His Honour Judge Marien SC, previously Director, CLRD;
- Mr Ernest Schmatt PSM, Chief Executive, Judicial Commission of NSW; and
- Mr Brendan Thomas, Executive Officer, AJAC.

The Sentencing Council has developed a close relationship with the Judicial Commission, and has met with staff of the Judicial Commission on numerous occasions to discuss projects of mutual interest, including the monitoring of the standard non-parole sentencing scheme.

The NSW LRC, the Judicial Commission, BOCSAR and the Council have agreed to a system of joint quarterly meetings in order to ascertain how each body's work in the area of sentencing will impact upon the others.

The Sentencing Council's Chairperson has presented a paper at the Local Courts Annual Conference 2003. The conference was held over three days, beginning 2 July and finishing 4 July 2003. The paper presented by the Chairperson addressed the functions, membership and some information on current projects of the Sentencing Council.

The Chairperson and Deputy Chairperson of the Sentencing Council have met with a delegation of members from the Western Division Councils Association to discuss concerns that they had regarding the sentencing of offenders from their respective local government areas. The comments of the delegation were borne in mind when the Council prepared its report on "how best to promote consistency in sentencing in the Local Court".

The Sentencing Council has presented a paper (by Mr Peter Zahra SC on behalf of the Council) to a delegation of Judges from the Supreme People's Court of China, as part of the Human Rights and Equal Opportunity Commission's "China-Australia Human Rights Technical Cooperation Program".

2.2 Establishment of Secretariat

The Sentencing Council was officially launched on 18 June 2003 in the Jubilee Room of Parliament House, at which the Attorney General spoke. The Sentencing Council believes that the Official Launch was successful in raising the profile of the Council, and educating stakeholders and members of the public about the functions of the Sentencing Council.

The Sentencing Council has established, with the assistance of the Attorney General's Department, a website containing information on the Sentencing Council's functions and membership (including a brief biography for each of the members). The website also contains links to various articles concerning the Sentencing Council and links to relevant external websites. The website can be found at www.lawlink.nsw.gov.au/sentencingcouncil

The Sentencing Council has recruited a secretariat and has been operating within budget. The Sentencing Council would like to thank the staff of the Attorney General's Department in establishing its secretariat, and in particular, with the recruitment of staff. The Secretariat consists of one full-time and three part-time staff:

- Ms Jasmine Stanton, Executive Officer;
- Ms Emma Wood, Administrative Officer;
- Ms Sheridan de Kruiff, Research Officer; and
- Ms Samantha Edwards, Research Officer.

In November 2003, the Sentencing Council's secretariat moved from temporary accommodation on level 20 of the Goodsell building into its permanent offices on level 8. The Attorney General attended a morning tea at the Council's new offices to celebrate its opening.

2.3 Projects update

To date, the Sentencing Council has considered a number of issues:

- "Attempt" and "accessorial" offences and the standard non-parole sentencing scheme – The Sentencing Council reported to the Attorney General on 9 March 2004 on whether "attempt" and "accessorial" offences should be added to the standard non-parole sentencing scheme.[21]
- How best to promote consistency in sentencing in the Local Court – The Sentencing Council reported to the Attorney General on "how best to promote consistency in sentencing in the Local Court" on 30 June 2004.[22] The project proved to be a major one of substance and complexity with much time spent on it. The Sentencing Council called for submissions from a number of interested individuals and organisations (including NSW Magistrates) prior to preparing its report. Ongoing consultation took place with the NSW Police, the Ministry for Police and the Chief Magistrate of the Local Court.
- Issue of abolishing prison sentences of 6 months or less - The Sentencing Council expects to report on "the issue of abolishing prison sentences of 6 months or less" in August 2004.[23] This project has also proved to be a major one of substance and complexity with much time spent on it. The Sentencing Council called for submissions from a number of interested individuals and organisations in September 2003. A Committee was also established in September 2003 to assist the Council with this project.[24] The constitution of the Committee along with dates of the Committee's meetings are attached at **Annexure C**. The Committee provided its assistance to the Council in the form of a discussion paper, which was presented to the Council in April 2004. A copy of the discussion paper was also provided to the Attorney General.[25] The Council has called for comments on the discussion paper, and will make its final recommendations taking into account the Committee's discussion paper and comments received on the discussion paper. The Council proposes to have its final report to the Attorney General on this issue in August 2004. As part of this project, the Sentencing Council has considered a number of court diversion programs, in particular, MERIT and Circle Sentencing.[26] See also the *Crimes Legislation Amendment (Criminal Justice Interventions) Act 2002 No 100* and the current inquiry by the Legislative Council's Standing Committee on Law and Justice into "back-end" home detention. See also the Local Court Annual Review 2003 and the

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[21] Report of the Sentencing Council prepared pursuant to section 100 J(1) (d) of the *Crimes (Sentencing Procedure) Act 1999*, and presented to the Attorney General on 9 March 2004.
[22] Report of the Sentencing Council prepared pursuant to section 100 J(1) (d) of the *Crimes (Sentencing Procedure) Act 1999*, and presented to the Attorney General on 30 June 2004.
[23] Report of the Sentencing Council prepared pursuant to section 100 J(1) (d) of the *Crimes (Sentencing Procedure) Act 1999*.
[24] With the approval of the Attorney General, pursuant to section 100K(1) of the *Crimes (Sentencing Procedure) Act 1999*.
[25] Discussion Paper presented to the Attorney General on 28 April 2004.
[26] The expansion and current status of these diversionary programs are considered in the Local Court NSW Annual Review 2003 at p 7.

Sentencing Council's Report on "How best to promote consistency in sentencing in the Local Court."

- Firearms offences and the standard non-parole sentencing scheme - The Sentencing Council reported to the Attorney General on "Firearms offences and the standard non-parole sentencing scheme" on 20 May 2004.[27]
- Offences to public property and offences involving danger to the public generally - The Sentencing Council has prepared a working paper on the issue of offences to public property and offences involving danger to the public generally, or "terrorism type offences". In particular, issues were raised regarding whether some offences contained in the *Crimes Act 1900*, which are relevant to public property and public safety, are suitable for inclusion in the standard non-parole sentencing scheme (and the means for doing so). The issue was discussed at a meeting between the Sentencing Council's Chairperson and the Attorney General on 26 November 2003, and it was agreed that the Sentencing Council would bear the issue in mind and that the Attorney General would alert the Sentencing Council if he would like the issue further considered.

3. The Standard Non-Parole Period Sentencing Scheme

Standard non-parole periods were introduced by the amending *Act*.[28] The Table in Division 1A to the *Act* sets out the standard non-parole periods for a series of criminal offences. Section 54B sets out the procedure for applying the standard non-parole period scheme, namely that:[29]

> "When determining the sentence for the offence, the court is to set the standard non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period."

If the standard non-parole period is not applied, the court must make a record of its reasons,[30] which are "*only those referred to in section 21A.*"[31]

A "standard non-parole period" is defined by the *Act* to represent "the non-parole period for an offence in the middle range of objective seriousness"[32] for offences of that category. It provides a "reference point or benchmark"[33] within the sentencing range. The standard non-parole sentencing scheme has been described as "a new concept in sentencing".[34]

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[27] Report of the Sentencing Council prepared pursuant to sections 100 J(1) (a) and (d) *Crimes(Sentencing Procedure) Act 1999*, and presented to the Attorney General on 20 May 2004.

[28] The Act was assented to on 22 November 2002 (Gaz 263) and commenced operation 1 February 2003.

[29] Section 54B(2) *Crimes(Sentencing Procedure) Act 1999.*

[30] Section 54B(4) *Crimes(Sentencing Procedure) Act 1999.*

[31] Section 54B(3) *Crimes(Sentencing Procedure) Act 1999.* In *R v Way* [2004] NSWCCA 131 at [57] the Court of Criminal Appeal held that section 21A should be given a broad interpretation: "*s 21A(1) preserves the entire body of such principles. They fall within the scope of "matters" which are "required or permitted to be taken into account under any ... rule of law". The judicially developed body of sentencing principles constitute "law" for the purposes of this clause and also for purposes of s 21A(4). When Parliament referred, in s 54B(1), s 21A as identifying the matters for which a non-parole period that is shorter or longer than a standard non-parole period may be set, it was not referring to a narrow list of considerations.*"

[32] Section 54A *Crimes (Sentencing Procedure) Act 1999.*

[33] The Hon Bob Debus MP Attorney General, *Hansard*, Legislative Assembly, 23 October 2002, p5813 at 5816.

[34] See *Attorney General's Application no 2 of 2002* [2002] NSWCCA 515 at [16].

Having regard to the relatively recent enactment of this legislation and the fact that the scheme is indeed a ‘new concept’, the Sentencing Council feels that it is appropriate to outline the debates leading up to the introduction of the standard non-parole period legislation, and the subsequent commentary.

3.1 Introduction of the standard non-parole sentencing scheme

The NSW Attorney General, when introducing the amending *Act* stated:[35]

> “The scheme being introduced by the Government today provides further guidance and structure to judicial discretion. These reforms are primarily aimed at promoting consistency and transparency in sentencing and also promoting public understanding of the sentencing process.”

The Government’s stated objectives of the legislation must be viewed in context of the political debates about sentencing approaches, which were taking place at the time of the amendment. This context is evident in the Attorney General’s second reading speech:[36]

> “At the outset I wish to make it perfectly clear that the scheme of sentencing being introduced by the Government today is not mandatory sentencing…By preserving judicial discretion we ensure that the criminal justice system is able to recognise and assess the facts of an individual case…In great contrast, the mandatory sentencing scheme proposed by the Opposition is a system that imposes the same penalty on all offenders, no questions asked.”

Further information about the Government’s rationale for the legislation, the offences selected for inclusion and their standard non-parole periods can also be gleaned from the second reading speech:[37]

> “The standard non-parole periods set out in the Table to the bill have been set taking into account the seriousness of the offence, the maximum penalty for the offence and current sentencing trends for the offence as shown by sentencing statistics compiled by the Judicial Commission of New South Wales. The community expectation that an appropriate penalty will be imposed having regard to the objective seriousness of the offence has also been taken into account in setting standard non-parole periods. The bill provides in section 54A (2) that the standard non-parole period for an offence represents the non-parole period for an offence in the middle of the range of objective seriousness for such an offence.”

In summary, the broad aim of the amending *Act* is to provide guidance and structure to the sentencing process by introducing a new sentencing reference point, hoping that this will, in turn, promote consistency, transparency and enhance public understanding of the sentencing process.

3.2 Commentary on the Standard Non-Parole Period Sentencing Scheme

Peter Johnson SC has described the periods contained in the *Act* as “*substantial*”,[38] even if care is taken when comparing them to the median non-parole periods recorded in the Judicial

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[35] The Hon Bob Debus MP, above n 33, p 5813.
[36] Ibid, p5813-5814.
[37] Ibid.
[38] P Johnson SC, ‘Reforms to New South Wales Sentencing Law: The *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*’ (2003) 6 *The Judicial Review* 314 at 331.

Information Research System ("JIRS").[39] This issue will be explored later in this report. Mr Johnson SC also made note of the fact that:[40]

> "…there are several offences with the same maximum penalty, but differing standard non-parole periods…These differing statutory numerical indicators may serve to demonstrate that some offences are regarded by the legislature as being more serious than others, although these offences have the same maximum penalty. Such an approach would involve concepts which are new to the law of sentencing."

For example, items 2, 3, 4, 10, 11 and 13 of the chart below are offences with the same maximum available sentence of 25 years. However, the standard non-parole periods range from 7 to 15 years.

Item	Offence	Standard Non-Parole Period
2	Section 26 *Crimes Act 1900* (conspiracy to murder)	10 years
3	Sections 27, 28, 29 or 30 *Crimes Act 1900* (attempt to murder)	10 years
4	Section 33 *Crimes Act 1900* (wounding etc with intent to do bodily harm or resist arrest)	7 years
10	Section 66A *Crimes Act 1900* (sexual intercourse-child under 10)	15 years
11	Section 98 *Crimes Act 1900* (robbery with arms etc and wounding)	7 years
13	Section 112(3) *Crimes Act 1900* (breaking into any house and committing indictable offence circumstances special aggravation)	7 years

It can be seen that whilst Items 10, 11 and 13 have the same statutory maximum, Item 10 has been prescribed with a standard non-parole period of more than twice the length of the non-parole period set for Items 11 and 13.

A disparity is also evident with respect to Items 8, 12, 16 and 18 in the next chart. These offences have a maximum sentence of 20 years. Yet there is a significant difference in the prescribed non-parole period for Item 12, when compared with the other Items.

Item	Offence	Standard Non-Parole Period
8	Section 61J *Crimes Act* 1900 (aggravated sexual assault)	10 years
12	Section 112(2) *Crimes Act* 1900 (breaking etc into any house and committing serious indictable offence in circumstances of aggravation)	5 years
16	Section 24(2) *Drug Misuse and Trafficking Act* 1985 (manufacture or production of commercial quantity of prohibited drug) being an offence that: a) does not relate to cannabis leaf, and b) if a large commercial	10 years

[39] Judicial Information Research System, Judicial Commission of New South Wales.
[40] Johnson, above n 38 at 355.

	quantity specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug)	
18	Section 25(2) *Drug Misuse and Trafficking Act* 1985 (supplying commercial quantity of prohibited drug) being an offence that: a) does not relate to cannabis leaf, and b) if a large commercial quantity specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug)	10 years

The recent judgment of the NSW Court of Criminal Appeal in *R v. Way*[41] has clarified many of the issues related to the standard non-parole sentencing scheme, but leaves unresolved the issue of inconsistency regarding the prescription of standard non-parole periods.

