Report on Sentencing Trends and Practices 2004-2005

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

July 2005

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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.[3]

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[1] Commander Laycock served on the Sentencing Council until 27 February 2005.
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[3] 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 Council") has been operating for over two years.[4] This is the Council's second statutory report to the Attorney General on sentencing trends and practices, including the operation of standard non-parole periods and guideline judgements.[5]

The Council has continued to meet on a monthly basis during2004/05. Council business was conducted at these meetings and out of session.[6] The Chairperson has been closely involved in the conduct of Council business; most notably in the research and preparation of Council reports. The Chairperson thanks each Council member and the Council's Secretariat for their assistance throughout the year.

The Council has examined a number of sentencing issues including:

- Suspended sentences and the possibility of a guideline judgment;
- Proposed legislative changes for suspended sentences dealing with proceedings on breach;
- Abolishing prison sentences of six months or less; and
- Powers and functions of the Council.

These projects are discussed in part 3 of this report.

During 2004/05, following approval from the Attorney General, a number of Council reports were publicly released:

- Abolishing prison sentences of six months or less;
- Attempt and accessorial offences and the standard non-parole sentencing scheme;
- Firearms offences and the standard non-parole sentencing scheme; and
- How best to promote consistency in sentencing in the Local Court.

In 2004/05, the Council has continued its relationship with related organisations including: the Judicial Commission of NSW; the Bureau of Crime Statistics and Research (BOCSAR); The NSW Law Reform Commission (NSW LRC); the Criminal Law Review Division (CLRD); and the Crown Advocate. Guest speakers attended a number of monthly meetings of the Council.

As part of this report, the Council has considered the standard non-parole sentencing scheme. At the time of preparing this report, over 300 matters have been sentenced under the scheme. As will be seen from **Attachment A**, the scheme seems to have resulted in an increase in length of the non-parole period for at least some table offences. However, for many of the items on the table, there have not been enough matters to draw any meaningful conclusions about the effect of the scheme.

The NSW Court of Criminal Appeal (CCA) in *R v. Way*[7] discussed the scheme extensively, although there remain some issues of statutory interpretation. In its last statutory report on

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[4] The Sentencing Council was established by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002,* assented to on 22 November 2002. Schedule 1[5] and [7] (the provisions establishing the Sentencing Council) commenced on 17 February 2003.

[5] Section 100J(1)(c) of the *Act* requires the Sentencing Council 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."

[6] The Council did not meet in March 2005 as members' appointments had expired, awaiting reappointment.

[7] [2004] NSWCCA 131, (2004) 60 NSWLR 168

sentencing trends and practices, the Council raised concerns about the length of the standard non-parole period for item 9A on the table of standard non-parole periods. The Council is still concerned about the standard non-parole period for this item. The Council does acknowledge that the Attorney General is not inclined to amend the scheme until after the current review.

As part of this report, the Council has considered guideline judgments. In the area of guideline judgments, the Council has developed a protocol with CLRD and the Crown Advocate to clarify the responsibilities of each. The Council initiated advice on suspended sentences, as an area possibly suitable for a guideline judgment.[8] During the year, the NSW CCA promulgated a guideline judgment for the offence of driving with a high range prescribed concentration of alcohol. The Council was not involved in this application.

The Council has not, of its own motion or at the request of the Attorney General , provided advice on instituting a quantitative guideline judgment. The reasons for this are set forth in part 5 of this report.

This report considers some of the sentencing developments in NSW over the past year. An issue raised in the Council's last statutory report on sentencing trends and practices was whether the correct approach to sentencing should involve a staged or instinctive synthesis approach. The High Court considered the issue in *Markarian v The Queen,*[9] where the majority held that there is no universal rule that Courts should adopt an instinctive synthesis approach to sentencing. This decision is discussed in more detail in part 6.1 of this report.

Part 6.2 of this report also considers the high number of appeals relating to section 21A of the *Crimes (Sentencing Procedure) Act 1999* (the *Act*).

2. Sentencing Council's relationship with other bodies

This is a statutory report on sentencing trends and practices over the past year. However, the Council considers this report to be a good opportunity to provide a brief update on the Council's operations, including its relationship with other bodies.

In 2004/05, the Council has continued to develop 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.[10] The Council has maintained relationships with bodies such as: the Judicial Commission; BOCSAR; the NSW LRC; the Crown Advocate; the Crime Prevention Division and CLRD. The NSW LRC, the Judicial Commission, BOCSAR and the Council have continued its system of joint quarterly meetings in order to ascertain how each organisation's work, in the area of sentencing, will impact upon the others.

The Council has had a number of guest speakers at its monthly meetings including:

- The NSW Attorney General, the Hon. Bob Debus MP (August 2004);
- The NSW Chief Justice, the Hon. J. J. Spigelman AC (October 2004);

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[8] Advice initiated under section 100J(1)(b)(i) of the *Act*.

[9] *Markarian v. The Queen* [2005] HCA 25

[10] 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).*"

- The NSW Crown Advocate, Mr Richard Cogswell SC (December 2004); and
- Mr Dean Hart, Crime Prevention Division (May 2005).

3. Projects update

The Council considered a number of issues throughout the year. These include matters referred to the Council by the Attorney General and matters raised of the Council's own motion. During the year, a number of reports previously prepared for the Attorney General were publicly released following the Attorney General's approval to do so.

3.1 Seeking a guideline judgment for suspended sentences

The Council, of its own motion and pursuant to section 100J(1)(b) of the *Act* resolved to explore and consider providing advice in relation to the application for a guideline judgment on suspended sentences. The Council commenced to prepare such a report. The Attorney General subsequently asked the Council to consider the feasibility of a guideline judgment application for suspended sentences.[11] The Council hopes that a guideline judgment could address concerns about the Court's decision to suspend a sentence. The Council considered issues including whether the CCA will be likely to consider declining any such application because of, for example, pending legislative changes.

The Council considered trends in the use of suspended sentences, drawing upon the Judicial Commission's recently completed study.[12] For example, the Commission found that the most common term for a suspended sentence in the higher courts was 2 years, with almost half of all suspended sentences being for this length (44.6%). This could be evidence that Courts are using an artificial reasoning process to arrive at a suspended sentence. This issue is more extensively discussed in the Council's advice on the feasibility of obtaining a guideline judgment for the use of suspended sentences.

The Council recognises that there are other concerns with suspended sentences, such as issues arising on breach, which could more appropriately be dealt with through legislative change. The Council considered such issues when reporting on the legislative amendments to suspended sentences being considered by CLRD.[13]

An incomplete draft was furnished to the Attorney General on 10 May 2005 together with advice that it could not be completed until relevant up to date information is obtained from the Judicial Commission. The Council's advice should be completed in August 2005.

3.2 Proposed statutory amendments to the suspended sentences legislation

In its last statutory report on sentencing trends and practices the Council raised a number of issues regarding the use of suspended sentences.[14] The matter was also dealt with in its Report: *Abolishing Prison Sentences of Six Months or Less*.[15]

The Attorney General subsequently requested that the Council provide a report pursuant to section 100J(1)(d) of the *Act* on legislative amendments to suspended sentences being

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[11] Letter of 14 December 2004.
[12] Patrizia Poletti and Sumitra Vignaendra (June 2005) "Sentencing Trends and Issues number 34: Trends in the use of s 12 suspended sentences." Sydney: Judicial Commission of NSW
[13] The Council finalised its report pursuant to section 100J(1)(d) on 10 May 2005.
[14] At p 29. Annexure F to the report contained further information regarding some of the issues of concern.
[15] See in particular its recommendations at p4 of that report.

considered by CLRD. These contemplated amendments to sections 12 and 99 of the *Act* have the primary purposes of providing more flexibility to the Court in dealing with a breached suspended sentence and to address the problems identified in *Graham* and *Tolley*. These include clarifying whether the period of imprisonment to be served on breach decreases over time. This report was furnished to the Attorney General on 10 May 2005.

3.3 Protocol between relevant agencies for guideline applications

During 2004/05, the Council liaised with the Crown Advocate and CLRD to develop a protocol between the various bodies who have responsibility for advising the Attorney General on guideline judgment matters. The protocol aims to clarify the roles and responsibilities of the various advisers, avoid duplication of work, promote efficient use of resources, encourage agreement, and (where possible) minimise conflicting advice.

The protocol acknowledges the two distinct stages in advising on guideline judgments. Namely:

1. advice on instituting guideline proceedings; and
2. advice on the submissions to be made once proceedings are instituted.

The protocol encourages consultation between the various bodies in a non-binding way, particularly in the first stage of advising.

The protocol has been approved by the Attorney General.

3.4 Abolishing prison sentences of six months or less

During the past year, the Council finalised its Report to the Attorney General on *Abolishing Prison Sentences of Six Months or Less*. The report was the result of considerable consultation and research.

The report considers a number of problems with prison sentences of six months or less. For example, a major criticism of short prison sentences is their limited rehabilitative value. Indeed, it is often argued that short prison sentences are counter-rehabilitative as they have negative effects on family, housing and employment and may even introduce minor offenders to more hardened offenders. For these reasons, people who are sentenced to a short term of imprisonment could be better sentenced in the community.

On the other hand, there are concerns about the possibility of abolishing short prison sentences. The main concern being it would lead to sentence creep. That is, offenders who would normally be given a sentence of less than six month might be given a longer sentence. As such, the Council recommends that safeguards should be in place before considering abolition any further.

The Council's primary recommendation is that the NSW Government should consider abolishing short prison sentences but not until:

- Primary alternatives to full-time custody are available uniformly throughout NSW;
- The Western Australian government evaluates the impact of abolition in that state;
- There are settled exceptions to abolition;
- There is a trial of abolition throughout all of NSW for Aboriginal women

3.5 Reports released during 2004/05

During the past year, a number of Council Reports were publicly released, following the Attorney General's approval to do so:

- *Abolishing Prison Sentences of Six Months or Less*;
- *Attempt and Accessorial Offences and the Standard Non-Parole Sentencing Scheme*;
- *Firearms Offences and the Standard Non-Parole Sentencing Scheme*; and
- *How Best to Promote Consistency in Sentencing in the Local Court*.

These reports are available to the public through the Council's website: www.lawlink.nsw.gov.au/sentencingcouncil

3.6 Powers and functions of the Council

The Council has, from time to time, discussed its role and functions. Over the past year, the Council has produced an internal working paper considering these issues.
The Council is cautious about interpreting its legislation too widely and is conscious that it operates under strict statutory constraints. Now that the Council has been in existence for over two years it considers its powers and functions should be addressed.

The Council's role and functions has been the subject of ongoing discussion, and its reasons for caution in interpreting its powers well understood.

As the Council understands it, CLRD will draw up a proposal amending section 100J of the *Act* to provide that the Council may inform the public about the Council's Reports and sentencing issues generally. Whilst the terms of such a proposal are not yet clear, the Council believes that such would be a positive step in enhancing the Council's status, standing and identity in the community at large. It would address, in part, the matter of its present and future role. In saying this, the Council is aware that CLRD is conducting a review of the *Act* in accordance with sections 105 and 106.

The Council has already raised issues of concern including the absence of specific legislative powers to self-generate or initiate reports on several matters (some in accordance with express provisions of the *Act*). This has meant that the Council has not been able to put submissions (even if it chose to do so) to requests from third parties or bodies. Also, its statutory powers to give advice are limited by the existing provisions of section 100J. The Council is of the view that the advice referred to in section 100J(2) of the *Act* refers to advice in subsections 100J(1)(a) and (b). The Council possesses no general power to advise on sentencing matters. The Council is concerned about the perception of its role (apart from the actuality) in relation to sentencing matters in this state. It believes that the demarcation between the Council's role and that of other bodies is perhaps blurred and by no means clear.

The Council notes that the Victorian Sentencing Advisory Council has an unqualified function to advise the Attorney General on sentencing matters.[16] In Queensland, a private member's *Bill* provides for a Sentencing Advisory Council which would have a similar function.[17] There is no one body in NSW, statutory or otherwise, that has a power or a function to advise the minister on sentencing matters generally.

These are some of the matters of concern. These matters and others were extensively explored in the Council's internal working paper: *Discussion Paper on the Role of NSW Sentencing Council and Issues for the Future*.

