'Leading steps aright': Judicial guideline judgments in New South Wales[*]

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Introduction

> He who, from zone to zone,
> Guides through the boundless sky thy certain flight,
> In the long way that *I must tread alone*,
> Will *lead my steps aright.*

The reference from these lines of poetry by William Bryant (1818 in Tripp 1985:248) to a divine being able to lead the steps of individuals in the right path can provide a parallel to certain forms of judicial power and authority. Leading 'steps aright' is a phrase that may usefully describe the guidance sought to be provided by the Court of Criminal Appeal to first-instance sentencing judges through the mechanism of guideline judgments in New South Wales.[2]

The task of the first-instance sentencing judge has been unsentimentally described as lonely, 'painful and unrewarding' (Kirby 1980). The exercise of discretion inherent in this task carries with it the potential for public criticism and misunderstanding. Arguably the challenges confronted by judges in sentencing offenders can be ameliorated, perhaps substantially, by informative and useful guidance from appellate court judges.

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* An earlier version of this paper was presented at the Australian and New Zealand Society of Criminology (ANZSOC) Annual Conference, 'Controlling Crime: risks and responsibilities', held in Sydney 3 October 2003. The author has benefited from discussion which was stimulated by the conference delegates. The author would like to acknowledge the work of Alicia Kuczera, a recent LLB (Hons) graduate of the School of Law at the University of Newcastle who was supervised by the author in the course LAWS5005 *Advanced Legal Research and Writing* during second semester 2002 in her preparation of a dissertation in this area, entitled *Are appellate court guideline judgments a valuable mechanism for structuring judicial discretion in New South Wales?* This, along with the author's own postgraduate research into the life sentence for murder in New South Wales provided the impetus for this paper. Thanks to the anonymous referees of the paper for pointing out areas where fuller discussion, clarification or correction was required.

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2 It should be noted that there is a legislative mechanism for promulgating sentencing guideline judgments in Western Australia through s143 *Sentencing Act* 1995 (WA), although it has never been utilised to date. Also, such legislation has recently been under consideration in South Australia and Victoria — see Warner (2003:16–18, 19–20). In fact, a new Part 2AA *Sentencing Act* 1991 (Vic), which provides a mechanism for the Court of Appeal to promulgate guideline judgments, commenced operation on 1 July 2004 — see *Sentencing (Amendment) Act* 2003 (Vic).

The reaffirmation of the New South Wales Court of Criminal Appeal's commitment to guideline judgments as a mechanism to structure the exercise of judicial sentencing discretion is apparent from the comparatively recent case of *R v Dale Whyte*. In view of the earlier criticism of guideline judgments by the High Court in *Wong v The Queen; Leung v The Queen*, particularly the promotion of a two-stage approach to sentencing through this mechanism, the decision in *Whyte* was encouraging to those who see guideline judgments as an important, flexible and moderate device for fostering consistency in sentencing (Warner 2003:22). Additional encouragement in this regard has come from NSW Judicial Commission reports dealing with the impact of the *Jurisic* and *Henry* guidelines on sentencing practice for dangerous driving and armed robbery offences (Barnes et al 2002; Barnes & Poletti 2003). Also, guideline judgments promulgated by the Court of Criminal Appeal in *Re Attorney-General's Application under s.37 Crimes (Sentencing Procedure) Act 1999 No. 1 of 2002*[3] and lately in *Re Attorney-General's Application under s.37 Crimes (Sentencing Procedure) Act 1999 No.3 of 2002*,[4] have signalled the potential ongoing utility of guidelines for promoting consistency and equity in sentencing approach and outcomes.

These positive developments must, however, be considered against the recent introduction of standard minimum sentencing for a range of serious offences through the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002 (NSW).[5] The refusal by the Court of Criminal Appeal to issue a guideline sought by the Attorney-General for the offence of assaulting police officers in *Re Attorney-General's Application under s.37 Crimes (Sentencing Procedure) Act 1999 No. 2 of 2002* raises questions about the interaction of guideline judgments and the new legislative scheme for standard minimum sentences. Although the court refused the application based on the dual considerations that the offence encompasses a wide range of offending behaviour and there was no evidence of a systematic pattern of leniency in the sentences imposed by the lower courts, clearly the fact that aggravated forms of assaulting police officers under the *Crimes Act* 1900 (NSW) ss60(2) and (3) are included in the table of offences with legislatively prescribed standard non-parole periods was an important consideration in this case.

The role of judicial guideline judgments then must be considered in an enduring climate of 'law and order' politics where the need for tougher penalties and the patent denunciation of criminal offences are promoted. Has the more global approach of the legislature through the introduction of standard non-parole periods for a range of serious offences[6] diminished the value of guideline judgments in New South Wales? Has the Court of Criminal Appeal lost the initiative gained five years ago because of the cautious, albeit principled, approach taken to the promulgation of guideline judgments? This article will explore the guideline judgment mechanism in the contemporary New South Wales context against a background of recent contrasting developments in sentencing.

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3 This application was for a guideline as to the procedure for taking other offences into account on a Form 1 when sentencing for a primary offence.

4 This application was for a guideline concerning the offence of 'high range prescribed concentration of alcohol' under section 9(4) *Road Transport (Safety and Traffic) Management Act* 1999 (NSW). Judgment was delivered by the Court of Criminal Appeal on 8 September 2004.

5 This Act commenced operation from 1 February 2003.

6 In the Table to Part 4 Division 1A *Crimes (Sentencing Procedure) Act* 1999 (NSW) there are 24 items covering offence categories ranging from 'assault police officer occasioning actual bodily harm' to 'murder', 'car jacking' to 'armed robbery', and various forms of sexual assault, drug trafficking and manufacture.

Guideline judgments as a mechanism to structure judicial sentencing discretion

Guideline judgments are a judicially implemented mechanism designed to enhance consistency in sentencing, particularly in relation to the outcome or results of the sentencing exercise but may also promote consistency of the approach taken in sentencing, that is, taking account of the same factors and giving similar weight to those factors (Barnes et al 2002:13).[7] This style of regulation relies on the judiciary to develop detailed guidance through appellate judgments and 'depends for its success on the judiciary's willingness to take the principles (when declared by legislation) seriously and to develop them sympathetically' (Ashworth 1998a:215). The judicial decrees embodied in a guideline judgment usually relate to the appropriate range, starting point, or relevant factors for consideration when imposing sentences for a specific type of criminal offence. There are, however, examples of more general guidelines, such as that given in 2000 by the New South Wales Court of Criminal Appeal in *R v Thomson*; *R v Houlton*, where the appropriate level of discount for the utilitarian value of a guilty plea in criminal cases was specified.

The New South Wales Court of Criminal Appeal commenced promulgation of guideline judgments approximately five years ago in the case of *R v Jurisic*.[8] This mechanism has been utilised by the English Court of Appeal for in excess of 20 years in the forms of descriptive, qualitative guidelines and/or numerical, quantitative guidelines:

> The usual English guideline judgment does two things: First, it sets a tariff or sentencing range for a particular offence and, secondly, it differentiates between, and analyses, aggravating and mitigating factors in relation to a particular type of offence. Guidelines have been for particular offences, or for type of penalty, or for type of offender. Sometimes, a quantitative measure is not appropriate because of wide variations in the circumstances of an offence, for example burglary or manslaughter. In such cases the guidance is in the form of consideration of aggravating and mitigating factors (Spigelman 1999:881).

