

PART 2: THE SENTENCING COUNCIL AND SENTENCING GUIDELINES

Enactment of Sentencing Council Act 2007

32. The Commission's Report *Sentencing Guidelines and Parole Reform* outlined the inadequacies with the traditional model set out above. As a result, the Government moved quickly to accept the Commission's recommendations, and within a year enacted the Sentencing Council Act 2007.

33. The key feature of that legislation is that it provides for the establishment of a Sentencing Council to draft both numerical and narrative sentencing guidelines, as well as to undertake related information and policy advice functions.

34. Under the Act, the Council is to comprise:

- Four judicial members appointed by the relevant Head of Bench
- The Chair of the Parole Board
- Five non-judicial members appointed by the Governor General on the recommendation of Parliament

35. The non-judicial members of the Council are required to have expertise in one or more of the following areas:

- Criminal justice matters
- Policing
- Assessment of risk of reoffending
- The reintegration of offenders into society
- The promotion of the rights and welfare of victims of crime
- The effect of the criminal justice system on Maori and people from minority cultures
- Community issues affecting the courts and the corrections system
- Public policy

36. The equal split between judicial and non-judicial members is in recognition of the fact that judges have the daily task of sentencing and must have a significant input into the development of sentencing guidelines. Otherwise the guidelines may well be rendered unworkable for two reasons: they might not be fit for the purpose, because they are not sufficiently tailored to the range of circumstances that confront Judges on a daily basis; and they may not have the confidence of the judiciary that is likely to flow from significant judicial input. On the other hand, since the Council's responsibility for developing guidelines gives it a significant policy function, it would not be desirable for it to be, or be perceived to be, a body that is wholly or chiefly judicial. That would fundamentally undermine another of the Council's objectives: to rectify the "democratic deficit".

37. When the legislation establishing the Council was being developed, there was

considerable debate about whether the Chair should be a judicial or non-judicial member. Some held the view that it would be better for the Chair to be a nonjudicial member, since Judges would be constrained in what they could say publicly in defence of the Council's work. However, in the end it was decided that judicial leadership of the Council's work was desirable and that the Chair should accordingly be one of the judicial members.

38. Section 14 of the Sentencing Council Act 2007 requires that, when the Council produces draft guidelines for public consultation (as it is required to do), they should be accompanied by a statement of their forecasted impact on the prison population. This is a significant provision. It is intended to enable the public debate as to sentence severity levels reflected in the guidelines to take into account not only what benefits they are likely to produce but also how much they will cost. This means that for the first time there will at least be some prospect that political debates will be conducted, and political choices made, about sentencing severity levels on a properly informed basis.

39. A significant feature of the guidelines structure developed under the legislation is that the guidelines are ultimately subject to the control of Parliament. After draft guidelines have been subject to a public consultation process, they are to be presented to the Minister of Justice, together with a statement of the guidelines' likely effect on the prison population. The Minister must then present those guidelines to Parliament. After a prescribed period of time during which Parliament can scrutinise the guidelines, they automatically come into force unless they are disallowed by way of a negative resolution of Parliament. Parliament must disallow the guidelines as a whole; it cannot disallow some guidelines and allow others.

40. The guidelines are intended to be presumptively binding. Accordingly, section 21A of the Sentencing Act provides that, when sentencing an offender, the court must impose a sentence that is consistent with any sentencing guidelines that are relevant to an offender's case, unless the court is satisfied that this would be contrary to the interests of justice to do so. There is thus some flexibility for judges to depart from the guidelines in exceptional cases. However, there was an expectation by those developing the legislation that this would not occur in more than 20 percent of cases overall. Moreover, the legislation requires that, if judges do depart from the guidelines, they are required to give reasons for doing so.

Objectives of Sentencing Guidelines

41. The establishment of the Sentencing Council, and the development of sentencing guidelines under it, is intended to achieve the following objectives:

- greater consistency in sentencing, particularly for lower level offences where existing guidance is patchy or non-existent;
- a greater range of input into sentence levels, not only through the mixed judicial and non-judicial membership of the Sentencing Council but also

through the provision for greater legislative control;

- more informed political and public debate, particularly through the requirement for public consultation on draft sentencing guidelines and for the provision of an accompanying statement as to their cost effectiveness and impact on the prison population;
- a more predictable outcome, since the impact of guidelines on existing sentencing practice will be able to be assessed with some reliability;
- a better ability to manage penal resources, and in particular to plan prison capacity.

