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Standard Minimum Sentencing and Guideline Judgments: An uneasy alliance in the Way of the future

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This article will analyse the contemporary co-existence of standard non-parole periods and judicial guideline judgments in New South Wales. In R v Way, judicial interpretation of the standard non-parole provisions circumscribed their direct application. Subsequently, in cases such as R v Davies, R v AJP, R v Sangalang and R v Mills, the Court of Criminal Appeal has grappled with the meaning of the standard non-parole period as a “reference point” in sentencing and has expressed a view that the practical effect of these reference points will be to increase sentence levels for certain offence categories. Alongside this scheme stand judicial guideline judgments; the most recent promulgated in 2004 for the summary offence of driving within the high-range prescribed concentration of alcohol. With the concurrent operation of these two different forms of “guidance” for the exercise of judicial sentencing discretion, important questions have arisen in relation to enduring issues about sentencing in a context encompassing the potential for increasingly prescriptive statutory accretions. Will standard non-parole periods and judicial guideline judgments continue to provide moderate mechanisms for guidance to sentencers, or will the heightened emphasis on transparency and consistency in sentencing lead to more rigid regulation? What are the indicators for the future as to the extent and form of the guidance or regulation?

INTRODUCTION

The sentencing landscape in New South Wales recently has witnessed incremental but undoubtedly significant legislative intervention directed towards regulating, or at least structuring, the exercise of judicial sentencing discretion. Until comparatively recent times, the New South Wales and other Australian legislatures were seemingly reluctant to intervene in any substantial way to standardise sentence levels and explicitly identify factors and the importance of such factors in the sentencing process. However, the high community profile of sentencing decisions and the perceived leniency of sentencing judges in the contemporary context, particularly in relation to serious violent and sexual offences, have changed this apparent reluctance into a form of action.

The latest legislative action in New South Wales, ie the introduction of standard non-parole periods, has created an environment where the exercise of judicial discretion in sentencing for a number of indictable criminal offences has been shaped around “reference points”, which mostly represent a significant increase on the average range of sentences previously imposed for such
offences.\textsuperscript{2} Although the direct application of the standard minimum sentencing scheme has been circumscribed to cases where there has been a conviction after trial,\textsuperscript{3} there has also been specific judicial recognition that, while there was no stated legislative intention to increase sentencing patterns for the offences included in the scheme,\textsuperscript{4} the figures specified either evince a legislative intention to increase sentence levels for an offence category\textsuperscript{5} or such will be the inevitable result in practice.\textsuperscript{6} In addition, traditional judicial views as to the instinctive synthesis approach to sentencing\textsuperscript{7} have been challenged as a result of these legislative changes which arguably lend themselves to deciding upon a sentence through specific and express stages.

Concurrently, judicial guideline judgments continue to provide a mechanism for fostering consistency in sentencing, although there has been a notable decline in the promulgation of such judgments by the Court of Criminal Appeal since the implementation of the standard non-parole sentencing scheme. The most recent guideline judgment relating to high-range drink driving offences is an indication of the important, albeit restricted, role of guideline judgments in promoting consistency of approach and reducing disparity in sentencing. At the same time, the Court of Criminal Appeal has taken a “hands off” approach to considering guideline judgments for indicted offences (including alternatives to and variations of such offences)\textsuperscript{8} contained in the standard non-parole period table.

Although, ultimately, both modes of sentencing guidance may be described as moderate, the guideline judgment as a form of judicial self-regulation seems to sit uneasily with the legislative scheme of standard minimum sentencing. This is demonstrated most clearly in a context where “law and order” issues maintain a high political profile and there are sporadic and unpredictable legislative moves which may encroach incrementally on the scope of judicial discretion.\textsuperscript{9}

Several questions arise for exploration in this contemporary sentencing landscape. Although grid sentencing has been specifically discounted by the current New South Wales government, has the

\textsuperscript{2} See, eg \textit{R v AJP} (2004) 150 A Crim R 575 at 585 per Simpson J in relation to the offence of “sexual intercourse with a child under the age of 10 years” under s 66A of the \textit{Crimes Act 1900} (NSW). Also see \textit{R v Sangalang} [2005] NSWCCA 171 at [29] per Hunt AJA in relation to the offence of “aggravated indecent assault” under s 61M(1) of the \textit{Crimes Act 1999} (NSW).

\textsuperscript{3} \textit{R v Way} (2004) 60 NSWLR 168 at 184. In this case, Spigelman CJ, Wood CJ at CL and Simpson J issued a single judgment as the court.

\textsuperscript{4} See \textit{R v Way} (2004) 60 NSWLR 168 at 194 where the court observed: “There was no mention in the Second Reading Speech of any dissatisfaction with the general level of sentencing for the Table offences, or of any intention to increase the time that persons convicted of them should remain in custody.”

\textsuperscript{5} See \textit{R v Sangalang} [2005] NSWCCA 171 at [29] per Hunt AJA.


\textsuperscript{7} See particularly \textit{R v Williscroft} [1975] VR 292 at 300; \textit{R v Young} (1990) 45 A Crim R 147.

\textsuperscript{8} See \textit{Re Attorney-General’s Application (No 2 of 2002)} (2002) 137 A Crim R 196, where the Court of Criminal Appeal refused the Attorney-General’s application for a guideline judgment concerning sentencing for the offence of “assault police” observing that the aggravated offences of assault occasioning actual bodily harm and wounding of police officers (s 60(2) and (3) of the \textit{Crimes Act 1900} (NSW)) were included in the table providing for standard non-parole periods and this could have an influence on the sentencing patterns for assault police charges under s 60(1) of the \textit{Crimes Act 1900} (NSW).

\textsuperscript{9} A recent example is the \textit{Law Enforcement Legislation Amendment (Public Safety) Act 2005} (NSW), which commenced operation on 15 December 2005 as a response to the racially motivated riots on beaches in southern Sydney on 11 December 2005. Among other amendments, this Act amended the \textit{Bail Act 1978} (NSW) by extending the presumption against bail for more categories of offences, including “riot”. This provides an additional fetter, albeit only to a modest extent consonant with the nature of a presumption, upon judicial discretion in making bail decisions. Also, at the time of the last State election in New South Wales in March 2003, the Coalition Opposition put forward a sentencing policy which included mandatory minimum sentences for certain offences, thus proposing total removal of judicial discretion in regard to the minimum sentence appropriate to those offences. With the next New South Wales State election scheduled for March 2007, the Coalition Opposition continues to state that its policy is to introduce mandatory minimum sentences for some offences. This was most recently expressed by the Shadow Attorney-General, Chris Hartcher, during a news media conference on 24 March 2006 following the decision by the Court of Criminal Appeal to reduce the sentences of Dudley Aslett (\textit{Aslett v The Queen} [2006] NSWCCA 49) and Steven Aslett (\textit{Aslett v The Queen} [2006] NSWCCA 48) for what has been described as “the worst known gang rape in NSW” – see Wallace N, “Sentences Reduced for Brutal Gang Rape”, \textit{The Sydney Morning Herald}, 25 March 2006, p 11.
The introduction of standard non-parole periods for certain offences into New South Wales through Pt 4, Div 1A of the Crimes (Sentencing Procedure) Act 1999 (NSW) (the Act) has created some interesting issues of interpretation relating to the reach of the statutory scheme, the approach to sentencing it requires, and the sentencing scales for the offences in the table. The scheme provides a table that prescribes standard non-parole periods for a range of offences. The lengths of the set non-parole periods are described as representing “the non-parole period for an offence in the middle of the range of objective seriousness for offences in the Table” (emphasis added). Section 54B of the Act sets out the procedure for a court to follow in sentencing for an offence included in the table and provides by s 54B(2) and (3):

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

(3) The reasons for which the court may set a non-parole period that is longer or shorter than the standard non-parole period are only those referred to in section 21A.

Accordingly, parliament has established a style of “guidance” that potentially imposes restrictions on the exercise of judicial sentencing discretion. Such restrictions, namely, a legislatively specified non-parole period which must be set for certain offences (unless there are nominated reasons for departing from that specified period) had largely been absent from the New South Wales sentencing landscape. Mandatory minimum licence disqualification periods for drink driving and other major traffic offences are an example of an existing restriction in this genre. Seemingly, standard non-parole periods were not meant to directly replace the system of guideline judgments produced by the New South Wales Court of Criminal Appeal; however, the future utility of this self-regulatory mechanism was clearly confined “to offences that are not part of the standard non-parole period scheme”.