Structuring judicial sentencing discretion through the guideline judgment mechanism was endorsed by the Court of Criminal Appeal in *R v Jurisic* as 'a logical development of what the Court has long done' (at 217), rather than a radical departure from current sentencing practice (Morgan & Murray 1999:93). Accordingly, such a mechanism is designed to be more palatable to the judges who will become bound to take it into account in their everyday decision-making. In describing the guideline judgment as a 'significant innovation and an important tool for the development of consistent sentencing', leading academic sentencing commentator, Andrew Ashworth, has focussed on the judicial acceptance of such guidance as imperative to its success:

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7 Also, see the general definition of 'guideline judgment' in the *Crimes (Sentencing Procedure) Act* 1999 (NSW) s36, which provides, 'guideline judgment means a judgment containing guidelines to be taken into account by courts sentencing offenders, being: (a) guidelines that apply generally, or (b) guidelines that apply to particular courts or classes of courts, to particular offences or classes of offences, to particular penalties or classes of penalties or to particular classes of offenders (but not to particular offenders)'.

8 This case specifically related to offences of 'dangerous driving causing death' and 'dangerous driving causing grievous bodily harm' under *Crimes Act* (NSW) s52A. The day after this decision was handed down on 13 October 1998, the *Daily Telegraph* published an article written by Spigelman CJ wherein the Chief Justice sought to explain this 'new' approach to sentencing as a mechanism for addressing public criticism of inconsistent and/or lenient sentencing. This 'co-ordinated release of the judgment and the publication of an article by the Chief Justice in a major daily newspaper' has been viewed as a proactive initiative on the part of the Court to 'capture the public interest and take ownership of and responsibility for sentencing policy, which has so long been the bastard child of public policy' (Spears 1999:20).

> Guideline judgments appeared to be followed by most courts, and are not subjected to the suspicion and hostility that sentencers sometimes show towards legislative attempts to structure sentencing ...Guideline judgments have been welcomed by most English judges, as providing a common framework while preserving flexibility for individual cases, and this demonstrates that sensible guidance is possible. Much of the success of the technique of guideline judgments stems from the fact that they are constructed *by* judges *for* judges (1998b:229).

In *R v Jurisic*, the Court of Criminal Appeal established a guideline that involved a combination of a starting point for sentencing together with relevant aggravating considerations. In doing so, the Court of Criminal Appeal emphasised the 'limited' but nonetheless valuable role of such judgments:

> Such guidelines are *intended to be indicative only*. They are not intended to be applied to every case as if they were rules binding on sentencing judges ... such judgments will provide a useful statement of principle to assist trial judges to ensure consistency of sentencing with respect to particular kinds of offences ... The critical difference between judicial guidelines and statutory guidelines — whether minimum penalties or a grid system — is the flexibility of the former. There is provision for the special or exceptional case. *There is recognition that sentencing must serve the object of rehabilitation, as well as the objectives of denunciation and deterrence.* A trial judge can respond appropriately to all the circumstances of a particular case (at 220–221 emphases added).

Subsequent guideline judgments promulgated by the Court of Criminal Appeal have ranged from being descriptive of aggravating factors only in Re Attorney General's Application [No.1]; *R v Ponfield*[9] to providing a combination of sentencing range and relevant considerations in *R v Henry*[10], and to being quantitative only on the basis of a primary sentencing factor in *R v Wong*; *R v Leung*.[11] All such judgments have endorsed the utility of this mechanism as providing an authoritative indication of appropriate sentencing levels or factors in relation to a specific offence category. Although not binding rules, the status afforded to such judgments has led to a requirement for a reasoned explanation by a sentencing judge in the case of departure from the guideline (*R v Henry* at 357). The formal labelling of a judgment as a 'guideline' is an *important distinguishing feature*, which Spigelman CJ has emphasised avoids the judgments being 'overlooked' and ensures 'that the profession and trial judges are aware of what has been suggested', thereby assisting 'in diverting unjustifiable criticism of the sentences imposed in particular cases, or by particular judges' (*R v Jurisic* at 220).

In deciding whether to promulgate a guideline judgment, the Court of Criminal Appeal has largely relied on available empirical evidence. The most important source of this evidence is the systematic collection of sentencing statistics and data by the Judicial Commission of New South Wales (Spigelman 1999:879). The determinative factors in this process have been the prevalence of the offence (*R v Ponfield* at 331), inconsistency in the sentencing pattern (*R v Henry* at 353), or a sentencing pattern that has developed which is either too harsh or excessively lenient (*R v Jurisic* at 223; *R v Henry* at 371–373). Accordingly, the Court of Criminal Appeal has approached the development of guideline judgments on a selective and principled basis. Guidelines have only been promulgated where it was clearly considered necessary to direct sentencing judges on to the path of

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9 This case dealt with the offence of 'break, enter and steal' under the *Crimes Act* 1900 (NSW) s112(1).

10 This case dealt with the offences of 'armed robbery' and 'robbery in company' under the *Crimes Act* 1900 (NSW) s97(1).

11 This case dealt with the offence of importation of prohibited narcotic drugs under the *Customs Act* 1901 (Cth) s233B. In this case, primacy was given to the weight of the narcotic drug through the construction of a table comprising five levels with a span of weights and the applicable sentencing ranges.

consistency in approach or to promote equity in sentencing outcomes proportionate to the nature and seriousness of the offending rather than perpetuate excessively lenient sentencing patterns.

The guideline judgment mechanism came under challenge before the High Court in 2001 when a majority of the judges struck down the guideline promulgated in *Wong v The Queen*; *Leung v The Queen*.[12] Some members of the High Court criticised the quantitative guideline issued in this case as being 'overly prescriptive rather than descriptive, thereby potentially intruding on the province of the legislative arm of government, or else having the effect of depriving judicial officers from exercising their full range of sentencing powers' (Barnes et al 2002:11).[13] In the joint judgment of Gaudron, Gummow and Hayne JJ (at 608) there was particular criticism of numerical guidelines as being incompatible with the proper application of sentencing principles, including the principle of equality before the law:

> To focus on the *result* of the sentencing task, to the exclusion of the reasons which support the result, is to depart from fundamental principles of equal justice. Equal justice requires identity of outcome in cases that are *relevantly* identical. It requires *different* outcomes in cases that are different in some relevant respect. Publishing a *table of predicted or intended outcomes masks* the task of identifying what are relevant differences.[14]

These judges also emphasised that numerical guidelines cannot be inclusive of all relevant considerations in a sentencing task as this would be likely to involve such a complicated guideline that its application would be 'difficult, if not impossible', however, more importantly, prescriptive numerical guidelines 'cannot address considerations of proportionality'(at 612–613).

Accordingly, the main thrust of the opposition to guideline judgments was expressed in how they seek to guide and the potential for inappropriate fetters on the judicial sentencing discretion when there is a quantitative emphasis. This opposition is highlighted by the approval of observations made by Winneke P of the Victorian Court of Appeal in the case of *R v Ngui and Tiong* wherein the guidelines from *Wong's* case had been specifically considered:

> Experience in other areas of the law has shown that judicially expressed guidelines can have a tendency, with the passage of time, *to fetter judicial discretion by assuming the status of rules of universal application which they were never intended to have.* It would ... be unfortunate if such a trend were to emerge in the sentencing process where the exercise of the judge's discretion, within established principles, to fix a just sentence according to the individual circumstances of the case before him or her is fundamental to our system of criminal justice (at 584 emphasis added).

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12 Gaudron, Gummow and Hayne JJ (jointly) with Kirby J made up the majority. Gleeson CJ and Callinan J dissented as to the result, although in their respective judgments these judges joined the majority in criticising the sentencing guidelines promulgated in this case. McHugh J did not sit on this case. It may be observed that of the judges who sat on this case, only Gleeson CJ and Kirby J had regularly presided over criminal appeal cases on the New South Wales Court of Criminal Appeal before their respective elevations to the High Court.

