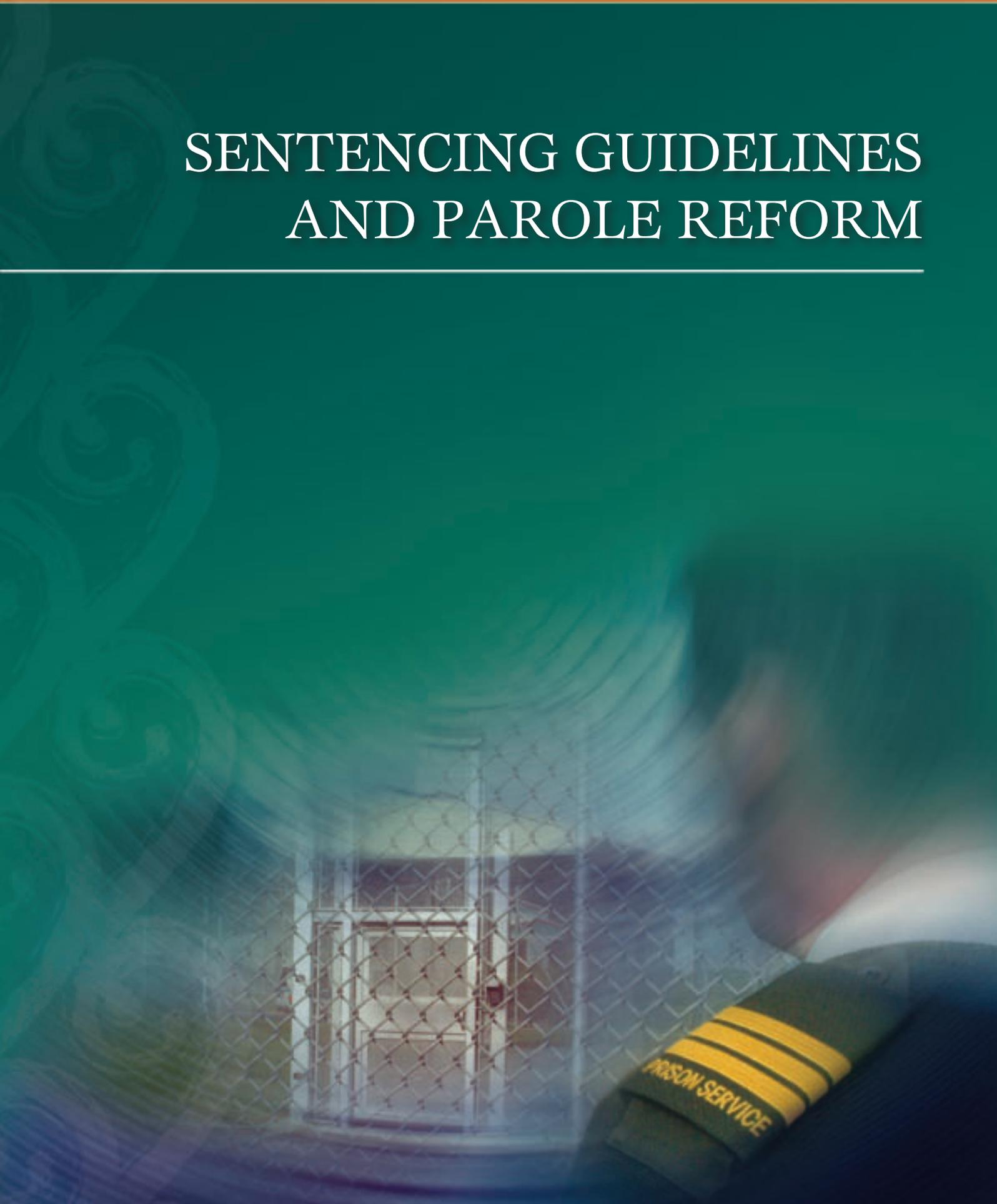




# SENTENCING GUIDELINES AND PAROLE REFORM

---







# SENTENCING GUIDELINES AND PAROLE REFORM

---

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

**The Commissioners are:**

Right Honourable Sir Geoffrey Palmer – *President*

Dr Warren Young – *Deputy President*

Honourable Justice Eddie Durie

Helen Aikman QC

The Manager of the Law Commission is Brigid Corcoran

The office of the Law Commission is at 89 The Terrace, Wellington

Postal address: PO Box 2590, Wellington 6001, New Zealand

Document Exchange Number: sp 23534

Telephone: (04) 473–3453, Facsimile: (04) 914–4760

Email: [com@lawcom.govt.nz](mailto:com@lawcom.govt.nz)

Internet: [www.lawcom.govt.nz](http://www.lawcom.govt.nz)

National Library of New Zealand Cataloguing-in-Publication Data

New Zealand. Law Commission.