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[16] See section 108C of the *Sentencing Act 1991* (VIC)
[17] See proposed section 198(c), contained in Clause 5 of the *Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2005* (QLD)

4. The Standard Non-Parole Period Sentencing Scheme

The Standard Non-Parole Sentencing Scheme ("the scheme") is contained in Division 1A of Part 4 of the *Act*. Under its statutory functions, the Council's statutory report on sentencing trends and practices is specifically required to include the operation of standard non-parole periods.[18]

The Council also has the function "to advise and consult with the Minister in relation to offences suitable for standard non-parole periods and their proposed length."[19]

4.1 Matters Sentenced under the Standard Non-Parole Period legislation

At the time of its last statutory report on sentencing trends and practices, there were few matters sentenced under the scheme. The predictions regarding the effect of the scheme could therefore not be evaluated.[20] The scheme applies to offences *committed* on or after 1 February 2003.

Speculation has surrounded the effect the scheme would have on the length of sentence for offences in the scheme.[21] In *Way* the Court noted that the second reading speech to the Bill did not disclose any intention to increase sentences. However, the Court noted 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 the sentences." In *Markarian* McHugh J notes that the scheme has "been used to increase the prevailing median sentence for particular classes of offences."[22] It may also be that in NSW, quantitative guidance could be provided to the Courts through the standard non-parole sentencing scheme rather than through a quantitative guideline judgment. Perhaps also the scheme could be viewed as a means for the legislature to express its view regarding a need to increase sentences, not by altering the maximum penalty but by fixing a standard non-parole period.

At the time of preparing this report, the prognosis of potential increases in non-parole periods has been generally borne out. There are roughly 300 matters that have been sentenced under the scheme. A comparison of sentences imposed before the scheme was introduced to offences sentenced under the scheme is attached (**Attachment A**).

For some items on the table, there have not been enough matters to draw any meaningful conclusions about the effect of the scheme. Indeed, for some items, there have been no matters sentenced under the scheme. For others, the effect of the scheme can now tentatively be considered.

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[18] Section 100J(1)(c) of the Act.
[19] Section 100J(1)(a) of the Act.
[20] See "2003-04 annual report to the Attorney General on sentencing trends and practices", at parts 3 and 4.
[21] See for example Warner, 'The Role of Guideline Judgements in the Law and Order Debate in Australia', (2003) 27 Crim LJ 8 at 14. See also Johnson SC (as His Honour then was) Reforms to NSW Sentencing Law - Seminar conducted by the Judicial Commission of New South Wales Presented - 12 March 2003, Revised - 14 March 2003. Johnson noted that care needs to be taken in relying upon a generalised comparison between the standard non-parole periods and the JIRS median non-parole period statistics because the JIRS statistics reflect a non-parole period where a complete sentencing discretion has been exercised. However, "That said, it is clear that the standard non-parole periods contained in the 2002 Act are substantial."
[22] [2005] HCA 25 at [80]

The Sentencing Council has focused its attention on the offences where more than 10 matters have been sentenced under the scheme. The following comments apply to the offences where more than 10 matters have been sentenced. They do not purport to provide a statistical analysis, but are merely observations. **Table 1** contains the scheme offences where more than 10 matters have been sentenced under the scheme.

Table 1: Scheme offences where more than 10 matters have been sentenced.

Item No. / Offence		SNPP	Percentage sent to imprisonment		Term of sentence		Non-parole period	
					Midpoint		Midpoint	
			Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03
4 Section 33 *Crimes Act* (wounding etc with intent to do bodily harm or resist arrest)	* wounding with intent (37 matters)	7 yrs	94%	89%	5 yrs	7 yrs	36 mth	54 mth
7 Section 61I *Crimes Act* (sexual assault) (13 matters)		7 yrs	86%	92%	48 mth	5 yrs	24 mth	24 mth
8 Section 61J *Crimes Act* (aggravated sexual assault) (11 matters)		10 yrs	95%	100%	6 yrs	6 yrs	36 mth	36 mth
11 Section 98 *Crimes Act* (robbery with arms etc and wounding)	* in company cause wounding (10 matters)	7 yrs	94%	90%	6 yrs	6 yrs	36 mth	42 mth
12 Section 112(2) *Crimes Act* (breaking etc into any house and committing serious indictable offence in circumstances of aggravation) (131 matters)		5 yrs	73%	72%	42 mth	42 mth	24 mth	24 mth

At first blush, the scheme seems to have had an upward effect on the length of non-parole periods. For some offences, this upward effect seems significant. The scheme seems to have had less of an impact on the percentage of offenders sentenced to imprisonment.

The Council observes that it is quite likely that there are factors other than the scheme which may account for the increased sentences, and the increased non-parole periods in particular. Most importantly, these include:

- Greater adherence by sentencers to the statutory ratio between the non-parole period and head sentence;
- Sentencers being influenced by the scheme, even if a matter is not sentenced under the scheme.

In relation to the statutory ratio, section 44(2) of the Act provides that "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…" In 2004, the Judicial Commission found that the statutory ratio between the non-parole period and the head sentence is departed from in the vast majority of cases.[23] As a consequence, the Chief Justice of NSW commented 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

[23] 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. The Commission found that *"special circumstances" must have been found in up to 87.1% of cases where imprisonment was ordered.*

finding is made."[24] These comments may have resulted in an adherence to the statutory ratio in a larger number of cases.

Item 12 on the table[25] is an example of the many factors, other than the scheme, that have increased the midpoint non-parole period. **Table 2** shows matters sentenced outside of the scheme over two overlapping time periods and matters sentenced under the scheme. The reason for the two overlapping time periods of the matters sentenced outside the scheme is because the JIRS statistics are updated every three months. As a new three months of data is entered to the statistics, the "oldest" three months of data is excluded from the JIRS statistics. The critical date is the date that the sentence was handed down rather than the date that the offence was committed.

Table 2 illustrates that there is a significant difference in sentencing practices for the two groups of matters sentenced outside of the scheme. For these two groups, the midpoint non-parole period increased from 18 months to 24 months. There are a number of possible explanations for this, including:

- In more recent times, sentencers may be adhering to the statutory ratio between the non-parole period and head sentence in more matters;
- In more recent times, sentencers may be imposing tougher sentences;
- In more recent times, offenders may be committing more serious offences;[26]

Since February 2003, sentencers may be influenced by the scheme, even if a matter is not sentenced under the scheme.

In addition, the JIRS statistics do not show the *exact* midpoint non-parole period. The midpoint shown coincides with an increment on the bottom axis of the graph.[27] All data is **rounded upwards**. For example, a midpoint non-parole period of 19 months would be rounded upwards to 24 months. It may be that the difference in midpoint non-parole period for the two groups of offences is closer that it first seems.

Table 2 – Sentencing statistics for item 12 on the table over three different periods

Statistical period	Sentenced under scheme?	% sent to imprisonment	Midpoint term	Midpoint NPP
Sept 1997 to Sept 2004	No (pre-scheme)	73%	42 months	18 months
Jan 1998 to Dec 2004	No (pre-scheme)	73%	42 months	24 months
Feb 2003 to Dec 2004	Yes (sentenced under scheme)	72%	42 months	24 months

The Council observes that the scheme may have affected election practices for certain offences within the scheme. There are a number of offences within the scheme that are either "Table 1" or "Table 2" offences.[28] That is, certain offences within the scheme are dealt with

[24] *R v. Fidow* [2004] NSWCCA 172 per Spigelman CJ at [20]. See also Adams J at [27]
[25] Section 112(2) of the *Crimes Act 1900*
[26] The JIRS statistics for item 12 on the table do not disclose the nature of the "indictable offence" committed. It is possible that the type of "indictable offence" concerned could affect the sentence imposed. However, there is no reason to believe that the spread of the type of "indictable offence" concerned in the two groups is significantly different.
[27] These increments increase by 6 months from 6-54 months, then by 1 year from 5-10 years, then by 2 years from 10-20 years. There is a separate category of 20+ years to life.
[28] Items 5, 9A, 9B, 14, 15 and 15A are all "table 1" offences. Item 20 is a "table 2" offence.

summarily unless an election is made for them to be dealt with on indictment.[29] The scheme does not apply where a matter is dealt with summarily.[30] The Council considers that it is quite possible that the scheme has therefore affected the number of elections made for matters to be dealt with on indictment.

It is also possible that the statistics may contain matters that were sentenced in the District Court prior to the CCA's consideration of the scheme in *R v. Way.* Some of these matters may not have been sentenced in accordance with the reasons in *R v. Way*, and are yet to be corrected on appeal, or indeed may never be corrected. With the passage of time, it is unlikely that there would be many errors of this type.[31]

The Judicial Commission, in its recently completed study of trends in the use of section 12 suspended sentences, found that the scheme has impacted upon the use of suspended sentences for offences contained in the scheme.[32] The Commission found a "noticeable reduction" in the use of section 12 suspended sentences for the three categories of offences in the scheme that had previously attracted a relatively high proportion of suspended sentences. The Commission's findings are summarised in **Table 3**.

Table 3: Change in the use of suspended sentences for scheme offences which had previously attracted a relatively high proportion of suspended sentences

SNPP offence	Percent of sentences for the offence which received s 12 sentence *before* SNPP scheme	Percent of sentences for the offence which received s 12 sentence *after* SNPP scheme
Aggravated indecent assault	21.9%	16.7%
Aggravated indecent assault, child<10	22.2%	Nil
Unauthorised possession or use of firearm	22.2%	Nil

The Judicial Commission has recently completed a study on Crown appeals against sentence.[33] The Judicial Commission found 8 Crown appeals in relation to scheme offences. In 6 cases, the CCA allowed the appeal and increased the sentence. In 4 of those cases where the appeal was allowed, the length of the sentence was increased. In the fifth case, the sentence was increased from a suspended sentence to a periodic detention order. In the sixth case, the matter was remitted to the Drug Court for re-sentencing. In two of the six cases the Judge erred in misapplying the new legislation and associated case law as articulated in *Way*.

Since the Commission's study, the Council's research reveals that there have been a further 2 Crown appeals against sentences imposed for standard non-parole period offences. Both were successful.[34]

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[29] For "table 1" offences, the election may be made by the prosecution or the person charged. For "table 2 offences, the election may be made by the prosecution.
[30] Section 54D(2) of the *Act*
[31] A summary of CCA matters involving standard non-parole matters is set forth in Attachment C. The vast majority are severity appeals.
[32] Patrizia Poletti and Sumitra Vignaendra (June 2005) "Sentencing Trends and Issues number 34: Trends in the use of s 12 suspended sentences." Sydney: Judicial Commission of NSW
[33] Brignell and Donnelly (July 2005) "Monograph 27: Crown Appeals Against Sentence" Sydney: The Judicial Commission.
[34] *R v Reyes* [2005] NSWCCA 218 – 16/06/05; *R v Mills* [2005] NSWCCA 175 – 06/05/05;

The Council has also considered the number of severity appeals against sentence for standard non-parole period matters, and found 15 such matters.

This data shows that in relation to standard non-parole period offences, there have been a considerable number of appeals against sentence. There have been a total of 24 appeals against sentence. There have been a considerable number of Crown appeals against sentence with the success rate for these Crown appeals being well above average at 80%. This suggests there is some uncertainty on the part of Judicial Officers and practitioners regarding the proper operation of the scheme. There may be a need for further judicial education in the application of the scheme.

A summary of standard non-parole matters dealt with in the CCA is attached (**Attachment B**)

4.2 *R v. Way*

The judgment of the NSW CCA in *Way* has clarified many of the issues related to the standard non-parole sentencing scheme. There are still further interpretation issues which could be addressed. The High Court refused special leave to appeal on the specific basis that the outcome would be no different. The High Court did not deny however, that there may remain issues of statutory interpretation, in particular the words "middle of the range" and "objective seriousness" in sections 54A(2) of the *Act*.[35] See also attached analysis and summary of special leave application (**Attachment D**). It therefore appears that there are some live construction issues in relation to the scheme. It may also be noted that in *Markarian* McHugh J in discussing the approach to sentencing in NSW did not cast doubt upon the scheme.[36]

4.3 Previous advice on standard non-parole periods - Item 9A

An issue raised by the Council in its last statutory report on sentencing trends and issues concerned inconsistency in prescribing standard non-parole periods. An example is the standard non-parole period prescribed for Item 9A – aggravated indecent assault. The Council remains concerned that the standard non-parole period for this offence is particularly high.

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 head sentence.