13 In fact, Callinan J strongly doubted whether the guidelines were a valid exercise of the judicial power of the Commonwealth in commenting (at 642), 'They appear to have about them a legislative quality, not only in form but as they speak prospectively. Despite the qualifications that their makers express, they also do have, and in practice will inevitably come to assume, in some circumstances, a prescriptive tone and operation'.

14 In particular, the majority, including Kirby J, found that the guideline was incompatible with *Crimes Act* 1914 (Cth) s16A, which directs sentencers to impose 'a sentence ... of a severity appropriate in all the circumstances of the offence' and in subsection (2) provides a list of matters which, where relevant and known to a court, are all to be taken into account by the judicial officer fixing an appropriate sentence.

In acknowledging that 'consistency in sentences imposed for like offences upon like offenders is an objective to which the system of criminal justice aspires' (at 583), Winneke P emphasised that the role of sentencing guidelines was only to provide 'a sounding board' or 'a check' against the exercise of judicial sentencing discretion 'because they do not assume to take into account many factors which, in the individual case, will bear upon the level of the appropriate sentence to be imposed' (at 584). This exemplifies a minimalist approach to guideline judgments and contrasts with Ashworth's observation that such judgments provide a 'common framework' and promote more transparency in the judicial approach to sentencing.

Despite a sustained attack by the majority of the High Court on quantitative guidelines generally, there was clear support from the Court for the more minimalist approach taken in the previous cases of Re Attorney-General's Application (No.1); *R v Ponfield* and by the Full Court of the Supreme Court of South Australia in *Police v Cadd.* These cases both involved largely descriptive guidelines by either setting out relevant factors to be taken into account in assessing offence seriousness, nominating a factor or factors to which principal weight should be given, or articulating 'the type of punishment that should *ordinarily* be exacted'(at 606–607). Overall, a minimalist approach was favoured by a number of the High Court judges although Gleeson CJ did express tacit approval for quantitative guidelines and Kirby J showed support for guideline judgments outside the federal sphere as a 'check' or 'sounding board' against the exercise of judicial sentencing discretion. In demonstrating this support, Kirby J noted (at 636) a trend to this style of guidance in a number of comparable jurisdictions:

> The fact that so many judges in different jurisdictions have sought to promote greater consistency in sentencing by the use of what they have called 'guidelines' is a reason for this Court to exercise caution before condemning the innovation as incompatible with judicial functions under the Australian Constitution.

Kirby J also emphasised (at 622) the value of guidelines as a transparent device for promoting consistency in sentencing generally and his Honour's judgment certainly does not purport to make numerical guidelines impermissible in all circumstances.

The decision in *R v Whyte*

The more cautious form of expression used by Kirby J as to the role of judicial guideline judgments was adopted by Spigelman CJ in the New South Wales Court of Criminal Appeal when that court came to consider the impact of the High Court decision in *Wong v The Queen* on the existing guidelines for state offences and the future of guideline judgments generally as a mechanism for structuring judicial sentencing discretion. In *R v Whyte*, the Court of Criminal Appeal affirmed the status of guideline judgments as involving a restricted capacity to structure judicial sentencing discretion by seeking only to assist and 'guide' sentencing judges without imposing prescriptive requirements upon them:

> (T)he authorities referred to ...suggest that this Court should take particular care when expressing a guideline judgment to ensure that it does not, as a matter of practical effect, impermissibly confine the exercise of discretion. This involves ... ensuring that the observations in the original guideline judgment of *Jurisic* — that a guideline was only an 'indicator' — must be emphasised, albeit in the language of the 2001 Act as a matter to be 'taken into account'. A guideline is to be taken into account only as a 'check' or 'sounding board' or 'guide' but not as a 'rule' or 'presumption'. I see this as a reaffirmation of the reasoning in *Jurisic* (at 269).[15]

Although the words 'check', 'sounding board' and 'guide' seem to be presented as synonyms for the guideline being 'taken into account', and arguably there is a difference in what these terms connote, the practical thrust of Spigelman CJ's reasoning is clear. In seeking to provide guidance to sentencing judges, the role of guideline judgments is limited to a useful method of comparing the exercise of sentencing discretion between cases rather than prescribing a certain approach or outcome.

Importantly, in reasserting the specific and moderate role of guideline judgments in *R v Whyte* and concurrently refining the guideline for dangerous driving offences, Spigelman CJ affirmed the emphasis he made in *R v Jurisic* that the tension between maintaining the discretion essential for individualised justice and promoting consistency in sentencing decisions can be relieved through the numerical guideline mechanism:

> The basic principle is that of equality of justice. *Like cases must be treated alike. Unlike cases must be treated differently. The first statement requires consistency. The second statement requires individualised justice.* In my opinion numerical guideline judgments have a role to play in achieving *the ultimate goal of equality of justice* in circumstances where, as a matter of practical reality, there is tension between the principle of individualised justice and the principle of consistency (at 275–276 emphases added).

Spigelman CJ views the whole process of appellate courts establishing numerical guidelines to promote consistency as having important advantages in enhancing the authority and subsequent acceptance of such decisions:

> First, an appellate court has an overview of remarks on sentence by a range of judges ... Second, perhaps more significantly, a multi-judge bench must engage in a process of dialogue about the appropriate level of sentence that is more likely to lead to a result that takes a variety of considerations into account, and is unaffected by the idiosyncratic personal philosophy of an individual judge. The process of dialogue amongst members of an appellate court changes the quality of the decision-making process ... It is the very concreteness of a numerical guideline, which may create tension with the principle of individualised justice, that can, as a matter of practical reality, help to avoid impermissible inconsistency (at 281–282).

Accordingly, the upshot is that the Court of Criminal Appeal has re-affirmed the role of guideline judgments, including quantitative numerical guidelines, in the contemporary context even though there was significant criticism of such mechanisms by a majority of High Court judges. Certainly, such a mechanism has been put forward as preferable to mandatory sentencing and rigid legislative prescription of sentences by grids or matrices.

The legislation to which Spigelman CJ made reference in *R v Whyte* was the *Criminal Legislation Amendment Act* 2001 (NSW), which represented the response of the New South Wales Government to the High Court decision in *Wong v The Queen*.[16] Therefore, in New South Wales there is an important and broad legislative basis for issuing a guideline judgment, which does not require a pending appeal case in a particular offence category for an application to be made by the Attorney-General. This shows clear support by the New South Wales Government for the continued use of guideline judgments as an acceptable and effective mechanism to structure judicial discretion, however the recent introduction of standard minimum sentencing for a number of serious offences gives the distinct impression that the Government considers the courts have not been sufficiently proactive in

15 Mason P, Barr, Bell and McClellan JJ all agreed with the judgment of Spigelman CJ. McClellan J added some further observations at [267] particularly highlighting the comments made by Kirby J in *Wong v The Queen* that 'continued public confidence in the administration of justice requires effective transparency and honesty just as those attributes are required of other areas of public administration in contemporary society. The law must facilitate this objective'.

dealing with the issue of sentencing disparity across all offence categories. Both forms of sentencing 'guidance', judicial guideline judgments and statutory standard minimum sentences, are now in place in New South Wales and it remains to be seen whether, in practice, this leads to harmony or conflict.