3.3 Standard Non-Parole Periods: Offences in the Middle of the Range of Objective Seriousness

Section 54A of the *Act* states that the standard non-parole period represents the non-parole period for an offence in the *middle range of objective seriousness* (emphasis added). Sentencing judges are familiar with classifying an offence in terms of where it lies on the spectrum of objective seriousness; the maximum penalty reserved for the worst type of case.[42] The scheme introduces a new reference point – the middle of the range – and prescribes the non-parole period which shall be set for offences falling into this range of objective seriousness.

The Sentencing Council has compared the standard non-parole period with both the median non-parole periods recorded in JIRS statistics for the relevant offences, and, a representation of the 'standard' head sentence as a percentage of the maximum penalty.[43] This is presented as a Table in **Annexure D**. It can be clearly seen that there are vast differences in the proportion of the standard non-parole period to the maximum penalty available for the offence.

In utilising JIRS statistics, the Sentencing Council notes the valid comments of Peter Johnson SC in that they reflect a median non-parole period where a complete sentencing exercise has been exercised, and also that the figures are representative of a particular period and not necessarily the offence in general.[44]

Care must be taken in using the statistics as a guide to ascertaining the appropriate sentence for an offence "*in the middle of the range of objective seriousness.*"[45] It would be incorrect to equate the midpoint range of the statistics for an offence as representing the sentence for an offence "*in the middle of the range of objective seriousness*" for a number of reasons:

- The JIRS statistics represent the final sentence imposed, taking into account the subjective features of the offender;

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[41] [2004] NSWCCA 131.
[42] See *R v Fernando* [1999] NSWCCA 66 at [343].
[43] Section 44(2) of the *Crimes (Sentencing Procedure) Act 1999.*
[44] Johnson, above n 38 at 331.
[45] Section 54A(2), *Crimes (Sentencing Procedure) Act 1999.*

- The JIRS statistics are categorised according to principal offence, but other offences may be reflected in the sentence;
- The JIRS statistics represent the sentences imposed over a particular period;
- There is delay in correcting statistics where a sentenced is altered on appeal to the Court of Criminal Appeal, or where a matter is appealed to the District Court; and
- There may be a spate of particularly serious or non-serious offences which may skew the statistics.

There is ample High Court and Court of Criminal Appeal authority noting that the sentencing statistics maintained by the Judicial Commission can be of use to the sentencing judicial officer, but care must be taken in how they are used, and for what purpose.[46] Generally speaking, statistics provide an indication of general sentencing trends and standards, but they do not reveal anything about the circumstances of the individual offences committed. The JIRS database contains a preliminary explanation of the statistics, noting that they are but one component of the JIRS database, and that the statistics must be approached with caution.

The Sentencing Council is mindful of the fact that in the preamble to the statistics, the Judicial Commission states the statistics are to be approached with caution. For present purposes, however, the Sentencing Council maintains that the statistics are a useful tool.

Section 44(2) of the *Act* states:

> "The balance of the term of the sentence must not exceed one-third of the non-parole period for the sentence, unless the court decides that there are special circumstances for it being more…"

For the offences included in the standard non-parole scheme, the 'standard' head sentence is therefore an additional one-quarter of the stipulated non-parole period. The 'standard' head sentence has then been calculated as a percentage of the maximum penalty. Although the Sentencing Council considers it useful to calculate the 'standard' head sentence for standard non-parole offences for comparison against the maximum available sentence, the Sentencing Council notes that the statutory ratio between the non-parole period and the head sentence is departed from in the vast majority of cases.[47] Recently, the NSW Court of Criminal Appeal has commented that the Judicial Commission's research suggests that "findings of special circumstances have become so common that it appears likely that there can be nothing "special" about many cases in which the finding is made."[48]

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[46] See for example, *Wong v The Queen; Leung v The Queen* [2001] HCA 64, (2001) 207 CLR 584; (2001) 185 ALR 233 at [59], [66] per Gaudron, Gummow and Hayne JJ and [91] per Kirby J. See also *R v. Bloomfield* (1998) 44 NSWLR 734 at 738 – 739.

[47] See Keane, Poletti and Donnelly (2004) "*Sentencing Trends and Issues 30: Common Offences and the Use of Imprisonment in the District and Supreme Courts in 2002*" Sydney: Judicial Commission. It was found that only 12.9% of sentences included a non-parole period on 75% or more of the full term, and "*it would appear, therefore, that "special circumstances" must have been found* [as required by section 44(2)] *in up to 87.1% of cases where imprisonment was ordered.*" The paper also noted that "*it is not known whether this trend will continue with the introduction of the Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002. That Act altered the sentencing procedure so that for offences committed after 1 February 2003, the non-parole period is determined first, followed by the balance of the sentence. The Attorney General in his Second Reading Speech did, however, refer to the "existing presumptive ratio" of 75% being maintained not withstanding the amendment to section 44(1).*"

[48] *R v. Fidow* [2004] NSWCCA 172 per Spigelman CJ at [20]. Adams J added at [27] "*Where special circumstances are found, as here, it is desirable, in my view, to avoid the appearance of rounding down or the*

From **Annexure D,** it can be seen that standard non-parole periods are often much higher than the median non-parole period recorded in JIRS. The Sentencing Council acknowledges that it is parliament's intention to establish a new sentencing scheme, aimed towards achieving objectives such as "*consistency and transparency in sentencing*".[49] The Sentencing Council also acknowledges the Attorney-General's statement in his second reading speech that standard non-parole periods were set taking into account "*current sentencing trends for the offence as shown by sentencing statistics compiled by the Judicial Commission of New South Wales.*"[50]

The Sentencing Council accepts that the standard non-parole periods have in effect been "*deemed*" or by way of statutory presumption to apply to offences in the "*middle of the range of objective seriousness*" and that it would be inappropriate for the Courts to look behind a legislative provision to ascertain if it is well founded. The parliament has stated that standard non-parole periods are for offences in the "*middle of the range of objective seriousness*" and such statutory assertion acts as a "*deeming*" provision.[51]

3.4 Item 9A: Aggravated indecent assault – child under 10 (s 61M(1) of the *Crimes Act*)

A further issue arising from the data presented in **Annexure D** is the standard non-parole period for Item 9A – aggravated indecent assault.

The maximum available penalty for this offence is 7 years, and the standard non-parole period set out in the *Act* is 5 years. This creates a situation where the standard non-parole period is very close to the maximum available sentence. From **Annexure D**, it can further be seen that the JIRS median non-parole period is currently 12 months and that the 'standard head sentence' will amount to 95% of the maximum.

Peter Johnson SC noted this issue in his paper already discussed above.[52] He wrote:[53]

> "At least one offence in the table has a standard non-parole period which appears to be anomalous. Offence Item 9A provides for a standard non-parole period of five years for an offence with a

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appearance that the special circumstances were regarded as relatively inconsequential and that a sentencing judge explain that the limited reduction of the non-parole period imposed arises from the seriousness of the offence and that, accordingly, the benefit that might otherwise be given as a result of the finding of special circumstances cannot, having regard to the facts of the particular case, justify a non-parole period lower than that which is being imposed. This will enable it more readily to be understood that, although the Judge has found special circumstances, it has had a relatively limited impact on the sentence ultimately imposed."

[49] Hon Bob Debus, above n 33, p 5813.

[50] Ibid 5813-5814.

[51] In relation to "deeming" provisions applying in the different context of worker's compensation, Windeyer J noted, in *Commissioner for Railways v. Bain* (1965) 112 CLR 426: "*... a statement that a condition is to be deemed to be a disease contracted by a gradual process does not amount to a declaration that it is not in fact such a disease. The word "deemed" is of course often used to give an artificial meaning to a word, or to direct how notwithstanding the true facts some situation should be understood. But, remembering its derivation, the word "deemed" merely states how some matter is to be adjudged: and a direction that a matter is to be adjudged in a particular way is not necessarily an assertion that without such a direction it must have been adjudged differently.*" The observations may apply in relation to section 54 of the *Crimes (Sentencing Procedure) Act 1999* and the fact that the standard non-parole periods have been "deemed" to apply to offences in the "*middle of the range of objective seriousness.*"

[52] Johnson, above n 38 at 335.

[53] Ibid (footnotes omitted).

maximum penalty of seven years. Given that it will be necessary for a sentencing court to set a balance of term to produce a complete sentence, the total sentence for an offence under s 61M(1) of the Crimes Act 1900 at the middle range of objective seriousness and where no other factors operate to reduce the standard non-parole period, would lie at the point close to the maximum penalty for the offence. **This provision requires consideration**." (Emphasis added.)

Mr Nicholas Cowdery AM QC, NSW Director of Public Prosecutions and member of the Sentencing Council has also raised this anomaly of Item 9A. In addition to the standard non-parole being very close to the maximum, Mr Cowdery also raised the following considerations with the Council:

- As section 61M(1) is a Table 1 offence, there must almost always be an election. [Mr Cowdery was making reference to the inclusion of section 61M(1) in Table 1 of the Schedule to the *Criminal Procedure Act 1986*]; and
- Comparison of Item 9A (which encompasses a broad range of offending behaviour and which could apply in theory, to an offence of touching over clothing in appropriate other circumstances) with, for instance, Item 6 which also carries a standard non-parole period of 5 years. Item 6 is section 60(3) of the *Crimes Act*: wounding or inflicting grievous bodily harm on a police officer.

The Sentencing Council agrees that the standard non-parole period set for Item 9A (section 61M(1)) requires consideration. In response to the concern over such a high standard non-parole being set for section 61M(1), Mr Cowdery requested the NSW DPP's Principal Research Lawyer, Helen Cunningham to conduct research into the matter. Ms Cunningham's useful report was forwarded to the Sentencing Council for review.[54]

In order to assess whether an anomaly exists in the standard non-parole period for offences under sections 61M(1) and (2), Ms Cunningham considered the standard non-parole period in terms of the factors said to underpin its formulation, that is, the seriousness of the offence, its maximum penalty, sentencing trends and the mid point in the range of objective seriousness for the offence.

In this regard, Ms Cunningham observed that aggravated indecent assault is an indictable offence that may be dealt with summarily,[55] if dealt with on indictment it has a maximum penalty of seven years, and the standard non-parole period is 71 per cent of the maximum sentence. Ms Cunningham concluded that:[56]

> "It is difficult to see how a non-parole period representing almost three quarters of the maximum sentence reflects a mid point in the spectrum of objective seriousness. The high ratio of the standard non-parole period to the maximum sentence would also operate to reduce

[54] Helen Cunningham, 'Standard non-parole periods in the Crimes Sentencing Procedure Act 1999', October 2003, copy on file with the NSW Sentencing Council. The report also discusses many of the issues outlined above, including that standard non-parole periods will increase sentences, offences with identical maximum penalties have different standard non-parole periods, the standard non-parole periods appear not to reflect sentencing statistics, and the specific concern relating to the standard non-parole periods for offences under s 61M *Crimes Act 1900*.

55 Schedule 1, Table 1 to the *Criminal Procedure Act 1986* unless the prosecuting authority or person charged elects otherwise.

56 Under section 54D(2) of the *Crimes (Sentencing Procedure) Act* standard non-parole period do not apply if the matter is disposed of summarily.

further the sentencing discretion to set the balance of the term of sentence under s 44 of the *Crimes (Sentencing Procedure) Act 1999*."

Ms Cunningham also noted that:

> "…there appears to be an anomaly between the standard non-parole period for the aggravated indecent assault under s 61M(1) and the more serious offence of aggravated indecent assault of a child under ten years of age under 61M(2)...The more serious offence under s 61M(2) of the *Crimes Act* carries a maximum penalty of ten years and has a standard non-parole period of five years or 50 per cent of the maximum sentence. This figure is 21 percentage points below the standard non-parole period for the offence under 61M(1), which by reason of its lower maximum penalty, must necessarily be less grave."

Ms Cunningham then went on to consider whether other factors existed which would offer some insight into why aggravated indecent assault was added to the Table of standard non-parole periods at a late stage, along with a very lengthy standard non-parole period:[57]

> "As Items 9A and 9B in the Table were added to the bill the evening before it received assent, it is possible that a particular sentencing case or cases which attracted inflamed, adverse media attention prompted the inclusion of the offence in the Table where it otherwise may not have been considered.
>
> The second reading speeches contain many statements from members of various opposition parties on community perceptions that sentences imposed for various criminal offences were inadequate during 2002. These debates refer to cases in an anecdotal way and provide no information on the facts of the matter being discussed or the subjective features of the offender."