The reforms were originally described by a senior New South Wales judge as introducing:
grave injustices to the court system, threatening the independence of the judiciary and its ability to make decisions in an unfettered way … The whole underpinning philosophy of the independence of the judiciary is that judges have the freedom to make decisions in an unfettered way.\textsuperscript{14}

Other commentators described the reforms as not creating mandatory sentences but preserving “the discretion of judges to sentence above and below the ‘standard’” by taking into account a non-exhaustive “check list of aggravating and mitigating factors” which “are already largely taken into account by sentencing judges”.\textsuperscript{15} The government promoted the legislation as “aimed at structuring discretion in sentencing and satisfying community expectations in sentencing consistency”.\textsuperscript{16}

In light of these varying interpretations of, and responses to, the new legislation, legitimate concerns were raised about the practical ramifications for the exercise of judicial sentencing discretion and achieving individualised justice. To some extent, these concerns have been alleviated by recent cases in which judicial interpretation of the Pt 4, Div 1A provisions has circumscribed the operation of standard non-parole periods. At the same time, the Court of Criminal Appeal has accorded a certain measure of prominence to the periods of imprisonment fixed in the table for the nominated offences. Sentencers must expressly use the standard non-parole period as a “reference point” in the formulation of a particular sentence, thus providing another legislative yardstick for individual sentence lengths in addition to the maximum penalty. The meaning of “reference point” when sentencing judges have applied it to actual cases demonstrates that the degree of prominence of standard non-parole periods and their constraining influence on sentencers in practice probably can be best described as moderate and, at this relatively early stage of operation, little different from the maximum penalty as a sentencing reference point.\textsuperscript{17}

THE DECISION IN \textit{R v Way}

The decision by the Court of Criminal Appeal in \textit{R v Way} (2004) 60 NSWLR 168, was the first in which the standard non-parole statutory provisions were considered in detail, with the court deciding (at 184) “a purposive interpretation needs to be applied”. The legislative language needed unpacking and the Court of Criminal Appeal carefully analysed the various terms and their interrelationship for general application. The potentially harsh restrictive effect of the scheme was substantially softened by the purposive approach taken to the interpretation of the provisions. A most important interpretation of the potential reach of standard non-parole periods is that they “must … be taken as having been intended for a middle-range case where the offender was convicted after trial”, thus removing a significant number of cases from the direct operation of the provisions where there is a plea of guilty.\textsuperscript{18}

In a case where the standard non-parole period does apply directly because there is a conviction after trial and the offence falls “in the middle of the range of objective seriousness” for that offence, the scope for departing from that standard is still significant. Both the specific mitigating and


\textsuperscript{15}Ackland R, “Judges need to be Discriminating – but they don’t need to be told how”, \textit{The Sydney Morning Herald} (6 September 2002) p 13.

\textsuperscript{16}Totaro, n 14. Also, see Second Reading Speech of the Attorney-General, Debus, n 1.

\textsuperscript{17}See \textit{Markarian v The Queen} (2005) 79 ALJR 1048 at 1056; 215 ALR 213, per Gleeson CJ, Gummow, Hayne and Callinan JJ where it is observed “that careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick … [but] it will rarely be … appropriate … to look first to a maximum penalty, and to proceed by making a proportional deduction from it”.

\textsuperscript{18}R v Way (2004) 60 NSWLR 168 at 184. This interpretation was seen as following from the fact that “a plea of guilty” is a mitigating factor to be taken into account under s 21A(3) of the \textit{Crimes (Sentencing Procedure) Act 1999} (NSW) and which might justify departure from the standard non-parole period. In New South Wales, a significant majority of cases before the higher criminal courts, where the standard non-parole scheme applies, are disposed of by way of guilty plea – see New South Wales Bureau of Statistics and Research, \textit{New South Wales Criminal Court Statistics} 2004 (2005) p 84 where it is recorded that in 2004 of 3,623 criminal cases disposed of in the District and Supreme Courts, 2,560 (or 70.7%) cases were finalised by sentencing after guilty plea.

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aggravating factors set out in s 21A(2) and (3) of the Act and any other objective or subjective factor that affects the relative seriousness of the offence are to be taken into account in the upward or downward adjustments of the non-parole period. Therefore, initially, the objective seriousness of the offence before the court must be measured without having regard to any aggravating or mitigating factors as detailed in s 21A. The threshold question – is the offence in the middle-range of objective seriousness? – is to be answered by reference to the elements that prove the offence beyond reasonable doubt.

This threshold question, although incorporating new legislative terminology, was held in R v Way (at 185) to be little different from that which “judges are well accustomed to considering and stating that a particular case falls into the worst category, or into the category of offences at a lower level of objective seriousness”. It is simply a question referring to a different and identifiable place on the spectrum of offence seriousness which sentencing judges deal with on a daily basis.

Clearly, from this interpretation, a material part of the process of categorising offence seriousness is still intuitive and referable to the sentenced’s experience in the criminal law, as well as individual interpretation of facts in specific cases. Also, the Court of Criminal Appeal makes clear in R v Way (at 188-189) that the sentencing judge is not to be concerned with some abstract point or “typical” case as occupying the middle range of objective seriousness of the offence; parliament intended that “in the middle of the range” is a band rather than a point and the band should not be assumed to be a narrow one.

Such an interpretation plainly does not affect the latitude available at common law for judicial characterisation of offences within a particular category along the spectrum of seriousness. There are existing common law principles as to relevant factors impacting on offence seriousness which provide the sentencing framework. However, individual case circumstances remain a primary concern. Seemingly, this interpretation also allows some scope for judicially locating the middle band of specific offences for the purposes of determining the applicability of the standard non-parole period. Since it is a band and not a point, there is also potential for the application of the standard non-parole period to a broader compass of factual circumstances within the particular offence category.

Once those matters “directly or causally related to its commission” have been identified and the offence categorised as falling in the band occupying the middle-range of objective seriousness, then the sentencing judge must turn to the s 21A of the Act and any other relevant factors to determine the adjustments to the standard non-parole period. Accordingly, it is strongly arguable that, even after conviction at trial, the legislative scheme does not impose a significant fetter upon discretion. There is

19 Crimes (Sentencing Procedure) Act 1999 (NSW), s 21A(1)(c).

Note the court said in R v Way (2004) 60 NSWLR 168 at 185-186 that the process of reasoning involved in making this initial assessment of seriousness depends upon “a combination of sentencing experience, which is based upon the range of instances which go to make up cases of the relevant kind that come before the courts, combined with an understanding of the facts which are necessary elements of the offence, as well as those which are concerned with its consequences, and the reasons for its commission”. Further, when considering the purposes of sentencing to which a court must have regard in s 21A of the Crimes (Sentencing Procedure) Act 1999 (NSW), the court went on to state: “the inquiry which we consider to have been intended is that af which aff ects the relative seriousness of the offence before the court must be measured without having regard to any aggravating or mitigating factors as detailed in s 21A. The threshold question – is the offence in the middle-range of objective seriousness? – is to be answered by reference to the elements that prove the offence beyond reasonable doubt.

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21 It is apparent that there is no rigid scientific categorisation of what constitutes a “worst class of case”. Implicit in this principle is that there are limitations on the type of cases falling within the “worst case” category. Such limitations have been interpreted to mean that imposition of the maximum penalty is justified “only for the worst example of an offence likely to be encountered in practice”. (See R v McMahon (1978) 19 ALR 448 at 450-451; R v Mallinder (1986) 23 A Crim R 179 at 180.) This interpretation effectively places the onus on the judicial officer to determine, by applying his or her knowledge and experience of the criminal law, what examples of a specific offence are likely to be encountered in practice and whether a particular example is among the worst that he or she believes would probably be confronted in practice. It is an interpretation that allows for the primacy of individual judicial characterisations of the facts of specific cases and, thus, some latitude in determining what types of features will or will not place a particular example of an offence into that category. Also, see Badgery-Parker J in R v Twala (unreported, CCA, NSW, 4 November 1994) at 7 as to the worst class of case of murder and the requirement for it to “be possible to point to particular features which of very great heinousness and it must be possible to postulate the absence of facts mitigating the seriousness of the crime (as distinct from subjective features mitigating the penalty to be imposed)”.


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discretion in determining the position of the middle range of objective seriousness for an offence category and then further extensive discretion to remove an offence from that band by reference ultimately to an unlimited range of factors depending on the circumstances of an individual case. The assertion that there is no significant fetter upon discretion is consonant with the court’s observation in *R v Way* (at 183) that “the legislative policy … was not to create a straight jacket for judges … [and] the amendments were not introduced as a form of mandatory sentencing, but rather were intended to provide further guidance and structure to judicial discretion”. Although numerous factors can take an offence and an offender out of the midrange of objective seriousness and make the standard non-parole period inappropriate to be imposed, it is said to remain “useful” as a sentencing guide or yardstick. All the hallmarks of a moderate form of guidance and structuring of judicial discretion are evident from the court’s interpretation of the legislative language and purpose.