Standard minimum sentencing

The scheme of standard non-parole periods introduced by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002 (NSW) was promoted by the Attorney-General, in his second reading speech (23 October 2002:5813), as providing 'further guidance and structure to judicial discretion' and being 'primarily aimed at promoting consistency and transparency in sentencing and also promoting public understanding of the sentencing process'. The standard non-parole period represents the non-parole period for 'an offence in the middle of the range of objective seriousness' for those offences listed in the Table to Part 4 Division 1A *Crimes (Sentencing Procedure) Act* 1999 (NSW) (s54A(2)). In this regard, the Attorney-General referred (23 October 2002:5816–5817) to the 'sentencing spectrum' as well known to sentencing judges so that identifying a reference point within that spectrum as the middle of the range of objective seriousness should not present any great difficulty to the judges. One case example, *R v Perese*, has been pointed to in illustrating judicial characterisation of a case falling in the middle of the range of objective seriousness for a particular offence category (Marien 2002:84). However, as Loukas points out (2003:5), 'the setting of a specific middle range in this manner is largely unknown and unexplored in the criminal law in Australia'.[17] The legislation goes on to prescribe that the standard non-parole period *is to be* set by the court 'unless the court determines that there are reasons for increasing or reducing the standard non-parole period' (*Crimes (Sentencing Procedure) Act* 1999 (NSW) s54B(2)). By subsections 54B(3) and (4) those reasons must be recorded specifically by reference to the aggravating and mitigating factors set out in the *Crimes (Sentencing Procedure) Act* 1999 (NSW) s21A.

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16 The New South Wales Premier, Bob Carr, responded to the High Court decision in *Wong v The Queen* by stating on ABC radio that he would 'introduce minimum sentencing overnight . . . We are not going to have High Court decisions get in the way of us giving the community what it's asking for and it's beginning to get, and that is sentences for serious crimes that reflect the seriousness of those crimes' (Johns 2002:19). Power in the New South Wales Court of Criminal Appeal to issue guideline judgments had already been enshrined in *Crimes (Sentencing Procedure) Act* 1999 (NSW) ss36–42, which commenced operation on 3 April 2000, however the decision in *Wong v The Queen* prompted the Government to react with further legislation that purported to strengthen these existing guideline judgment powers. The amending legislation was contained in the *Criminal Legislation Amendment Act* 2001 (NSW) Schedule 5, which commenced on assent on 18 December 2001. A new section 37A *Crimes (Sentencing Procedure) Act* 1999 (NSW) was created, which explicitly authorises the Court of Criminal Appeal 'to deliver a guideline judgment on its own motion in any proceedings considered appropriate by the Court, whether or not it is necessary for the purpose of determining the proceedings'. The legislation also validated previous guideline judgments that were not the subject of an Attorney General's reference under s37. It is interesting to note that in retrospectively protecting past guideline judgments, Mr Debus, Attorney General, commented, 'It is not, and has never been, any secret that sentencing guidelines are preferred Government policy. It therefore does not offend any jurisprudential principle to introduce these retrospective provisions to make plain and explicit the powers of the court' (*New South Wales Parliamentary Debates (Legislative Assembly)* 30 November 2001:19300).

17 See the recent case of *R v Way* [2004] NSWCCA 131 for judicial consideration of the standard minimum sentencing legislation and that sentencing by reference to the middle range of objective seriousness is to be 'approached intuitively and ... based upon the general experience of the courts in sentencing for the particular offence'. (per The Court at [74]–[75]).

In seeking to distinguish this form of legislative regulation of sentencing from mandatory minimum sentencing, the Attorney-General stated that guideline judgments would continue to play an important role with respect to offences that are not part of the standard non-parole period sentencing scheme (Marien 2002:86–87). Clearly then the potential application of guideline judgments to various offence categories has been circumscribed by this legislation, which provides standard non-parole periods for over twenty offence categories, some of which overlap to varying degrees with existing guideline judgments.[18]

Despite the Attorney-General's rhetoric, the introduction of standard minimum sentencing can arguably be viewed as a deliberate move to impose significant restrictions on the exercise of judicial discretion rather than providing further guidance and structure. Loukas observes (2003:9) that it 'represents a concession to the most insupportable misconceptions as to the reality of the justice system' and shows a lack of support for 'the present and effective modes of judicial supervision through the Court of Criminal Appeal and the guideline judgments'. The fixing of standard non-parole periods cannot be related to any principled consideration of sentencing patterns, offence prevalence or informed community concerns. Unlike the reasoned promulgation of judicial guideline judgments as 'checks' or 'sounding boards' for the exercise of judicial discretion, this legislative prescription of sentence levels provides an unacceptable fetter upon judicial discretion.

This legislative scheme seems to arise from either impatience with the guideline judgments system or a view that this approach cannot adequately promote the consistency and equity in sentencing practice which the Chief Justice publicly stated that it was capable of doing following promulgation of the first guideline judgment in 1998.[19] It is certainly arguable that political impatience with the guideline judgment mechanism arises from the ongoing 'law and order' policy agenda of the Government and the concomitant demand for tougher sentencing, which has not been reflected in the existing guideline judgments. The Court of Criminal Appeal now appears to have lost the initiative in self-regulation of judicial sentencing discretion as a result of its cautious and principled approach to the promulgation of guideline judgments during the last five years. A legislative approach favouring standard numerical minimum sentences for a significant number and range of serious offences seems to have taken the place of the qualitative and reasoned judicial approach to formulating guideline judgments.

Recent decisions as to guideline judgments

Most recently there have been three cases before the Court of Criminal Appeal involving applications for the promulgation of guideline judgments. Arguably at one level, the making of such applications illustrates the continued contemporary significance of the mechanism in the sentencing system. At another level, the actual decisions, particularly in one case, have signalled a potential subsidiary role for guideline judgments in light of the enactment of the standard minimum sentencing legislation.

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18 Note particularly that the 'Standard non-parole period' Table in Part 4 Division 1A *Crimes (Sentencing Procedure) Act* 1999 (NSW) includes the offences of 'Armed Robbery with wounding', 'Break, enter and commit serious indictable offence in circumstances of aggravation and of special aggravation', which overlap to some extent with the guidelines promulgated in the cases of *R v Henry* and *Re Attorney General's Application [No.1]: R v Ponfield*. Also, the various standard non-parole periods specified for drug trafficking offences seem, at least to some extent, to replace the 'void' left through the striking down of the guideline by the High Court in *Wong v The Queen; Leung v The Queen*.

19 See above n 8.

In *Attorney-General's Application No. 1 of 2002* the Court of Criminal Appeal granted the Attorney-General's application (in part) for a guideline judgment in relation to the proper administration of the procedures when a Court is sentencing an offender for one offence and taking into account another or other offences in the process. Such procedures potentially apply to all criminal offences. This guideline, which endorsed a 'bottom up' approach to sentencing for a principal offence when other matters are taken into account on a Form 1 (at [39]–[42]), can be described as a general procedural guideline in a similar vein to the guilty plea guideline in *R v Thomson; R v Houlton.*

The judgment emphasises that the focus of the judge is on sentencing for the principal offence. Offences on the Form 1, depending on their nature and extent, allow the judge to give greater weight to 'two elements which are always material in the sentencing process', namely the need for personal deterrence and the community's entitlement to exact retribution (at [42]).[20] Important clarification of the approach to sentencing where additional matters are taken into account on a Form 1 is provided through the guideline judgment which declares that those additional matters are of 'significantly lower salience in the sentencing process' and 'the sentencing judge does not, in any sense, impose sentences for those offences'(at [66]–[68]). Whilst providing a valuable resolution of the issues that have arisen from the Form 1 procedure,[21] the judgment really represents little more than a low profile practice direction and not a high profile confirmation of the significance of guideline judgments.

In the second application, *Attorney-General's Application No.2 of 2002*, the Court of Criminal Appeal refused the Attorney-General's application for a guideline judgment concerning sentencing for the offence of 'assault police' (*Crimes Act* 1900 (NSW) s60(1)). There was no application for a numerical guideline in this case but the Attorney-General sought a guideline for judges and magistrates as to the seriousness with which 'assault police' offences should be viewed, the aggravating features of such offences and the circumstances where a full-time custodial penalty would generally be appropriate. The application for a guideline was refused on the dual bases that the offence encompasses a wide range of offending behaviour and there was no evidence of a systematic pattern of leniency in sentences imposed by the lower courts, there being no Crown appeals in such cases (at [38]–[41] and [48]). At once, the basis of refusal highlights some inherent limitations in the form and structure of the current guideline judgment mechanism. At the same time, however, the necessity for a broader sentencing discretion in some offence categories is recognised in the principled approach to providing sentencing guidance.