Ms Cunningham also notes that at the time the bill was being debated, there was also criticism of the government's recourse to "short term measures hastily conceived in response to individual cases."[58] Some of such criticism came from within Parliament.[59]

3.5 Other changes made by the amending legislation and relationship to the standard non-parole sentencing scheme

The amending *Act* introduced a number of other significant changes to the sentencing law in NSW. These included a statutory statement as to the purposes of sentencing,[60] a new statement of the aggravating, mitigating and other factors to be taken into account on sentencing,[61] and a requirement that the sentencing court is first to set a non-parole period

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57 For example, Ms Cunningham notes the comments of the Rev. the Hon Fred Nile, Hansard, Legislative Council, 20 November 2002 p 7062, that "*There was widespread dismay, even anger, about a number of sentences that were determined by various judges in a range of cases, including a drunken driver who killed a pedestrian, a person who raped a young girl, and a person who committed murder. In some cases the sentences appeared very low, and that led to a reaction in the community.*" Also, On 29 October 2002 Mr Glachan, the Honourable member for Albury, referred in parliament to the imposition of a sentence of 18 months periodic detention for the repeated sexual assault of two girls describing, the sentence as "totally inadequate". See Hansard, Legislative Assembly, 29 October 2002 p 6087. Ms Cunningham suggests that this may have been a reference to McSmith [2002] NSWCCA 68. On appeal, the conviction was quashed and a new trial ordered.

58 Warner K, "The Role of Guideline Judgments in the Law and Order Debate in Australia" (2003) 27 *Criminal Law Journal* 8; in David Brown at 64, Stephen Odgers at 11.

59 Hansard, Legislative Council, 20 November 2002 p 7075.

60 Section 3A of the *Crimes (Sentencing Procedure) Act 1999.*

61 Section 21A of the *Crimes (Sentencing Procedure) Act 1999.*

and then to set the balance of the term.[62] The Court of Criminal Appeal in *R v. Way* considered the interrelationship between these other changes and the standard non-parole sentencing scheme.[63] The Court also considered the place of previously settled sentencing principles in NSW. That judgment is further considered below.

The amending *Act* also introduced a requirement for the Attorney General to review the operation of the standard non-parole scheme to determine its effect, after 2 years from the commencement of the scheme. Further, a report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 2 years.[64]

4 Identified Matters Sentenced under the Standard Non-Parole Period Legislation

The Office of the DPP has informed the Sentencing Council of a number of matters sentenced under the standard non-parole period legislation. The Office of the DPP has requested its solicitors to report relevant matters upon completion. It is accepted that this is unlikely to be an exhaustive list of matters which have been sentenced using the new scheme.

A number of these matters have been appealed to the Court of Criminal Appeal. Five Matters were heard in the Court of Criminal Appeal on 15 April 2004, and judgment was delivered in those matters on 10 and 11 May 2004. *R v. Mouloudi*[65] was heard in the Court of Criminal Appeal in March, and judgment was delivered on 28 June 2004. One further matter, *R v. Perez*[66] was heard in the Court of Criminal Appeal on 28 June 2004, with judgment delivered on 30 June 2004. A summary of those matters is attached at **Annexure E**.

In one of those five judgments, *R v. Way*,[67] the Court of Criminal Appeal discussed in some depth the proper application of the standard non-parole sentencing scheme. The important aspects of that judgment will now be outlined.

4.1 *R v Way*

4.1.1 Impact of the amendments on Sentencing

The Court of Criminal Appeal in its joint judgment[68] held that the new standard non-parole sentencing regime does not stand alone, but must be considered in the light of the other provisions of the *Act*, including the new section 3A ("Purposes of sentencing") and updated section 21A ("Aggravating, mitigating and other factors in sentencing"). Recently amended section 44 must also be considered, which now requires the Court to first set the non-parole period. Other provisions to bear in mind include sections 22, 22A and 23 (various powers to reduce penalties for assistance given).

[62] Section 44 of the *Crimes (Sentencing Procedure) Act 1999.*
[63] [2004] NSWCCA 131.
[64] Section 106 of the *Crimes (Sentencing Procedure) Act 1999.*
[65] [2004] NSWCCA 96. *R v. Way* [2004] NSWCCA 131 was considered and applied.
[66] *R v. Perez* [2004] NSWCCA 218, revised 9 July 2004. *R v. Way* [2004] NSWCCA 131 was again considered and applied.
[67] [2004] NSWCCA 131.
[68] Joint judgment of Spigelman CJ, Wood CJ at CL and Simpson J.

The Court considered whether section 54B of the *Act* precluded imposition of a non-custodial penalty. Again, the Court noted that the new standard non-parole scheme needs to be read in the context of the rest of the *Act*, including section 5(1), which importantly provides that imprisonment is a sentence of last resort, and that it must not be used unless the court is satisfied, "*having considered all possible alternatives, that no penalty other than imprisonment is appropriate.*" Section 5 reflects the common law position that imprisonment is a sentence of last resort. The Court held:[69]

> "The nature of the offences included in the Table is such that only rarely will sentences involving an alternative to full time custody be appropriate. However, there is nothing in the Act, to indicate any intention to confine the available sentence, for a Table offence, to one of full time custody, provided that a non-custodial sentence would be a proper sentence upon the particular facts of the case. In fact, subject to appropriate reasons being given s 54C(1) of the Act expressly contemplates that alternatives to full time custody will continue to be available."

The Court also noted the purpose for which the standard non-parole sentencing scheme was introduced, as stated in the Second Reading Speech. It was there said that the scheme was introduced to provide *guidance and structure* to judicial discretion, and to promote *consistency and transparency* in sentencing:[70]

> "The new sentencing scheme proposed in the bill introduces a further important reference point, being a point in the middle of the range of objective seriousness for the particular offence. The identification of a further reference point within the sentencing spectrum will provide further guidance and structure to the exercise of the sentencing discretion."

The Court noted that there is nothing to suggest that the maximum penalty ceases to provide a benchmark for standard non-parole period offences, although the focus is likely to shift more towards the standard non-parole periods "*since they may be taken to express a legislative intention as to the minimum periods of actual imprisonment, which are appropriate for the relevant offences.*"[71]

The Court held that Parliament did *not* intend to overrule the well-established body of sentencing principles, and in particular, section 21A(1) expressly preserves such principles.[72] The Court of Criminal Appeal held that:

> "When Parliament referred, in s 54B(1), s21A as identifying the matters for which a non-parole period that is shorter or longer than a standard non-parole period may be set, it was **not** referring to a narrow list of considerations."

The Court of Criminal Appeal did, however, note that the scheme "*may well result in some change in the established sentencing pattern for these offences, or at least some of them, with an* ***overall increase in the non-parole periods*** *and terms of sentences.*"[73] (Emphasis added).

[69] *R v. Way* [2004] NSWCCA 131 at [116].
[70] Cited in *R v. Way* [2004] NSWCCA 131 at [49].
[71] *R v. Way* [2004] NSWCCA 131 at [53].
[72] Section 21A(1) of the *Crimes (Sentencing Procedure) Act 1999.*
[73] *R v. Way* [2004] NSWCCA 131 at [54]

The Court held that if the scheme, and in particular, section 54B were to be construed literally, it would need to be confined to offences which fall "*in the middle of the range of objective seriousness.*" Rather, a purposive interpretation is correct, which permits a departure from the standard non-parole period wherever the objective seriousness of the offence is lesser or greater.[74]

The Court also held that the periods specified should be understood as being specified for a sentence imposed for a mid range case *after conviction at trial*. A plea, will in most circumstances, have a utilitarian value which would attract some discount.[75]

4.1.2 What is an offence "in the middle of the range of objective seriousness"?

There is no statutory definition as to the meaning of an offence "in the middle of the range of objective seriousness. The Sentencing Council observes that there are no statutory criteria for determining how such is to be ascertained in the case of new statutory offences for which there are no sentencing statistics.[76] In *R v. Way*, the Court held that a sentencing judge should consider in the abstract, an offence in the middle of the range of objective seriousness, but what is meant by the phrase should be approached intuitively, and based on the general experience of the Courts in sentencing for the offence in question. The Court also noted that this exercise is not materially different from what has always been necessary in evaluating the objective seriousness of a particular offence: "*Judges are well accustomed to considering and stating that a particular case falls into the worst category, or into the category of offences at a lower level of objective seriousness.*"[77]

In undertaking this exercise, the Court held that it would not be necessary or useful to "*engage in an exercise of imagination*", or to assume an offence with an equal balance of aggravating and mitigating factors:[78]

> "Any such approach would be artificial in the extreme, given the infinite variations which might arise, and it would reduce the sentencing exercise to an arithmetic nonsense. It would not even begin to reflect long standing practice in which Judges have necessarily, and inevitably, been required to make an intuitive assessment of where the offence before the Court sits in terms of objective seriousness."

The Court held that the exercise involves taking into account "*the actus reus, the consequences of the conduct, and those factors that might properly have been said to have impinged on the mens rea of the offender.*"[79] The Court explained further:[80]

> "Questions of degree and remoteness arise which will need to be developed in the case law. There are potential areas of overlap. For example, impaired mental or intellectual functioning can go to either, or both, the seriousness of the offence and punishment, so far as deterrence is concerned.
>
> In an assessment of the objective seriousness of the subject offence it seems to us that attention must accordingly be given to the factors mentioned above. Some of these relevant factors will be

[74] *R v. Way* [2004] NSWCCA 131 at [66]
[75] *R v. Way* [2004] NSWCCA 131 at [71]
[76] This point is considered in the Sentencing Council's report on Firearms offences and the standard non-parole sentencing scheme" at 3.1 and at 10.2.3
[77] *R v. Way* [2004] NSWCCA 131 at [77]
[78] *R v. Way* [2004] NSWCCA 131 at [83]
[79] *R v. Way* [2004] NSWCCA 131 at [85]
[80] *R v. Way* [2004] NSWCCA 131 at [87]

elements of the offence itself. Others will fall within the list of aggravating and mitigating factors referred to in s 21A (2) and (3) of the Act, so far as they relate to purely objective considerations."

The Court also addressed the impact of the new legislation on the difference between matters related to the *offence*, and matters related to the *offender*:[81]

> "Prior to enactment of legislation of the kind which is seen in Division 1A of Part 4 it was probably not necessary for any strict line to be drawn between matters which related to the offence, and to the offender, respectively, since the focus was placed upon the question of setting a sentence that reflected the overall criminal culpability involved.
>
> The position has now changed in relation to sentencing in respect of offences for which standard non-parole periods have been set, in so far as there needs to be an examination of the level of objective seriousness involved in the offence, in which considerations that do not have a nexus with its commission are to be placed to one side."

Lastly, in considering an offence "*in the middle of the range of objective seriousness*", the Court held that it is not necessarily a "typical" offence.[82] The Court held that a "typical" offence relates to numerical frequency rather than to any assessment of objective seriousness. Nor should a "middle of the range" offence be assumed to occupy a narrow bandwidth in the continuum of worst category to least serious.

4.1.3 Approach to section 54B: Sentencing procedure for the standard non-parole scheme

In *R v. Way*, the Court held that the correct approach to using the standard non-parole sentencing scheme is for the sentencing judge to consider the following question: "*are there any reasons for not imposing the standard non-parole period?*" The Court further held that this question is to be answered by considering two issues, namely the objective seriousness of the offence, and the circumstances of aggravation and mitigation.

The Court explained that after considering the first issue, it might be clear that the standard non-parole period is not appropriate. The second issue may similarly make it clear that the standard non-parole period is not appropriate.

The Court held that the approach outlined does not require a departure from the intuitive or instinctive synthesis approach to sentencing.[83] The Court also noted that such an intuitive approach minimises the risk of "double counting" the factors to be taken into account.

This approach is consistent with the purpose of the scheme as stated in the legislation, namely to provide a further guidepost or benchmark, and also that it ensures that the "*ultimate objective remains one of imposing a sentence that is just and appropriate, having regard to all of the circumstances of the offence and the offender, and so as to give effect to the purposes mentioned in s 3A of the Sentencing Procedure Act.*"[84]

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[81] *R v. Way* [2004] NSWCCA 131 at [98]
[82] *R v. Way* [2004] NSWCCA 131 at [100]
[83] This approach has been approved in *R v. Thomson and Houlton* (2000) 49 NSWLR 383 at [57]-[60], *Wong v. The Queen* (2001) 207 CLR 584; *R v. Whyte* (2002) 55 NSWLR 252; but criticised in *R v. Markarian* [2003] NSWCCA 8. Special leave to appeal to the High Court has been granted in the matter of *Markarian*.
[84] *R v. Way* [2004] NSWCCA 131 at [121]

The Court also specifically noted that it is inappropriate to approach the standard non-parole periods as a starting point:[85]

> "What is not appropriate, in our view, is for a sentencing judge to commence the process for every offence (irrespective of its seriousness, and irrespective of whether the offender's guilt was established after trial or by a plea), at the standard non-parole period, and then to oscillate about it by reference to the aggravating and mitigating factors. The problem with that approach is that the standard non-parole period will tend to dominate the remainder of the exercise, thereby fettering the important discretion which has been preserved by the Act."

4.1.4 Should the scheme be understood as a legislative indication for increased sentences?

In *R v. Way*, the Court observed that there is no consistent ratio between the standard non-parole period set and the maximum penalty available. This point has been noted above,[86] and also that offences with identical maxima also have different standard non-parole periods. The Court considers that this is "*not surprising*" considering the standard non-parole periods were set taking into account the "*seriousness of the offence, the maximum penalties, the Judicial Commission statistics and community expectations in relation to each of the selected offences.*"

In relation to the sentencing statistics, the Court observed that the standard non-parole periods fall at the very top of the existing range of statistics, and they sometimes fall *above* the longest non-parole period imposed. The Court advised however, that this observation should be treated with care considering that: the statistics are for all offenders and show the non-parole period after adjustment for all relevant mitigating and aggravating circumstances; some statistics are based on a numerically small population; it is not possible to use the statistics to identify a case in the middle of the range of objective seriousness by reference to outcome; and they represent little more than a "snapshot" for the period selected.