Importantly, the standard non-parole period for the specified offences has not been discounted as irrelevant to the sentencing process where there has been a guilty plea. Rather, in such circumstances, it is still to be used in an indirect way as “a reference point, or benchmark, or sounding board, or guidepost, along with other extrinsic aids such as authorities, statistics, guideline judgments and the specified maximum penalty, as are applicable and relevant”.24 This grouping with other reference points or guideposts, including the maximum penalty, arguably illustrates that the Court of Criminal Appeal contemplated a limited role for the standard non-parole period as part of the mix of guidance in organising the various relevant factors leading to the appropriate sentence in an individual case where a guilty plea has been entered. Any prominence it may have above other reference points, such as the maximum penalty, arguably would come from the fact that, statistically, the number of cases falling at, above, or below the middle range of objective seriousness, marginally or otherwise, is greater than those falling at the upper end or in the worst category of case attracting close to or the maximum penalty.

In practice, once the terms of ss 21A(3)(k) and 22 of the Act and the guideline judgment promulgated in *R v Thomson; R v Houlton* (2000) 49 NSWLR 383; 115 A Crim R 104 are properly taken into account by the sentencer upon a guilty plea, a lower minimum sentence than the standard non-parole period, as a reference point, will usually result for offences characterised as being at or below the middle of the range of objective seriousness. Having regard to the actual non-parole periods fixed by the legislation, however, it is also arguable that, if the standard non-parole period is to be properly used as a guidepost, then there is likely to be upward movement in global sentencing patterns for some offences, including where there has been a guilty plea. The full ramifications of using the standard non-parole period as a reference point and the aggregate reach of the statutory scheme have been gradually explored in subsequent decisions by the Court of Criminal Appeal dealing with different offences contained in the standard non-parole period table.25

Turning to the approach to sentencing required by the standard minimum sentencing scheme, the court in *R v Way* expressly stated (at 192-193) that it “does not seem to require a departure from the intuitive or instinctive synthesis approach to sentencing … nor do we see it as requiring resort to a rigid two-tiered approach which involves determining an objective sentence and then adjusting it to take account of subjective factors of the kind which was criticised in *AB v The Queen* (1999) 198 CLR 111”. The language used by the court does not categorically identify the necessary approach to complying with the legislative requirements. As the instinctive synthesis approach is not seen as being expressly repudiated, it seemingly remains the preferred approach to sentencing when using standard non-parole periods. A comparison is then made by the court (at 193) with guideline judgments in establishing benchmarks or reference points, the use of which also is not regarded “as being inconsistent with the ultimate application of an instinctive synthesis approach”. Accordingly, the court saw no obstacle to applying the legislative scheme within the instinctive synthesis approach to

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25 See below in the section headed “Recent decisions on sentencing for offences included in the standard non-parole period table” for an analysis of the relevant recent cases.
sentencing, thus reflecting the express legislative intention in that regard \(^\text{26}\) and presenting a further indication of its limited role in the overall sentencing exercise.

On the other hand, it is open to contend that the specific statement that the legislation does not require a “rigid” two-tiered approach, ie “a mechanistic or arithmetic approach” appears to leave some flexibility in this regard dependent largely on the factors relevant to the particular sentencing decision. This founds an argument that, depending on how the “instinctive synthesis” and “two-stage” approaches to sentencing are defined, an approach which requires: (a) an assessment of objective seriousness across a spectrum; (b) a determination at that point as to whether or not an offence falls into the middle range to which the standard non-parole period applies; (c) assignment of a numerical value if it does apply directly; and (d) an assessment of what specific factors require upward or downward adjustment of the objectively appropriate sentence, depending on the nature of those factors, can invite a sequential or staged approach to sentencing. \(^\text{27}\) It may not be sequential in the rigid mathematical sense that every factor identified has to be assigned a specific numerical value. Arguably, however, it is two-staged in that, once a location for the objective seriousness is stated, be it above or below or at the middle range (which might well include the statement of a numerical value relative to the standard non-parole period figure), then other relevant factors have to be identified and assigned weight in the overall process of reaching an ultimate sentence. In this second stage of adjusting the stated figure considered appropriate on the spectrum of objective seriousness, some factors, depending on their number, nature and complexity, may be assigned specific numerical or percentage values, particularly those such as a guilty plea or assistance to authorities. Otherwise, in identifying each of the factors taken into account, \(^\text{28}\) which may point in different directions, the court is not required to assign quantitative values but might descriptively express the weight to be given to such factors in the adjustment of the objectively proportionate sentence. Although there may be some synthesis of relevant factors in this approach, it is certainly arguable that there are defined stages which invite specification of numerical values and allow for some arithmetical calculations.

In his dissenting opinion in Markarian v The Queen (2005) 79 ALJR 1048 at 1074; 215 ALR 213, Kirby J observed that:

the introduction of standard non-parole sentencing obliges judges, in effect, to adopt a two-stage approach … [with] the sentencing judge effectively obliged to identify the “standard non-parole period” … [which] then becomes the statutory reference point relating to the “middle of the range of” objective seriousness of the offence.

Once this reference point is identified, the judge is required to take into account the other factors set out in the Act in order to arrive at an appropriate non-parole period and the balance of the sentence. Kirby J considered that (at 1075) “(a) clearer example of a two-stage approach could not be imagined”. Although this reasoning did not receive majority support, it has much to commend it. Kirby J’s version of what constitutes a two-stage approach (at 1075-1077) does not involve assigning a quantitative value to all relevant factors in the sentencing exercise; rather, it involves assigning such values only to the most important factors as a transparent matter of judgment. As a leading Australian sentencing academic, Professor Kate Warner, has observed in relation to Kirby J’s reasoning in this case: "A two-tier sentence is not purporting to engage in a scientific or mathematical exercise. He or she is just attempting to make the reasoning process, inevitably one involving matters of judgment rather than mathematical calculations, more explicit."\(^\text{29}\)

\(^\text{26}\) See Debus, n 1, p 5816 where the Attorney-General was at pains to point out that the procedure prescribed by the legislation “does not require the court to assign a numerical value to [relevant factors identified in the sentencing process] … the sentencing process remains one of synthesis of all the relevant factors in the circumstances of the case … section 54B does not require a court to adopt a mathematical or multi-staged approach to sentencing”.

\(^\text{27}\) Specific discount provisions enshrined in legislation, particularly ss 22-23 of the Crimes (Sentencing Procedure) Act 1999 (NSW), have been identified as lending themselves to a sequential or two-stage approach to sentencing – see Cameron v The Queen (2002) 76 ALJR 382 per Kirby J at 395-396.

\(^\text{28}\) To comply with s 54B(4) of the Crimes (Sentencing Procedure) Act 1999 (NSW).

Overall, it seems that whether the standard non-parole period has direct application and becomes a significant sentencing consideration following conviction after trial, or whether it is only to be used as a guidepost to the appropriate sentence alongside other relevant considerations, its existence in the sentencing matrix directs the sentencer to a series of progressive considerations, starting with characterisation of objective seriousness for the particular offence, which must be expressly articulated to comply with the legislative requirements. The numerical values assigned as standard non-parole periods for the various indictable offences in the table direct the sentencer to an initial quantification of the objective seriousness of the offence depending on where the offence is found to fall on the spectrum between the guideposts of low and mid range and up to the maximum penalty for the worst class of case. In this sense, the instinctive synthesis approach of combining all relevant objective and subjective considerations, as well as the various mechanisms for guidance to an appropriate sentence in order to reach one overall quantitative measure of criminality without identifiable steps, appears insufficient. Although the legislative scheme does not strictly require numerical quantification of all relevant factors, apart from where this may be required by law (notably in the case of pleas of guilty and where there has been assistance to the authorities), the court recognised in *R v Way* (at 191-192) that for the standard non-parole period to take its place as a reference point, there are specific questions to be answered in a particular sequence before exercising the sentencing discretion. The application of this reasoning in subsequent cases has provided examples of both instinctive synthesis and two-staged approaches to determining the appropriate sentence and, although a rigid mathematical approach is never apparent, the standard non-parole period seems to have achieved a moderate degree of prominence in the overall approach taken to formulating the final sentence.

As to the sentence levels created by the standard minimum sentencing scheme, it is apparent from data contained in the Judicial Commission Sentencing Information System that the standards fixed in the table are generally longer than the average sentences and non-parole periods that were imposed by courts prior to the commencement of the legislation. The Court of Criminal Appeal observed in *R v Way* (at 194-195) that this “is hardly surprising … since they were set as reference points before adjustment for purely subjective features which almost certainly influenced the outcome of the cases included in the statistics”. On the other hand, the court noted (at 195):

the absence of any consistent proportion between the non-parole period and maximum penalties prescribed for the Table offences, and the absence of any consistent relativity between those non-parole periods apparent from an examination of the statistics, [such that] it may be that for some offences the sentencing pattern will move upwards, while for others it will not.