The Court of Criminal Appeal noted the significance of the recently enacted sections 3A and 21A *Crimes (Sentencing Procedure) Act* 1999 (NSW) in providing legislative guidance to the courts in relation to the purposes of sentencing and the relevant aggravating and mitigating factors to be taken into account in determining an appropriate sentence. Also, the inclusion of the aggravated offences of assault and wounding of police officers under the *Crimes Act* 1900 (NSW) ss60(2) and 60(3) in the table providing for standard non-parole periods[22] was viewed by the Court of Criminal Appeal (at [62]) as allowing for the emergence of a new sentencing pattern for these type of offences, which could have an influence on the sentencing patterns for assault police charges under section 60(1).

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20 It should be noted that these 'two elements' are included in the legislative statement of the purposes for which a court may impose a sentence for an offence pursuant to *Crimes (Sentencing Procedure) Act* 1999 (NSW) s3A.

21 See Spigelman CJ at [25]–[34] where his Honour sets out the divergence of approaches taken by the court in a number of earlier cases to sentencing when the Form 1 procedure has been utilised.

This approach may arguably be viewed as significantly in contrast to the previous proactive approach of the courts in developing guideline judgments.[23] There seems to be an air of acquiescence in the existence of standard minimum non-parole periods that may re-direct sentencing for various categories of offence, which is perhaps inevitable. Guideline judgments will seemingly be relegated to a minor or subsidiary role in the structuring of judicial sentencing discretion when there is potential for conflict with legislatively prescribed minimum sentences.

Most recently in *Attorney-General's Application No.3 of 2002,* the Court of Criminal Appeal gave the strongest indication of the ongoing utility of guideline judgments by promulgating a detailed guideline for the sentencing of offenders in the ordinary case of driving with the high range prescribed concentration of alcohol (at [146]). As this is a summary offence dealt with exclusively by Local Court magistrates at first instance, there is no potential for overlap with the present legislative scheme for standard minimum sentencing. Nevertheless, this judgment provides an important endorsement of the principled approach to the promulgation of judicial sentencing guidelines (at [45]–[47]), particularly in the face of previous legislative attempts to address the prevalence and social and economic impact of drink driving through the prescription of mandatory penalties and limitations on discretion in relation to licence disqualification (at [12]).

An important factor in prompting the Court to formulate a guideline in this case was the clear evidence that high range prescribed concentration of alcohol offences are prevalent (at [52]–[54] and [97]). In addition, the inconsistency in the approach to sentencing and sentences imposed for the offence in Local Courts across the State, particularly making orders for dismissal or conditional discharge under s10 *Crimes (Sentencing Procedure) Act*, was considered significant (at [81]–[82] and [130]–[135]). Although acknowledging the legislative role in limiting the circumstances in which a conviction may be avoided and the range of penalties generally, Howie J[24] emphasised (at [135]) that it was preferable for 'the courts themselves, and not Parliament, (to) attempt to address such an inconsistency in approach and a guideline judgment is an appropriate method whereby such inconsistency can be avoided'. This is a clear reiteration of the limited yet important role of guideline judgments in the overall attempt to promote consistency and reduce disparity in sentencing.

The significance of this latest judicial guideline judgment must clearly be assessed by reference to the fact that it relates to a summary offence that is not subject to the standard minimum sentencing scheme. Although this fact may be seen as diminishing the role of judicial guideline judgments generally, it is certainly arguable that the profile of this particular guideline is heightened by the prevalence of drink driving offences in the community and the anticipated reach of the appellate court guidance.[25] Concomitantly, of the three recent cases this one provides the clearest indication of the ongoing, albeit restricted, role of guideline judgments.

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22 In this table an offence under s60(2), which carries a maximum penalty of 7 years imprisonment, has a standard non-parole period of 3 years (Item no. 5). An offence under s60(3), which carries a maximum penalty of 12 years imprisonment, has a standard non-parole period of 5 years (Item no. 6).

23 See above n 8.

24 All other members of the court, Spigelman CJ, Wood CJ at CL, Grove and Dunford JJ, agreed with Howie J.

25 Certainly this case was widely reported in the print media. See for example, Wallace N, 'No excuse to drink and drive, courts told' in *The Sydney Morning Herald*, 9 September 2004:3.

Judicial guideline judgments in practice

Notwithstanding the recent legislative changes to the sentencing system which have seemingly relegated judicial guideline judgments into a secondary role, the practical benefits of such judgments has in fact been confirmed by some recent empirical studies of the impact of the *Jurisic* and *Henry* guidelines by the Judicial Commission of New South Wales. The first study, analysing the impact of the *Jurisic* guidelines on sentencing practice for dangerous driving offences, found that there was much greater consistency in both sentencing approach and outcomes for these offences since the promulgation of the *Jurisic* guidelines:

> The guidelines have resulted in consistent results or outcomes in the sentencing of offenders convicted of dangerous driving offences under s.52A ... consistency is also evident in the articulation of the purpose underlying the type and quantum of sentences handed down, and in the approach taken by trial judges in sentencing for these offences ... In conclusion, the impact of the *Jurisic* guidelines is clearly demonstrated by the increased severity of sentences and also by the greater consistency of result in the penalties imposed on offenders convicted of dangerous driving and aggravated dangerous driving offences under s.52A of the *Crimes Act* 1900 (NSW) (Barnes et al 2002:33–34).

Secondly, the Judicial Commission has recently released an analysis of the impact of the guideline judgment in *R v Henry* in relation to armed robbery and robbery in company offences. A similar sentencing trend has been observed through a comparative analysis of such cases over a five year period, two and a half years before, and two and a half years after the issuing of the guideline judgment:

> The results of our present analysis suggest that the sentencing guideline has been successful in reducing the 'systematic excessive leniency and inconsistency in sentencing practice' in respect of armed robbery and robbery in company. This conclusion is supported by our finding that post *Henry* there was: an increase in the overall proportion of offenders receiving more severe penalties as evidenced by an increase in the proportion of offenders receiving a sentence of full time custody . . and by the greater proportion of offenders who received some form of custody ... an increase in the proportion of cases where the ratio between the non-parole period and head sentence was greater than 1:2 ... (and) a decrease in Crown appeals from 36.1% pre *Henry* to 23.8% post *Henry* (Barnes & Poletti 2003:11).

Both Judicial Commission studies have, therefore, revealed a positive impact of the respective guideline judgments in achieving more consistent approaches to, and more equitable outcomes from, sentencing for dangerous driving and armed robbery offences. As far as it goes, this research provides an important measure of empirical support for the practical utility of guideline judgments.[26] In addition, many academic commentators also favour this judicial self-regulation mechanism. At the same time as being authoritative, it is also viewed as being inclusive of the judiciary as a whole and the methodology involves 'moves towards institutional accountability and openness'(Spears 1999:20). The source of the guidance is arguably an important motivating factor for compliance, endorsing Ashworth's proposition that the apparent success of guideline judgments stems largely from the fact that they 'are constructed *by* judges *for* judges' (1998b:229).