The Court noted that there was no intention stated in the second reading speech that the scheme would increase sentences, but concluded by acknowledging that the scheme *may* result in the sentencing pattern increasing for some offences:[87]

> "The outcome for individual cases will depend upon the range of objective and subjective considerations that are to be taken into account. Given the absence of any consistent proportion between the non-parole period and maximum penalties prescribed for the Table offences, and the absence of any consistent relativity between those non-parole periods apparent from an examination of the statistics, it may be that for some offences the sentencing pattern will move upwards, while for others it will not."

5. Guideline Judgments

The matter of guideline judgments is also discussed in the Sentencing Council's report on "How best to promote consistency in sentencing in the Local Court".

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85 *R v. Way* [2004] NSWCCA 131 at [131]
86 See: 3.3 Standard Non-Parole Periods: Offences in the Middle of the Range of Objective Seriousness
87 *R v. Way* [2004] NSWCCA 131 at [142]

5.1 Driving with a High-Range Prescribed Concentration of Alcohol

The Office of the DPP has notified the Sentencing Council that the Attorney General, pursuant to section 37 of the *Act,* has brought an application for a guideline judgment in the Court of Criminal Appeal. The offence in question is section 9(4) of the *Road Transport (Safety and Traffic Management) Act 1999*: driving a motor vehicle with a high range prescribed concentration of alcohol ('PCA'). The application was heard on 5 May 2004, with judgment reserved.

The Sentencing Council mentions that one of its legislative functions is:[88]

"to advise and consult with the Minister in relation to:

(i) matters suitable for guideline judgments under Division 4 of Part 3, and

(ii) the submissions to the Court of Criminal Appeal to be made by the Minister in guideline proceedings."

This legislative function was recently amended at the request of the Sentencing Council.[89] The Sentencing Council notes and records that the Attorney General both made the guideline application, and proceeded to hearing, without consulting the Sentencing Council. The Sentencing Council does, however, acknowledge that this may have been influenced by the fact that the application for such a guideline judgment was first raised in February 2003, prior to the formation of the Sentencing Council. The Sentencing Council feels it appropriate to draw attention to its statutory advisory and consultative powers.

The Sentencing Council notes that it has a role to advise and consult with the Attorney General in relation to the submissions to the Court of Criminal Appeal *to be made by the Attorney General* in guideline proceedings. In contrast, the Victorian Sentencing Advisory Council will have a function "*to state in writing to the Court of Appeal its views in relation to the giving, or review of a guideline judgment.*"[90]

The topic of guideline judgments is further considered in the Sentencing Council's report on "How best to promote consistency in the Local Court",[91] including the NSW Court of Criminal Appeal's discretion to refuse to promulgate a guideline judgment. In England, the Sentencing Guidelines Council has taken over the Court of Appeal's responsibility for issuing sentencing guidelines.[92] This matter is also discussed in the Sentencing Council's report on "How best to promote consistency in the Local Court".

In February 2004, BOCSAR published the findings of a study into sentencing for all PCA offences, which together account for over 20% of the total number of sentences imposed.[93] The study arose in a context where there has been rapid growth in the frequency of which PCA offences have been dismissed or conditionally discharged. Under the *Road Transport*

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[88] Section 100J(1) (b) of the *Crimes (Sentencing Procedure) Act 1999*.

[89] Amended by the *Crimes Legislation Amendment Act 2004* (no 11), at the request of the Sentencing Council.

[90] The *Sentencing (Amendment) Act 2003* received assent on 6 May 2003, and commenced on 1 July 2004. It inserts Part 9A into the *Sentencing Act 1991* (VIC). See section 108(C)(1)(a).

[91] At section 4.4

[92] The Sentencing Guidelines Council is headed by the Lord Chief Justice. See section 8.4 of the Sentencing Council's report.

[93] Moffat S, Weatherburn D and Fitzgerald J (2004) "Sentencing Drink-Drivers: The use of Dismissals and Conditional Discharges" 81 *Crime and Justice Bulletin* 1.

(Safety and Traffic Management) Act 1999, conviction for PCA offences carries an automatic period of licence disqualification. However, compulsory licence disqualification does not apply where the Court finds a defendant guilty but directs that the charge be dismissed or the offender conditionally discharged under section 10 of the *Sentencing Procedure Act*.

Part of the report focused on variations between courts in outcomes in 2002, and these findings provide significant evidence of inconsistency in sentencing across NSW in relation to those offences. One of the findings was that the court which deals with an offender sometimes has a much larger effect on the odds of a dismissal or discharge being given than the charge (low, medium or high range PCA offence) on which a person is convicted. The study found clear evidence that the Court where the offender was sentenced influenced the outcome (a "court effect") even when allowing for age, gender, offence seriousness and prior PCA record. The variation was also found to exist amongst courts which did not have access to the Traffic Offenders Program (TOP), showing that the availability of TOP in some Courts but not others could not explain the disparity.

A further discussion of BOCSAR's findings in relation to PCA sentencing, and of the application for a guideline judgment for high range PCA offences is contained in the Sentencing Council's Report on "How best to promote consistency in sentencing in the Local Court."

6. Establishing Procedures for the Efficient Monitoring of Standard Non-Parole Periods and Guideline Judgements

Due to the relative recent enactment of the standard non-parole period sentencing scheme,[94] procedures for the monitoring and reporting of standard non-parole periods are being developed and finalised in consultation with the Judicial Commission of NSW.

The Sentencing Council has been liaising with the Office of the DPP, BOCSAR and the Judicial Commission to ensure that the most efficient and cost effective procedures are in place. It is evident from the Sentencing Council's budget and statutory functions[95] that our role is primarily to assist the Attorney General with respect to sentencing issues and policy. Section 100J(4) provides that:

> "In the exercise of its functions, the Sentencing Council may consult with, and may receive and consider information and advice from, the Judicial Commission of New South Wales and the Bureau of Crime Statistics and Research of the Attorney General's Department (or any like agency that may replace either of those agencies)."

Bearing in mind the Sentencing Council's budget and statutory functions the Council will not be directly involved in the primary collection or analysis of sentencing statistics and data. The Judicial Commission has agreed to assist the Sentencing Council to carry out its responsibilities. The statutory functions of the Judicial Commission include monitoring or assisting in monitoring sentences imposed by courts, and disseminating information and

[94] The standard non-parole sentencing scheme came into effect on 1 February 2003, but only applies to offences committed after that date. It has therefore only been since approximately February 2004 that such matters have come before the Courts to be sentenced under the new scheme. See Schedule 2, Part 7 of the *Crimes (Sentencing Procedure) Act 1999.*

[95] See *Crimes (Sentencing Procedure) Act 1999* section 100J.

reports on sentences imposed by courts.[96] The Sentencing Council does not see its formation in any way as taking over the existing functions of bodies such as the Judicial Commission or BOCSAR.

6.1 Monitoring Standard Non-Parole Periods

The Sentencing Council has access to the Judicial Commission's database, JIRS, which contains sentencing statistics. Following the introduction of the standard non-parole period sentencing scheme, the Judicial Commission will be publishing statistics for offences sentenced under the scheme. These will be presented on the JIRS database as a distinct set of data, separate to the data collected prior to the commencement of the scheme. This will allow all parties concerned to make a meaningful evaluation of the overall impact of the scheme on sentencing trends and practices.

In addition to this, the Judicial Commission will undertake a more detailed analysis of the operation of the standard non-parole periods on the sentencing of the following offences:

Item No	Offence
1A	Murder- where the victim was a police officer, emergency services worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation
1	Murder – other cases
2	Section 26 *Crimes Act 1900* (conspiracy to murder)
3	Sections 27, 28, 29 or 30 *Crimes Act 1900* (attempt to murder)
4	Section 33 *Crimes Act 1900* (wounding etc with intent to do bodily harm or resist arrest)
11	Section 98 *Crimes Act 1900* (robbery with arms etc and wounding)

The Judicial Commission's detailed analysis of these offences will take place once an appropriate amount of material is available for the Judicial Commission to analyse.[97]

The Office of the DPP will assist the Judicial Commission in identifying matters sentenced under the standard non-parole period legislation. In the interim, the Office of the DPP has also provided this information directly to the Sentencing Council for use in the preparation of this Annual Report.

6.2 Monitoring Guideline Judgments

The Sentencing Council has made a request of the Office of the DPP to be notified of applications for guideline judgments. The DPP's Court of Criminal Appeal Branch has indicated that it will contact the Sentencing Council directly in relation to such matters. Also see below and Section 5, for a further discussion regarding guideline judgements.

The Judicial Commission is currently conducting a study into the effect of the Guideline judgment in *Henry*[98] on sentencing for armed robbery offences.[99] The Sentencing Council is

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[96] Section 8 of the *Judicial Officers Act 1986*.

[97] It is expected that this may not be for some months. Indeed, the "Caselaw NSW" database for the Supreme Court of NSW does not contain any reasons for sentence for offences (in particular, murder) committed after 1 February 2003.

[98] [1999] NSWCCA 111, (1999) 46 NSWLR 346

advised that the study will contain both a statistical and legal analysis of the effect of the guideline.

7. Power to Provide Education to the General Public on sentencing matters generally

In July 2003 the Sentencing Council made a submission to the Attorney General requesting possible amendments to provisions of the *Act* pertaining to the functions of the Sentencing Council. Parts of this submission (which included other possible amendments) read:

> 15. It may be of assistance if the Council were given a power to provide education to the general public in connection with the functions of the Council. Such a power would promote public understanding and confidence in the sentencing process.
> 16. This proposal would not give power to the Council to provide education to the general public on sentencing issues generally.

The Sentencing Council notes that the Attorney General, in introducing the amending *Act* stated that the reforms, which included the creation of the Sentencing Council:[100]

> "…are aimed primarily at promoting consistency and transparency in sentencing **and promoting public understanding of the sentencing process."** (Emphasis added).

In response to the submission, the Attorney General stated that:

> "I do not have any strong in principle objections to these proposals but it is far too early to begin amending the legislation so recently passed. We should review the Act after 12 months operation and then introduce amendments."

In the light of the Sentencing Council's preparation of a number of detailed reports on important sentencing issues, the Sentencing Council feels that it should possess powers to inform the public about its functions, as well as to educate the public on sentencing matters generally (subject to being properly resourced). Public confidence in the criminal justice system, and particularly the sentencing process, is an issue raised in various materials used by the Sentencing Council. Having the ability to educate the public on sentencing matters generally will be conducive to addressing this broad issue.

To add, many of the Sentencing Council members, particularly the community members, are well placed to use such an educative power. As prominent members of the community and of their respective organisations they are often invited to share their views at public and private forums. An educative power for the Sentencing Council could assist and compliment the educative roles of other bodies such as BOCSAR and the Judicial Commission without diminishing their responsibilities.

It is noted that the Victorian Sentencing Advisory Council has broad powers in relation to disseminating information on sentencing matters,[101] and consulting with the general public.[102]

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[99] At present, the Sentencing Council is advised that the Judicial Commission hopes to complete this study in the beginning of 2005.
[100] Hon Bob Debus, above n 33, p 5813.
[101] The *Sentencing (Amendment) Act 2003* received assent on 6 May 2003, and part 3 is yet to commence. If not proclaimed, it will automatically commence on 1 July 2004. It will insert Part 9A into the *Sentencing Act 1991*.

8. Sentencing Approach: Instinctive Synthesis or Two-tiered?

There has been recent debase surrounding whether the correct approach to sentencing should involve a staged approach, or an instinctive synthesis. Recent judgments of the High Court and NSW Court of Criminal Appeal show contention as to the correct approach to sentencing, but most recently, the Court of Criminal Appeal has held that an instinctive approach is to be preferred.[103] The High Court is expected to address and consider the issue in *Markarian v. The Queen*.[104]

8.1 What is meant by "two tiered" and "instinctive synthesis"

In December 2002, the Judicial Commission published a paper noting the current confusion as to the correct approach to sentencing, both in terms of what exactly is meant by the terms "two tiered" and "instinctive synthesis" as well as in terms of which approach should be preferred.[105]

The paper notes that in a broad sense, a "two tiered" approach can be used to describe a process whereby the sentencer first considers the objective elements of the offence and then considers the subjective aggravating and mitigating factors and alters the sentence accordingly. In a narrower sense, "two tiered" is used to describe the approach where a sentence length is first specified, and is then altered by reference to a specific factor. An example is where a sentence is reduced, perhaps by a certain percentage, due to a plea of guilty. Further, there is sometimes a mix of these broad and narrow approaches.