Generally, it is evident that the standard non-parole periods are substantial, representing a significant percentage (ranging from 21.5%-71.5% with an average of approximately 42%) of the maximum penalty and exceeding the mean non-parole period for most offence categories discernible from available sentencing data. This issue of the legislative intent as to the severity of sentence levels and the practical ramifications of the figures contained in the table has been developed in subsequent cases with some notable comments as to the need to increase the sentence levels for certain offence categories.

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30 See particularly the cases of *R v Barker*; *R v Gibson* [2006] NSWCCA 20 and *R v Mills* (2005) 154 A Crim R 40 for examples of the “instinctive synthesis” approach to using the standard non-parole period with some specific adjustments for pleas of guilty, offences on a Form 1 and parity between co-offenders. See *R v Huynh* [2005] NSWCCA 220 for an example of the sequential approach to using the standard non-parole period and specifically adjusting an objectively appropriate sentence.

31 *R v Way* (2004) 60 NSWLR 168 at 193-194, where the court observed that “in several instances … the standard non-parole period is set at 50% of the maximum sentence. In some instances the proportion falls below 30% (for example the offences under ss 33, 98, 112(2), 112(3) of the *Crimes Act*) and in one other instance it exceeds 50% (s 66A of the *Crimes Act* … In general terms it does appear that in most, if not all of the Table offences the standard non-parole period will exceed the mean non-parole period, both for all offenders and for those who have been sentenced after a plea, as recorded in the Judicial Commission Sentencing Statistics”.

Following the Court of Criminal Appeal’s decision in *R v Way*, application for special leave to appeal to the High Court was refused with the three judges deciding there was no question of general importance related to the judicial interpretation of the key statutory phrases in the legislation. The applicant’s contention was that the interpretation of the phrase “the middle of the range of objective seriousness” adopted by the Court of Criminal Appeal was too broad and would reduce available sentencing discretion by making the standard non-parole period applicable to a larger number of cases. Counsel for the applicant stressed (at 6) that as a result of the decision there was a danger “of giving too much weight to the objective seriousness or giving too much weight to the standard non-parole period itself”. An interpretation as a midpoint and not a broad range of objective seriousness in the middle of the spectrum was pressed.

Ultimately, the application failed as the court decided (at 10) that “on any view of the construction of the legislation there are insufficient prospects that on any resentencing the result would differ from that already reached in the Court of Criminal Appeal in this case”. The indication from the High Court judges was that the interpretation of a range or band of offences in the middle of objective seriousness was consistent with the legislative language allowing “some flexibility to the sentencing judge” with Callinan J adding (at 8): “I am not too sure that the adoption of a precise middle point would not be an artificial exercise anyway. It would be very, very difficult to do.” It is certainly open to contend that the “dangers” identified by the applicant’s counsel have materialised in subsequent cases with the standard non-parole period, assuming some prominence that would have been avoided by a narrower interpretation of the reach of the legislative scheme and was not necessarily intended to result from the court’s decision in *R v Way*.

Overall, although this modified form of mandatory minimum sentencing in New South Wales seems to leave some scope for the exercise of judicial discretion, the question ultimately becomes one as to whether such a move principally represents a symbolic form of political manoeuvring in a climate of “law and order” politics in order “to help politicians win elections”. If so, the present legislative reforms may not be the final instalment in legislative attempts to further “structure” judicial sentencing discretion. With standard non-parole periods now part of the sentencing landscape, there is always capacity for legislative amendment to extend and fortify the scheme. The danger is that, depending on the perceived mood of the electorate toward judicial sentencing, such legislative precedents could eventually lead to more onerous restrictions on judicial discretion to the point where the legislature effectively stipulates the sentencing outcomes for particular offence categories in a similar way to “controlled offences” in a rigid grid system of sentencing with little or no room for departure from standard sentences.

**THE HIGH COURT: INSTINCTIVE SYNTHESIS V TWO-STAGED OR SEQUENTIAL APPROACH**

As identified above in the analysis of the decision in *R v Way*, the standard minimum sentencing legislation also contributed to the debate on the correct approach to sentencing; a debate that Warner observes “has been simmering away in the High Court for a number of years without a clear resolution”.  

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33 *Way v The Queen* [2005] HCATrans 147.
34 Notably, the words “middle of the range” in s 54A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).
36 See above at the paragraphs containing fns 26-29.
37 Warner, n 29 at 355. Also, see Traynor S and Potas I, “Sentencing Methodology: Two-tiered or Instinctive Synthesis?” (2002) 25 Sentencing Trends & Issues 1 for a very useful analysis of the debate and an important concluding observation in reference to the standard minimum sentencing legislation (at 14) that “a purely instinctive synthesis, single-tiered approach to sentencing will be increasingly difficult to reconcile with the requirements of this legislation”.

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In *Markarian v The Queen* (2005) 79 ALJR 1048; 215 ALR 213, the most recent High decision in this area, the majority accepted “instinctive synthesis” as the preferred approach to sentencing. At the same time, however, the perceived prohibition against the “two-tiered” approach has been significantly modified. Such modification has clearly resulted from an acknowledgement of the increasingly specific requirements of statutory sentencing regimes applicable in particular jurisdictions such that “no universal rules can be stated” and from an apparent, though somewhat cryptic, shift in what is actually meant by an “instinctive synthesis” approach to sentencing:

> An invitation to a sentencing judge to engage in a process of “instinctive synthesis”, as useful as shorthand terminology may on occasions be, is not desirable if no more is said or understood about what that means. The expression “instinctive synthesis” may then be understood to suggest an arcane process into the mysteries of which only judges can be initiated. The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public. There may be occasions when *some indulgence* in an arithmetical process will better serve these ends.\(^39\) (emphasis added)

The four judges who delivered the joint reasons in *Markarian* seem to be searching for a “middle ground”; a flexible approach that may be sequential or singularly instinctive depending on whether the sentencing exercise is simple or complex. Once there is complexity, multiple considerations to be weighed by the trial judge (eg, the circumstances in *Markarian*), then resort to sequenced arithmetical processes is seen to increase the potential for error. This “middle ground” is between the fervent preference for the “instinctive synthesis approach” of McHugh J (at 1060) and the recognition by Kirby J (at 1076) that modern sentencing judges must proceed with their task in two or more stages to encourage transparent decision making.

The majority decision invited scepticism from Kirby J who observed (at 1077) that, despite the majority preference for an instinctive synthesis approach, “if it is merely a ‘sequential’ approach involving distinct factors, it is apparently unobjectionable. The difference will usually be illusory”. As Warner comments, Kirby J delivered “a powerfully persuasive judgment critical of instinctive synthesis” reasoning that the trend to spell out in legislation specific considerations that are to be taken into account – a trend which suggests the need for adjustment up or down from a hypothesised norm – is clearly inconsistent with what traditionally is considered to be an intuitive or instinctive approach to sentencing.\(^40\) Certainly, it is arguable that Kirby J’s approach lends itself to clearer articulation of the reasoning process and the identification of the most important factors leading to determination of the ultimate sentence. This, in turn, arguably promotes public confidence in sentencing and greater understanding of the sentences handed down by judges. Otherwise, it is open to contend that there would be a risk of a continuation of the blind criticism of perceived leniency in sentencing generated by the secretive process of “instinctive synthesis”, which Kirby J emphasises (at 1075-1076) “is good neither for the parties, nor for the community, nor for the discharge of the functions of sentencing, nor for appellate review … it might be understood as endorsing a process of sentencing that involves little more than plucking a figure from the air”.

It seems likely that, although the “instinctive synthesis” approach is identified as the preferred approach to carrying out the complex and difficult task of sentencing, the underlying debate will continue in this era of increasingly detailed statutory reforms related to sentencing. As Warner has noted, appellate-level courts in Tasmania, South Australia and Western Australia have interpreted the High Court decision in *Markarian* as not preventing a judge from adopting a two-stage approach to sentencing,\(^41\) depending to some extent on the statutory requirements in the jurisdiction, particularly discounts for guilty pleas.

