

# Sentencing Practice and Sentencing Guidance in New Zealand

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## Introduction

1. In February 2006 the New Zealand Law Commission was asked by the Government to consider whether improvements could be made to New Zealand's sentencing and parole structures. More specifically, we were asked to consider whether New Zealand should establish a Sentencing Council to give more guidance to judges as to the appropriate type and level of punishment, and whether there should be changes to parole to ensure a closer relationship between the length of the prison sentence imposed by the Court and the time that the prisoner actually services.

2. The Commission report *Sentencing Guidelines and Parole Reform* was published in August 2006 and recommended the establishment of a Sentencing Council to draft sentencing guidelines. The Government of the day accepted the recommendations and enacted the Sentencing Council Act 2007 and Sentencing Amendment Act 2007 to give effect to them.

3. This paper outlines the traditional sentencing system in New Zealand; the perceived problems with it that gave rise to the recommendation for a Sentencing Council; the nature of the Sentencing Council established by statute; and the format of the guidelines that have been developed and their current status.

## **PART 1: TRADITIONAL SENTENCING SYSTEM IN NEW ZEALAND**

### Common Law Model

4. The sentencing system in New Zealand is based upon the traditional common law model. That model has the following core features:

- The legislature prescribes maximum penalties and the types of sentences (eg. imprisonment, fine, community work) that are available to judges, but otherwise provides relatively little guidance.
- Subject to the maximum penalty, judges have wide discretion to determine the appropriate sentence in the individual case.
- That discretion is primarily moderated and limited by principles and

precedents laid down by higher court when reviewing cases that go on appeal.

## **Statutory Guidance**

5. The Sentencing Act 2002 made some significant changes to this traditional approach by providing much more detailed legislative guidance. Nevertheless, the basic structure of the common law model remains intact.

6. In summary, the guidance that was provided in the Sentencing Act 2002 took the following forms:

### ***(i) Purpose of Maximum Penalties***

7. Section 8(c) made clear that maximum penalties are reserved for the worst hypothetical class of case of that type. They are not intended to dictate day to day sentencing practice. Thus, since there are generally no minimum penalties, Judges continue to be free to choose any sentence they wish within the maximum. Sentencing levels typically bear little relationship to the maximum penalty and are largely determined by the judiciary themselves.

### ***(ii) Sentencing Purposes***

8. Section 7 of the Act specifies, for the first time, the purposes of sentencing.

That section reads:

- (1) The purposes for which a court may sentence or otherwise deal with an offender are—
- (a) to hold the offender accountable for harm done to the victim and the community by the offending; or
  - (b) to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or
  - (c) to provide for the interests of the victim of the offence; or
  - (d) to provide reparation for harm done by the offending; or
  - (e) to denounce the conduct in which the offender was involved; or
  - (f) to deter the offender or other persons from committing the same or a similar offence; or
  - (g) to protect the community from the offender; or
  - (h) to assist in the offender's rehabilitation and reintegration; or
  - (i) a combination of 2 or more of the purposes in paragraphs (a) to (h).
- (2) To avoid doubt, nothing about the order in which the purposes appear in this section implies that any purpose referred to must be given greater weight than any other purpose referred to.

While all of the major purposes of sentencing appear in this list, the relative weight that is to be given to each of them is not specified. That is still left to the judiciary to determine. As a result, the list is of little assistance in determining what sentence should be given in the individual case.

### ***(iii) Sentencing Principles***

9. Section 8 of the Act sets out the principles which the court is to apply or to take

into account in selecting the appropriate sentence. These principles include the requirement to take into account the seriousness of the offence and culpability of the offender; the general desirability of consistency between one case and another; the need to impose the least restrictive outcome that is appropriate in the circumstances; and the requirement to take into account the effect of the offending on the victim.