There have not been enough matters sentenced under the scheme for item 9A to make any meaningful analysis. However, the five offences sentenced under the scheme all resulted in sentences of imprisonment. This compares to an imprisonment rate of 55% before the scheme was introduced. Since the scheme has been operating, the midpoint non-parole period has increased from 12 to 18 months.[37]

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[35] It may perhaps be noted in passing that the particular points raised reflect issues raised by Donnelly & Potas in 'Ways Case Confirms Individual Justice.' Judicial Officers Bulletin Vol 16 No 6

[36] [2005] HCA 25 at [80].

[37] See Sentencing Statistics published on the JIRS database, maintained by the Judicial Commission of NSW.

4.4 Previous advice on standard non-parole periods – firearms offences

In its Report on *Firearms Offences and the Standard Non-Parole Sentencing Scheme*,[38] the Council recommended that certain specified offences should be added to the scheme.[39] The Attorney General indicated that he is not inclined to add offences to the scheme until after it has been reviewed. CLRD is currently undertaking the reviews, pursuant to sections 105 and 106 of the *Act*.

Save for the above, the Council has therefore not proffered advice to the Attorney General in relation to offences that it considers suitable for standard non-parole periods.[40]

5. Guideline Judgments

Sentencing Guidelines are provided for in Division 4 of Part 3 of the Act. Under its statutory functions, the Council's statutory report on sentencing trends and practices is specifically required to include the operation of guideline judgments.[41]

The Council also has a legislative function:[42]

> 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.

Throughout the year, the Council has been involved with two developments relating to guideline judgments.

- Consideration of a guideline judgment for the use of suspended sentences; and
- Seeking a protocol with the Crown Advocate and CLRD to settle responsibilities and minimise duplication.

Details of these two projects are dealt with above at part 3 under "Council projects."

In addition there have been several other developments relating to guideline judgments. Most notably, the NSW CCA promulgated a guideline for driving with a high range PCA.[43] The Council was not involved in this application.

In its last statutory report on sentencing trends and practices the Council discussed some of the limitations and restrictions relating to obtaining a guideline judgment.[44]

5.1 Quantitative guidelines

The Council has not of its own motion advised or consulted with the Attorney General in relation to quantitative guideline judgments.[45] Further the Attorney General has not sought

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[38] May 2004
[39] at p6 and p40.
[40] Under s 100J(1)(a), either at the request of the Attorney or without any request.
[41] Section 100J(1)(c) of the Act.
[42] Section 100J(1) (b) of the *Crimes (Sentencing Procedure) Act 1999*.
[43] *Attorney General's Application No. 3 of 2002* [2004] NSWCCA 303; 147 A Crim R 546; 61 NSWLR 305.
[44] At pp 36-38

views of the Council in relation to quantitative guidelines. The High Court's discouraging views in relation to quantitative or numerical guideline judgments has perhaps provided an explanation as to why no quantitative guideline judgment applications have been made this year.[46] Other factors may be the view that if there is a need to provide further guidance on sentence length (not so much by altering the statutory maximum penalty) then this may be done by fixing a standard non-parole period for the offence. In *Markarian,* McHugh J specifically adverted to guideline judgments (generally but not numerical ones specifically) and the standard non-parole scheme in NSW as having been used to increase the prevailing median sentence for particular classes of offences.[47] None of the other judges expressed views on guideline judgments, compared to the critical views in *Wong and Leung* regarding numerical guidelines.

Further, an application under section 37 must satisfy certain threshold tests as the Court has the discretion to refuse to promulgate a guideline judgment.[48]

That said, perhaps the approach may change with the case law in respect of numerical guideline judgment applications. It is interesting to observe a subtle change in outlook by the High Court at least on the part of Justice McHugh in relation to appropriateness and relevance of guideline judgments.

The Council has not, for these reasons, initiated any advice in relation to instituting a numerical guideline application. Nor has the Attorney General requested advice of the Council under section 100J(1)(b) in respect of a numerical guideline judgment.

5.2 Guideline judgment for suspended sentences

That said, the Council decided to consider advising in relation to a qualitative or principled guideline on the use of suspended sentences under section 100J(1)(b). The Attorney General subsequently asked the Council to consider the feasibility of a guideline judgment application for suspended sentences. Its preparation is well advanced. A project update is provided in part 3.1 of this paper. The Victorian Sentencing Advisory Council is also considering the possibility of a guideline judgment for the use of suspended sentences.[49]

5.3 High Range PCA

On 8 September 2004, the CCA promulgated a guideline judgment for the offence of driving with a high range prescribed concentration of alcohol ("high range PCA"). The decision was in the context of a qualitative or principled guideline judgment for that offence rather than a quantitative judgment. A copy of the Council's case note is attached (**Attachment D.**)

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[45] See unfavourable views of the High Court in *Wong and Leung v. The Queen* (2001) 207 CLR 584. It may also be that in NSW, quantitative guidance could be provided to the Courts through the standard non-parole sentencing scheme rather than through a quantitative guideline judgment.

[46] Post *Wong* legislation and the law touching upon numerical guideline judgments for specific offences has however been addressed in *R v. Whyte* [2002] NSWCCA 343 (2002) 55 NSWLR 252; (2002) 134 A Crim R 53.

[47] At [80]His Honour also considered that the standard non-parole scheme and guideline judgments are accommodated in an instinctive approach to sentencing.

[48] See in particular, re *Attorney General's Application Under S 37 of the Crimes (Sentencing Procedure) Act 1999 No 2 of 2002* (2002) 137 A Crim R 196; [2002] NSWCCA 515 See also section 40 of the *Crimes (Sentencing Procedure) Act 1999*

[49] See para 8.36 of Sentencing Advisory Council (April 2005) "Suspended Sentences Discussion Paper" Victoria: Sentencing Advisory Council.

The Judicial Commission has found that the guideline judgment for high range PCA impacted upon the use of suspended sentences in the Local Court.[50] The Commission found that s 12 suspended sentences were used in 2.8% of cases before the guideline, compared with 7.6% after the guideline. The Judicial Commission is currently conducting a comprehensive study on the impact of the high range PCA guideline.

5.4 Issues concerning the application of guidelines

Guideline judgments have been promulgated by the Court for the following offences and issues: armed robbery, break enter and steal, dangerous driving causing death or grievous bodily harm, driving with a high range prescribed concentration of alcohol, taking matters into account on a "form 1" and discounting for a plea of guilty.

As part of the Judicial Commission's recent study on Crown appeals against sentence,[51] it considered Crown appeals in matters where a guideline judgment applied. There were 22 cases (10.4%) of Crown appeals where an error was found where the sentencing judge misapplied a guideline judgment. However, only half of those resulted in the CCA intervening to increase the sentence.

The Judicial Commission found that, "most guideline judgment errors involved the judge departing significantly from the guideline judgment, misunderstanding the guideline, not referring to the guideline at all or ruling that the guideline was not applicable." The Judicial Commission found that the most common error involved the application of the guideline for armed robbery, *R v. Henry*.[52] The Judicial Commission suggests that, "although guidelines were introduced with the goal of achieving greater consistency in sentencing, they are also fertile ground for exposing error."[53]

6. Significant sentencing developments in NSW

6.1 Instinctive or tiered approach?

There has been recent debate surrounding whether the correct approach to sentencing should involve a staged or instinctive synthesis approach. The Council noted in its last statutory report on sentencing trends and practices that this seemed to be a contentious issue in the NSW CCA. The High Court has since considered whether the correct approach to sentencing involved an instinctive synthesis or a staged approach.[54]

The majority in *Markarian* held that there is no universal rule that courts should adopt an instinctive synthesis approach to sentencing. Indeed, the majority saw that there is little utility in applying labels to various sentencing approaches. However, the majority appears to favour an instinctive approach.[55] The High Court also held that the CCA erred in re-

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[50] Patrizia Poletti and Sumitra Vignaendra (June 2005) "Sentencing Trends and Issues number 34: Trends in the use of s 12 suspended sentences." Sydney: Judicial Commission of NSW

[51] Brignell and Donnelly (July 2005) "Monograph 27: Crown Appeals Against Sentence" Sydney: The Judicial Commission.

[52] At p 38

[53] At p 38

[54] [2005] HCA 25

[55] This is also perhaps also how Kirby J perceived the joint reason.

sentencing by placing too much emphasis on the quantity of the drug by oscillating around a particular penalty.[56]

The Court also considered the way that matters should be taken into account on a "form 1." The Court held that although it may not be appropriate for the Court to adopt an arithmetic approach in relation to all sentencing factors, it may be useful for the Court to make clear the extent of the increase on account of form 1 offences.

In the course of judgment, the Court considered the meaning of the term consistency. The joint reasons show a clear preference for consistency of approach (subject to any specific statutory regime) as the preferred approach in sentencing.[57] This is the preferred view adopted by the Council in its report on "How best to promote consistency in sentencing in the Local Court."

A copy of the Council's case note is attached (**Attachment E**).

6.2 Section 21A

There seems to have been a large volume of case law considering the provisions of 21A, particularly in relation to "double counting" aggravating factors, and when it is appropriate to take into account, as an aggravating factor, an element which is part of an offence.[58] Another error relating to section 21A involves taking into account, as an aggravating factor, a matter which would render the accused liable for a greater punishment, and thus infringes the principle laid down in *The Queen v De Simoni.*[59] Mr Andrew Haesler SC has recently noted that more than 75 matters have gone to the CCA in the last year complaining, often successfully, that the use of s 21A has led to error.[60]

It is unclear whether the principles of the common law referred to into s 21A is making it easier to identify errors in sentencing, or actually causing more errors itself. A recent article by Justice Howie suggests that s 21A is causing errors, for example by judicial officers using the section as a "check list" at the end of the sentencing exercise, and then double counting factors that they have already taken into account as part of the sentencing exercise.[61]

His Honour notes that it was never the intention of the legislature to alter the established common law principles through enacting s 21A. For this reason, his Honour suggests that whenever a sentencing judge is taking into account a matter that would not have been taken

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[56] Being the lesser maximum penalty for an offence involving a quantity of drug immediately below the one in question.

[57] At [27]: "And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with *consistency of approach* and as accords with the statutory regime that applies." (Emphasis added.)

[58] See for example, *R v. JDB* [2005] NSWCCA 102 and *R v.SMP* [2005] NSWCCA 116. Most recently, see *R v. Tzanis* [2005] NSWCCA 274 where a five judge bench of the CCA held that it is impermissible to take into account the fact of death with respect to "dangerous driving causing death". In contrast, where the offence is dangerous driving causing grievous bodily harm, the "injury, emotional harm, loss or damage caused by the offence" may be a question of fact and degree, which can be taken into account.

[59] See for example, *R v. Johnson* [2005] NSWCCA 186 at [23] per Hunt AJA. The Court held that the violence involved in that offence was that which is inherent "sexual connection" involved in the offence of sexual intercourse without consent.

[60] Haesler SC, Senior Public Defender "Sexual Assault Update – How the prudent judge can avoid error" (2005) 17 *Judicial Officers' Bulletin*

[61] The Honourable Justice R Howie "Section 21A and the Sentencing Exercise" (2005) 17(6) *Judicial Officer's Bulletin* 43

into account before enactment of the section, there is a “real risk that the section is being misapplied.”[62]

His Honour observes that if a court identifies, in its sentencing remarks, the objective factors relevant in determining the objective seriousness, and then considers the mitigating matters arising from the subjective considerations, the task of taking s 21A factors into account should be accomplished. If a sentencer, at the end of this exercise, then goes through s 21A factors as a checklist, they are likely to fall into error through double counting, or having regard to matters that don’t apply to the case before the Court.

A particular area of concern, identified by Mr Haesler, is when is it appropriate to take the age or vulnerability of the victim into account as an aggravating factor where it is also an element of the offence. Most notably, this applies to sexual offences involving children. In this area, Haesler stresses the importance of explaining how and why this factor is taken into account, with reference to case law. [63] That is, the Court should continue to approach the issue as it did under the common law.

Howie J has recently observed that a prudent judge should discuss with the parties, during addresses, whether any of the factors listed in s 21A apply. If the judge considers any of the factors are present, they should, in fairness, indicate that they are considering taking them into account.[64]

The provisions of s 21A have not yet been considered in a judgment of the High Court. In *Markarian*, the majority judges noted that the provisions of s 21A were not called to the attention of the sentencing judge or the CCA and hence the terms of the section did not need to be considered. Kirby J was of the view such would need to be considered on re-sentencing.

The very large number of s 21A appeals raises the question of whether a guideline judgment is warranted. Alternatively, it may be that the recent volume of CCA authority has clarified the application of the section, and corrected the approach being taken in the lower courts. Certainly, articles such as that published by Justice Howie in the Judicial Officers’ Bulletin have an important role to play in terms of providing education and guidance to Judicial Officers and highlighting areas where caution must be exercised.