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38 Warner, n 29 at 356, 360.
39 *Markarian v The Queen* (2005) 79 ALJR 1048 at 1058; 215 ALR 213, per Gleeson CJ, Gummow, Hayne and Callinan JJ.
40 Warner, n 29 at 358.
41 Warner, n 29 at 360-361.
Most recently, in New South Wales, Howie J has referred to the joint judgment in *Markarian* as signifying the “importance of judges being allowed flexibility in sentencing”.42 While recognising that flexibility, the current trend in Court of Criminal Appeal cases dealing with standard minimum sentencing has been a requirement for detailed articulation of reasoning for departing from the set non-parole period in a way that clearly exposes the rationale for a particular sentence. This trend lends itself to at least some sequential reasoning. The initial assessment of objective seriousness in relation to the mid-range descriptor, with a numerical value sometimes specified,43 and then consideration of the s 21A factors with a percentage discount invariably expressed where there is a plea of guilty and other “mitigating and aggravating factors (taken) into account together”,44 shows some movement away from traditional conceptions of the instinctive synthesis approach to sentencing but certainly not to a rigid mathematical approach. Perhaps this trend confirms there are “no universal rules” and the majority approach allowing some flexibility accommodates certain variations dependent on the interpretation of legislative requirements and the overall complexity of the individual sentencing exercise.

**RECENT DECISIONS ON SENTENCING FOR OFFENCES INCLUDED IN THE TABLE OF STANDARD NON-PAROLE PERIODS**

Since the Court of Criminal Appeal decision in *R v Way*, there has been a line of cases which contribute to explaining and refining the interpretation of the standard minimum sentencing legislation and its application in practice. The combination of judicial statements from these subsequent cases puts the standard non-parole period in a moderately prominent position in the sentencing exercise. In practical effect, though, it is doubtful whether this new yardstick is any more or less important than the maximum penalty that has always been a reference point in sentencing but rarely imposed. The standard non-parole period equation with midrange levels of objective seriousness arguably raises its application as a reference point in more cases than the maximum penalty and this is reflected in the number of cases dealing with the legislative scheme. At the same time, that does not mean the standard non-parole periods necessarily have a more constraining influence on sentencing behaviour and outcomes than the maximum penalty has had traditionally in this regard.45

In *R v Davies* [2004] NSWCCA 319, the Court of Criminal Appeal considered the application of the Way principles in the context of a case where there were pleas of guilty to serious assault and malicious damage offences. The decision is a useful demonstration of the status of the standard non-parole period in the case of a guilty plea “as a reference point” with the court categorically rejecting the argument that the standard non-parole period has no application where there has been a guilty plea. The court held (at [6]-[7]) that the “reference point” function “insofar as it specifies the standard non-parole period for a mid range case determined after trial, before any necessary adjustment which might be made in accordance with the section”,46 means that the sentencing discretion is not entirely at large. The upshot of this application of the Way principles is that there is

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42 *R v Barker; R v Gibson* [2006] NSWCCA 20 at [55].

43 See *R v Huynh* [2005] NSWCCA 220 at [26]-[27], [41]-[47], per Simpson J, where it was held that the offence fell in the middle range of objective seriousness and that a starting point of a non-parole period of five years (for an offence of aggravated break, enter and steal under s 112(2) of the *Crimes Act 1900* (NSW) was appropriate. Thereafter, a reduction of 20% for the utilitarian value of the plea of guilty was made and a further reduction of the non-parole period by nine months was made for a finding of special circumstances to result in a sentence comprising a non-parole period of three years and three months with a balance of term of two years and one month (at [47]). This is a clear example of sequential reasoning in reaching the appropriate sentence by allocating specific quantitative values to the most important, but not all, sentencing factors.

44 *R v Sangalang* [2005] NSWCCA 171 at [26], per Hunt AJA.


46 Reference is also made in *R v Davies* [2004] NSWCCA 319 at [5]-[6] to the case of *R v Mouloudi* [2004] NSWCCA 96 in this regard where Bergin J’s statement “that the discretion in fixing a non-parole period after a plea is unfettered” was held not to suggest that s 54B of the *Crimes (Sentencing Procedure) Act 1999* (NSW) had no application and was to be ignored in a case where the sentencing followed a guilty plea. Also, most recently in *R v Stambolis* [2006] NSWCCA 56 at [17], Howie J observed that a statement by defence counsel to the sentencing judge that the case of *R v Way* “makes it very clear that the
clearly some, albeit modest, limitation imposed on the exercise of judicial discretion in any sentencing exercise by reference to the periods of imprisonment specified by the legislature for offences in the standard non-parole table. It is clearly in the nature of a useful verification for consistency and certainly not in the nature of prescriptive regulation.

In the later case of *R v AJP* (2004) 150 A Crim R 575, the Court of Criminal Appeal dealt with a Crown appeal against the leniency of a sentence imposed after a plea of guilty to one count of sexual intercourse with a child under the age of 10 years. This offence was identified by the court in *Way* as the only one where the standard non-parole period represented a proportion of greater than 50% of the maximum sentence, in fact it represents 60% of the maximum sentence. CONSEQUENTIALLY, the total sentence to comply with s 44(1) of the Act would have to be 20 years, representing 80% of the maximum sentence for an offence found to be “in the middle of the range of objective seriousness”. At first instance, the District Court judge imposed a non-parole period of 18 months and a total sentence of three years imprisonment. On appeal, Simpson J observed (at 581) this non-parole period represented “only 10% of the standard non-parole period provided in the Table … and (the sentencing judge) entirely discarded the standard non-parole period and, in effect, reverted to pre-Division 1A sentencing processes”. Ultimately, the original sentence imposed in this case was seen as a patent indicator that the judge had not had regard to the standard non-parole period as:

a reference point, benchmark, sounding board or guidepost. And the sentence itself, being so disproportionate to the standard non-parole period, strongly suggests that the standard non-parole period was simply put to one side once the decision was made to set a non-parole period shorter than that prescribed in the Table.

In allowing the Crown appeal, this particular offence was characterised judicially as falling below the mid-range of objective seriousness and there were a number of other mitigating factors to reduce the sentence with the result that the non-parole period was increased to two and a half years imprisonment once the standard non-parole period was said to have been properly taken into account as a reference point’ the increase was to approximately 17% of the standard non-parole period. Even though it is not a mathematical exercise and in *R v Sangalang* [2005] NSWCCA 171 at [22], Hunt AJA warned that “(the) appropriate non-parole period should never be described as a percentage of the standard non-parole period”, clear issues as to the significance of this legislative reference point or benchmark are raised by this decision.

Simpson J stated in *R v AJP* (at 585) that “the diligent application of ss 54A and 54B requires a very considerable increase on the sentence imposed” but then went on to refer to the contrast between the sentencing statistics for s 66A offences and the standard non-parole period of 15 years as “striking and disturbing” with “eighty per cent of offenders dealt with under s 66A before February 2003, sentenced to total terms of imprisonment of between two and eight years, with non-parole periods in the range of 12 months to six years”. Clearly, such figures were seen to be in stark contrast to a standard non-parole period of 15 years. The final sentence imposed on appeal, even taking the principle of double jeopardy into account, hardly represents “a very considerable increase” on the initial sentence as her Honour’s rhetoric indicated was required in this case.

standard doesn’t apply in a situation where a person has pleaded guilty” was not an accurate reflection of the law and “the standard non-parole period remained relevant as a guidepost to the appropriate sentence so that the Judge was required to give consideration to where the particular offence stood in relation to the mid-range of seriousness for an offence of its class”. Further, Hoeben J observed in *R v Stambolis* [2006] NSWCCA 56 at [59] that “although there was a plea of guilty to that offence, the standard non-parole period remains relevant as an important guidepost for sentencing purposes”.

This is an offence under s 66A of the *Crimes Act 1900* (NSW) carrying a maximum penalty of 25 years imprisonment and a standard non-parole period of 15 years.

This is not correct as the standard non-parole period of five years for “aggravated indecent assault” under s 61M(1) of the *Crimes Act 1900* (NSW) represents 71.5% of the maximum penalty of seven years imprisonment for that offence as identified in the case of *R v Sangalang* [2005] NSWCCA 171 at [29], per Hunt AJA.

R v AJP (2004) 150 A Crim R 575 at 581, per Simpson J.

Note in *R v AJP* (2004) 150 A Crim R 575 at 583 that Simpson J identified the fact “this was an isolated incident” as “itself sufficient to warrant departure from the standard non-parole period”.

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Upon careful analysis of this decision, it is arguable that Simpson J also did not properly use the standard non-parole period as a reference point, certainly not of any numerical significance, in reaching the final sentence. This may have been as a result of the disquiet expressed about the substantial increase in the standard minimum sentence when compared to the available statistical data. Alternatively, it may have been the court’s way of interpreting the meaning of the standard non-parole period as a reference point, ie of minimal influence even in numerical terms, despite the further rhetoric (at 585) that with the legislature having fixed 60% of the statutory maximum as the standard non-parole period for such offences, “it is inevitable that sentences for these offences will increase” and, notwithstanding that the standard non-parole period of 15 years “represents a remarkable increase … that is what the legislature has decreed, and it is for this Court to implement the dictates of the legislature”. If the increase in this case is an indication of the extent of upward movement in sentence levels, then it is certainly open to contend that the dictates of the legislature have not been strongly influential, at least in the particular circumstances of this case. If Simpson J’s rhetoric is to be taken seriously, then it must be expected that there would be sharp increases in the sentences for s 66A offences, even taking into account the availability of various mitigating factors under s 21A and the guilty plea discount under s 22 of the Act. Perhaps it is now up to first instance judges to systematically implement increases in this offence category or for the New South Wales Sentencing Council to reconsider the length of this standard non-parole period as part of its advisory and consultative functions under s 100J of the Act.