In contrast, an instinctive synthesis approach[106] to sentencing "*purports to derive the appropriate sentence by looking at all the relevant factors and sentencing principles, and determining their relative weights by reference to all the circumstances of the case. The balancing of all the relevant considerations takes place in a single step or synthesis, not sequentially.*"

Recent judgments of the High Court show contention as to the correct approach to sentencing,[107] but as noted by Kirby J in *Johnson v. The Queen*:[108]

New section 108C(1)(b) will give the Sentencing Advisory Council the function "*to provide statistical information on sentencing, including information on current sentencing practices, to members of the judiciary and other interested persons*". New section 108C(1)(c) will give the Sentencing Advisory Council the function "*to conduct research, and disseminate information to members of the judiciary and other interested persons, on sentencing matters*"

[102] Ibid. New section 108C(1)(d) will give the Sentencing Advisory Council the function "*to gauge public opinion on sentencing matters*" and section 108(1)(e) will give the Sentencing Advisory Council the function "*to consult, on sentencing matters, with government departments and other interested persons and bodies as well as the general public.*"

[103] *R v. Way* [2004] NSWCCA 131. See recently criticism of an instinctive approach in *R v. Markarian* [2003] NSWCCA 8 at [33]. The matter has recently been considered in the judgment of Kirby J in *Johnson v. The Queen* [2004] HCA 15 at [40] – [44].

[104] See transcript to special leave application: *Markarian v. The Queen* [2003] HCA Trans 505 (2 December 2003).

[105] Traynor, S and Potas, I (December 2002) "*Sentencing Trends and Issues no 25 - Sentencing Methodology: Two tiered or instinctive synthesis?*" Sydney – Judicial Commission of NSW.

[106] First expressed in *R v. Williscroft* [1975] VR 292.

[107] See *AB v. The Queen* (1999) 198 CLR 111, McHugh J in dissent as to the outcome of the appeal, viewed a two-tiered approach as erroneous at [13] – [19], *Ryan v The Queen* [2001] HCA 21 (2001) 206 CLR 267 per Hayne J in favour of an instinctive approach at [144] –[145]; *Wong v The Queen; Leung v The Queen* (2002) 207 CLR 584 per Gaudron, Gummow and Hayne JJ arguing against a two step approach at [74]; per Gleeson CJ

"This Court has not yet conclusively held, in a determination of a majority essential to the orders disposing of a matter, which of these approaches is required by law. Upon each, there are merely obiter dicta."

Those favouring an instinctive approach note the need for judicial discretion, and in criticising a "two stage" approach, note that it is difficult to categorise some factors as being objective or subjective and further, it may depend on the circumstances of the case as to whether a factor is mitigating or aggravating. Further, there is a danger that in first looking at the objective factors and then the subjective factors, that some factors may be "double counted".[109] On the other hand, it is argued that the "instinctive synthesis" approach to sentencing lacks accountability and transparency,[110] see *Markarian v. The Queen*.[111]

8.2 The approach taken in NSW

The NSW Court of Criminal Appeal has on numerous occasions discussed "two stage" and "instinctive synthesis" approaches, with a degree of instinctive synthesis preferred.[112] It has been said that "*Indeed, in NSW, the instinctive synthesis approach is the correct general approach to sentencing.*"[113] It must however be remembered that there are various definitions of what is meant by the terms "two tiered" and "instinctive synthesis".

Most recently in *R v. Way*,[114] the Court held that the correct approach to the new standard non-parole sentencing scheme is for the sentencing judge to consider the following question: "*are there any reasons for not imposing the standard non-parole period?*" The Court further held that this question is to be answered by considering two issues, namely, the objective seriousness of the offence, and the circumstances of aggravation and mitigation which are present in the subject case.[115] The Court explained that after considering the first issue, it might be clear that the standard non-parole period is not appropriate, as it may not fall into

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favouring some degree of a two-step approach at [11]; per Kirby J in obiter, favouring some degree of a two-step approach [101]; *Cameron v The Que*en (2002) 209 CLR 339 per McHugh J at [41]; per Kirby J at[69]–[73]; *Weininger v.The Queen* [2003] HCA 14; (2003) 212 CLR 629 per Gleeson CJ, McHugh, Gummow and Hayne JJ at [24]; *Johnson v. The Queen* [2004] HCA 15 per Kirby J in *obiter* at [39]-[44]

108 *Johnson v. The Queen* [2004] HCA 15 at [40]

109 See also *R v. Way* [2002] NSWCCA 131 at [129]

110 *Wong v The Queen; Leung v The Queen* (2002) 207 CLR 584 per Kirby J at [101] – [102]. Kirby also notes section 22 of the *Crimes (Sentencing Procedure) Act 1999* and questions how the concept of a "discount" can be thought of at all unless an integer has already been thought of from which a discount can be made. An argument against the "instinctive" approach to sentencing is also made by Bagaric, M and Edney, R *"What's instinct got to do with it? A blueprint for a coherent approach to punishing criminals"* (2003) 27(3) Criminal Law Journal 119-141.

111 Special leave granted on 2 December 2003, on appeal from the NSW Court of Criminal Appeal. See *Markarian v. R* [2003] NSWCCA 8

112 See for example, *R v. Thomson and Houlton* (2000) 49 NSWLR 383; *R v. Sharma* [2002] NSWCCA 142, (2002) 54 NSWLR 300; *R v. Whyte* [2002] NSWCCA 343, (2002) 55 NSWLR 252; *R v. McGourty* [2002] NSWCCA 335; *R v. Markarian* [2003] NSWCCA 8. Special leave to appeal to the High Court has been granted in the matter of *Markarian.*

113 See Marien, M "*Standard Non-Parole Sentencing: The New Sentencing Reforms*" (Dec 2002) 14(11) Judicial Officers' Bulletin 83 at 86, citing *R v. Thomson and Houlton* (2000) 49 NSWLR 383 per Spigelman CJ at [57].

114 [2004] NSWCCA 131. See recently criticism of an instinctive approach in *R v. Markarian* [2003] NSWCCA 8 at [33].

115 The Court held that section 21A was not simply a list of limited factors to be taken into account, but as is made clear in section 21A(1), "*The matters referred to in this subsection are in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law.*"

the mid range of seriousness for an offence of the relevant kind. The second issue may similarly make it clear that the standard non-parole period is not appropriate.

The Court held that the approach outlined does *not* require a departure from the intuitive, or instinctive synthesis approach to sentencing, and the Court also noted that such an intuitive approach minimises the risk of "double counting" the factors to be taken into account:[116]

> "The approach which we have outlined does not seem to require a departure from the intuitive or instinctive synthesis approach to sentencing which received judicial support in *R v Thomson and Houlton* (2000) 49 NSWLR 383 at paras 57-60 and which was favoured in the joint judgment in *Wong v The Queen* (2001) 207 CLR 584, but which has also attracted some criticism (*R v Markarian* [2003] NSWCCA 8 – special leave to appeal to the High Court granted). Nor do we see it as requiring resort to a rigid two-tiered approach which involves determining an objective sentence and then adjusting it to take account of subjective factors of the kind which was criticised in *AB v The Queen* (1999) 198 CLR 111, per McHugh and Hayne JJ.
> In *R v Whyte* (2002) 55 NSWLR 252 Spigelman CJ did not regard the use of guideline judgments as being inconsistent with the ultimate application of an "instinctive synthesis approach" (at paras 160 – 167) and we do not see that any material difference arises where the benchmark or reference point is given by legislation.
> Moreover, if the exercise is confined to a single stage, the risk of double counting which might otherwise be involved can be avoided. That arises from the circumstance that some of the aggravating and mitigating factors referred to in s 21A (eg the use of violence on the one hand, or the presence of provocation or duress on the other hand) are of direct application to the circumstances in which the offence occurred, and need to be taken into account in assessing where the offence ranks in the range of seriousness. If they were to place it for example in the mid range, then to bring them to account again for the purposes of s 54B(2) would involve double counting.
> The approach which we favour is consistent with the disclosed legislative intention that Division 1A of Part 4 was to operate, not by way of any mandate or removal of sentencing discretion, but rather as providing a guidepost, or benchmark, against which the case at hand could be compared. That is not to say that it should be merely acknowledged in the passing. It takes its place alongside guideline judgments, and the prescribed maximum sentence for the relevant offence, which are to be taken into account in the same way that sentencing judges are required to take into account the provisions of s 21A, 22, 22A and 23, when exercising their sentencing discretion."

As previously mentioned, the issue of whether an "instinctive" or "two tiered" approach should be preferred is expected to be considered and addressed by the High Court in *Markarian v. The Queen*.[117]

9. Sentencing Trend: The Operation of Suspended Sentences

Section 100J(1)(b) of the *Act* stipulates that the Sentencing Council is to advise and consult the Attorney General in relation to matters suitable for guideline judgments. Pursuant to this, the Sentencing Council wishes to raise a number of issues regarding the use of suspended sentences.

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[116] This approach has been approved in *R v. Thomson and Houlton* (2000) 49 NSWLR 383 at [57]-[60], *Wong v. The Queen* (2001) 207 CLR 584; *R v. Whyte* (2002) 55 NSWLR 252; but criticised in *R v. Markarian* [2003] NSWCCA 8. Special leave to appeal to the High Court has been granted in the matter of *Markarian*.

[117] See transcript to special leave application: *Markarian v. The Queen* [2003] HCA Trans 505 (2 December 2003).

There are issues of concern relevant to the matter of suspended sentences that will perhaps need to be addressed in one or more ways, perhaps after the Sentencing Council's report on "abolishing prison sentences of six months or less" is furnished to the Attorney General. Attached at **Annexure F** is further information regarding some of the issues of concern which arise.

9.1 Background

A suspended sentence is a sentence of imprisonment imposed on an offender, but not actually carried out. Despite the court's decision to sentence the offender to a period of imprisonment, he or she is allowed to remain in the community on certain conditions. That is, the sentence is 'suspended'.

Suspended sentences were re-introduced as a sentencing option in 2000.[118] An important matter of administration is that breach of a suspended sentence is dealt with by the Court rather than by the Parole Board and there is little flexibility as to what may be done in consequence of a breach.[119]

Partially suspended prison sentences were removed as a sentencing option in July 2003 as it was inter alia considered that they were difficult to administer.[120] The Sentencing Council records that it was not consulted in relation to this removal and amendment and had no input in relation to it.

Prior to the amendment in July 2003, and shortly after the establishment of the Sentencing Council, the DPP as a member of the Sentencing Council raised the issue of suspended sentences and in particular whether the Sentencing Council should advise the Attorney General that it was an issue or matter suitable for a guideline judgment because its general discretionary wording suggested a need for guidance as to its discretionary use.

At the time such was raised, the Sentencing Council inter alia considered (that at least on its own initiative) that it lacked the power to address the matter and to advise because of the then provisions of section 100J(1)(b) of the Act.[121] At the suggestion of the Council and on its initiative, section 100J(1)(b) has recently been amended to correct what appears to be a drafting oversight to ensure that the Sentencing Council can advise and consult with the Attorney General not only in relation to whether an *offence* is suitable for a guideline judgment but in relation to *all matters* that may arise in the context of a guideline judgment (for example, classes of courts, offences or powers).[122]

An expansion of power allows the Sentencing Council to explore inter alia the matter of a guideline judgment for suspended sentences if it considers it appropriate to do so. However as some of the issues of concern in relation to the matter of suspended sentence will be addressed in some detail in its report on the subject of "abolishing prison sentences of six

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[118] Section 12 of the *Crimes (Sentencing Procedure) Act 1999.*
[119] See section 98(3) and 99(1) of the *Crimes (Sentencing Procedure) Act 1999.*
[120] *Crimes Legislation Amendment Act 2003* assented to on 8 July 2003. Schedule 6 commenced on the same day.
[121] Section 100J(1)(b) and (2) of the *Crimes (Sentencing Procedure) Act 1999.*
[122] See *Crimes Legislation Amendment Act 2004* (no 11) Schedule 3.

months or less", the Council is of the view that any question of a guideline judgement should be deferred until after the report is completed and considered.

9.2 Some issues of concern in relation to suspended sentences

The Sentencing Council determined at its meeting of 19th May 2004 that the issue of suspended sentences be deferred until the Committee's discussion paper is again before the Council after comments upon such have been received.

It is nevertheless appropriate to observe in passing a number of issues in the Discussion Paper concerning suspended sentences:

- consideration of re-introducing a power to partially suspend a prison sentence (including in particular short prison sentences);[123]
- whether a wider discretion should be given to the Court in addressing a breach of a suspended sentence;[124] and
- falling short of abolishing short prison sentences could/should "short prison sentences" be automatically suspended in whole or in part.[125]

Other issues which arise in relation to suspended sentences include:

- Whether the criteria should be clarified as to when it is appropriate to suspend a sentence;[126]
- Whether suspended sentences are inappropriately being used in place of less severe penalties, such as community service orders and good behaviour bonds;[127] and
- Whether "street time" for a suspended sentence is to count, or whether an offender who breaches a suspended sentences for example on the last day could be required to serve the whole sentence in prison.[128]

On the issue of "street time" for suspended sentences, the Sentencing Council notes the views of Howie J speaking in the Court of Criminal Appeal in the recent decision of *R v. Tolley*[129] when discussing the effects of a revocation of a bond under section 12. His Honour observed:[130]

> "I am prepared to admit that, in the absence of full argument by the parties on these matters, I may be overlooking some provision or policy that makes the operation of suspended sentences rational, consistent and comprehensible. But I am also prepared to admit defeat and move on. I would simply pause to express my exasperation that it appears to be so difficult to find in the legislation the answer to what is a fundamental question and one that should be capable of an immediate and simple answer by reference to a single provision of the Act. Does the revocation of a bond under s 12 reactivate the whole of the suspended sentence so that, subject to s 47(2), it commences from the date of revocation or does it merely reactivate that part of the sentence that is the equivalent to the unexpired period of the bond? The

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[123] See Committee's Discussion Paper at p 36.
[124] See Committee's Discussion Paper at p 38.
[125] See Committee's Discussion Paper at p 37.
[126] This issue was raised with the Sentencing Council by one of its members, Mr Nicholas Cowdery QC, NSW Director of Public Prosecutions. Also, there have recently been a number of Crown sentence appeals where the sentence at first instance was suspended.
[127] See for example, Brignell and Poletti (November 2003) "*Sentencing Trends and Issues Number 29: Suspended sentences in NSW*" Sydney: Judicial Commission of NSW.
[128] See for example, recent comments by Howie J in *R v. Tolley* [2004] NSWCCA 165.
[129] [2004] NSWCCA 165, 26 May 2004.
[130] at [43]

> answer to that question will reveal whether a suspended sentence in this State is a sword or a butter knife."