6.3 Community based sentencing

Prima facie, it is much cheaper to manage an offender in the community than it is to manage an offender in custody. The Department of Corrective Services reports that full-time custody currently costs between $218.71-$172.77 per day, dependent upon security classification, whereas an offender managed by community offender services costs on average $8 per day.[65] This leads to question the effectiveness of community based sentencing, and whether sufficient funding is being allocated for community based sentencing.

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[62] Ibid, at p 43

[63] See for example, *R v. JDB* [2005] NSWCCA 102 and *R v.SMP* [2005] NSWCCA 116

64 R *v Tadrosse* [2005] NSWCCA 145

[65] See Department of Corrective Services “*Annual Report 2002-2003*” Maximum security is costed at $218.71 per day, medium at $169.35 per day, and minimum at 172.77 per day. The Department further reports that the cost of housing an offender in Periodic Detention roughly equates to the costs of housing an offender in minimum security, namely $172.77 per day. This cost reduces substantially when an offender moves to “stage 2” periodic detention, there is no requirement to stay overnight.

The Judicial Commission and the Department of Corrective Services have recently completed a joint study: *Successful Completion Rates for Supervised Sentencing Options*.[66] The study focuses on offenders who were supervised by the Probation and Parole service[67] and notes that at any one time the NSW Department of Corrective Services is responsible for supervising about twice as many offenders in the general community as there are inmates in prison.

The Judicial Commission's study was completed at a time when there had been some parliamentary concern in the decreasing rate in the use of non-custodial sentencing options, particularly Community Service Orders.[68]

The study found an apparent association between the intensity of supervision and failure rates.[69] The Commission reiterates that success should not be judged purely in terms of revocation rates, since different orders have differing levels of intensity and strictness of supervision. For example:

> Those on home detention who are electronically monitored by bracelet are more strictly observed than those reporting once a week to a Probation and Parole officer in compliance with a good behaviour bond. The Drug Court imposes a strict regime of drug tests and attendance requirements which are calculated to fully test the resolve of those drug offenders under its supervision.[70]

The Commission found an overall high completion rate for supervised community based orders of 84.3%, with 15.7% of such orders being revoked.[71] The highest completion rate was for bonds at 88.9% with the lowest completion rate being for the drug court at 58.7%. In relation to the drug court, BOCSAR's evaluation is relevant and acknowledges that those offenders who ultimately fail to meet the high standards set by the Court nevertheless benefit from the treatment received and the social skills learned on a Drug Court program. The community also benefits due to the delayed onset of further offending.[72]

Another community based sentencing option which is proving to be highly successful is Circle Sentencing. In October 2003, the Judicial Commission together with AJAC conducted a review and evaluation of Circle Sentencing.[73] The evaluation showed the Circle Sentencing trial in Nowra to be successful. It found that it:

- helps to break the cycle of recidivism;
- introduces more relevant and meaningful sentencing options for Aboriginal offenders, with the help of respected community members;

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[66] Ivan Potas, Simon Eyland and Jennifer Munro (June 2005) "Sentencing Trends and Issues number 33: Successful Completion Rates for Supervised Sentencing Options." Sydney: Judicial Commission of NSW

[67] Offenders serving either a home detention order under section 7, a community service order under section 8, good behaviour bond under section 9 or 10, a deferred sentence under section 11, or a suspended sentence under section 12 were included in the study. Offenders serving equivalent Commonwealth sentences under the supervision of the NSW Probation and Parole service were also included in the study.

[68] See for example *Hansard*, NSW Legislative Council, 8 June 2005, "Community Service Orders" Question without notice from the Hon. Peter Breen to the Minister for Justice, the Hon. John Hatzistergos.

[69] at p 14

[70] at p 13-14

[71] at p 5. The study gives the annual average for the years 2003 and 2004.

[72] See in particular, Lind, Weatherburn and Chen (2002) "NSW Drug Court Evaluation: Cost Effectiveness" Sydney: BOCSAR

[73] Potas, Smart, Brignell, Thomas and Lawrie (Oct 2003) "Circle Sentencing in NSW – A Review and Evaluation Sydney: Judicial Commission and Aboriginal Justice Advisory Council.

- reduces the barriers that currently exist between the courts and Aboriginal people;
- leads to improvements in the level of support for Aboriginal offenders;
- incorporates support for victims, and promotes healing and reconciliation;
- increases the confidence and generally promotes the empowerment of Aboriginal persons in the community.

Following the evaluation of Nowra, Circle Sentencing has been extended to Brewarrina, Dubbo and Walgett.[74] Circle Sentencing will soon be expanded to Bourke, Lismore, Armidale, Kempsey and Western Sydney in the future.[75]

The Council acknowledges that Circle Sentencing is costly, "particularly in the early stages of its implementation." However, the most recent information on the Circle Sentencing pilot has found that success rate are quite impressive. "90% of the offenders who have come before "the Circle" (as the indigenous locals call it) have not re-offended. Aboriginal persons' criminal offending in the region has declined in substantial proportions. The word has spread among the Koori youth in this region about how embarrassing and humiliating it is to appear in front of relatives and respected Elders to explain conduct they had hoped to hide from them."[76] The Council will follow the development of Circle Sentencing with interest.

6.4 Trends in Crown Appeals against Sentence

The Judicial Commission has recently completed a study on Crown appeals against sentence.[77] In addition, the High Court has recently affirmed the restriction which applies to in Crown appeals against sentence,[78] that is that the CCA will only intervene where error is shown, and even then the Court has a discretion to refuse to intervene.

The Commission found that the Crown appealed in 2.5% of all first instance sentencing matters for the period January 2001 to September 2004. The study focuses on 293 of 310 Crown appeals to the CCA (and not appeals to the District Court from the Local Court).[79] Of the 293 cases analysed, the most common sentences for which a Crown appeal was lodged were:

- Full time custody (196 cases 66.9%)
- Suspended sentences (44 cases, 15%)
- Periodic detention (24 cases, 8.2%)
- Good behaviour bonds (8 cases, 2.8%)
- Non-conviction orders (7 cases, 2.4%)
- Home detention orders (5 cases, 1.7%)
- Community Service orders and fines (2 cases, 0.7%)
- Section 11 deferred sentences (5 cases, 1.7%).

The five most common offences in respect of Crown appeals were:

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[74] AJAC, 14 July 2005.

[75] His Honour Judge Nicholson SC (July 2005) "Circle Sentencing is a Success" (2005) 17(6) *Judicial Officers' Bulletin* 47

[76] His Honour Judge Nicholson SC (July 2005) "Circle Sentencing is a Success" (2005) 17(6) *Judicial Officers' Bulletin* 47 at 47.

[77] Brignell and Donnelly (July 2005) "Monograph 27: Crown Appeals Against Sentence" Sydney: The Judicial Commission.

[78] See *Markarian v. The Queen* [2005] HCA 25 at [25]

[79] In the remaining 12 matters, the convicted person lodged a successful conviction appeal.

- Drug offences (70 cases, 23.9%),
- Robbery and extortion (58 cases, 19.8%),
- Acts intended to cause injury (33 cases, 11.3%),
- Homicide related offences (29 cases 9.9%),
- Sexual assault and related offences (25 cases, 8.5%).

The Commission found that the CCA allowed the Crown appeal in 54.6% of cases, and that the Court identified error in 72% of cases. In 17.4% of all Crown appeals, the Court exercised its discretion not to intervene despite identifying error.

7. Some sentencing & guideline changes in other jurisdictions

There have been a number of significant sentencing developments in other jurisdictions, most notably in the area of sentencing guidelines.

7.1 Sentencing Guidelines and the United States Sentencing Commission

In the USA, sentencing guidelines have recently been held to be no longer binding on the Judges.[80] The Federal Guidelines have been held to be administrative, not statutory, in nature. The United States Sentencing Commission ("USSC") is an independent agency that exercises policy making authority delegated to it by congress. In setting guidelines (which are numerical and not qualitative in nature) the USSC essentially relies upon studies of earlier judicial decisions. The studies consider the earlier judicial decisions to identify which factors federal judges have previously found to be important.

The USSC has other statutory mandated functions such as collecting sentencing data from all federal district courts, amending the guidelines where appropriate[81] and conducting sentencing related research. The case of *United States v. Booker and Fanfan*[82]*r* did not dispute that the USSC could continue to perform these statutory functions.

The sentencing guidelines consist of a set of detailed rules for calculating recommended sentences for persons convicted in the federal courts. The rules are tailored to the crimes committed, certain characteristics of the offender and to circumstances that can mitigate or enhance punishments. The theory is that by following the guidelines the federal courts can each arrive at similar decisions for similar cases. The rules do not however set forth a prescribed "statutory maximum."[83]

In *Booker*, the Court held that the provisions of the USCA, which make the sentencing guidelines mandatory, are incompatible with the sixth amendment jury trial. By severing the offending provisions,[84] the guidelines become *effectively advisory*. This requires the sentencing court to consider guideline ranges but permits it to tailor the sentence in the light of statutory concerns. The dissenting view of interest is that of Breyer J as to how much difference is to be given to the applicable guideline range as opposed to other statutory concerns

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[80] *United States v. Booker and Fanfan* (12 January 2005) 125 S. Ct 738
[81] The Guidelines Manual was first issued in 1987 and is updated annually by the USSC.
[82] *United States v. Booker and Fanfan* (12 January 2005) 125 S. Ct 738
[83] *United States v. Booker and Fanfan* (12 January 2005) 125 S. Ct 738, Breyer J dissenting in part
[84] Of the *Sentencing Reform Act 1984*

The current position of the USSC guidelines is now perhaps somewhat akin to the NSW CCA guidelines[85] and the English Sentencing Guidelines Council's guidelines.[86]

7.2 English Sentencing Guidelines Council

As outlined in the Council's last statutory report on sentencing trends and practices,[87] the Sentencing Guidelines Council ("the SGC") is now responsible for promulgating English sentencing guidelines. The Sentencing Advisory Panel ("SAP") continues to exist, and has a relationship with the SGC quite similar to the one it previously had with the English Court of Appeal. The English Court of Appeal has been removed from the process.

Since its establishment the SGC has issued three guidelines:

- Reduction in sentence for a guilty plea
- Overarching principles – seriousness
- New Sentences: Criminal Justice Act 2003

These may be described in a sense as qualitative or principle guidelines. Before finally promulgating these guidelines, the SGC consulted extensively and made adjustments to the guidelines.[88]

7.3 Victorian Sentencing Advisory Council

In May 2003 the Victorian Government announced that it would commit $6.2 million over four years to the establishment of a Victorian Sentencing Advisory Council (Victorian SAC), as part of the aim to strengthen the sentencing process and to encourage and incorporate community input into sentencing.[89]

The Victorian SAC currently has 12 members, from diverse backgrounds:[90]

- Prof Arie Frieberg – Monash University, Dean of Law;
- Andrew Jackomos - Indigenous rights advocate;
- Therese McCarthy - Experienced consultant on court issues;
- Carmel Benjamin - Court Network founder;
- Prof Jennifer Morgan - Advocate for victims of domestic violence and sexual assault;
- Barbara Rozenes -Court Network board member;
- Jeremy Rapke QC - Chief Crown Prosecutor;
- David Grace QC - Prominent legal practitioner;
- Bernie Geary -Youth advocate;
- Simon Overland - Assistant Police Commissioner;
- Noel Butland - Regional community corrections officer; and
- Carmel Arthur – Victims of Crime Advocate

The Victorian SAC has a number of projects afoot. Its main project is the review of suspended sentences. The Victorian SAC launched a discussion paper on suspended sentences on 21 April 2005. Following release of the discussion paper, the Victorian SAC engaged in an extensive public consultation process by hosting a series of community forums,

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[85] the status of which were considered in *R v. Whyte*
[86] See section 172 of the *Criminal Justice Act 2003* (UK)
[87] at pp84 to 85
[88] See Sentencing Guidelines Council "Summary of responses to the first set of draft guidelines" 16 December, 2004
[89] 2003-2004 Victorian Budget: Media Releases <www.budget.vic.gov.au>
[90] The membership of the Victorian Sentencing Advisory Council is in accordance with section 108F of the *Sentencing Act 1991* (Vic)

specialist roundtables, focus groups and meetings during May and June 2005. In addition, the Victorian SAC has received a number of written and oral submissions on suspended sentences. The Victorian SAC is currently working on its final report.