This issue about the meaning and prominence of the standard non-parole period as a reference point in the sentencing exercise has arisen in several other cases. There are some mixed messages about the practical meaning of this reference point in the various cases purporting to apply the principles from R v Way.

In R v Sangalang [2005] NSWCCA 171; R v Hung Lo [2005] NSWCCA 436; and Tidona v The Queen [2005] NSWCCA 410, it was held to be an error to use the standard non-parole period as a “starting point” in a sentencing exercise. This is not the meaning of “reference point” as described in the case of R v Way and thus delimits the role of the standard non-parole period. The following comment by Hunt AJA (at [21]-[22]) in R v Sangalang is illustrative:

the judge did commit a further error in using the standard non-parole period as the starting point rather than as a reference point … A sentencing judge should state no more than that he or she has used the standard non-parole period as a reference point or guidepost, and then identify the appropriate non-parole period, describing where significant any particular matters taken into account in doing so.

In Tidona v The Queen [2005] NSWCCA 410 at [57], per Hoeben J, using the standard non-parole period as a starting point was viewed as inimical to the “instinctive synthesis” approach to fixing a sentence and the methodology of calculating the total sentence only after setting the non-parole period “deprived [the sentencing judge] of the opportunity of standing back and looking at the appropriate balance between the head sentence and non-parole period”. Hoeben J emphasised (at [57]) that “crafting the structure of the sentence” around the standard non-parole period is an erroneous methodology as it places undue weight on the standard non-parole period as a reference point. The correct approach is put forward as reasoning to a sentence by an instinctive synthesis of all relevant objective and subjective factors and then assessing that sentence against “such reference points or guideposts as the standard non-parole period” before making the final sentencing decision. In this way the “reference point” role of the standard non-parole period is limited as a check against excess or inadequacy of sentence.

Further, in R v Ancuta [2005] NSWCCA 275 at [9], per Brownie AJA, the Court of Criminal Appeal emphasised that the proper approach to the standard non-parole period was not to commence with it and then oscillate around it by reference to various aggravating and mitigating factors. In this case, involving the deemed supply of a commercial quantity of heroin, the sentencing judge had fallen into error by starting with the standard non-parole period of 10 years then reducing it by 20% to allow for the utilitarian value of the guilty plea before looking at other aggravating and mitigating factors which might increase or decrease the resultant figure of eight years imprisonment. This was seen to give the standard non-parole period a dominant role in the sentencing exercise which was a fetter on judicial discretion that was not intended by the legislation as interpreted in R v Way (at 193).
On the other hand, in *R v Huynh* [2005] NSWCCA 220, Simpson J identified that there will be cases where the correct approach is “to begin with the standard non-parole period, [then] to consider whether there are reasons for departing from that sentence”. In the circumstances of this particular case, her Honour’s reasoning (at [47]) was certainly partially sequential with the standard non-parole period assuming a significant role as a reference point in the calculation of the final sentence. This case illustrates that there does appear to be some flexibility in the “reference point” role of the standard non-parole period, depending on the circumstances of the case and with “some indulgence in an arithmetical process” where considered appropriate.

At the same time as questions relating to the “reference point” role have arisen, the importance of the figure set as the standard non-parole period to overall sentencing levels for the offences under consideration has been featured periodically. In *R v Sangaliang*, Hunt AJA observed in relation to offences of aggravated indecent assault (at [29]):

> The standard non-parole period for this offence … is set at almost 71.5 percent [sic] of the maximum sentence, which is far above the medium range of sentences imposed before Division 1A came into effect. The nominated standard non-parole period for this offence of aggravated indecent assault was the clearest indication of an intention by the legislature in Division 1A that such an increase was to be the case for this offence … And, as the standard non-parole period is a reference point for all offences of aggravated indecent assault to which such a non-parole period does not directly apply, it was the intention of the legislature that the sentences for all those offences were also to increase.

This is an important statement as to the significance of a substantial standard non-parole period supporting the rhetoric of Simpson J in *R v AJP*. However, arguably, there is more practical force in Hunt AJA’s comments with his Honour holding that a sentence of four years and three months imprisonment with a non-parole period of two years and nine months for a case falling “just below” the mid-range of objective seriousness and involving a plea of guilty was not manifestly excessive when compared to a standard non-parole period of five years.

Further, in *R v Hung Lo*, Latham J observed (at [89]-[90]) that the offences of commercial drug trafficking dealt with in this case fell into the category of offences where “the pattern of sentencing will move above the range demonstrated … for like offences before 1 February 2003”, and substantial sentences of imprisonment were imposed relative to the standard non-parole period as an important reference point. Finally, in *R v Mills* (2005) 154 A Crim R 40, where sentences of 12 and 28 months periodic detention for offences of intentionally causing a fire with recklessness as to the spread of the fire were found to be manifestly inadequate and were significantly increased to a total of five years and two months full-time imprisonment, with a non-parole period of two years and 8 months, Wood CJ at CL observed (at 48):

> the sentencing Court was required to take into account the serious nature of these offences as reflected by the maximum penalty of imprisonment for 14 years … as well as the fact that the legislature had recently fixed a five year standard non-parole period for it. This latter circumstance provided an indication that sentences for the offence were expected to move upwards, consistently with the view taken by the community of its seriousness.

Apart from this observation and practical implementation of a sharp upward movement in sentences for this offence category using the standard non-parole period as a reference point, Wood CJ at CL emphasised (at 48) the overarching requirement that, whenever a sentencing judge is dealing with offences that appear in the table of standard non-parole periods, there must be a full and express consideration of the role of the standard non-parole period as a “reference or check point”. This includes giving adequate reasons; clearly identifying the relevant sentencing factors by reference to s 21A of the Act and the relative weight attributed to those factors in formulating the final sentencing order. Only when such adequate reasoning is explicitly provided will it be clear to an appellate court that the standard non-parole period has been properly taken into account in the overall sentencing task.

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51 See *R v Huynh* [2005] NSWCCA 220 where Barr and Latham JJ agreed with Simpson J.

52 Crimes Act 1900 (NSW), s 203E(1). This offence carries a maximum penalty of 14 years imprisonment with a standard non-parole period of five years.
Arguably, the reasoning from this case evidences a heightened general directive function for the standard non-parole period in the judicial refinement of its role as a guidepost or “reference point” from the initial interpretation in \( R v \) Way.

Overall, the cases analysed above and other recent decisions dealing with the standard minimum sentencing scheme illustrate that the weight of judicial opinion is such that the standard non-parole period, where one exists for an indictable offence, is not usually to assume a dominant position as a starting point in any sentencing task. As a “reference point” for offences falling in the middle-range of objective seriousness, it can be described as a moderately prominent sentencing guide to which careful attention must expressly be given by the sentencer. Also, its practical effect in relation to some offence categories will be to increase sentence levels. In comparison to the maximum penalty “reference point”, there are more factual circumstances that will correlate to mid-range objective seriousness, including above and below that range, than to the worst class of case category. Additionally, the legislative requirements in relation to standard non-parole periods, including express reasons for departure from the standard, appear to have elevated its prominence in certain cases. The general indicators are that the actual constraints imposed on sentencers by the standard non-parole period as a “reference point” are no more or less onerous than the maximum penalty as a “reference point” but the range of cases that may be encompassed by the middle range of objective seriousness are such that this new guidepost will be utilised more often in structuring judicial sentencing to check that like cases are treated alike and different cases are treated differently.

The Role of Guideline Judgments

In this contemporary sentencing environment where standard non-parole periods have been judicially recognised as a moderately prominent but not dominant part of the sentencing exercise for serious indictable offences, what is the place of judicial guideline judgments?

When originally promulgated, guideline judgments demonstrated a powerful example of judicial self-regulation and the maintenance of discretion for individualised justice in sentencing. Guideline judgments can be promulgated by the Court of Criminal Appeal following an application by the Attorney-General, or by the court’s own motion. The judicial decrees embodied in guideline judgments have related to the appropriate range, starting point, or relevant factors for consideration when imposing sentences for specific types of criminal offences. There are also what might be labelled “process” or “allocation” guidelines, such as the proper approach to sentencing where additional matters are taken into account on a Form 1 and the appropriate percentage discount for the utilitarian value of a guilty plea. Since the introduction of standard minimum sentencing, seemingly, there has been a diminution in the need to promulgate further guideline judgments. Rather, recent Court of Criminal Appeal jurisprudence has shown a notable focus on the interpretation and application of the standard minimum sentencing scheme for indictable offences and of the legislative articulation of mitigating and aggravating factors under s 21A of the Act.