Criticisms and Responses

42. There were three key criticisms of the proposal to establish the Sentencing Council and develop sentencing guidelines.

43. First, it was suggested that the Council would jeopardise judicial independence

– that it is the responsibility of the judiciary rather than Parliament or some other statutory body to undertake the task of determining sentence severity levels. My response is that Parliament has always had the ability to determine sentence levels or develop alternative mechanisms for doing so. The fact that Parliament has not done so is a matter of preference rather than constitutional principle. If the legislative is constitutionally able to prescribe maximum, mandatory or minimum penalties, it is equally constitutionally able to dictate the nature or range of penalties that ought to be applied in the ordinary run of cases.

44. Secondly, it was argued that judges should not participate in the Council, because the Council will be determining social policy. My response is that judges have always had input into social policy through their decisions. Moreover, a sentencing guidelines system will only be effective if Judges do participate in it. Judicial participation merely make the role of judges in developing social policy more transparent.

45. Thirdly, perhaps the most significant concern was that a comprehensive system of guidelines will unduly fetter judicial discretion and ultimately result in an injustice in an individual case. However, this is a question of how guidelines are drafted, not whether they should exist at all. It is true that the right balance needs to be struck between prescriptiveness and flexibility, so as to ensure that justice can be done in any individual case. However, the draft guidelines that have been prepared in New Zealand achieve that. They allow for a range of sentences, and as noted above the legislation itself provides for departure from the guidelines in the exceptional case.

Implementation

46. Following the enactment of the legislation, the Law Commission was asked by the Government to prepare draft guidelines, in collaboration with the judiciary,

so that there would be a first set of draft guidelines that could be considered by the Council once it was established. The Law Commission duly undertook that work throughout 2007 and 2008, with the assistance of four judges who were seconded to the Commission part-time for that purpose.

47. A comprehensive set of draft guidelines are therefore now available. These guidelines differ, in both structure and content, from the “grid systems” that have been employed in a number of jurisdictions in the United States. They are instead similar to the approach that has been taken by the English Sentencing Guidelines Council (on whose experience we extensively drew in developing our own proposals). The guidelines fall into the following categories:

- A sentencing methodology guideline that sets out the approach that is to be taken to the sentencing task (a copy of which is provided in Appendix 1).
- Sixteen generic guidelines that are written in a narrative form and cover issues such as discounts for guilty pleas, aggravating factors, mitigating factors, criminal history and victim interests. The draft guidelines on discounts for guilty pleas, aggravating factors and mitigating factors are attached as Appendix 2 by way of example.
- Offence-based guidelines are written by offence type rather than offence category. The draft guidelines for burglary, assault, and driving causing injury or death are attached as Appendix 3 by way of example.
- A guideline about when it is in the interests of justice to depart from the guidelines (copy of which is attached as Appendix 4).

48. While the sentence ranges within each band of seriousness are sometimes quite wide, the narrative on the factors that determine the choice of band and placement within the band are designed to indicate roughly where within the range an offender might expect to be placed.

49. Although the Sentencing Council Act has come into force and substantial work has been done on drafting guidelines for its consideration, the new Government elected in November 2008 has indicated that it does not wish to proceed with sentencing guidelines at this time. As a result, no action has been taken to appoint members to the Council, and the work is an abeyance.

50. In response, the Court of Appeal itself has begun to develop additional guideline judgments drawing on the work undertaken by the Law Commission. For example, the court has recently issued a comprehensive guideline judgment on sentencing discounts for a guilty plea, largely adopting the draft guideline drafted by the Law Commission without significant amendment. It is shortly to produce a similar guideline judgment on all sex offences. While this is a good development, it does not achieve all of the purposes for which the Sentencing Council Act was enacted. In particular, the court is still reliant upon the information gathered by counsel; there is no process of public consultation; and there is no mechanism for legislative approval or disallowance.