Some reservations, however, have been expressed particularly in relation to whether such judicial activism is appropriate and 'the introduction of such guidelines may also be seen ... as an unacceptable engagement by the judiciary with populist views and as an

26 A comprehensive critical evaluation of this research, including the validity of the conclusions suggesting greater consistency in sentencing and whether consistency came at the expense of individualised justice is beyond the scope of this article.

institutional acknowledgement of a law and order crisis' (Spears 1999:18). There must be a proper and perceptible division between legislative and judicial functions in sentencing to ensure the independence of the judiciary and continuing respect for the rule of law. The need for caution in judicial responses to public opinion as manifested through the various forms of media was apparent from the reasoning of Adams J in *R v Jurisic* and these sentiments continue to be applicable following the decision in *R v Whyte*:

> The media ... plays a vital role in communicating both what happens in and the judgments of the courts. It is clear that the exigencies of journalism result in very limited reporting of both ... It is self evident that a couple of brief columns or a two-minute statement dominated by the 'newsworthy' elements of a case will almost never convey sufficient information to enable an informed judgment to be made about it. This is especially evident in the sensational reporting of controversial sentences ... Accordingly, whilst the courts must do everything in their power so to act that public confidence is maintained, and whilst the importance of public perceptions must be accepted (and without resentment or patronising) we must treat with care assertions about what might be the public perception about this or that issue. Nor can publicity about a particular case or cases deflect a Court ever from doing justice according to law. To do so would be, amongst other things, to betray the trust that the overwhelming majority of citizens place in the Courts to stand as a bulwark against prejudice and unreason (at 255–256).

A further issue relating to guideline judgments is the inherent limitations of the actual mechanism in being able to sufficiently deal with a wide enough range of criminal offences in order to effectively promote principled and consistent sentencing across the board, which may be seen as part of the impetus for standard minimum sentencing in New South Wales. Andrew Ashworth has observed in the English context where guideline judgments have been used for over 20 years that they 'cover only a small area of sentencing' and have been delivered 'sporadically and without any sense of an overall strategy' (1998b:228). Therefore, although improving consistency within one offence category there has been no consideration of 'the proper relationship of sentence levels for that offence to sentence levels for other crimes' (Ashworth 1998b:228–229). In addition, an important internal weakness apparent in guideline judgments is that they 'may give little indication as to the weight and effect of aggravating and mitigating factors, and this is the very problem most likely to be encountered in practice' (Ashworth 1998b:228).

Austin Lovegrove sees guideline judgments as having limited capacity 'to significantly moderate inconsistency' and that in diminishing the role of intuitive synthesis in sentencing, he also observes that they 'hazard inadequate individualisation and error' (Lovegrove 2002:200). Lovegrove's main criticism is directed to the inadequate form of the current guideline judgments in that they are very narrowly devised 'and are based on or force upon the user a crude logic' (2002:200). Lovegrove does not completely dismiss the guideline judgment as of no utility in attempting to structure judicial sentencing discretion but promotes a more sophisticated development of the mechanism to take on the challenge of providing more complex qualitative and quantitative guidance to first instance judges, which Gaudron, Gummow and Hayne JJ viewed as 'difficult, if not impossible' (*Wong v The Queen*; *Leung v The Queen* at 612).

Ashworth's conclusion that the disadvantages of guideline 'narrative' judgments are outweighed by their strengths when they are used in conjunction with a hierarchy of legislatively declared sentencing aims is persuasive:

> Judicial self-regulation offers an excellent basis for the development of principles that are closely sensitive to the practical problems of sentencers and, *because the guidance is in narrative form and emanates from other judges, it is likely to have the support of sentencers.* As a technique of guidance, judicial self-regulation is likely to work best in those

> jurisdictions where the appellate courts are experienced at delivering principled judgments. However, judicial self-regulation is not a suitable means for deciding upon the overall aims of sentencing or on policies to be pursued with respect to imprisonment, victims, and so on (1998b:236 emphasis added).[27]

Clearly, there are both theoretical and practical arguments in favour of the retention and expansion of the judicial guideline judgment system in New South Wales. An important aspect of utility is found in guiding the exercise of discretion by first instance sentencing judges through the channelling of combined experience and knowledge to provide soundly reasoned benchmarks for sentencing in particular offence categories (*R v Whyte* at 281–282). As Ashworth observes, however, there needs to be a co-operative and harmonious approach to the structuring of judicial discretion by the legislature and judiciary, which seems to have been undermined by the recent legislative reform introducing standard minimum sentencing into New South Wales. Perhaps an independent and representative body, such as a Sentencing Council can promote and restore a level of harmony between these two organs of government.

The Role of the New South Wales Sentencing Council

The United Kingdom Parliament has recently passed the *Criminal Justice Act* 2003 (UK),[28] which amongst other major reforms to the criminal justice system established a Sentencing Guidelines Council with more extensive powers than the existing Sentencing Advisory Panel. The Sentencing Guidelines Council is based on a comprehensive report compiled in 2001 by John Halliday, a senior Home Office civil servant. Prior to the passage of the legislation, academic commentator. Michael Tonry, observed that the Sentencing Guidelines Council would be 'charged to establish guidelines that, at least, would provide presumptive starting points for judicial considerations of sentences in individual cases'. With proportionality as the guiding aim the commission would 'address all offences, not just a handful of the most serious, and in particular must address high-volume offences of low and moderate severity for which no (judicial) guidelines now exist' (2002:75–76). This is potentially a very important development for the system of criminal sentencing in England as successful guidelines emanating from such a body are anticipated: 'to make English sentencing more consistent, transparent and predictable; reduce the scale of racial, ethnic and gender disparities; provide a tool for the management and control of state resources devoted to the punishment of offenders; and make judges more accountable for their decisions about citizens' liberties' (Tonry 2002:101). A recent Home Office press release emphasised that the Sentencing Guidelines Council 'will set out comprehensive guidelines for the full range of criminal offences to help remove uncertainty and disparity in sentencing and give representatives of the police, prisons, probation and victims a voice in sentencing for the first time' (21 November 2003:4).

Andrew Ashworth, a current member of the UK Sentencing Advisory Panel, has, for a long time, been an enthusiastic advocate of the establishment of such a body in Australia to research sentencing practice and 'to construct a network of starting-points and ceilings for the most common, and then the other, offences' (Ashworth 1987a:60). Ashworth has contended that a 'rule-making function' should be legislatively delegated to this body to

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27 Also, see Ashworth A. *Sentencing & Criminal Justice*. 3rd edition, London: Butterworths, 2000 at 362 where the author concludes, 'The role of the Court of Appeal should be to develop and refine principles that have received legislative approval, a task that has been accomplished in fine style in many guideline judgments and in which the Sentencing Advisory Panel is now to assist'.

28 The *Criminal Justice Act* 2003 (UK) received the Royal Assent on 21 November 2003.

draw up and promulgate guidance and guidelines for the courts (1987a:61) with the advantage that 'whole areas' of criminal offending can be looked at in devising guidance rather than the piecemeal approach of the courts in waiting for an appropriate case to come on appeal before issuing a guideline judgment (1987b:545). Therefore, there are a varying range of roles for, and powers that can be conferred upon, a Sentencing Council, from simply advisory and consultative roles to a quasi-legislative power to prescribe rules and guidelines for sentencing in relation to particular offence categories.

The first legislative move to establish such a body in New South Wales is of comparatively recent origin. A New South Wales Sentencing Council was established through recent amendments to the *Crimes (Sentencing Procedure) Act*.[29] The role and powers of this body need to be carefully considered in any system for regulating judicial sentencing discretion and the place of judicial guideline judgments. Arguably, this is an important initiative and pursuant to the *Crimes (Sentencing Procedure) Act* 1999 (NSW) s100J(1) the functions of this Council include:

> (a) advising and consulting with the Minister in relation to offences suitable for standard non-parole periods and their proposed length,
>
> (b) advising and consulting with the Minister in relation to offences suitable for guideline judgments and the submissions to be made by the Minister on an application for a guideline judgment,
>
> (c) to monitor, and to report annually to the Minister on, sentencing trends and practices, including the operation of standard non-parole periods and guideline judgments,
>
> (d) at the request of the Minister, to prepare research papers or reports on particular subjects in connection with sentencing.