Although acknowledging that it is unclear in the legislation, the judgment in *Tolley* appears to suggest a preferred view that the sentence of imprisonment should commence on the date of revocation of the bond.

Clearly, there are issues of concern relevant to the matter of suspended sentences that will perhaps need to be addressed in one or more ways, perhaps after the Council's report on "abolishing prison sentences of six months or less" is furnished to the Attorney General.

Annexure A

Inaugural members of the NSW Sentencing Council with brief biography

By section 100 I(2) of the *Crimes (Sentencing Procedure) Act 1999*, the Sentencing Council is to consist of 10 members appointed by the Minister, of whom:

(a) one is to be a retired judicial officer, and
(b) one is to have expertise or experience in law enforcement, and
(c) three are to have expertise or experience in criminal law or sentencing (of whom one is to have expertise or experience in the area of prosecution and one is to have expertise or experience in the area of defence), and
(d) one is to be a person who has expertise or experience in Aboriginal justice matters, and
(e) four are to be persons representing the general community, of whom two are to have expertise or experience in matters associated with victims of crime.

The inaugural members of the NSW Sentencing Council are:

Hon Alan R Abadee RFD QC (Chairperson)
The Honourable Alan Abadee RFD QC is a retired Judge of the Supreme Court of New South Wales. He was admitted to the Bar in 1964 and appointed one of Her Majesty's Council (QC) in 1984. He was also a Deputy Judge Advocate General of the Australian Defence Force between 1996 and 2000. Mr Abadee is the Chairperson of the Sentencing Council.

Hon J P Slattery AO QC (Deputy Chairperson)
The Honourable John Patrick Slattery AO QC was appointed as a Judge of the Supreme Court in 1970 and Chief Judge at Common Law in 1984, a position he held until his retirement in 1988. He has held a number of Chair and Committee member appointments including Royal Commissioner of the Chelmsford Private Hospital and Mental Health Services between 1988 and 1990, Chair of the NSW Parole Board between 1976 and 1983 and Director of Langton Clinic between 1972 and 1981. Mr Slattery is the Deputy Chairperson of the Sentencing Council.

Prof. Larissa Behrendt (Jumbunna Indigenous House of Learning, UTS)
Prof. Larissa Behrendt completed her Masters and Doctorate in Indigenous Rights and International Law at Harvard Law School, and is a Lionel Murphy Scholar. She is a Barrister of the Supreme Court of the ACT, the Director of Jumbunna Indigenous House of Learning at UTS and the Director of Ngiya, National Institute of Indigenous Law, Policy and Practice. Professor Behrendt is a member of the Council who has particular experience in Aboriginal Justice matters.

Mr Howard W Brown OAM (Victims of Crime Assistance League)
Mr Howard W Brown is a community representative on the NSW Victims Advisory Board and represents the Board on the NSW Innocence Panel. He is the Deputy President of the Victims of Crime Assistance League. He is one of four members of the Council who represent the general community.

Mr N R Cowdery AM QC (NSW Director of Public Prosecutions)
Nicholas Cowdery QC has been the Director of Public Prosecutions for the State of New South Wales since 1994. He worked as a Public Defender in Papua New Guinea until 1975 and then in private practice at the Sydney Bar until 1994. In 1987 he was appointed one of Her Majesty's Counsel. He has been President of the International Association of Prosecutors since 1999; is Chairman of the Criminal Law Committee of the Section on Legal Practice of the International Bar Association (IBA) and a member of the Council of the Human Rights Institute of the IBA. Mr Cowdery is one of three members of the Council with criminal law or sentencing expertise. He has particular experience in the area of prosecution.

Mrs Jennifer Fullford (Community Representative)
Mrs Jenny Fullford is a welfare officer at Maitland Community & Information Centre, the current registrar for Maitland R.S.L. Youth Club and a active member of St Paul's Anglican Parish. Mrs Fullford is one of four members of the Council who represent the general community.

Ms Martha Jabour (Homicide Victims Support Group)
Ms Martha Jabour, Executive Director of the Homicide Victims Support Group (HVSG), represents the HVSG on the Victims Advisory Board, the Youth Justice Advisory Committee and the NSW Mental Health Sentinel Events Review Committee. She is also on the Serious Offender's Review Council as a community representative. Ms Jabour is one of four members of the Council who represent the general community. She has particular experience in matters associated with victims of crime.

Commander John Laycock APM (NSW Police)
Commander John Kevin Laycock has been a member of the New South Wales Police Force for over 35 years and has attained the rank of Assistant Commissioner. He has extensive expertise in criminal investigation and law enforcement as well as command roles at many levels. He is currently the Commander of Special Investigations reporting to the Deputy Commissioner (Operations). He brings to the Council considerable expertise and experience in law enforcement.

Mr Ken Marslew AM (Enough is Enough Anti-Violence Movement)
Mr Ken Marslew AM founded the Enough is Enough Anti Violence Movement Inc. in late 1994 and represents Enough is Enough on the NSW Attorney General's Victims Services Advisory Board, the Premier's Council on Crime Prevention and the Corrective Services Restorative Justice Advisory Committee. Mr Marslew is one of four members of the Council who represent the general community. He has particular experience in matters associated with victims of crime.

Mr Peter Zahra SC (Senior Public Defender)
Peter Zahra SC is currently Senior Public Defender in New South Wales. He is involved in practice in the Supreme Court, the Court of Criminal Appeal and the High Court. He is one of three members of the Council with criminal law or sentencing expertise. He has particular experience in the area of defence.

Annexure B

Meeting dates of the NSW Sentencing Council

Wednesday, 25 March 2003
Wednesday, 21st May 2003
Wednesday, 18th June 2003
Wednesday, 16th July 2003
Wednesday, 20th August 2003
Wednesday, 17th September 2003
Wednesday, 15th October 2003
Wednesday, 19th November 2003
Wednesday, 17th December 2003
Wednesday, 25th February 2004
Wednesday, 17th March 2004
Wednesday, 21st April 2004
Wednesday, 19th May 2004
Wednesday, 16th June 2004

Annexure C

Membership and meeting dates of the Committee assisting the NSW Sentencing Council on the issue of abolishing prison sentences of 6 months or less.

The members of the Committee were:

The Hon. A. R. Abadee RFD QC (Chairperson)
Professor Chris Cunneen, Director, Institute for Criminology, University of Sydney
Ms Robyn Gray, Deputy Solicitor for Public Prosecutions (Legal), Office of the Director of Public Prosecutions
Senior Assistant Commissioner Ken Middlebrook, Community Offender Services, Department of Corrective Services
Mr Peter Muir, Director, Operations, Department of Juvenile Justice
Superintendent Bruce Newling, Court and Legal Services, NSW Police
Mr Ivan Potas, Director, Research and Sentencing, Judicial Commission of NSW
Mr Brian Sandland, Acting Director, Criminal Law, Legal Aid Commission of NSW
Ms Mary Spiers, Senior Policy Officer, Criminal Law Review Division
Ms Tricia White, Senior Policy Analyst, Ministry for Police

<u>Meeting dates:</u>
Thursday, 11 September 2003
Monday, 13 October 2003
Monday, 17 November 2003
Monday, 23 February 2004
Tuesday, 6 April 2004

Annexure D

Standard non-parole period offences: standard non-parole period compared with JIRS median non-parole period, 'standard' head sentence, and 'standard' head sentence as a percentage of the maximum penalty.

Table 1

	Offence	**Standard non-parole period**	**JIRS median non-parole period**	**'Standard' head sentence***	**Maximum penalty**	**'Standard' head sentence as % of max.**
1A	Murder- where the victim was a police officer, emergency services worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation	25 years	14 years	33.3 years	Life imprisonment s19A Crimes Act	Not calculable
1	Murder – other cases	20 years	14 years	26.7 years	Life	Not calculable
2	Section 26 *Crimes Act* 1900 (conspiracy to murder)	10 years	6 years	13.3 years	25 years	53 %
3	Sections 27,28,29 or 30 *Crimes Act* (attempt to murder)	10 years	See **Table 2** below	13.3 years	25 years	53 %
4	Section 33 *Crimes Act* (wounding etc with intent to do bodily harm or resist arrest)	7 years	36 months	9.3 years	25 years	37 %
5	Section 60 (2) *Crimes Act* (assault of police officer occasioning bodily harm)	3 years	12 months	4 years	7 years	57 %
6	Section 60(3) *Crimes Act* (wounding or inflicting GBH on police officer)	5 years	60(3)(a) – 12 months	6.7 years	12 years	56 %
7	Section 61I *Crimes Act* (sexual assault)	7 years	24 months	9.3 years	14 years	67 %
8	Section 61J *Crimes Act* (aggravated sexual assault)	10 years	36 months	13.3 years	20 years	67 %
9**	Section 61JA *Crimes Act* (aggravated sexual assault in company)	15 years	N/A*	20 years	Life imprisonment	Not calculable
9A	Section 61M (1) *Crimes Act* (aggravated indecent assault)	5 years	12 months	6.7 years	7 years	95 %
9B	Section 61M (2) *Crimes Act* (aggravated indecent assault-child under 10)	5 years	18 months	6.7 years	10 years	67 %
10	Section 66A *Crimes Act* (sexual intercourse-child under 10)	15 years	30 months	20 years	25 years	80 %
11	Section 98 *Crimes Act* (robbery with arms etc and wounding)	7 years	36 m; 42 m	9.3 years	25 years	37 %
12	Section 112(2) *Crimes Act* (breaking etc into any house and committing serious indictable offence in circumstances of aggravation)	5 years	2 years	6.7 years	20 years	34 %
13	Section 112(3) *Crimes Act* (breaking into any house and committing indictable offence circumstances special aggvt)	7 years	42 months (3.5 years)	9.3 years	25 years	37 %
14	Section 154C (1) *Crimes Act* (car-	3 years	No data listed	4 years	10 years	40 %

	jacking)					
15	Section 154C (2) *Crimes Act* (car-jacking in circumstances of special aggravation)	5 years	18 months	6.7 years	14 years	48 %
15 A	Section 203E *Crimes Act* (bushfires)	5 years	30 months (Note: 1 prisoner only)	6.7 years	14 years	48 %
16	Section 24(2) *Drug Misuse and Trafficking Act* 1985 (manufacture or production of commercial quantity of prohibited drug) being an offence that: a) does not relate to cannabis leaf, and b) if a large commercial quantity specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug)	10 years		13.3 years	20 years	67 %
17	Section 24(2) *Drug Misuse and Trafficking Act* 1985 (manufacture or production of commercial quantity of prohibited drug) being an offence that: a) does not relate to cannabis leaf, and b) if a large commercial quantity specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug)	15 years		20 years	Life imprisonment	Not calculable
18	Section 25(2) *Drug Misuse and Trafficking Act* 1985 (supplying commercial quantity of prohibited drug) being an offence that: a) does not relate to cannabis leaf, and b) if a large commercial quantity specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug)	10 years		13.3 years	20 years	67 %
19	Section 25(2) *Drug Misuse and Trafficking Act* 1985 (supplying commercial quantity of prohibited drug) being an offence that: a) does not relate to cannabis leaf, and b) if a large commercial quantity specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug)	15 years		20 years	Life imprisonment	Not calculable
20	Section 7 *Firearms Act* 1996 (unauthorised possession or use of firearms)	3 years	18 months	4 years	(a) prohibited firearm: 14 years	(a) 29 % (b) 80 %

					(b) all other cases: 5 years	

* The *Crimes (Sentencing Procedure) Act 1999* section 44(2) states, *"The balance of the term of the sentence must not exceed one-third of the non-parole period for the sentence, unless the court decides that there are special circumstances for it being more…"* For the offences included in the standard non-parole scheme, the 'standard' head sentence is therefore an additional one-quarter of the stipulated non-parole period. The standard head sentence was then calculated as a percentage of the maximum penalty.

**For Item 9, section 61JA one prisoner was sentenced to a non-parole period of 2 years; another was sentenced to a non-parole period of 6 years; and a third prisoner received a non-parole period of 10 years. A 'median' period is therefore impossible to represent.