The Victorian SAC is also working on a number of other projects. The Victorian SAC is assisting the Victims Support Agency with a project exploring whether Victoria should have a Victims' Rights Charter. The Victorian SAC has also produced a number of fact sheets on various sentencing options as part of its functions to disseminate information on sentencing matters, gauge public opinion and consult on sentencing matters with the general public.[91]

The Victorian SAC will soon release accessible and consistent statistical material, in accordance with its statutory functions.[92] To do this, the Victorian SAC is working in conjunction with the courts and statistical units of the Victorian Department of Justice. The Victorian SAC hopes that the statistical information will be used to:

- inform the public and others about what is happening in sentencing;
- inform our own research into sentencing trends and issues;
- provide greater transparency of the judicial and correctional process;
- provide a basis for sociological critique or research into potential law reform.[93]

In relation to guideline judgments, the Victorian SAC has a direct relationship with the Victorian Court of Appeal,[94] but the power to promulgate a guideline remains with the Court.[95]

The Victorian SAC's first mentioned function is to, "*state in writing to the Court of Appeal its views in relation to the giving or review, of a Guideline Judgment*". In this way, the Victorian Court of Appeal has the benefit of the views of a diverse body in exercising its powers in relation to guideline judgments. There is a direct relationship between the Victorian SAC and the Court, and the Attorney General is not juxtaposed between the two as he or she is in NSW.

The Court must notify the Victorian SAC and consider the Victorian SAC's views when it decides to give or review a guideline judgment.[96] Other procedural requirements are that the DPP and a legal practitioner representing Legal Aid be given an opportunity to appear before the Court and make a submission on the matter.[97] The Court has an obligation to have regard to the Victorian SAC's views and the submissions of the DPP and Legal Aid when giving or reviewing a guideline judgment.[98]

The Court of Appeal may give or review a guideline judgment either on its own initiative or on application by a party to the appeal.[99] The Victorian SAC does not have the power to

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[91] The SAC's functions in these respects are quite broad: See section 108C (1)(c)-(e) of the *Sentencing Act 1991* (Vic)

[92] section 108C (1)(b) of the *Sentencing Act 1991* (Vic)

[93] See SAC's website: http://www.sentencingcouncil.vic.gov.au/CA256F82000D281D/page/Research+%26+Statistics?OpenDocument&1=70-Research+%26+Statistics~&2=~&3=~ (accessed 14 July 2005)

[94] See section 108C of the *Sentencing Act 1991* (Vic)

[95] See Part 2AA of the *Sentencing Act 1991* (Vic)

[96] Section 6AD(a)

[97] Section 6AD(b)

[98] Section 6AE(c)

[99] Under section 6AB(1) of the *Sentencing Act*

initiate guideline judgments. There is also no specific legislative basis for the Attorney General to apply for a guideline judgment, as is the case in NSW. As yet, the Victorian legislation on guideline judgments has not been exercised.

The Sentencing Council's Chairperson and secretariat have meet with the Victorian SAC's Chairperson and secretariat to discuss projects being undertaken by each agency in the area of sentencing, to discuss other projects of mutual interest and to generally share ideas.[100]

7.4 Queensland Sentencing Advisory Council

A *Private Member's Bill* has been introduced into the Queensland Parliament proposing a sentencing advisory council.[101] The proposed council is closely modelled on the Victorian SAC. Many of the Queensland council's statutory functions would be identical to those of the Victorian SAC. The categories of membership in the Queensland *Bill* are almost identical to those of the Victorian SAC.[102]

One point of difference relates to guideline judgments. Prima facie, the powers outlined in the Queensland *Bill* seem similar to the Victorian SAC. For example, the Queensland *Bill* attempts to provide for a direct relationship with the Court. The Victorian SAC has a power "to state in writing to the Court of Appeal its views in relation to the giving or review of a guideline judgment"[103] and the Court of Appeal has a corresponding obligation to "have regard to any views stated by the Sentencing Advisory Council" in giving a guideline judgment. The Queensland *Bill* provides a power for the proposed Council "to state in writing to the Court of Appeal its views in relation to the application by Courts of the Sentencing Guidelines and principles in section 9 [of the *Penalties and Sentences Act*]." Unlike the Victorian legislation, the Queensland *Bill* does not provide for a corresponding power of the Court to consult with the proposed Council.[104]

Also, Queensland's "sentencing guidelines and principles"[105] are of a fundamentally different nature to a guideline judgment. Queensland's "sentencing guidelines and principles" set forth the purposes for which a sentence may be imposed. They are similar in nature to the purposes and principles of sentencing set forth, for example, in sections 3A, 5 and 21A of the NSW *Act*. In Queensland, there is no legislative basis for a guideline judgment. There could, however, possibly be a common law application.[106]

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[100] These meetings were held in Sydney on Friday, 10 June and Tuesday, 2 August,

[101] *Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2005*. Introduced by Mr McCardle, member for Caloundra (Lib) on 11 May 2005.

[102] See Clause 201 of the Bill,

[103] Section 108(a) of the *Sentencing Act 1991*

[104] See section 6AE(c) of the *Victorian Sentencing Act 1991*

[105] Found in clause 9 of the Bill

[106] In this respect, see *R v. Wong and Leung* [1999] NSWCCA 420; (1999) 48 NSWLR 340; 108 A Crim R 531 and *Wong and Leung v. The Queen* (2001) 207 CLR 584; 185 ALR 233

Attachment A

The effect of the scheme on sentences for offences included in the scheme

Notes:
The "before 1/02/03" period covers matters sentenced outside of the scheme from 1 January 1998 to 30 December 2004. The "after 1/2/03" period covers matters sentenced under the scheme from 1 Feb 2003 to 30 December 2004.

The "number of matters" refers to matters sentenced under the scheme. The "number of matters" and "percentage sentenced to imprisonment" were calculated on the basis of *all* matters sentenced, that is, both consecutive and non-consecutive terms.
The "term of sentence" and "non-parole period" were calculated on matters where a non-consecutive term was imposed. That is, matters where a consecutive term was imposed were excluded from calculations of "term of the sentence" and "non-parole period."

The "80% range" is provided to give an indication of the breadth of sentencing for the offence in question.

TABLE 1

Item No. / Offence		SNPP	Percentage sent to imprisonment		Term of sentence				Non-parole period			
			Before 1/02/03	After 1/02/03	Midpoint		80% range		Midpoint		80% range	
					Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03
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 yrs	n/a		n/a				n/a		n/a	
1 Murder – other cases (8 matters)		20 yrs	100%	100%	18 yrs	20+ yrs	14 yrs – 20 yrs	18yrs - life	14 yrs	18 yrs	10 yrs – 20 yrs	12-20
2 Section 26 *Crimes Act* (conspiracy to murder)	* conspiracy to murder (0 matters)	10 yrs	100%	n/a	10 yrs	n/a	6-10 yrs	n/a	6 yrs	n/a	48 mth - 6 yrs	n/a
	* solicit to murder (0 matters)	10 yrs	92%	n/a	5 yrs	n/a	48 mth – 8 yrs	n/a	42 mth	n/a	24 mth - 6 yrs	n/a
Item No. / Offence		**SNPP**	**Percentage sent to imprisonment**		**Term of sentence**				**Non-parole period**			
			Before 1/02/03	**After 1/02/03**	**Midpoint**		**80% range**		**Midpoint**		**80% range**	
					Before 1/02/03	**After 1/02/03**	**Before 1/02/03**	**After 1/02/03**	**Before 1/02/03**	**After 1/02/03**	**Before 1/02/03**	**After 1/02/03**
3 Sections 27,28,29 or 30 *Crimes Act* (attempt to murder)		10 yrs	See **Table 2** below									
4 Section 33 *Crimes Act* (wounding etc with intent to do bodily harm or resist arrest)	* wounding with intent (37 matters)	7 yrs	94%	89%	5 yrs	7 yrs	36 mth - 10 yrs	5 yrs– 12 yrs	36 mth	54 mth	12 mth - 6 yrs	18mth – 8 yrs
	* shoot at/attempt to shoot with intent (2 matters)	7 yrs	92%	100%	7 yrs	36 mths	42 mth - 10 yrs	n/a	5 yrs	18 mth	12 mth - 8 yrs	n/a
5 Section 60 (2) *Crimes Act* (assault of police officer occasioning bodily harm) (2 matters)		3 yrs	58%	100%	24 mth	36 mth	12mth - 48 mth	n/a	12 mth	12 mth	6 mth - 24 mth	n/a

6 Section 60(3) *Crimes Act* (wounding or inflicting GBH on police officer) (0 matters)		5 yrs	33%	n/a	24 mth	n/a	n/a	n/a	12 mth	n/a	n/a	n/a
7 Section 61I *Crimes Act* (sexual assault) (13 matters)		7 yrs	86%	92%	48 mth	5 yrs	24 mth – 8 yrs	38 mth – 7 yrs	24 mth	24 mth	12 mth - 54 mth	12 mth – 54 mth
8 Section 61J *Crimes Act* (aggravated sexual assault) (11 matters)		10 yrs	95%	100%	6 yrs	6 yrs	36 mths - 10 yrs	24 mth – 8 yrs	36 mth	36 mth	18 mth - 7 yrs	6 mth – 6 yrs
9 Section 61JA *Crimes Act* (aggravated sexual assault in company)	* inflict abh (1 matter)	15 yrs	n/a	100%	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
	* threaten abh by weapon (0 matters)	15 yrs	100%	n/a	7 yrs	n/a	7 yrs – 9 yrs	n/a	48 mth	n/a	48 mth – 6 yrs	n/a
	* deprive liberty (2 matters)	15 yrs	100%	n/a	16 yrs	n/a	n/a	n/a	10 yrs	n/a	n/a	n/a
9A Section 61M (1) *Crimes Act* (aggravated indecent assault) (8 matters)		5 yrs	43%	88%	24 mth	36 mth	12 mth – 48 mth	18 mth - 6 yrs	12 mth	18 mth	6 mth – 30 mth	12 mth – 48 mth
9B Section 61M (2) *Crimes Act* (aggravated indecent assault-child under 10) (8 matters)		5 yrs	57%	63%	36 mth	36 mth	18 mth – 6 yrs	18 mth – 48 mth	18 mth	12 mth	6 mth – 30 mth	6 mth – 36 mth
10 Section 66A *Crimes Act* (sexual intercourse-child under 10) (4 matters)		15 yrs	82%	100%	54 mth	5 yrs	24 mth – 8 yrs	42 mth – 18 yrs	36 mth	30 mth	12 mth – 6 yrs	12 mth – 14 yrs

Item No. / Offence		SNPP	Percentage sent to imprisonment		Term of sentence				Non-parole period			
			Before 1/02/03	After 1/02/03	Midpoint		80% range		Midpoint		80% range	
					Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03
11 Section 98 *Crimes Act* (robbery with arms etc and wounding)	* with arms cause wounding (6 matters)	7 yrs	98%	100%	5 yrs	6 yrs	36 mth – 10 yrs	5 yrs – 7 yrs	36 mth	36 mth	18 mth – 6 yrs	36 mth – 42 mth
	* in company cause wounding (10 matters)	7 yrs	94%	90%	5 yrs	6 yrs	36 mth – 8 yrs	36 mth – 9 yrs	36 mth	42 mth	12 mth – 6 yrs	12 mth – 6 yrs
	* assault with intent to rob and cause wounding (9 matters)	7 yrs	88%	89%	6 yrs	8 yrs	48 mth – 9 yrs	6 yrs – 9 yrs	42 mth	5 yrs	24 mth – 6 yrs	36 mth – 5 yrs
12 Section 112(2) *Crimes Act* (breaking etc into any house and committing serious indictable offence in circumstances of aggravation) (131 matters)		5 yrs	73%	72%	42 mth	42 mth	24 mth – 6 yrs	24 mth – 6 yrs	24 mth	24 mth	12 mth – 48 mth	12 mth – 42 mth
13 Section 112(3) *Crimes Act* (breaking into any house and committing indictable offence circumstances special aggvt) (3 matters)		7 yrs	92%	100%	6 yrs	5 yrs	30 mth – 12 yrs	48 mth – 9 yrs	42 mth	36 mth	12 mth – 8 yrs	30 mth – 6 yrs
14 Section 154C (1) *Crimes Act* (car-jacking) (0 matters)		3 yrs	100%	n/a	36 mth	n/a	n/a	n/a	18 mth	n/a	n/a	n/a
15 Section 154C (2) *Crimes Act* (car-jacking in circumstances of special aggravation) (7 matters)		5 yrs	89%	100%	48 mth	36 mth	24 mth – 54 mth	24 mth – 48 mth	18 mth	18 mth	12 mth – 36 mth	12 mth – 24 mth
15A Section 203E *Crimes Act* (bushfires) (1 matter)		5 yrs	67%	100%	54 mth	n/a	54 mth – 5 yrs	n/a	30 mth	n/a	n/a	n/a