Sentencing guidelines and parole reform / Law Commission.

(New Zealand. Law Commission. Report ; 94)

ISBN 1-877316-25-3

1. Sentences (Criminal procedure)—New Zealand.

2. Parole—New Zealand.

3. Criminal justice, Administration of—New Zealand. I. Title. II. Series.

345.930772—dc 22

Report/Law Commission, Wellington, 2006

ISSN 0113–2334 ISBN 1–877316–25–3

This report may be cited as: NZLC R94

This report is also available on the Internet at the Commission’s website: [www.lawcom.govt.nz](http://www.lawcom.govt.nz)



# Sentencing Guidelines and Parole Reform

## CONTENTS

Letter of transmittal.....	5
Foreword.....	6
Terms of reference.....	8

## EXECUTIVE SUMMARY

Background.....	9
The nature of the problem.....	9
A Sentencing Council and sentencing guidelines.....	10
The reform of parole.....	11
The integrated nature of our proposed reforms.....	12
Parallel work on maximum penalties.....	12

## SUMMARY OF RECOMMENDATIONS

### CHAPTER 1

A Sentencing Council and sentencing guidelines.....	17
Introduction.....	17
Problems with the current sentencing structure.....	17
Sentencing reform options.....	22
Purposes and functions of the New Zealand Sentencing Council.....	29
Composition of the Council.....	32
Organisational form of the Council.....	35
The scope and format of the guidelines.....	37
How should the Council undertake the work?.....	38
Relationship between the Council, the executive, and Parliament.....	41
Enforcing and monitoring compliance with the guidelines.....	43
Updating the guidelines.....	44

### CHAPTER 2

The reform of parole.....	46
The rationales for parole.....	46
Problems with the current parole structure.....	46
Minimum periods of imprisonment.....	49
The retention of parole.....	50
Parole reform: different sentencing practice and higher proportion of time served... ..	57
Circumstances that may justify earlier consideration by the Parole Board.....	60
Parole Board decision-making criteria.....	60
Implications for victims.....	60
Post-release conditions.....	61
Parole Board follow-up post-release.....	62
Back-end home detention.....	63

**CHAPTER 3**

Miscellaneous matters ..... 65

    The integrated nature of our proposed reforms..... 65

    Risk analysis and mitigation ..... 66

    Prison population implications ..... 69

    Transitional provisions ..... 70

    Parallel work on maximum penalties ..... 72

    Community-based sanctions..... 73

**APPENDIX**

Regional analysis of variations in District Court sentencing..... 74

11 August 2006

*The Hon Mark Burton*  
Minister Responsible for the Law Commission  
Parliament Buildings  
WELLINGTON

Dear Minister

I am pleased to present to you Law Commission Report 94, *Sentencing Guidelines and Parole Reform*, which we submit under section 16 of the Law Commission Act 1985.

Yours sincerely

A handwritten signature in cursive script, appearing to read "Geoffrey Palmer", with a horizontal line underneath.

*Sir Geoffrey Palmer*  
President

## FOREWORD

The reference for this report came about in an unusual manner. In December 2005, the Law Commission was discussing potential projects with the Department of Prime Minister and Cabinet. We suggested that reforms were needed to the sentencing and parole systems in New Zealand. As a result, the government in February 2006 gave the Commission the terms of reference set out in this report.

It was necessary because of other work going on within the government that the project be undertaken relatively quickly. A consultation draft was prepared and discussed with many interested parties concerned with the criminal justice system.

In particular there was extensive consultation with members of the judiciary. This was not designed to secure their support for the recommendations, but rather to ensure that the recommendations were informed by the insights that judges derive from sentencing. These consultations turned out to be extraordinarily valuable. As a result, the consultation proposals were altered significantly.

Many busy people co-operated with the Commission at relatively short notice for which we are very grateful. In particular, many members of the judiciary, too numerous to mention, went beyond the call of duty in assisting us.