10. In addition, section 9 of the Act provides a non-exhaustive list of aggravating and mitigating factors. This section reads as follows:

(1) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case:

- (a) that the offence involved actual or threatened violence or the actual or threatened use of a weapon:
- (b) that the offence involved unlawful entry into, or unlawful presence in, a dwelling place:
- (c) that the offence was committed while the offender was on bail or still subject to a sentence:
- (d) the extent of any loss, damage, or harm resulting from the offence:
- (e) particular cruelty in the commission of the offence:
- (f) that the offender was abusing a position of trust or authority in relation to the victim:
  - (g) that the victim was particularly vulnerable because of his or her age or health or because of any other factor known to the offender:
  - (h) that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and
    - (i) the hostility is because of the common characteristic; and
    - (ii) the offender believed that the victim has that characteristic:
  - (ha) that the offence was committed as part of, or involves, a terrorist act (as defined in [section 5\(1\)](#) of the Terrorism Suppression Act 2002):
  - (hb) the nature and extent of any connection between the offending and the offender's—
    - (i) participation in an organised criminal group (within the meaning of [section 98A](#) of the Crimes Act 1961); or
    - (ii) involvement in any other form of organised criminal association:
  - (i) premeditation on the part of the offender and, if so, the level of premeditation involved:
  - (j) the number, seriousness, date, relevance, and nature of any previous convictions of the offender and of any convictions for which the offender is being sentenced or otherwise dealt with at the same time.

(2) In sentencing or otherwise dealing with an offender the court must take into account the following mitigating factors to the extent that they are applicable in the case:

- (a) the age of the offender:
- (b) whether and when the offender pleaded guilty:
- (c) the conduct of the victim:
- (d) that there was a limited involvement in the offence on the offender's part:
- (e) that the offender has, or had at the time the offence was committed, diminished intellectual capacity or understanding:
- (f) any remorse shown by the offender, or anything as described in [section 10](#):
- (g) any evidence of the offender's previous good character.

(3) Despite subsection (2)(e), the court must not take into account by way of mitigation the fact that the offender was, at the time of committing the offence, affected by the voluntary consumption or use of alcohol or any drug or other substance (other than a drug or other substance used for bona fide medical purposes).

(4) Nothing in subsection (1) or subsection (2)—

- (a) prevents the court from taking into account any other aggravating or mitigating factor that the court thinks fit; or
- (b) implies that a factor referred to in those subsections must be given greater weight than any other factor that the court might take into account.

Compare: 1985 No 120 s 12A

Section 9(1)(ha): inserted, on 31 October 2003, by section 3 of the Sentencing Amendment Act 2003 (2003 No 109).

Section 9(1)(hb): inserted, on 1 December 2009, by section 4 of the Sentencing Amendment Act (No 3) 2009 (2009 No 49).

While this list was largely codifying the approach already being taken by the courts to aggravating and mitigating factors, the inclusion of the list was significant, in that it demonstrated that Parliament took the view that the specification of aggravating and mitigating factors was primarily a legislative rather than judicial responsibility.

11. Subsection(3) is also significant, because it makes clear that the fact that an offender is affected by the voluntary consumption or use of alcohol or other drug cannot be taken into account by way of mitigation.

12. The Act also specifies a number of other general principles. For example, there are provisions about the extent to which the views of victims should be taken into account. There is guidance about the way in which the courts are to approach sentencing for multiple offences. And there is a presumption that the courts must always impose reparation in favour of the victim where there has been loss, damage or emotional harm, unless that may result in undue hardship to the offender or dependants of the offender or other special circumstances would make it inappropriate.