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 yrs	See **Table 3** below
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 yrs	See **Table 3** below
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 yrs	See **Table 3** below
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 yrs	See **Table 3** below

Item No. / Offence	SNPP	Percentage sent to imprisonment		Term of sentence				Non-parole period			
		Before 1/02/03	After 1/02/03	Midpoint		80% range		Midpoint		80% range	
				Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03
20 Section 7 *Firearms Act* 1996 (unauthorised possession or use of firearms)	3 yrs	57%	100%	24 mth	24 mth	12 mth – 36 mth	18 mth – 6 yrs	18 mth	12 mth	12 mth – 18 mth	12 mth – 48 mth

TABLE 2

Item No. / Offence		SNPP	Percentage sent to imprisonment		Term of sentence				Non-parole period			
			Before 1/02/03	After 1/02/03	Midpoint		80% range		Midpoint		80% range	
					Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03
3 Section 27 *Crimes Act* (acts done to the person with intent to murder)	* administer poison with intent to murder (0 matters)	10 yrs	100%	N/A	9 yrs	N/A	n/a	N/A	5 yrs	N/A	n/a	N/A
	* wound or cause GBH with intent to murder (1 matter)	10 yrs	100%	100%	14 yrs	7 yrs	9 yrs – 16 yrs	N/A	7 yrs	6 yrs	5 yrs – 12 yrs	N/A
3 Section 29 *Crimes Act* (certain other attempts to murder)	* attempt to strangle/suffocate with intent to murder (0 matters)	10 yrs	100%	N/A	48 mth	N/A	n/a	N/A	30 mth	N/A	n/a	N/A
	* shoot at with intent to murder (0 matters)	10 yrs	100%	N/A	5 yrs	N/A	N/A	N/A	5 yrs	N/A	n/a	N/A
3 Section 30 *Crimes Act* (attempt to murder by other means) (0 matters)		10 yrs	100%	N/A	5 yrs	N/A	18 mth – 7 yrs	N/A	24 mth	N/A	18 mth – 42 mth	N/A

TABLE 3

Item No. / Offence		SNPP	Percentage sent to imprisonment		Term of sentence				Non-parole period			
					Midpoint		80% range		Midpoint		80% range	
			Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03
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)	* manufacture prohibited drug - commercial quantity amphetamines (0 matter)	10 yrs	100%	N/a	6 yrs	N/a	48 mth – 7 yrs	N/a	48 mth	N/a	24 mth – 54 mth	N/a
	* manufacture prohibited drug – commercial quantity cannabis oil (0 matters)	10 yrs	67%	N/a	24 mths	N/a	N/a	N/a	12 mth	N/a	N/a	N/a
	* manufacture prohibited drug – commercial quantity ecstasy (0 matters)	10 yrs	100%	N/a	48 mths	N/a	N/a	N/a	30 mth	N/a	N/a	N/a
	* knowingly take part in manufacture of prohibited drug – commercial quantity amphetamines (0 matters)	10 yrs	90%	N/a	5 yrs	N/a	36 mth – 7 yrs	N/a	36 mth	N/a	18 mth – 42 mth	N/a
	* knowingly take part in manufacture of prohibited drug – commercial quantity cocaine (0 matters)	10 yrs	67%	N/a	36 mth	N/a	n/a	N/a	12 mth	N/a	12 mth – 24 mth	N/a
	* knowingly take part in manufacture of prohibited drug – commercial quantity ecstasy (0 matters)	10 yrs	100%	N/a	18 mth	N/a	12 mth – 6 yrs	N/a	12 mth	N/a	6 mth – 42 mth	N/a

Item No. / Offence		SNPP	Percentage sent to imprisonment		Term of sentence				Non-parole period			
			Before 1/02/03	After 1/02/03	Midpoint		80% range		Midpoint		80% range	
					Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03
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)	* manufacture prohibited drug – large commercial quantity amphetamines (1 matter)	15 yrs	100%	100%	18 mth	48 mth	18 mth – 6 yrs	n/a	6 mth	18 mth	6 mth – 36 mth	n/a
	* knowingly take part in manufacture of prohibited drug – large commercial quantity amphetamines (0 matters)	15 yrs	87%	n/a	48 mth	n/a	24 mth – 10 yrs	n/a	30 mth	n/a	12 mth – 6 yrs	n/a
	* knowingly take part in manufacture of prohibited drug – large commercial quantity ecstasy (0 matters)	15 yrs	100%	n/a	6 yrs	n/a	n/a	n/a	48 mth	n/a	n/a	n/a

Item No. / Offence		SNPP	Percentage sent to imprisonment		Term of sentence				Non-parole period			
			Before 1/02/03	After 1/02/03	Midpoint		80% range		Midpoint		80% range	
					Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03
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)	* supply prohibited drug – commercial quantity heroin (5 matters)	10 yrs	94%	100%	5 yrs	7 yrs	36 mth – 8 yrs	54 mth – 9 yrs	36 mth	48 mth	18 mth – 5 yrs	30 mth – 7 yrs
	* supply prohibited drug – commercial quantity amphetamines (5 matters)	10 yrs	93%	80%	48 mth	5 yrs	24 mth – 6 yrs	36 mth – 7 yrs	30 mth	36 mth	12 mth – 48 mth	18 mth – 6 yrs
	* supply prohibited drug – commercial quantity cocaine (0 matters)	10 yrs	87%	n/a	5 yrs	n/a	36 mth – 6 yrs	n/a	36 mth	n/a	18 mth – 48 mth	n/a
	* supply prohibited drug – commercial quantity cannabis resin (0 matters)	10 yrs	100%	N/a	48 mths	N/a	N/a	N/a	24 mths	N/a	N/a	N/a
	* supply prohibited drug – commercial quantity ecstasy (6 matters)	10 yrs	82%	83%	36 mth	42 mth	24 mth – 48 mth	36 mth – 5 yrs	18 mth	24 mth	12 mth – 30 mth	18 mth – 30 mth
	* knowingly take part in supply of prohibited drug – commercial quantity heroin (2 matters)	10 yrs	100%	100%	48 mth	48 mth	30 mth – 8 yrs	48 mth – 54 mth	30 mth	24 mth	6 mth – 54 mth	24mth – 30mth

	* knowingly take part in supply of prohibited drug – commercial quantity amphetamines (1 matter)	10 yrs	83%	100%	36 mth	6 yrs	24 mth – 48 mth	n/a	18 mth	36 mth	12 mth – 36 mth	n/a
	* knowingly take part in supply of prohibited drug – commercial quantity cocaine (0 matters)	10 yrs	100%	n/a	48 mth	n/a	12 mth – 6 yrs	n/a	24 mth	n/a	12 mth – 42 mth	n/a
	* knowingly take part in supply of prohibited drug – commercial quantity ecstasy (1 matter)	10 yrs	75%	100%	36 mth	36 mth	18 mth – 42 mth	n/a	18 mth	18 mth	6 mth – 24 mth	n/a

Item No. / Offence		SNPP	Percentage sent to imprisonment		Term of sentence				Non-parole period			
			Before 1/02/03	After 1/02/03	Midpoint		80% range		Midpoint		80% range	
					Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03	Before 1/02/03	After 1/02/03
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)	* supply prohibited drug – large commercial quantity heroin (1 matter)	15 yrs	100%	100%	8 yrs	n/a	6 yrs – 14 yrs	n/a	6 yrs	n/a	36 mth – 12 yrs	n/a
	* supply prohibited drug – large commercial quantity amphetamines (3 matters)	15 yrs	96%	100%	7 yrs	6 yrs	36 mth – 10 yrs	48 mth – 9 yrs	48 mth	54 mth	24 mth – 6 yrs	24 mth – 6 yrs
	* supply prohibited drug – large commercial quantity cocaine (0 matters)	15 yrs	71%	n/a	7 yrs	n/a	6 yrs – 7 yrs	n/a	5 yrs	n/a	48 mth - 5 yrs	n/a
	* supply prohibited drug – large commercial quantity cannabis resin	15 yrs	100%	N/a	8 yrs	N/a	N/a	N/a	54 mth	N/a	N/a	N/a
	* supply prohibited drug – large commercial quantity ecstasy (4 matters)	15 yrs	100%	100%	6 yrs	10 yrs	48 mth – 9 yrs	7 yrs – 16 yrs	48 mth	7 yrs	24 mth – 5 yrs	54 mth – 12 yrs
	* knowingly take part in supply of prohibited drug – large commercial quantity heroin (1 matter)	15 yrs	100%	100%	7 yrs	8 yrs	48 mth – 10 yrs	n/a	54 mth	5 yrs	24 mth – 7 yrs	n/a

	* knowingly take part in supply of prohibited drug – large commercial quantity amphetamines (0 matters)	15 yrs	100%	n/a	54 mth	n/a	36 mth – 8 yrs	n/a	30 mth	n/a	24 mth – 5 yrs	n/a
	* knowingly take part in supply of prohibited drug – large commercial quantity cocaine (0 matters)	15 yrs	100%	n/a	5 yrs	n/a	5 yrs – 6 yrs	n/a	48 mth	n/a	n/a	n/a
	* knowingly take part in supply of prohibited drug – large commercial quantity cannabis resin (0 matters)	15 yrs	100%	N/a	36 mth	N/a	N/a	N/a	18 mth	N/a	N/a	N/a
	* knowingly take part in supply of prohibited drug – large commercial quantity ecstasy (0 matters)	15 yrs	100%	n/a	30 mths	n/a	n/a	n/a	12 mth	n/a	12mth – 18mth	n/a

Attachment B

<u>Summary of Standard non-parole judgments of the Court of Criminal Appeal.</u>

2005

***R v Huynh* [2005] NSWCCA 220 – 17/06/05**
Item No. 12 - Section 112(2) *Crimes Act* (aggravated break, enter and commit serious indictable offence) NPP: 5 years
Appeal against severity of sentence. The sentencing judge was in error in fixing the standard non-parole period without any reduction for the plea of guilty. The sentencing judge also erred by failing to take into account a finding of special circumstances when determining the non-parole period.

***R v Reyes* [2005] NSWCCA 218 – 16/06/05**
Item No. 8 – Section 61J *Crimes Act* (aggravated sexual assault) NPP: 10 years
Crown appeal allowed. Counsel for the Crown brought to the attention of the sentencing judge the application of the SNPP to the offence in question. When it came time to pass sentence the sentencing judge made no reference to in his remarks. The sentencing judge erred by stating no reason for reducing the SNPP.

***R v AD* [2005] NSWCCA 208 – 09/06/05**
Item No. 8 – Section 61J *Crimes Act* (aggravated sexual assault) NPP: 10 years
Appeal against severity of sentence. CCA held sentence was not manifestly excessive and the sentencing judge was correct to refer to the standard non-parole period of 10 years despite it not directly applying because of the guilty plea.

***R v Mills* [2005] NSWCCA 175 – 06/05/05**
Item No. 15A - Section 203E *Crimes Act* (bushfires) NPP: 5 years
Crown appeal allowed. The sentencing judge failed to give reasons for departure from standard non-parole period and failed to impose a sentence that adequately reflected the objective seriousness of the offences. The offences were not impulsive acts and put life and property at great risk. Regard should have been made to the seriousness of the offence as reflected by the maximum penalty and the fixed standard non-parole period of five years.

***R v Mougin* [2005] NSWCCA 146 – 18/04/05**
Item No. 12 - Section 112(2) *Crimes Act* (aggravated break, enter and commit serious indictable offence) NPP: 5 years
Appeal against severity of sentence. Appeal dismissed. The sentencing judge considered that the case was not one that required the imposition of the standard non-parole period after consideration of the factors under s 21A. It was submitted that the sentencing judge should have departed from the SNPP because of the plea of guilty. That submission was rejected.

***R v AMT* [2005] NSWCCA 151 – 14/04/05**
Item No. 18 – Section 25(2) *Drug Misuse and Trafficking Act* (supply commercial quantity of prohibited drug) NPP: 10 years
Appeal against severity of sentence. Appeal allowed. The sentence imposed was harsh due to the applicant not receiving the appropriate discounts for pleading guilty at the earliest opportunity and for assisting authorities.