Accordingly, the New South Wales Sentencing Council is an advisory and consultative body with a similar brief to the former UK Sentencing Advisory Panel although this Panel reported to the judiciary not to politicians. The Sentencing Council does not have any delegated law making power so that the extent of its influence will be largely determined by the calibre of its membership. The Sentencing Council is made up of 10 members who represent a spread of expertise and experience in sentencing,[30] and provide a suitable body to both represent public opinion and give useful advice through the political process.

It is a moderate reform compared to the proposals set out in the report of John Halliday and recently adopted in the *Criminal Justice Act* 2003 (UK). The responsibilities given to

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29 See *Crimes (Sentencing Procedure) Act* 1999 (NSW) Part 8B, ss100I–100L and Schedule 1A inserted by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002 (NSW). These provisions commenced operation on 17 February 2003. A Sentencing Advisory Council has also recently been created in Victoria. Part 9A *Sentencing Act* 1991 (Vic), inserted by the *Sentencing (Amendment) Act* 2003, commenced operation on 1 July 2004 (see n 2 for reference to the related amendments introducing a mechanism for guideline judgments into that jurisdiction). This Part provides for the establishment of a Sentencing Advisory Council, which has a number of advisory and consultative functions in relation to sentencing matters generally as set out in s108C *Sentencing Act* 1991 (Vic). Its functions include '(a) to state in writing to the Court of Appeal its views in relation to the giving, or review, of a guideline judgment ... (f) to advise the Attorney-General on sentencing matters'.

30 Section 100I *Crimes (Sentencing Procedure) Act* 1999 (NSW) provides that the Sentencing Council consist of one retired judicial officer, one person with expertise or experience in law enforcement, three persons with expertise or experience in criminal law or sentencing, one person who has expertise in Aboriginal justice matters, and four representatives of the general community, of whom two are to have expertise or experience in matters associated with victims of crime. This membership can be compared with the board of directors of the Victorian Sentencing Advisory Council, which consists of not more than 12 directors as provided in s108F *Sentencing Act* 1991 (Vic).

the New South Wales Sentencing Council are not such as would undermine the validity and utility of judicial guideline judgments to regulate judicial discretion in this state. Rather, legislative sentencing policy formulated after consultation with, and advice from, the Sentencing Council can be directed to complementing the judicial mechanism of guideline judgments by providing carefully researched and detailed solutions to problematic areas under the existing common law system. The political dimension is of some concern in the contemporary context of a populist 'law and order' reform agenda and arguably there should be a mechanism for the Sentencing Council to consult with and report to the judiciary in this key area of judicial responsibility.[31] Overall, though, this initiative represents a positive shift towards responsible legislative sentencing policy in New South Wales, and is at least a step, albeit a small one, in the right direction.

Andrew Ashworth has argued that the assistance provided to sentencers by guideline judgments will be enhanced 'if they incorporate some examples, drawn from previous cases, of how to weigh the different factors' (Ashworth 1984:528). Therefore, beyond a legislative statement of relevant aggravating and mitigating factors there is a pressing need for a mechanism of systematic guidance articulating 'a process of reasoning whereby the gravity of the offence is assessed, the mitigation is assessed, the alternative measures discounted and a sentence arrived at' (Ashworth 1984:528). This might provide a more complex and sophisticated form of guidance along the lines proposed by Lovegrove. A broadly-based Sentencing Council to establish comprehensive guidelines and guidance over a wider area than the limited cases coming before the Court of Criminal Appeal may well be an important mechanism to inform both legislative and judicial sentencing initiatives directed at enabling sentencers 'to find guidance which is clear, self-consistent, relevant to [their] problems and readily accessible'(Ashworth 1984:530). Arguably, there would be real benefits from such a co-ordinated system in seeking to find solutions for the complex legal, policy, and practice issues arising in the day-to-day sentencing tasks of judicial officers

Extensive experience of the work and influence of various sentencing commissions in a number of jurisdictions in the United States recently led Michael Tonry to come to the conclusion that:

> In the end, the success of a system of guidelines depends on the technical knowledge, policy sophistication, political acumen and leadership of the body that creates it (2002:88).

Therefore, with the right mix of relevantly experienced individuals, the New South Wales Sentencing Council has the potential to have a positive impact on sentencing law, policy, and practice in this state. The Council is currently chaired by a retired Supreme Court judge, Alan Abadee QC, and other members include Nick Cowdrey QC (Director of Public Prosecutions), Peter Zahra SC (Senior Public Defender), Commander John Laycock of the New South Wales Police, Professor Larissa Behrendt as the Aboriginal justice representative and Howard Brown from the Victims of Crime Assistance League and the Victims Advisory Board (Loukas 2003:6). The Council is only in its infancy at this point in time, however, its progress will be monitored with both a critical eye and a degree of enthusiasm as to its potential positive influence over sentencing policy and practice.

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31 The functions of the Victorian Sentencing Advisory Council are broader than the NSW Sentencing Council in this regard. The Victorian Sentencing Advisory Council directly provides statistical, research, and other information on sentencing to members of the judiciary in addition to having a power to put forward its own views to the Court of Appeal in relation to guideline judgments.

The creation of a Sentencing Council in New South Wales also raises a question of the intended practical interaction of this body with the existing Judicial Commission of New South Wales.[32] Responsibility for monitoring sentencing trends and practices as well as preparing research papers and reports in connection with sentencing provides an apparent overlap between the two bodies, however the functions of the Sentencing Council seem to be focussed more narrowly on the operation of standard non-parole periods and judicial guideline judgments. In this way there appears to be an emphasis for the Sentencing Council on monitoring certain offence categories, largely of the more serious kind. The recently proclaimed legislative provisions, notably *Crimes (Sentencing Procedure) Act* 1999 (NSW) s100J(4), clearly envisage some degree of co-operation between the Sentencing Council and the Judicial Commission plus other agencies, such as the Bureau of Crime Statistics and Research, in relation to sharing information about sentencing practice and promoting consistency in sentencing.

The collection of statistical data on sentencing and the furnishing of this information through the Sentencing Information System (SIS) to the judiciary and legal profession will clearly remain an important continuing function of the Judicial Commission. This may be the type of information considered by the Sentencing Council in accordance with its monitoring function and in preparing advices to the Minister about setting different or additional standard non-parole periods, or applying for guideline judgments. Opportunities to apply for guideline judgments in relation to sentencing for various offences outside those regulated by the standard minimum sentencing legislation may arise through this sharing of information and experiences. Additionally, there is a clear need to include the judiciary in any consultation processes about the appropriateness or otherwise of formulating guideline judgments for particular offence categories. In fact, the creation of the Sentencing Council should also provide new opportunities for judicial training in substantive and technical areas of sentencing law and practice so as to enhance judicial understanding of the functions of the Council. Further, and importantly, collaboration should be fostered between all these agencies and the judiciary in achieving the common aim of promoting consistency in sentencing and the equal application of the law in this high profile part of the criminal justice system. This may require amendments to the seemingly narrow scope for consultation, advice and reporting available to the Sentencing Council under the structural arrangements of the present legislation.