Table 2

Item no. 3 Attempt Murder Sections	**SNPP**	**Mid point range of non-parole periods**
Administer poison w/i to murder (s 27)	10 years	5 years
Wound or cause g.b.h w/i to murder (s 27)	10 years	7 years
Shoot at w/i to murder (s 29)	10 years	48 months
Attempt to strangle/ suffocate w/i to murder (s 29)	10 years	30 months
Attempt to murder by other means (s 30)	10 years	24 months

Annexure E

Summary of Standard non-parole judgments of the Court of Criminal Appeal.

***R v. Way* [2004] NSWCCA 131**
Appeal against severity of sentence – supply commercial quantity of methylamphetamine – Appeal allowed. At first instance, W was sentenced to concurrent sentences of imprisonment of 13 years and 4 months for count 1, and a fixed term of 3 years for count 2. A non-parole period of 10 years was fixed for the first count, which is the standard non-parole period specified for that offence. On appeal, re-sentenced to a non-parole period of 7 years with a head sentence of 9 years and 4 months in relation to the standard non-parole period offence.

The Court's judgment in *R v. Way* considered, in detail, the operation of the standard non-parole sentencing scheme, and is extracted in the body of the Council's Report.

***R v. Shi* [2004] NSWCCA 135**
Crown appeal against sentence – Supply commercial quantity of methylamphetamine – Appeal allowed.

The offence of supply commercial quantity of methylamphetamine is one listed in the standard non-parole sentencing scheme, with a standard non-parole period of 10 years. Sentenced imposed after a plea of guilty was imprisonment for 4 years with a non-parole period of 2 years. On appeal, re-sentenced to 6 years with a non-parole period of 3 years.

***R v. Hopkins* [2004] NSWCCA 105**
Crown appeal against sentence – Aggravated sexual assault – Appeal dismissed. Sentenced to two years with a non-parole period of six months (standard non-parole period is 10 years).

The sentencing judge found that the offender "*was labouring under considerable disability at the time in the form of mental illness"* Court of Criminal Appeal held that it was open to the sentencing judge to conclude that the degree of culpability of the offender was considerably attenuated to the extent that a short sentence with a very short non-parole period was within the range of the appropriate exercise of discretion.

***R v. Tuncbilek* [2004] NSWCCA 105**
Appeal against severity of sentence – aggravated car jacking – Appeal allowed.

Applicant was sentenced after pleas of guilty to assault with intent to rob whilst armed with an offensive weapon, and aggravated car jacking (standard non-parole period 5 years). Sentences were partially cumulated resulting in a combined sentence of ten years with a non-parole period of seven and a half years.

Sentencing judge made no reference to the standard non-parole sentencing scheme, and consequently, did not consider where the offence lay on the continuum of objective

seriousness. The CCA held[131] that this clearly demonstrated error, and referred to *R v. Way* where the operation of the scheme was explained. In re-sentencing the applicant, the CCA concluded that the case was in the middle of the range of objective seriousness, but also noted that the standard non-parole period should be reduced to allow for the plea of guilty, and also further reduced the non-parole period to allow for special circumstances under section 44. Count 2: non-parole period of three years, commencing on 3 March 2005 and expiring on 2 March 2008, with a balance of term of two years, expiring on 2 March 2010.

***R v. Johnson* [2004] NSWCCA 140**
Crown appeal – Break, enter and steal in circumstances of aggravation (2 counts, one of which sentenced under standard non-parole sentencing scheme with standard non-parole period of 5 years) – Appeal dismissed.

The Crown appeal was dismissed, but partly upon the basis of concessions made at the sentencing hearing. Court conceded that the sentence may have been manifestly inadequate, but there were a number of factors present which were relevant to the Court's discretion to decline to intervene, including a lengthy delay prior to appeal.

***R v Mouloudi* [2004] NSWCCA 96**
Crown appeal against sentences – Section 7 of the *Firearms Act 1996* – approach on re-sentencing since introduction of standard non-parole periods.

The respondent was charged with 2 offences of unauthorised possession of a prohibited firearm contrary to the provisions of section 7(1) of the *Firearms Act 1996* (the Act). Two pistols were found on the respondent's person when searched by police. An aggravating factor to be taken into account was the respondent's attempts to hide/remove one of the pistols which was considered to be a "hostile" act. The maximum penalty prescribed for offences under section 7(1) is imprisonment for 14 years with a standard non-parole period of 3 years.
The sentencing judge sentenced the respondent to four and a half years imprisonment with two and a half years non-parole period. The remarks on sentence detail that the sentencing judge referred to the maximum penalty for these offences being five years. This is incorrect and the appellant submitted that this was a material error of law and warranted the intervention of the CCA.
<u>Material error of law</u>
The CCA held that, from an analysis of the sentencing judge's remarks and the sentencing proceedings, the sentencing judge regarded these offences as very serious. The CCA held that it is not realistic to think that after considering the references the sentencing judge made to the seriousness of the offences he would then only sentence the offender to a prison term of four and half years if he had not felt himself constrained by a maximum penalty of five years. The reference to the incorrect maximum penalty was not a "slip of the tongue" and was a material error of law warranting intervention by the CCA and the re-sentencing of the respondent.
<u>The re-sentence</u>
In fixing the non-parole period, the CCA made reference to *R v. Way*[132] where it was held that the standard non-parole period only applies to an offender convicted after trial. In the

[131] Per Simpson J with Spigelman CJ and Wood CJ at CL agreeing.
[132] [2004] NSWCCA 131

present case the offender was convicted after a plea, thus the standard non-parole period does not apply leaving the Court's discretion in fixing a non-parole period unfettered. The CCA held that in a case such as the present, a Court may have regard to the standard non-parole period but they do not need to adhere to it.
It was submitted by the appellant that the offences in question should be categorised as being towards the upper range of the scale of seriousness for this offence. The CCA held that the aggravating factors in this case far outweighed the mitigating factors:

> "[65] To be in possession of two loaded prohibited firearms, in respect of one of which there was a threatened use, whilst on bail and within two weeks of being sentenced to eight months periodic detention for maliciously wounding his nephew as a result of the use of an unauthorised firearm, and on the day that he was to commence his detention is conduct of a gravely serious kind."

The Crown appeal was upheld and the respondent was sentenced to six years imprisonment with a non-parole period of four years.

***R v Perez* [2004] NSWCCA 218**
The case arose from an appeal from a sentence imposed by the District Court (Judge Urquhart) on 27 February 2004 in respect of two robbery offences. The sentence imposed in the District Court occurred prior to the judgment in *R v Way* [2004] NSWCCA 131 being handed down.

The more serious offence was armed robbery with wounding, which carries a standard non-parole period of 7 years. One of the grounds of appeal to Court of Criminal Appeal was that the District Court Judge had erred in treating the standard non-parole period as applying after a *plea* of guilty. The District Court Judge had not accepted the submission on behalf of Mr Perez that the standard non-parole periods did not apply to a sentence following a *plea* of guilty, but should be applied on conviction after *trial*. His Honour departed downwards from the standard non-parole period in the case, in light of the offender's age and the offences on the Form 1. The DCJ imposed a non-parole period of 6 years, with the balance set at 5 years.

The Court of Criminal Appeal (Hulme J, with Ipp JA and Hislop J agreeing) held that in the light of *R v Way*, His Honour's conclusion as to the applicability of the standard non-parole periods in the context of a guilty *plea* must be regarded as wrong. The CCA also took the view that the standard non-parole period should not be imposed in the case, not only due the applicant's plea, but also his youth and the existence of special circumstances justifying a longer non-parole period than one-third of the appropriate non-parole period. Applying *R v Way*, the Court then turned to consider "normal sentencing practice" to determine the appropriate sentence (at para 39).

Annexure F

Some current issues and concerns with Suspended sentences in NSW

Re-introduction of suspended sentences in NSW

The issue of suspended sentences is dealt with in greater detail in the Sentencing Council's report on "Abolishing prison sentences of 6 months or less" which is to be furnished to the Attorney General in the coming month.

The power to suspend was formerly available under sections 558 –562 of the *Crimes Act 1900*. It was removed in 1974 following a *Report of the Criminal Law Committee*[133] that the bond system was operating more effectively than the option to suspend punishment on conviction.[134] Following its review of the law of sentencing, the NSW Law Reform Commission ("NSWLRC"), in Report 79 (1996) recommended:

> "Suspended sentences should be reintroduced in New South Wales. Appropriate safeguards should be implemented to ensure that injustice does not arise in an individual case where an offender's sentence has been suspended."[135]

The NSWLRC's recommendation to re-introduce suspended sentences was made following consideration of submissions which both supported and opposed the proposal.[136] Those in opposition argued that suspended sentences might result in net-widening and penalty escalation. This is because offenders who would ordinarily have received a sentence other than imprisonment, such as a fine, may be sentenced to a suspended term of imprisonment.[137] The flow-on effect of this may be that, if a breach were to occur, the person could spend time in custody when previously their offence would not have had this result. Another issue raised in Discussion Paper 33 was that suspended sentences tend to be longer than a sentence served immediately.[138]

Whilst acknowledging these objections, the Commission took the view that the advantages of adding suspended sentences as an available sentencing option outweighed these possible negative consequences. The major advantage is in situations where the seriousness of the offence calls for a term of imprisonment, for reasons of denunciation, but strong mitigating factors justify the offender's release to the community.[139] In relation to the objections raised in various submissions, the Commission took the view that appropriate safeguards could be implemented in legislation to counter such concerns.[140] In Discussion Paper 33 the Commission stated that instances where a suspended sentence would be the preferred sentencing option are 'conceivably limited in number and scope'.[141]

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[133] New South Wales. Criminal Law Committee, *Report of the Criminal Law Committee on Proposed Amendments to the Criminal Law and Procedure* (September 1973).
[134] Ibid at 15. See also NSWLRC, Discussion Paper 33 *Sentencing* (1996) at 9.58-9.60
[135] New South Wales Law Reform Commission ('NSWLRC'), Report 79 *Sentencing* (1996), Recommendation 20 at 4.20.
[136] Ibid at 4.21. See note 32 for submissions in favour; note 33 for submissions opposing.
[137] Ibid at 4.21.
[138] NSWLRC, at 9.63.
[139] Ibid at 4.22, and Discussion Paper 33 at 9.62.
[140] NSWLRC, at 4.23
[141] NSWLRC, at 9.62

As a result of this recommendation, on 3 April 2000 suspended sentences were re-introduced as part of the *Act,* as a sentencing option. The Government adopted the NSW LRC's rationale for the use of suspended sentences:

> "The primary purpose of suspended sentences is to impute the seriousness of the offence and the consequences of re-offending, whilst at the same time providing an opportunity, by good behaviour, to avoid the consequences. Their impact on the offender is however weightier than that of a bond. Suspended sentences will only apply to sentences of not more than two years."[142]

The relevant provision provides:[143]

(1) A court that imposes a sentence of imprisonment on an offender (being a sentence for a term of not more than 2 years) may make an order:

(a) suspending execution of the whole of the sentence for such period (not exceeding the term of the sentence) as the court may specify in the order, and

(b) directing that the offender be released from custody on condition that the offender enters into a good behaviour bond for a term not exceeding the term of the sentence.

(2) An order under this section may not be made in relation to a sentence of imprisonment if the offender is subject to some other sentence of imprisonment that is not the subject of such an order…

Where the court suspends the sentence, it must direct that the offender enter into a good behaviour bond[144] for a term not exceeding that of the sentence.

The Inappropriate Use of Suspended Sentences?

The use of suspended sentences is an issue the Sentencing Council would like to raise with the Attorney General. This issue has come to our attention following the release of a report by the Judicial Commission which suggests that the re-introduction of suspended sentences may have resulted in "sentence escalation".[145] It was also raised by one of our members, Mr Nicholas Cowdery AM QC, NSW Director of Public Prosecutions.[146] Further, the Sentencing Council's research indicates that there have been a large number of Crown appeals against suspended sentences, and a fair proportion of such appeals have been successful.