***R v Simon* [2005] NSWCCA 123 – 05/04/05**
Item No. 7 – Section 33 *Crimes Act* (wounding etc with intent to do bodily harm or resist arrest) NPP: 7 years
Appeal against severity of sentence. There was no error in the sentencing judge's reference to the standard non-parole period despite finding the offence to be higher than the middle range of objective seriousness. A reference to the standard non-parole period in those circumstances follows the decisions in *Way* and *Pellew,* which emphasised that the SNPP retains significance as a guide even where it does not strictly apply because the offender pleaded guilty.

***R v JDB* [2005] NSWCCA 102 – 24/03/05**
Item No. 10 – Section 66A *Crimes Act* (sexual intercourse – child under 10) NPP: 15 years
Appeal against severity of sentence. The sentencing judge made a passing reference to the SNPP in the judgment noting that it didn't apply due to the plea of guilty. This was incorrect, as the judge should have made reference to it as a guidepost. However neither party made that a ground of appeal. The youth of the applicant was considered a reason to render the SNPP of little guidance.

***R v Blair* [2005] NSWCCA 78 – 11/03/05**
Item No. 18 – Section 25(2) *Drug Misuse and Trafficking Act* (supply commercial quantity of prohibited drug) NPP: 10 years
Appeal against severity of sentence. Appeal allowed. Sentencing judge did not approach the assessment of whether the offence fell within the middle range of objective seriousness correctly. Sentencing judge should have asked whether there were reasons for not imposing the SNPP. Sentencing judge did not adequately take into consideration the appellant's limited role in the offence which was a determining factor as to whether it fell within the mid range of objective seriousness.

***R v Drew* [2005] NSWCCA 50 – 23/02/05**
Item No. 15 – Section 154C (2) *Crimes Act* (carjacking in circumstances of aggravation) NPP: 5 years
Appeal against severity of sentence. Appeal allowed. As the offence occurred in September 2003 the SNPP legislation applied as a reference point taking account the fact that the applicant pleaded guilty. His Honour referred to a number of circumstances that led him to adopt a term lower than the SNPP however his Honour did not expressly refer to the law as explained in *Way*.

2004

***R v Ceissman* [2004] NSWCCA 466 – 20/12/04**
Item No. 12 - Section 112(2) *Crimes Act* (aggravated break, enter and commit serious indictable offence) NPP: 5 years
Crown appeal allowed. Sentencing judge did not overlook or incorrectly state any principle of sentencing. The judge correctly acknowledged that the SNPP acts as a guide in guilty plea cases. Where the judge was shown to have erred was after the offence was correctly found to be one within the middle range of objective seriousness, the sentence did not adequately reflect the criminality of the offence.

***R v Pellew* [2004] NSWCCA 434 – 16/12/04**
Item No. 10 – Section 66A *Crimes Act* (sexual intercourse – child under 10) NPP: 15 years
Crown appeal allowed. Sentencing judge erred by classifying the offence as one in the middle range of objective seriousness. Whilst not an offence in the middle range of objective seriousness, the sentence was still manifestly inadequate. The sentencing Judge also failed to take into account a Form 1 offence.

***R v Dickinson* [2004] NSWCCA 457 – 16/12/04**
Item No. 4 – Section 33 *Crimes Act* (wounding etc with intent to do bodily harm or resist arrest) NPP: 7 years
Crown appeal. Offence was malicious wounding with intent to do grievous bodily harm. Appeal was allowed. Sentencing judge erred by not considering the SNPP as a guide despite having found that the offence fell below the mid-range of objective seriousness. A decision that an offence falls below the mid-range of seriousness does not render the standard non-parole period irrelevant: see Way at [122].

***R v Cahill* [2004] NSWCCA 451 – 29/11/04**
Item No. 20 – Section 7 *Firearms Act* (unauthorised possession or use of firearms) NPP: 3 years
Appeal against severity of sentence. Appeal allowed. The imposition of the standard non-parole period where there was a guilty plea led to an excessive sentence.

***R v Tobar; R v Jan* (2004) 150 A Crim R 104 – 19/11/04**
Item No. 11 – Section 98 *Crimes Act* (robbery with arms etc and wounding) NPP: 7 years
Appeal against severity of sentence. Judge erred by determining the non-parole period first and increasing the balance of the term of sentence to take account of a finding of special circumstances. The inclusion of the offence of armed robbery with wounding in the table of standard non-parole period offences must be taken to have excluded, or at least significantly reduced, the application of the guideline judgment in *R v Henry* to that offence.

***R v Rice* [2004] NSWCCA 384 – 10/11/04**
Item No. 12 - Section 112(2) *Crimes Act* (aggravated break, enter and commit serious indictable offence) NPP: 5 years
Conviction and Crown appeal. Conviction appeal dismissed and Crown appeal allowed. Initial sentence imposed by Drug Court. Sentence imposed before the case of *Way*. Sentencing Judge incorrectly applied the SNPP scheme. Sentences were manifestly inadequate.

***R v Dodd* [2004] NSWCCA 374 – 2/11/04**
Item No. 12 - Section 112(2) *Crimes Act* (aggravated break, enter and commit serious indictable offence) NPP: 5 years
Appeal against severity of sentence. Appeal allowed. The sentencing judge erred in considering that because the offence was committed after 1 February 2003 then prima facie the SNPP applied. It was determined in *Way* that the SNPP applied where the offender was convicted "after trial" whilst in guilty plea cases the SNPP takes its place as a reference point. The Crown conceded that there was an error in the sentencing process and that re-sentencing was appropriate.

***R v Davies* [2004] NSWCCA 319 – 21/09/04**
Item No. 12 - Section 112(2) *Crimes Act* (aggravated break, enter and commit serious indictable offence) NPP: 5 years
Appeal against severity of sentence. Appeal dismissed. Applicant pleaded guilty. The applicant relied upon remarks made in *R v Maloudi* to the effect that the SNPP had no application in the sentencing exercise after a plea of guilty. The CCA rejected that submission.

***R v P* [2004] NSWCCA 218 – 30/06/04**
Item No. 11 – Section 98 *Crimes Act* (robbery with arms etc and wounding) NPP: 7 years
Appeal against severity of sentence. The applicant was sentenced before the judgement of *Way*. The sentencing judge erred by holding that the SNPP applied to persons who plead guilty. Sentence appeal allowed.

***R v Mouloudi* [2004] NSWCCA 96 – 28/06/04**
Item No. 20 – Section 7 *Firearms Act* (unauthorised possession or use of firearms) NPP: 3 years
Crown appeal allowed. The sentencing judge erred by incorrectly stating the maximum penalty for these offences as five years imprisonment, rather than 14 years. Respondent pleaded guilty at first instance and 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.

***R v Shi* [2004] NSWCCA 135 – 11/05/04**
Item No. 18 – Section 25(2) *Drug Misuse and Trafficking Act* (supply commercial quantity of prohibited drug) NPP: 10 years

Crown appeal allowed. The sentencing judge erred by assuming that the SNPP applied equally where the case was determined at trial or after a plea. The sentencing judge also erred by assuming that considerations, which are relevant for an assessment of objective seriousness, are confined to those that fall within s 21A(1)(c). Finally the sentencing judge erred by finding that the SNPP did not have any application after the offence was held to not fall within the middle range of objective seriousness. The Crown appeal was upheld and the respondent was sentences to six years imprisonment with a non-parole period of four years.

***R v Tuncbilek* [2004] NSWCCA 139 – 11/05/04**
Item No. 15 – Section 154C (2) *Crimes Act* (carjacking in circumstances of aggravation) NPP: 5 years
Appeal against severity of sentence. Appeal allowed. The sentencing judge erred in imposing the standard non-parole period without giving consideration to where the objective seriousness of the applicant's offence sat in the hierarchy of offences against s 154C(2). There was also in this case a plea of guilty and in those cases the SNPP should be used as a reference point. Given the SNPP as a reference point then the 25% discount for the plea of guilty the starting point for sentence should have been lower.

***R v Johnson* [2004] NSWCCA 140 – 11/05/04**
Item No. 12 - Section 112(2) *Crimes Act* (aggravated break, enter and commit serious indictable offence) NPP: 5 years
Crown appeal. Appeal dismissed. Sentencing judge found that the offence fell within the lower range of objective seriousness and the Crown did not adequately refute this finding. The sentencing judge was free to depart from the standard non-parole period for the offence.

***R v Way* (2004) 60 NSWLR 168 – 11/05/04**
Item No. 18 - Section 25 (2) *Drug Misuse and Trafficking Act 1985* (supplying commercial quantity of prohibited drug) NPP: 10 years
Appeal against severity of sentence. The case considered the SNPP legislation and its correct application. The **incorrect** approach taken by the sentencing judge was firstly to ascertain where the offence falls within the range of objective seriousness, then to indicate what non-parole period will apply, and then to look at section 21A aggravating and mitigating matters. The **correct** approach is to consider all relevant objective and subjective features, including those listed in section 21A and any other "matter of settled sentencing law" in order to arrive at a sentence which takes into account the "guidance" provided by the statutory standard non-parole period.

***R v Hopkins* [2004] NSWCCA 105 – 10/05/04**
Item No. 8 – Section 61J *Crimes Act* (aggravated sexual assault) NPP: 10 years
Crown appeal. No error by sentencing judge. The judge expressly stated the reasons as to why the SNPP did not apply to the circumstances of this case. The reasons related to the respondents mental health.

Attachment C

R v. Way: Special Leave Application to the High Court

The Court: Gummow J and Callinan J
Date heard: 11 March 2005.
Result: Special leave refused on the basis that there are insufficient prospects of success. Any re-sentencing of Mr Way would not be substantially different. .
Applicant: Odgers SC and Haesler SC
Respondent: Cogswell SC and Mitchelmore

The applicant argued that the CCA had fallen into error in interpreting the phrase "middle of the range of objective seriousness". The error had two parts:

- interpretation of the words "middle of the range" and
- interpretation of the words "objective seriousness".

The applicant argued that the CCA has construed the words "middle of the range" as a broad band in the middle of the range, and that this has resulted in too many cases being "caught" by the scheme. The applicant argued that the second reading speech shows that the "middle of the range" should instead be seen as a *point* in the sentencing spectrum. The applicant also referred to the difficulties that Adams J saw in construing an "abstract offence in the middle of the range".[107] The applicant argued that construing the "*middle* of the range" as a point would afford more discretion to sentencing judges.

The applicant argued that the CCA has interpreted the words "objective seriousness" very broadly with the result that many mitigating factors are being taken into account in assessing the "objective seriousness" of the offence. This can preclude a finding of "special circumstances"[108] to reduce the non-parole period as these factors cannot be considered a second time.

The applicant submitted that the combined effect is that many mitigating factors will be considered in assessing the "objective" seriousness". These may reduce the assessment of the objective seriousness, but because the "middle of the range" is a broad band, many cases will be caught within the scheme nonetheless, and the standard non-parole period will apply. It will then be very difficult to find "special circumstances" to reduce the non-parole period. This will mean an increase in sentence length for tabled offences. However, the purpose of the scheme, as disclosed in the second reading speech, was to promote consistency and transparency.

The respondent submitted that the two points of statutory construction were open to the CCA, and that a literal approach of calculating a "point" in the middle of the range of objective seriousness may require an overly statistical approach. The respondent also noted that it has never hitherto been necessary to categorise a factor as "objective" or "subjective".

It seemed to be agreed that issues of statutory interpretation were certainly arguable points, but the Court held that in all probability, any re-sentencing of Mr Way would not be substantially different.

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[107] See *R v. Pellew* [2004] NSWCCA 434 at [44] – [46]
[108] Section 44 Crimes (Sentencing Procedure) Act 1999

Attachment D

Guideline Judgment for High Range PCA Offences

On 8 September 2004, the NSW Court of Criminal Appeal promulgated a guideline judgment for the offence of driving with a high range prescribed concentration of alcohol in response to an application made by the Attorney General.

What follows is a summary of the proceedings and judgment. Statements as to opinions of the Court are referring to the judgement of Howie J.