#### ***(iv) Types and Hierarchy of Sentences***

13. The sentences available to Judges are specified in the Sentencing Act 2002, as in previous legislation. For the first time there is also some guidance as to the purposes for which sentences should be used. But more importantly, since 2007 the legislation has established a clear hierarchy of sanctions in terms of severity as follows:

- Tier 1 – imprisonment
- Tier 2 – home detention
- Tier 3 – curfew with electronic monitoring and/or intensive supervision
- Tier 4 – community work and/or supervision
- Tier 5 – monetary penalties (fines and/or reparation)
- Tier 6 – discharges with or without conviction

#### ***(v) Procedure for Determining Disputed Facts Following Guilty Plea***

14. Where a defendant has been convicted following a plea of guilty or a trial, section 24 sets out a procedure for determining a fact relating to the offence or the offender that is disputed and that may be significant in determining sentence. If the disputed fact was the subject of evidence at the trial, the court may determine whether or not it is proved without hearing further evidence. Otherwise it must allow the party relying upon the disputed fact to produce

evidence as to its existence.

15. Any disputed aggravating factor must be proved by the prosecution beyond reasonable doubt. Any mitigating factor raised by the defendant and relating to the offence must be disproved by the prosecution beyond reasonable doubt. Any mitigating factor not related to the offence must be proved by the defendant on the balance of probabilities.

## Other Guidance and Input into Sentencing Decisions

16. In addition to the guidance provided by the statutory provisions set out above, there have traditionally been three other sources of guidance and input into sentencing decisions:

- Pre-sentence reports
- Submissions from prosecution and defence
- Appellate guidance

### *(i) Pre-sentence Reports*

17. Whenever an offender is convicted of an offence punishable by imprisonment, the court may direct a probation officer to provide a pre-sentence report to the court. This includes not only information about the offence and the personal background of the offender, but it may also include a recommendation as to the appropriate sentence.

18. Pre-sentence reports are routinely obtained when the court is considering imposing a sentence of imprisonment. They may also be obtained prior to the imposition of a range of other community-based sanctions.

### *(ii) Submissions from Prosecution and Defence*

19. The prosecution and the defence are both entitled to make submissions on sentence. Those submissions may include views as to what the appropriate sentence ought to be.

20. In more minor cases, the prosecutor rarely does so. However, in serious cases both parties provide submissions in writing, and it is routine for the prosecutor to suggest (at a minimum) the type and range of sentence that ought to be imposed. However, the prosecutor's submission is given no greater weight than the defence submission.

### *(iii) Appellate Guidance*

21. Both prosecution and defence can appeal against sentence. Defence appeals are generally able to be brought only on the grounds that the sentence is manifestly excessive or wrong in principle or that there is such disparity with sentences imposed on other offenders convicted for the same type of offence that a reasonably minded independent observer would think that something had gone

wrong with the administration of justice. Prosecution appeals may generally be brought only on the grounds that the sentence is manifestly inadequate or wrong in principle. Prosecution appeals require the consent of the Solicitor-General, who is the senior law officer of the government.

22. Appellate decisions are widely available and provide a set of precedents that guide future decisions. Moreover, the Court of Appeal sometimes takes the opportunity, in the context of considering an appeal in an individual case, to produce a “guideline judgment” that prescribes the sentencing ranges for varying degrees of seriousness of the particular offence. Such guideline judgments become the standard reference point for all future sentencing decisions in relation to that offence type.

23. Notwithstanding the considerable guidance that is provided to Judges through the process of sentence appeals, appellate decisions have a number of significant limitations:

- Because they are delivered in the context of particular cases coming before the appellate courts, they tend to yield an unbalanced set of precedents. Serious crimes and severe sentences predominate, particularly in the guideline judgments that are produced. Hence guidance as to levels of sentence for routine offences, such as repeated driving with excess blood alcohol or common assault, is difficult to find. The result is that comprehensive guidance that ensures a coherent sentencing policy across the full range of offences, or even those that result in imprisonment, cannot readily be obtained through the vehicle of appellate review.
- Appellate courts do not have the resources to undertake systematic research, nor to investigate the cost effectiveness of different sentencing options and the wider impact of sentencing policy. The court is largely dependent upon the quality and the nature of the information provided by prosecution and defence counsel.
- Since appellate judgments are produced in the context of an individual case in which the parties to the appeal are awaiting the outcome, they are subject to time constraints. This means that, even if adequate resources were available, the sort of research that might be desirable in developing a policy as to sentencing levels cannot feasibly be undertaken
- Appellate decisions are issued by the higher courts and therefore lack the breadth of perspective, experience and expertise that would be beneficial in the development of sentencing policy.