From section 12 it can be see that the imposition of a suspended sentence involves at least two, possibly three separate stages: determination that a term of imprisonment is warranted,[147] determination of the length of the term, then lastly, if the term of imprisonment

[142] Hon. I.M Macdonald, *Hansard*, Legislative Council, 30 November 1999, p3807.
[143] Section 12, *Crimes (Sentencing Procedure) Act 1999.*
[144] Section 95 *Crimes (Sentencing Procedure) Act 1999.*
[145] Brignell and Poletti (November 2003) "*Sentencing Trends and Issues Number 29: Suspended sentences in NSW*" Sydney: Judicial Commission of NSW.
[146] Raised at the May 2003 meeting of the Sentencing Council
[147] In accordance with section 5(1) *Crimes Sentencing Procedure Act 1999.*

is less than 2 years, a decision to suspend the sentence.[148] In *JCE* [149] the NSW Court of Criminal Appeal emphasised the importance of this process when it stated that:

> "A sentence of imprisonment which is suspended is nonetheless a sentence of imprisonment…If the court is satisfied that no penalty other than imprisonment is appropriate, it must determine what term of imprisonment is appropriate. Other questions then arise. By subsection 12(1) of the Act, one of the questions to be considered when the appropriate term of imprisonment is not more than two years, is whether execution of the sentence should be suspended." [150]

It is accepted that sentencing courts need not explicitly state they have applied the two steps in imposing a suspended sentence.[151] However, the nature of the sentence imposed and the failure to record that a two-step approach has been taken may lead the Court of Criminal Appeal to examine carefully the findings made by the sentencing judge to determine whether the sentence is erroneous.[152]

This reasoning process involved in imposing a suspended sentence has been the subject of criticism.[153] Bagaric points out it is ' paradoxical' to impose a suspended sentence only where it is felt that an immediate custodial sanction is appropriate.[154]

More specifically, Bagaric argues that:

> "If all of the factors in mitigation have been considered at the outset and an immediate custodial sentence is imposed, there is nothing left which can reduce the severity of the penalty. Once sentences higher up in the sentencing hierarchy than a suspended sentence have been dismissed as too mild, it is farcical to claim that a suspended sentence is appropriate, particularly when there are no new variables to tip the scales further in favour of a more lenient disposition."[155]

One consideration is that this double weighing of mitigating factors may favour white-collar and middle class offenders.[156]

In *Dinsdale v The Queen*[157] Kirby J made note of such objections to the suspended sentence,[158] but went on to state that 'suspended imprisonment is both a popular and much used sentencing option in Australia.'[159] Kirby J took the view that the criticisms:

> "…draw attention to the need for courts to attend to the precise terms in which the option of suspended sentences of imprisonment is afforded to them and to avoid any temptation to misapply the option where a non-custodial sentence would suffice."[160]

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[148] This could also be described as involving 2 stages, as in *Dinsdale v The Queen* [2000] HCA 54 at 76 per Kirby '…the imposition of a term of imprisonment, and the suspension of it…'
[149] [2000] NSWCCA 498.
[150] Ibid at [15-17] per Fitzgerald JA (Whealy and Howie JJ agreeing) .
[151] *R v Foster* [2001] NSWCCA 215 at [33].
[152] Ibid, at [35].
[153] M Bagaric, 'Suspended Sentences and Preventative Sentences: Illusory Evils and Disproportionate Punishments' (2002) 22(2) *UNSW Law Journal* 535, at 538-540. See also, L Bartels, 'Suspended sentences in NSW' (2001) 8(9) *Criminal Law News NSW and ACT* 81.
[154] Ibid at 538 (footnotes omitted).
[155] Ibid at 539 (footnotes omitted).
[156] Judicial Commission of NSW, at note 11 citing Warner (2002). See also Bagaric, above n 151at 540.
[157] [2000] HCA 54
[158] Ibid at [74-76]
[159] Ibid at [76]

Bagaric also agrees that the 'absurdity associated with the reasoning process behind suspended sentences is not, however, a persuasive reason for their abolishment.'[161] Rather, it points to the need for transparency and revision regarding the circumstances in which they can be imposed.[162]

It is this need for clear guidance regarding the use of suspended sentences which the Sentencing Council wishes to raise with the Attorney General: when is suspension of a term of imprisonment 'legally and factually justified'?[163] Certainly, regard should be given to the policy objectives outlined above. In addition, there exists some judicial guidance on this topic. In *Dinsdale v The Queen*[164] Kirby J (with whom Gaudron and Gummow JJ agreed) made reference to authorities suggesting that the primary consideration is rehabilitation.[165] His Honour went on to state that:

> "To limit the exercise of the discretion to suspend a sentence of imprisonment be reference wholly, mainly, or specially, to the effect which suspension would have on rehabilitation of the offender would constitute an error."[166]

The preferred approach is to look at all the matters relevant to the circumstances of the offence as well as those personal to the offender. That is, the same considerations which are relevant to the initial decision to impose imprisonment.[167] *Dinsdale* has subsequently been applied in *R v JCE,*[168] where Fitzgerald JA said:

> "Broadly stated, as Kirby J pointed out in Dinsdale, the material considerations are the objective features of the offence and the personal considerations applicable to the offender including considerations of rehabilitation and mercy.
>
> Often, as in the present case, the material considerations in sentencing will point in different directions. The sentencing process requires the court to balance those considerations. A balancing of the considerations which led to a conclusion that no sentence other than imprisonment is appropriate may, nonetheless, lead to a decision that execution of the sentence should be suspended."[169]

In *R v Zamagias,* Howie J, on behalf of the Court, stated a suspended sentence is to be viewed as a real sentence and as punishment for the offence, placing it as a more severe option than a community service order. [170] His Honour went on:

> "Further, a sentencing court must approach the imposition of a sentence that is suspended on the basis that it can be a sufficiently severe form of punishment to act as a deterrent to both the general public and the particular offender. Of course it must also be recognised that the fact that the execution of the sentence is to be immediately suspended will deprive the punishment of much of

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[160] Ibid
[161] Bagaric, above n 151at 540
[162] Ibid
[163] *Dinsdale v The Queen* [2000] HCA 54 at 76 per Kirby
[164] [2000] HCA 54
[165] Ibid, at [81]
[166] Ibid, at [84]
[167] Ibid, at [85]
[168] [2000] NSWCCA 498
[169] Ibid, at [17 – 18]
[170] [2002] NSWCCA 17 at [31]

> its effectiveness in this regard because it is a significantly more lenient penalty than any other sentence of imprisonment. The question of whether any particular sentencing alternative, including a suspended sentence, is an appropriate or adequate form of punishment must be considered on a case by case basis, having regard to the nature of the offence committed, the objective seriousness of the criminality involved, the need for general or specific deterrence and the subjective circumstances of the offender. It is perhaps trite to observe that, although the purpose of punishment is the protection of the community, that purpose can be achieved in an appropriate case by a sentence designed to assist in the rehabilitation of the offender at the expense of deterrence, retribution and denunciation. In such a case a suspended sentence may be particularly effective and appropriate."

This statement was cited with approval in *R v Hinton.*[171] In this case, a Crown appeal was allowed as the Court felt a suspended sentence was an inappropriate punishment to denounce the criminality of the respondent. The conduct in question was sixteen counts of defrauding the Commonwealth contrary to section 29D of the *Crimes Act* (CTH). Howie J (Wood CJ and Sully J agreeing) held,

> "The leniency involved in a suspended sentence could not in this case adequately reflect the objective seriousness of the offences committed or the need for general deterrence."[172]

Both of the above statements imply that suspended sentences incorporate an element of leniency. This should be contrasted with other statements asserting that a sentencing court must recognise that a sentence of imprisonment can be a significant and effective punishment even where the execution of that sentence is suspended.[173]

The outcome of this approach is that suspended sentences are to be regarded as *capable* of achieving denunciation and deterrence, dependant upon the particular facts in a case and the importance of those sentencing principles. The Sentencing Council considers that, in order to ensure that sentencing courts are using their discretion to impose suspended sentences in an appropriate manner, clear guidance is needed as to their function and use. The Court of Criminal Appeal could provide such guidance in the form of a guideline judgment.[174]

Detailed below are issues arising from Judicial Commission's research into suspended sentences, and also information on the number of Crown appeals against suspended sentence, and the outcomes of those appeals. Both of these considerations support its view that further structure and guidance on the use of suspended sentences would be desirable.

The Judicial Commission's Research

Published in November 2003, the Commission's paper 'Suspended Sentences in New South Wales'[175] has provided the first examination of their operation since they were re-introduced in 2000. The Commission undertook a detailed statistical analysis of the use of suspended sentences. Their focus was on the ten most common offences for which a suspended sentence was imposed during the period 3 April 2000 to 31 December 2002 in both the Local and

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[171] [2002] NSWCCA 405

[172] Ibid, at [35]

[173] See for example *JCE* [2000] NSWCCA 498 at [25] and *R v Foster* [2001] NSWCCA 215

[174] Part 3, Division 4 of the *Crimes (Sentencing Procedure) Act 1999.*

[175] Brignell and Poletti (November 2003) "*Sentencing Trends and Issues Number 29: Suspended sentences in NSW*" Sydney: Judicial Commission of NSW.

higher courts.[176] In order to provide a meaningful analysis this data was then compared with sentencing statistics during the period 5 July 1997 to 2 April 2000.

The overall aim of the Commission's research was to determine the effect of the introduction of suspended sentences on sentencing patterns, in particular whether they have produced a 'net-widening' effect.

The results of the research demonstrate that suspended sentences accounted for 4.2% of penalties handed down in the Local Courts where imprisonment was an available penalty, and 11.7% of penalties in the higher courts during this time period.

In the Local Courts, suspended sentences "appear to have been used at the expense of less severe penalties".[177] The data showed a drop in the use of less severe penalties (such as a fine or community service order) of 3.6% compared with a drop of 0.5% in the use of more severe penalties (such as periodic detention and prison).[178]

In the higher courts, the ten offences identified also showed drop in the proportion of cases where a less severe penalty than a suspended sentence was imposed.[179]

In the conclusion to the paper, the Commission stated:

> "Despite the fact that the legislations requires suspended sentences to be strictly imposed as an alternative to full-time custody, the statistics tend to suggest that courts sometimes impose suspended sentences in place of less severe penalties, such as community service orders and good behaviour bonds. As such there is little evidence to date to indicate that suspended sentences have contributed to any real reduction in the prison population. In fact, over the period studied, there was a slight increase in the use of full-time custody in the higher courts and a reduction in community service orders and bonds."[180]

They went on to state that, although the statistics suggest net widening, "it is important to note that such sentencing patterns may be a result of other factors such as harsher sentencing practices generally."[181]

Suspended Sentence Appeals

There have been a number of Crown sentence appeals where the sentence at first instance was suspended. This fact was brought to the attention of the Sentencing Council by one of our members, Mr Nicholas Cowdery QC, NSW Director of Public Prosecutions.

Subsequent research by the Sentencing Council into sentence appeals heard by the NSW Court of Criminal Appeal has revealed the following:

Number of Crown Appeals where the sentence was suspended at first instance:	27

[176] Ibid, see Tables 1 and 2 at p14-15.
[177] Ibid, p 16
[178] Ibid, Table 3 at p17.
[179] Ibid, Table 4 at p18.
[180] Ibid, p22
[181] Ibid, p23

Appeals Allowed	11
Appeals Dismissed	16

It is interesting to note that in some cases, the appeal on sentence was dismissed even though the Court held that the sentence was manifestly inadequate.[182] This is for reasons such as parity,[183] and reluctance by the CCA to use its discretion to intervene.[184]

Outcome of Breaching a Suspended Sentence
Another issue with suspended sentences is the outcome of a breach.

Section 99 of the *Act* applies when a good behaviour bond (attached to a suspended sentence) is breached – the court must revoke the bond. The relevant provisions read:

> (1) If a court revokes a good behaviour bond:
> …
> (c) in the case of a bond referred to in section 12:
> (i) the order under section 12 (1) (a) ceases to have effect in relation to the sentence of imprisonment suspended by the order, and
> (ii) Part 4 applies to the sentence, except to the extent to which it has already applied in relation to setting the non-parole period and the balance of the term of the sentence, and
> (iii) subject to the requirements of Part 4 having been complied with, the sentence takes effect.
> (2) Subject to Parts 5 and 6, a court may, on revoking a good behaviour bond referred to in section 12, make an order directing that the sentence of imprisonment to which the bond relates (disregarding any part that has already been served) is to be served by way of periodic detention or home detention.
> (3) An order made under subsection (2) is taken to be a periodic detention order made under section 6 or a home detention order made under section 7, as the case requires.

Howie J in *R v. Tolley*[185] recently discussed the operation of these provisions in the event of a breach of a suspended sentence. His Honour notes that the outcome of section 99 is that the execution of the sentence (originally suspended) is 'revived' and the court may order that it be served by way of periodic or home detention.[186] On examination of the relevant provisions, Howie J felt that "considerable uncertainty arises" as to the practical operation of section 99, in particular the date at which the offender's revived sentence is to commence.[187] In conclusion His Honour stated:

> "I am prepared to admit that, in the absence of full argument by the parties on these matters, I may be overlooking some provision or policy that makes the operation of suspended sentences rational, consistent and comprehensible. But I am also prepared to admit defeat and move on. I would simply pause to express my exasperation that it appears to be so difficult to find in the legislation the answer to what is a fundamental question and one that should be capable of an immediate and simple answer by reference to a single provision of the Act. **Does the revocation of a bond**

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[182] See for example *R v Cotter* [2003] NSWCCA 273 where the Court of Criminal Appeal was satisfied that the sentences were manifestly inadequate however due to issues of parity the Crown appeal was dismissed.
[183] Ibid
[184] *R v Taylor* [2000] NSWCCA 442, *R v Capar* (2002) 132 A Crim R 160, *R v Y* (2002) 36 MVR 328.
[185] [2004] NSWCCA 165
[186] Ibid, 28-30
[187] Ibid, 33

under s 12 reactivate the whole of the suspended sentence so that, subject to s 47(2), it commences from the date of revocation or does it merely reactivate that part of the sentence that is the equivalent to the unexpired period of the bond? The answer to that question will reveal whether a suspended sentence in this State is a sword or a butter knife." (Emphasis added.)

Although acknowledging that it is unclear, the judgment in *Tolley* appears to suggest a preferred view that the sentence of imprisonment commences on the date of revocation of the bond.

In drawing this judgment to the Attorney's attention, the Sentencing Council agrees with Howie J that legislative amendment could clarify the operation of sections 12, 99 and 47 when a suspended sentence is breached.

One further matter of concern is the issue of whether legislation should be passed allowing NSW Courts to partially suspend prison sentences. This matter is dealt with in the Sentencing Council's report on "Abolishing prison sentences of 6 months or less" which is to be furnished to the Attorney General in the coming month.