The summary offence of driving with a high-range prescribed concentration of alcohol was the subject of the most recent guideline judgment. Warner sees the promulgation of the guideline for this summary offence as a sign of the enduring utility of this device outside the offence categories

53 See, eg \( R v \) Reyes [2005] NSWCCA 218 at [35]-[53]; \( R v \) Dang [2005] NSWCCA 430 at [33]; \( R v \) Barker; \( R v \) Gibson [2006] NSWCCA 20 at [56]-[57]; Doolan v The Queen [2006] NSWCCA 29 at [28]-[29].

54 See Crimes (Sentencing Procedure) Act 1999 (NSW), ss 37, 40.


57 Most recently, the statement in Elyard v The Queen [2006] NSWCCA 43 at [45], per Howie J in relation to the prohibition of “double counting” aggravating features detailed in s 21A(2) of the Crimes (Sentencing Procedure) Act 1999 (NSW) highlights the diminution in the role of the guideline judgment for aggravated dangerous driving offences: “There is in my view simply no point in seeking to apply the guideline in Whyte in order to determine that question when the offence is an aggravated one by reason of the elements of the offence charged. There is a real risk that, in trying to apply the guideline judgment to decide that question, the court will double count an aggravating factor in the guideline which is an element of the aggravated offence.”
encapsulated in the standard non-parole period table. Clearly, the indictable offences included in the table will not be the subject of guideline judgments; such guidance is now provided through the legislative scheme as interpreted and applied by the courts in the line of cases starting with R v Way. Is this a sign of the decline of guideline judgments to the position of a subordinate or potentially outdated system of guidance to sentencing judges?

The latest guideline judgment in Attorney General’s (NSW) Application (No 3 of 2002) (2004) 61 NSWLR 305 has demonstrated the potential for meaningful and structured sentencing guidance from the appellate court, as was also evident in some of the earlier guideline judgments. Within the guideline judgment for high-range prescribed concentration of alcohol driving offences, there is quite detailed guidance provided to magistrates as to what is an ordinary case in this offence category and the approach to sentencing for such an ordinary case. In addition, there is specific guidance as to the factors which increase moral culpability and the sentencing ramifications in this regard. There is particular emphasis in the guideline judgment on the limited applicability of orders for dismissal without conviction under s 10 of the Act in this category of offence. Inconsistent approaches to the use of these orders across the State was an important factor in bringing the application and in the decision to promulgate the guideline.

Judicial Commission statistical data shows that this guideline judgment has been influential on the sentencing practices of local court magistrates with an increase in the severity of sentences for driving with a high-range prescribed concentration of alcohol offences, and heightened consistency in the approach to sentences imposed across local courts, particularly in relation to the limited use of s 10 non-conviction orders. Arguably, this type of effective guidance is not possible from legislative tables of standard non-parole periods. As academic commentator, Austin Lovegrove has observed:

Guideline judgments offer more detailed policy for the guidance of sentencing judges … This greater detail is necessary for consistency of approach but is too much for legislation … Their scope is wide in the matters they address, including prescribed lines of reasoning, lists of relevant case factors, and sentences considered appropriate to particular sets of factual circumstances for various categories of offence.

The experience in New South Wales with a limited number of guideline judgments since 1998 generally has been very positive. One reason for this is likely to be the source of the guidance, coming from within the judicial ranks. Another is the narrative form of the guidance. As eminent sentencing academic, Professor Andrew Ashworth has stated about guideline judgments in England, a jurisdiction having over 20 years experience with this mechanism:

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.

With encouraging data relating to reduced disparity and increased consistency in sentencing for existing guideline judgment offences in New South Wales, it is strongly arguable that guideline judgments could be more frequently utilised rather than giving way to legislative schemes like standard minimum sentencing.

An important example is available from England, where a Sentencing Guidelines Council has been established under the *Criminal Justice Act 2003* (UK) to issue sentencing guidelines to assist the courts and help encourage consistent sentencing. The Council is charged to produce comprehensive and authoritative sentencing guidelines in place of the Court of Appeal and the Magistrates’ Association which formerly undertook this task in relation to specific jurisdictions. The Council is an independent body under the chairmanship of the Lord Chief Justice and is primarily comprised of judicial officers from all jurisdictional levels in England and Wales. It publishes definitive guidelines to which courts must have regard when sentencing.\(^{65}\) In its short time in operation, the Council has produced several important sentencing guidelines, including *Overarching Principles: Seriousness*\(^{66}\) and *Manslaughter by Reason of Provocation*.\(^{67}\) The guidelines produced are designed to be as comprehensive as possible in narrative form and may cover establishing the basis for sentencing; factors influencing sentence for the offence; sentence ranges and starting points; and aggravating and mitigating factors to take into consideration. The Sentencing Advisory Panel, which predates the Sentencing Guidelines Council and was originally set up to provide advice to the Court of Appeal about sentencing guidelines, now provides advice to the Sentencing Guidelines Council and is required to consult widely before submitting a sentencing guideline proposal for the consideration of the Council. The Sentencing Advisory Panel has a diverse membership, including academics, judicial officers, criminal prosecution and defence lawyers, and representatives of relevant community organisations.

The current English model amply demonstrates the complexity involved in devising this comprehensive type of guidance, particularly for ensuring transparent reasoning processes. Arguably, as Lovegrove has contended, there is a need to devise guideline judgments in a more sophisticated manner, maintaining a narrative approach but also incorporating quantitative numerical guidance.\(^{68}\) The complexity of guidance required presents a significant challenge for appellate courts but would certainly be achievable in New South Wales, a jurisdiction with recent successful judicial experience in formulating guideline judgments. As long as sufficient resources were made available to support such endeavours – whether it be through an independent sentencing council with significant judicial input or through a court-initiated, systematic and comprehensive review of sentencing patterns for all offences – guideline judgments could continue to provide moderate regulation of judicial sentencing discretion to promote consistency across a broader range of offence categories. The aim should be to create a compendium of detailed guidelines across all offence categories as in England.

Overall, there is certainly scope for enhanced utility within the guideline judgment mechanism in devising authoritative guidance in line with the increasing contemporary emphasis on transparency and sequential considerations in sentencing. Currently, in practice, although the existing guideline judgments continue to provide an important guidance mechanism in relation to some offence categories and in aspects of sentencing process, there has been no activity in the sphere of indictable offences since the decision in *R v Whyte* (2002) 55 NSWLR 252, which was followed shortly by the legislative proclamation of the standard minimum sentencing scheme. There is certainly no indication of a store of applications for guideline judgments in serious offence categories. This mechanism has become secondary. In the contemporary environment of increasing statutory regulation of sentencing, guideline judgments are under threat of becoming obsolete. It seems that, as in 1998, if guideline judgments are still considered preferable “to the constraints of mandatory minimum terms or grid

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\(^{65}\) See *Criminal Justice Act 2003* (UK), ss 170-172.


sentencing”, it is for the appellate judiciary to seize the initiative and put guideline judgments back at the forefront of mechanisms for guiding the all-important sentencing discretion.

THE “UNEASY ALLIANCE” – STANDARD MINIMUM SENTENCING AND JUDICIAL GUIDELINE JUDGMENTS

The upshot of this current co-existence of standard non-parole periods and judicial guideline judgments in New South Wales is a mixture of two forms of guidance or structuring of judicial discretion in sentencing, which seem to sit together as moderate organisational devices, albeit somewhat uneasily. One is imposed by the legislature with a table of what is regarded as the minimum non-parole period for various categories of indictable offences, based largely on the perceived community view of the objective seriousness of these offences. The other is a flexible narrative form of self-regulation decreed by appellate judges on a non-prescriptive basis in the interests of consistency. Both are put forward as being determined to assist and organise first-instance sentencing judges in their complex task of finding the appropriate sentence in an individual case.

Standard non-parole periods have been interpreted as providing “a reference point, benchmark, sounding board, check”. Apart from questioning whether each of those concepts is synonymous, there is still arguably a significant question as to what kind of “reference point” this standard minimum sentence provides in relation to the middle range of the objective seriousness band when there are clearly subjective judicial constructions in the characterisation and ranking of each individual offence and within what band this characterisation then sits on the overall spectrum of offence seriousness. Although there has been an attempt to confine this characterisation to fundamental elements of the offence proved beyond reasonable doubt, is this what was intended by the legislature in fixing these minimum sentence levels?