## Perceived Problems with the Traditional Common Law Model

24. The traditional common law model in New Zealand has clearly been significantly modified by the provisions of the Sentencing Act. Moreover, the development of much more systematic, and more comprehensively drafted, appellate decisions has led to the establishment of a much more comprehensive

body of sentencing law. Guideline judgments have been particularly significant in this respect. Nevertheless, there has been increasing recognition of the inadequacies of the traditional common law model. Those inadequacies, that gave rise to the Law Commission Report in 2006 and the subsequent establishment of a Sentencing Council, fall into six categories:

***(i) Inconsistency in Sentencing Practice***

25. Partly as a result of the incomplete nature of appellate guidance, there is a great deal of anecdotal evidence in New Zealand about the degree of sentencing inconsistency between judges and courts. This has been confirmed by empirical research. Some courts are systematically more severe than others, particularly in relation to the percentage of convicted offenders who are imprisoned and the length of sentence they receive.

26. Some variation from judge to judge and from court to court is to be expected. However, it is simply unjust that offenders appearing before one judge or court should receive systematically more severe or more lenient sentences than equivalent offenders appearing before another judge or court. That is precisely what has occurred under the traditional model, with its emphasis on individualised justice.

***(ii) Lack of Transparency***

27. Because policy as to sentence severity levels, to the extent that it exists, is largely developed by appellate courts in the context of decisions in individual cases, it has tended to be non-transparent and relatively inaccessible. It is thus not the subject of an informed political or public debate.

***(iii) Lack of Public Confidence in the System***

28. Because of this lack of transparency, the public are ill-informed as to the reality of sentence levels. The debate about sentencing practice in particular, and law and order more generally, is thus conducted on the basis of ignorance, misunderstanding and a focus on particular cases. This leads to a lack of public confidence in the system and a constant demand for change.

***(iv) Lack of Legislative Input***

29. Under the traditional model, there is no effective mechanism to enable Parliament to alter sentence levels and thereby effectively determine the overall amount of punishment. If it wishes to try, it has recourse only to the indirect mechanism of amending maximum penalties (intended to be reserved for the worst hypothetical class of case of its type) in the hope that this will have some effect on the way in which judges behave on a day to day basis. This lack of legislative input into appropriate levels of punishment has been described by Andrew Ashworth, a Professor of Law at Oxford University, as a “democratic deficit”: a central area of social policy is determined not by elected representatives but by unelected judges.

***(v) Lack of Considerations of Cost Effectiveness***

30. Under the traditional model, sentence severity levels are determined without any explicit consideration or weighing up of relative costs and benefits. Moreover, it is the only part of Government expenditure that is allocated without reference to competing demands, because the Government has no control over it. There is thus no public debate about the relative cost effectiveness of punishment levels by comparison with policing activities, crime prevention, rehabilitative programmes, or even health and education services. This is inappropriate. Choices about expenditure within criminal justice (and for that matter between the justice sector and other areas of Government expenditure) ought to be identified explicitly and properly debated; they should not simply occur as a automatic consequence of the sentence levels that happen to be selected by the judiciary without those considerations in mind.

***(vi) Unpredictable Demand on Penal Resources***

31. The absence of a systematic and transparent mechanism for sentencing severity levels makes the system inherently unpredictable and thus creates substantial difficulties for the Government in managing its penal resources. In particular, in New Zealand there has been a rapidly rising prison population that has been driven in part by an increasingly severe sentencing and parole policy. That has made it difficult for the Government to predict the number of people who will be received into prison and the length of time that they will spend there. Forecasts of the prison population have often been woefully inaccurate and prison overcrowding has been the result.