Conclusion

Overall, the submission put forward by Professor Kate Warner in a recent article that judgments specifically labelled as promulgating guidelines have a very useful role in fostering consistency and equity in sentencing through promoting awareness of appellate guidance (2003:22), is clearly supportable. In their short period of operation in New South Wales there has been some positive empirical evidence to support the theoretical desirability of this form of regulation of judicial sentencing discretion. In the form presented so far, guideline judgments have the important features of flexibility and transparency allowing sufficient scope to enable justice to be done in the individual case. At the same time, the limitations of guideline judgments as a 'check' or 'sounding board' for the exercise of judicial sentencing discretion, the restricted degree of flexibility provided by the mechanism, the minimal number of offence categories covered by guideline

32 In accordance with the *Judicial Officers Act* 1986 (NSW) s8(1), one of the functions of the Judicial Commission is to monitor sentences imposed by the courts and disseminate information about these sentences 'for the purpose of assisting courts to achieve consistency in imposing sentences'.

judgments, and the reluctance of the Court of Criminal Appeal to devise complex forms of guidance have provided an environment where the legislature, dominated by a Government pursuing a 'law and order' agenda characterised by an emphasis on retributive punishments, has arguably taken the initiative from the court in the regulation of judicial sentencing discretion.

The recent legislative reforms in New South Wales have raised a question as to the ongoing role of guideline judgments in the face of prescribed standard non-parole periods for over twenty offence categories and the expressed reluctance of the Court of Criminal Appeal to promulgate guidelines which may overlap with this legislative scheme. Against this background, the operation of the New South Wales Sentencing Council must be monitored as to its utility as a consultative and advisory body in an environment where the two schemes exist side by side. It seems the Court of Criminal Appeal needs to take the guideline judgment mechanism beyond the statements made in *R v Whyte* and adopt a more sophisticated, principled approach to structuring judicial sentencing discretion within the legislative framework provided through the *Crimes (Sentencing Procedure) Act* 1999 (NSW) ss3A and 21A. The latest guideline judgment relating to drink driving is an indication that the Court still views these judgments as having an important role in promoting consistency and equity in sentencing.

As Nick Cowdery QC, now a member of the New South Wales Sentencing Council, has observed (1999:61):

> Judicial responsiveness to community concerns, by way of self-regulation, is appropriate and unobjectionable. The court's regime of guideline judgments ... is *acceptable in principle and workable in practice*

Ultimately guideline judgments can 'lead the steps' of first-instance sentencing judges 'aright' in a principled and measured way without placing undue fetters on the important sentencing discretion, however, the Court of Criminal Appeal needs to regain the initiative which it had effectively seized in 1998.

List of Cases

Attorney-General's Application under s 37 Crimes (Sentencing Procedure) Act 1999 No. 1 of 2002 [2002] NSWCCA 518.

Attorney-General's Application under s.37 Crimes (Sentencing Procedure) Act 1999 No. 2 of 2002 [2002] NSWCCA 515.

Attorney-General's Application under s.37 Crimes (Sentencing Procedure) Act 1999 No. 3 of 2002 [2004] NSWCCA 303.

Police v Cadd (1997) 69 SASR 150.

R v Henry and others (1999) 46 NSWLR 346.

R v Christopher Tom Jurisic (1998) 45 NSWLR 209.

R v Ngui and Tiong (2000) 1 VR 579.

R v Perese [2001] NSWCCA 478.

R v Thomson; R v Houlton (2000) 49 NSWLR 383.

R v Way [2004] NSWCCA 131.

R v Dale Whyte (2002) 55 NSWLR 252.

R v Wong; R v Leung (1999) 48 NSWLR 340.

Re Attorney General's Application [No.1]; R v Ponfield (1999) 48 NSWLR 327.

Wong v The Queen; Leung v The Queen (2001) 207 CLR 584.

References

Ashworth, A (1984) 'Techniques of Guidance on Sentencing', *Criminal Law Review*, pp 519–530.

Ashworth, A (1987a) 'Criminal Justice, Rights and Sentencing: A Review of Sentencing Policy and Problems' in Potas, I (ed) *Sentencing in Australia: Issues, Policy and Reform,* Australian Institute of Criminology, Canberra.

Ashworth, A (1987b) 'Closing Summary' in Potas, I (ed) *Sentencing in Australia: Issues, Policy and Reform,* Australian Institute of Criminology, Canberra.

Ashworth, A (1998a) 'Structuring Sentencing Discretion' in von Hirsch, A & Ashworth, A (eds) *Principled Sentencing: Readings on Theory and Policy,* 2nd edition, Hart Publishing, Oxford.

Ashworth, A (1998b) 'Four Techniques for Reducing Sentence Disparity' in von Hirsch, A & Ashworth, A (eds) *Principled Sentencing: Readings on Theory and Policy,* 2nd edition, Hart Publishing, Oxford.

Ashworth, A (2000) *Sentencing & Criminal Justice,* 3rd edition, Butterworths, London.

Barnes, L, Poletti, P & Potas, I (2002) *Sentencing dangerous drivers in New South Wales: Impact of the Jurisic guidelines on sentencing practice,* Monograph Series No 21, Judicial Commission of New South Wales, Sydney.

Barnes, L & Poletti, P (2003) 'Sentencing Trends for Armed Robbery and Robbery in Company: The Impact of the Guideline in *R v Henry*' in *Sentencing Trends & Issues* No 26, Judicial Commission of New South Wales, Sydney.

Bryant W C, 'To a Waterfowl' (1818) extracted in R Tripp (1970, reprinted 1985), *The Penguin International Thesaurus of Quotations,* Penguin Books, New York.

Cowdery, N (1999) 'Guideline Sentencing: A Prosecution Perspective', *Judicial Officers' Bulletin*, vol 11, no 8, pp 57–61.

Home Office, United Kingdom (2001) *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales*, Home Office Communications Directorate, London.

Home Office, United Kingdom *Delivering Justice for All — Criminal Justice Bill Receives Royal Assent*, Press Release 21 November 2003, <http://www.homeoffice.gov.uk>, viewed 4 December 2003.

Johns, R (2002) 'Sentencing Law: A Review of Developments in 1998–2001', *New South Wales Parliamentary Briefing Paper 2/2002*, <www.parliament.nsw.gov.au> viewed 31 January 2003.

Kirby, MD (1980) 'Sentencing Reform: Help in the "Most Painful" and "Unrewarding" of Judicial Tasks', *Australian Law Journal*, vol 54, pp 732–743.

Loukas, C (2003) 'Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act', <http://www.lawlink.nsw.gov.au/pdo.nsf/pages/CrimesSentencingProcedure>, viewed 19 September 2003.

Lovegrove, A (2002) 'Intuition, Structure and Sentencing: An Evaluation of Guideline Judgments', *Current Issues in Criminal Justice*, vol 14, no 2, pp 182–204.

Marien, M (2002) 'Standard Non-Parole Sentencing: The New Sentencing Reforms', *Judicial Officer's Bulletin*, vol 14, no 11, pp 83–87.

Morgan, N & Murray, B (1999) 'What's in a Name? Guideline Judgments in Australia', *Criminal Law Journal*, vol 23, no 2, pp 90–107.

New South Wales Parliamentary Debates (Legislative Assembly), Second Reading Speech, *Criminal Legislation Amendment Bill* 2001, 30 November 2001.

New South Wales Parliamentary Debates (Legislative Assembly), Second Reading Speech, *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill* 2002, 23 October 2003.

Spears, D (1999) 'Structuring Discretion: Sentencing in the *Jurisic* Age', *University of New South Wales Law Journal Forum*, vol 5, no 1, pp 18–20.

Spigelman, JJ (1999) 'Sentencing Guideline Judgments', *Australian Law Journal*, vol 73, no 12, pp 876–884.

Tonry, M (2002) 'Setting sentencing policy through guidelines' in Rex, S & Tonry, M (eds) *Reform and Punishment: The Future of* Sentencing, Willan Publishing in association with the Institute of Criminology, University of Cambridge, Uffculme Cullompton, Devon.

Warner, K (2002) 'Case and Comment – Wong and Leung', *Criminal Law Journal*, vol 26, pp 59–63.

Warner, K (2003) 'The role of guideline judgments in the law and order debate in Australia', *Criminal Law Journal*, vol 27, no 1, pp 8–22.