Undoubtedly the unease between the two forms of guidance for sentencers is the uncertainty in relation to the extent and purpose of legislative moves to regulate sentencing discretion. The promulgation of guideline judgments comes through a distinct judicial process with input from various stakeholders resulting in a reasoned judgment from the court after due consideration of, and reflection upon, the competing concerns. On the other hand, legislative reforms to sentencing in the last two decades largely have not resulted from such careful deliberation and consultation. A high profile case or criminal incident may cause a legislative reaction that cannot always be accurately predicted. Constant criticisms of judicial leniency in sentencing and the growth of lobby groups for victims’ rights have added to the reactionary nature of so-called sentencing “reform”. Overall, the political and the judicial have an awkward, if not strained, relationship in the controversial area of sentencing.

At this point in time, there have been no legislative moves to amend the standard non-parole period scheme. That may be a strong indication that the judicial interpretation in R v Way and in subsequent cases is adequate to achieve the objective of the legislative policy. However, only time and public scrutiny through research and responsible media reporting will tell whether this regime has “ensured ... greater consistency in sentencing ... [and] that proper regard is given to the community expectation that punishment is imposed that is commensurate with the gravity of the crime”. Ultimately, the question arises with this type of legislative “structuring” of sentencing in the context of community expectations as to its sufficiency – will political and populist ends result in legislative moves to more concrete forms of guidance not open to the vagaries of judicial interpretation provided by Div 1A? The cases show that judicial approaches to the use of the standard non-parole period as a “reference point” have not been consistent, however, with a growing stock of appellate decisions, the level of congruent guidance on the proper approach has arguably been increased. This approach accords moderate prominence to standard non-parole periods as a check against excess and inadequacy in sentencing and there has been some upward movement in sentence levels for certain offence categories or at least judicial rhetoric supporting such a movement. It is not entirely clear

69 Spigelman, n 1 at 877.
70 Debus, n 1, p 5814.
whether this judicial approach ultimately will allow for sufficient achievement of the legislative aims, particularly with another looming “law and order” auction at the next State election.

ROLE OF ADVISORY COUNCILS

Sentencing Councils or Advisory Boards have also achieved some prominence in the contemporary sentencing landscape and it is important to consider the role of such bodies in the overall question as to appropriate mechanisms for regulating judicial sentencing discretion. The New South Wales Sentencing Council was created at about the same time as standard non-parole periods commenced operation and its functions include consultative and advisory responsibilities in relation to offences suitable for standard non-parole periods.\textsuperscript{71} The Sentencing Council, chaired by retired Supreme Court judge, James Wood QC, does not have any delegated law-making power or power to issue sentencing guidelines in the same way as the Sentencing Guidelines Council in England.

The work of the New South Wales Sentencing Council has included a report which recommends against extending the standard non-parole sentencing scheme to “attempt” and “accessorial” offences\textsuperscript{72} and a further report which recommends inclusion of certain firearms offences.\textsuperscript{73} The government has not acted to include the additional offences in the standard non-parole period table at this stage. In its latest report, \textit{How Best to Promote Consistency in Sentencing in the Local Court}, the Sentencing Council included a statement of its view that the standard non-parole sentencing scheme should not be extended to the Local Court because it “would involve unwarranted interference with judicial discretion since non-custodial sentencing options will be appropriate in many cases and should not be discouraged”.\textsuperscript{74} There have been no legislative moves to include summary offences or indictable offences which can be disposed of summarily in the standard non-parole period table.

It is apparent that the New South Wales Sentencing Council has a restricted consultative and advisory role, although it is open to consider whether its powers should be extended. In its latest report, the Council makes reference to the Sentencing Guidelines Council in England with its power to issue definitive guidelines to which every court must have regard in sentencing offenders, and concludes by stating that “it may be worth considering whether a similar body should be established in NSW”.\textsuperscript{75} Interestingly, the Council also briefly addresses the concept of “grid sentencing”, used most widely in the United States, and categorically states that it “does not support the introduction of grid sentencing to improve consistency in sentencing in the Local Court”.\textsuperscript{76} The current New South Wales government does not advocate a policy of grid sentencing but the current Opposition continues to state that its policy is to introduce mandatory minimum sentencing for some offences. It remains to be seen whether these views expressed by the Sentencing Council might influence future government policy in New South Wales, particularly in relation to the extent of the Council’s powers to regulate sentencing through authoritative guidelines. The transparency of Council processes is an important factor in the credence to be given to any advice it devises and although its current functions are useful, there is clear scope for a more active role in providing effective sentencing guidance.

Currently, the only other example of a Sentencing Council in Australia is provided by the Victorian Sentencing Advisory Council. As its name suggests, this Council was established\textsuperscript{77} as an advisory body with functions to provide statistical information on sentencing; conduct research; gauge

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\textsuperscript{71} \textit{Crimes (Sentencing Procedure) Act 1999} (NSW), s 100J(1)(a).


\textsuperscript{75} New South Wales Sentencing Council, n 74, p 86.

\textsuperscript{76} New South Wales Sentencing Council, n 74, pp 86-87.

\textsuperscript{77} The Sentencing Advisory Council was established by the \textit{Sentencing (Amendment) Act 2003} (Vic) and commenced operation on 1 July 2004.
The contemporary existence of these sentencing councils raises a real question about the role of an independent authority to issue sentencing guidelines in a comprehensive fashion, which may avoid any need for further or stricter legislative regulation and allow the appellate courts to decide cases, rather than to be increasingly concerned with taking the substantial amount of time needed to formulate and articulate thoroughly considered and complex guideline judgments. Also, a sentencing council would not be restricted by having to wait for an appropriate case or for the Attorney-General to bring an application to promulgate a guideline judgment, as is currently the case for the Court of Criminal Appeal in New South Wales. Certainly, it may be an option to have court approval of guidelines formulated by a sentencing authority but the effectiveness of definitive guidelines from a body of this type will depend ultimately on its membership and the respect that its decisions will receive from the sentencers charged to implement such guidelines. It may not be as effective as the Court of Criminal Appeal in this regard but the English experience shows that it is worth serious consideration.

It is interesting to note that in the recent Australian Law Reform Commission (ALRC) Discussion Paper, Sentencing of Federal Offenders, within the section on promoting better sentencing, there is a question posed about the need to establish a federal sentencing council and what functions should be undertaken by such a body. Arguments for and against are briefly addressed but the ALRC view is that it is not necessary to establish a sentencing council at the federal level in Australia, largely due to the fact that “the three primary functions of sentencing councils – research, advice and rule making – are currently being performed by other bodies, will be performed by other bodies if the proposals in this Discussion Paper are implemented, or are not needed in the federal criminal justice system”. This view may be regarded as somewhat short-sighted, particularly given the potential for a larger number of federal criminal offences coming before the courts and the difficulties in maintaining sentencing consistency across the various courts in all Australian jurisdictions dealing with such offences.

**CONCLUSION**

In the last 10-15 years, there have been clear indications of the preparedness of the legislature to implement more far-reaching sentencing reforms than simply providing a maximum sentence for offence categories. The most recent line of appellate level cases in New South Wales show that judicial discretion remains paramount in sentencing, however, there has clearly been an incremental structuring of this discretion through both judicial guideline judgments setting benchmarks and legislation establishing numerical reference points. The prominence and momentum of judicial
Standard minimum sentencing and guideline judgments: An uneasy alliance in the Way of the future

guideline judgments seems, however, to have been reduced as a result of standard minimum sentencing. The more severe numerical sentence levels established through this legislative device have had a distinct influence on judicial sentencing patterns and practice for the specified offence categories.

Following this incremental development in the structuring of judicial discretion, there is inevitably a question as to what is the next stage and perhaps the ultimate political destination for the legislature; a detailed table or grid of numerical sentencing ranges? At this point in time, there is no definitive indication that such rigid regulation is a future legislative option, but the existence of the standard non-parole period table is a signal to the judiciary of the importance of re-establishing judicial guideline judgments as the preferred regulatory system in seeking consistency in sentencing approach and outcomes. The clear attraction of guideline judgments is the narrative form of guidance which emanates from other judges. Alternatively, lobbying for power to be extended to the Sentencing Council to issue comprehensive and authoritative sentencing guidelines on the English model may be another viable option in the quest for greater consistency in sentencing and also to deflect knee-jerk political responses to aberrant high profile incidents.

While sentencing remains as “the visible pinnacle of criminal justice decision-making” it is important – in a context where it is accepted that regulation or structuring of judicial sentencing discretion will certainly be pursued by one means or another – that the techniques used to promote consistency are moderate and allow individualised justice at the same time as reducing inequitable disparity in sentencing. The best and most comprehensive means of achieving this end are sentencing guidelines either in the form of appellate court judgments or definitive statements from an independent and highly respected sentencing council.

82 Ashworth A, n 64, p 236.