Guideline sought by Attorney General
The guideline sought by the Attorney General in the proceedings included the following points:

- A high range PCA offence should always be regarded as objectively serious;
- Deterrence must be given particular significance when sentencing offenders charged with a high range PCA offence and also those charged that have had a previous PCA offence;
- An order s 10 of the Sentencing Act discharging an offender is appropriate only in the most exceptional circumstances;
- Where the offender has a prior PCA conviction, serious consideration should be given to the imposition of a custodial sentence;
- Periods of licence disqualification should not be taken into account when determining the totality of the penalty;
- The court should give consideration to ordering a shorter period of licence disqualification only after it has determined the totality of the penalty and sentenced the offender;
- The court should order a shorter period of licence disqualification only if there are good reasons for doing so above the ordinary hardship inevitably occasioned by reason of licence disqualification;
- The court cannot reduce the period of disqualification beyond the statutory minimum periods in s 25 of the *RT (General) Act.*

Criteria justifying a guideline
Prevalence of Offence
The Senior Public Defender submitted that whilst the offence is relatively common, it is not increasing in prevalence.[109] The Attorney General submitted that the offence itself is prevalent. Data showed that over 20% of people convicted had at least 1 prior PCA conviction.[110] The Court held that there is utility in giving a guideline if an offence is prevalent.

Emergent Pattern of Sentencing
The Attorney General submitted there was systematic leniency in sentencing for high range PCA offences, evidenced by:

[109] at [52]
[110] at [53]

- statistics that show a fine is the most common penalty regardless of the significant increase in available penalties enacted in 1988;
- s 10 orders are "manifestly too frequent;"[111]
- a lenient approach to licence disqualification where in a study of 199 cases, the automatic period of disqualification was reduced in 89.5% of cases.

In response, the Senior Public Defender argued that during the period 2001 to 2003 there was an increase in both the rate of imprisoning offenders and the use of custodial orders.[112] It was also argued that it should be unlikely that a first time offender be sentenced to imprisonment.[113]

The Senior Public Defender also argued in response that it is not appropriate for the CCA to limit the use of s 10 as it was often used to force attendance at education programs.

Inconsistency in Sentences Imposed

The Attorney General submitted that the demonstrated leniency could lead to inconsistency, as not all offenders would receive such 'light' treatment. The Senior Public Defender argued that if a variation in attitudes of judicial officers needs addressing then education, and not a guideline, is required.

Deterrence

The Attorney General argued that general deterrence was not reflected in the sentences currently imposed. The Senior Public Defender submitted that punishment is not an effective deterrent for drink driving offences, rather, increasing the risk of detection is.

The Court's view of the need for a guideline

The Court's lack of direct experience with the offence was a relevant issue.[114] The Court distinguished the present case from *Attorney General's Application No 2 of 2002* on the basis that the Court had *indirect experience* with cases involving high range PCA offences, being very familiar with sentencing for offences of dangerous driving, and indeed has promulgated guideline judgments in respect of that offence.[115]

It was argued by the Senior Public Defender that the intricate system of penalties already in place means a guideline is not required. The Court stated, however, that it has a role to play in situations where legislative intention is not carried out meaningfully by the State's lower courts.[116]

Another issue, raised by the Senior Public Defender, was the 'failure' of the DPP to appeal inadequate sentences. The Court took the view that the DPP's power to appeal is "constrained by practical considerations"[117] and therefore the 'low' number of appeals should not be given too much emphasis.

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[111] at [70]
[112] at [65] – [66]
[113] Applying sentencing principles enshrined in s 5 *Sentencing Act*
[114] at [90] – [91]
[115] at [91]. The recent guideline judgment in relation to dangerous driving is that of *R v.Whyte* (2002) 55 NSWLR 252
[116] at [92]
[117] at [95]

The content of the guideline

Moral Responsibility

The Court outlined factors which aggravate an offender's *moral culpability*:

- Degree of intoxication;
- Erratic or aggressive driving;
- Competitive driving or showing off;
- Length of the journey at which others are exposed to risk;
- Number of persons put at risk by the driving (passengers, not the general public).[118]

Licence Disqualification

The Court rejected the Attorney General's submission that disqualification was not a penalty and could only be considered once punishment for the offence had been determined.

Particular Considerations

The Court made particular note of the following issues:

- Prior good character – has less relevance than other offences because of the prevalence of offenders who are otherwise of good character, and the need for general deterrence;
- Nature of driving – the offence is more serious once the vehicle is in motion. The Court stated that the absence of any of the factors under the heading 'Moral Responsibility' will not mitigate the seriousness of the conduct;
- Involvement in a Driver Education Program – participation in such a program cannot be seen as an alternative to punishment;
- Disqualification periods – the default disqualification periods set out in legislation should not be regarded as the maximum. Whilst this may prove hard on offenders who live in remote areas with little public transport, the offence is a serious summary offence;
- Section 10 orders – should only be used in rare cases and must be "exceedingly rare for a second or subsequent offence."[119]
- Ordinary case – a numerical guideline was not sought and the Court was unable to define a typical case. However, Howie J constructed an ordinary case to use as a model:
    - The ordinary case is an offender who drives along a public street, generally at night or very early morning. Their reason for driving is ordinarily convenience; or because the offender maintains that he or she was not aware of the amount of alcohol consumed or its effect upon the offender's driving and thought that it was safe to drive; or being prepared to risk detection.
    - The reason for drinking is irrelevant. Feelings of sympathy for the offender should not be confused with their culpability.[120]

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[118] Aside from the final factor, these were taken from the guideline in *R v Whyte* (2002) 55 NSWLR 252 '*Whyte*"

[119] at [130]

[120] at [142]

Attachment E

Markarian v. The Queen [2005] HCA 25

Summary of facts
The trial judge, in the District Court, sentenced Markarian to two and a half years with a non-parole period of 15 months. The principal offence was supply of prohibited drug, s 25(2) of the *Drug Misuse and Trafficking Act* 1985. The appellant also asked the Court to take 4 other matters into account on a "form 1." The Crown appealed to the CCA against the manifest inadequacy of the sentence, and the Court (per Hulme J, with Justice Heydon and Acting Justice Carruthers agreeing) allowed the appeal, quashed the sentence and imposed a sentence of eight years with a non-parole period of four and a half years.

The major issues on appeal to the High Court arose out of the rather 'untraditional' approach to sentencing adopted by Hulme J in the CCA. According to the appellant, his Honour treated a lesser statutory maximum[121] for the offence as the starting point and proceeded to oscillate around that figure, with specific discounts or increases given for various factors. His Honour identified a specific increase in the length of the sentence to take into account matters on the Form 1. The appellant saw this approach as an extreme example of a "two staged" or "two tiered" approach to sentencing, in contrast to the intuitive approach which has been generally favoured by the NSW CCA in recent years.

Outcome
The Court unanimously held that the appeal should be upheld. However the Court delivered a majority judgment (Gleeson CJ, Gummow, Hayne and Callinan JJ) with Kirby J and McHugh J delivering separate judgments, mainly on the issue of the proper approach to sentencing.

The Court held that the CCA erred in re-sentencing by placing too much emphasis on the quantity of the drug by oscillating around the maximum penalty.

Approach to sentencing – Instinctive or staged?
The majority held that there is no "universal rule" that Courts should adopt an "instinctive synthesis" approach to sentencing. Indeed, the majority saw that there is little utility in applying labels to various sentencing approaches. However, the majority appears to favour an instinctive approach and this is perhaps also how Kirby J perceived the joint reason. The majority held:[122]

Express legislative provisions apart, neither principle, nor any of the grounds of appellate review, dictates the particular path that a sentencer, passing sentence in a case where the penalty is not fixed by statute, must follow in reasoning to the conclusion that the sentence to be imposed should be fixed as it is. The judgment is a discretionary judgment and, as the bases for appellate review reveal, what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the conclusion reached. As has now been pointed out more than once, there is no single correct sentence.

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[121] The lesser maximum penalty for an offence immediately below the one in question, that is where the quantity of drug involved was less than 250 grams.
[122] At [27] and [35] - [37]

And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies.

…
The appellant's next submission invited the Court to reject sequential or two-tiered approaches to sentencing taking as their starting point the maximum penalty available, and to state as a universal rule to the extent that legislation does not otherwise dictate, that a process of instinctive synthesis is the one which sentencing courts should adopt.

No universal rules can be stated in those terms. As was pointed out earlier, much turns on what is meant by a "sequential or two-tiered" approach and, likewise, the "process of instinctive synthesis" may wrongly be understood as denying the requirement that a sentencer give reasons for the sentence passed. So, too, identifying "instinctive synthesis" and "transparency" as antonyms in this debate misdescribes the area for debate.

In general, a sentencing court will, after weighing all of the relevant factors, reach a conclusion that a particular penalty is the one that should be imposed.

The joint judgment also made the following points in relation to sentencing procedure:

- Careful attention to maximum penalties will almost always be required; and
- Sentencing courts may not add and subtract item by item from some apparently subliminally derived figure, passages of time in order to fix the time which an offender must serve in prison.

The judgments of Justices McHugh and Kirby take a much stronger stance on the issue of the correct approach to sentencing.

McHugh J adhered to his previously expressed preference for an instinctive synthesis approach to sentencing. His Honour defined what he means by a "two-tier" sentencing process, and then expressed a clear and distinct preference for the instinctive synthesis approach based inter alia on the following:

- "two tier" sentencing gives undue weight to only some of the factors of the case;
- The circumstances of criminal cases are so various that they cannot be the subject of mathematical equations: "A sentence can only be the product of human judgment, based on all the facts of the case, the judge's experience, the data derived from comparable sentences and the guidelines and principles authoritatively laid down in statutes and authoritative judgments;"
- "two tier" sentencing gives an illusion of exactitude and a false sense of transparency: "Certainly there are a series of numbers, but they are more likely than not to be erroneous."

In contrast, Kirby J shows a clear preference for a "two tiered" approach. His Honour agreed that there is no single correct sentence (unless it is lawfully fixed by Parliament). His Honour also agree that sentencing is not a mechanical, numerical, arithmetical or rigid activity in which one starts from the maximum fixed by Parliament and works down in mathematical steps. However, His Honour argued:

- The instinctive synthesis approach makes it difficult to identify error and is inconsistent with the trend towards statutory transparency;

- In some Australian jurisdictions, judges are expressing their obeisance to an "instinctive synthesis" as the explanation of their sentencing outcomes, yet in many instances, a "two stage" approach would not involve error in principle;
- The standard non-parole sentencing scheme in effect obliges judges to adopt a "two tier" approach; and
- Unlike the interpretation taken by other Judges, Kirby J interprets the early, seminal judgment of *Veen v. The Queen [no 2]* as supporting a "two stage" approach. The subsequent Victorian authority which coined the term "instinctive synthesis has, generally not been followed in other Australian states.

Interestingly, Kirby J acknowledged that much of the contention relates to semantics rather than substance, but interpreted the joint reasons as leaning in favour of an instinctive approach to sentencing.

Guideline judgments and standard non-parole periods.

Although the transcript of argument in *Markarian* revealed interesting dicta relating to guideline judgments and the standard non-parole sentencing scheme in NSW,[123] there is little discussion of these topics in the final judgments. As noted above, Kirby J is of the view that the standard non-parole sentencing scheme in effect obliges judges to adopt a "two stage" approach. In contrast, McHugh J does not see the scheme as inconsistent with an instinctive approach, but rather considers that such an approach accommodates and recognises the existence of both guideline judgments and the standard non-parole sentencing scheme: knowledge of such guides the instinct.

The further offences – Form 1 procedure

Division 3 of part 3 of the Sentencing Act is concerned with offences other than the principal offence. Section 34(1) prevents the imposition of a separate penalty for offences taken into account on a "form 1". The appellant complained that this requirement was ignored. The joint reasons address how this matter is to be addressed. The Court held that although it may not be appropriate for the Court to adopt an arithmetic approach in relation to all factors, when considering matters on a form 1, it may be useful for the Court to make clear the extent of the increase on account of the form 1 offences. The Court held that here, the CCA did not err. It did not seek to impose separate penalties for the form 1 offences, it merely specified the extent of the increase of penalty for the principal offence.

Consistency in Sentencing

The joint reasons show a clear preference for consistency of approach (subject to any specific statutory regime) as the preferred approach in sentencing.[124] This is the preferred view adopted by the Council in its report on "How best to promote consistency in sentencing in the Local Court."

[123] For example, the Chief Justice observed it may be that nowadays the legislature may express its view about a need to increase sentences not so much by altering the maximum penalty as by fixing a standard non-parole period. See *Markarian v. The Queen* [2004] HCATrans 329

[124] At [27]: "And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with *consistency of approach* and as accords with the statutory regime that applies." (Emphasis added.)