The President of the Commission was in the United Kingdom in March and was able to have discussions with the former and present Chairs of the Sentencing Guidelines Council for England and Wales, the Rt Hon Lord Woolf and the Rt Hon Lord Phillips, as well as members of the secretariat and members of the Sentencing Advisory Panel. Discussions were also held with the Home Office. The Deputy President also met with the Chair and staff of the Sentencing Advisory Council in Victoria. The Commission is grateful for the invaluable advice and assistance it received from all these quarters.

The Commission's recommendations in this report make important changes to the structure of both sentencing and parole in the New Zealand criminal justice system. These proposals need to be fully understood by the public whose views are an important ingredient in the system itself. We put these proposals forward in the strong belief that they will improve the administration of justice in New Zealand. They will make punishment fairer and more consistent. They will make both sentencing and parole more transparent and easier for the public to understand.

In making our recommendations, we have been conscious that the independence of the judiciary is an essential bulwark of a democratic society. It is a constitutional principle of the first importance. It is because of our belief in this principle that we make our recommendations. Too often the judges become the meat in the sentencing sandwich. If the sentence is perceived to be too lenient they are blamed. If it is perceived to be too harsh they are also blamed. In this way, judges are unfairly brought into public controversy. Our recommended system will allow them some measure of protection from such controversy, and thus enhance public confidence in their office. At the same time, it will place the judiciary in a better position to exercise their vital judicial functions independently. Our proposals represent a partnership between three branches of our government – the judiciary, whose independence must be fully protected, Parliament, who must have the final say, and the executive, which must manage the prison system.

The Commissioners responsible for the reference were Dr Warren Young and Sir Geoffrey Palmer. The researchers and writers were Claire Browning and Susan Hall.



---

TERMS OF  
REFERENCE

The Law Commission has been asked to consider:

- the advantages of providing greater guidance to judges on the exercise of their sentencing discretion, and appropriate mechanisms for achieving this (including whether New Zealand would benefit from the establishment of a body such as the UK Sentencing Guidelines Council);
- the extent to which such guidance can serve as an instrument to enable prison muster issues to be managed more effectively; and
- whether the parole eligibility component of prison sentences requires adjustment to ensure a closer relationship between the nominal sentence imposed and the actual time served.

# Executive summary

## BACKGROUND

1. In February 2006, the Law Commission was asked to consider whether improvements could be made to the existing sentencing and parole structures.
2. More specifically, we were asked to consider whether New Zealand should establish a Sentencing Council to give greater guidance to sentencing judges, and whether there should be changes to parole to ensure a closer relationship between the sentence imposed in court and the time that a prisoner actually serves.
3. Our recommendations are twofold: the establishment of a Sentencing Council in New Zealand, to draft sentencing guidelines; and the reform of parole, so that at least two-thirds of a determinate sentence is served.

## THE NATURE OF THE PROBLEM

4. In our view, one of the core problems with New Zealand's current sentencing and parole arrangements is their highly discretionary nature.
5. The Sentencing Act 2002 codified sentencing purposes and principles; listed aggravating and mitigating factors; required judges to impose the maximum sentence or something close to it in the worst cases; provided for 17-year minimum terms for aggravated murder; and established a hierarchy of sanctions. However, in general judges remain free to determine policy as to sentence levels, both generally and in the individual case, subject only to the constraint of the maximum penalty for the offence.
6. The key problems that arise from the extent of judicial sentencing discretion are:
  - To the extent that guidance as to sentence levels exists, it is provided by the higher court judiciary. Judicial guidance cannot be informed by the range of perspective, experience and expertise that would be beneficial in the development of sentencing policy, including the setting of sentence levels.
  - Guidance is given only in the context of cases that come before the courts on appeal. It is reactive rather than proactive, which may adversely affect its timeliness. For the same reason, guidance tends to be given in relation to offences at the upper end of the spectrum of seriousness, so that the coverage is incomplete.
  - There is significant inconsistency in the sentences imposed between judges and between courts, particularly in relation to lower end offences.
  - There is no mechanism whereby Parliament can reliably alter policy as to sentence levels, or reliably predict what sentence levels will flow from particular maximum penalties or other legislative prescriptions.

- The guidance as to sentence levels that currently exists does not adequately take into account the cost-effectiveness of different sentencing options, including their prison population impact.
7. Under the Parole Act 2002, most offenders sentenced to a determinate sentence of more than two years are eligible for parole release after serving one-third of their sentence. The sentencing judge can impose a longer minimum period of imprisonment under section 86 of the Sentencing Act 2002, but this rarely happens: figures supplied by the Ministry of Justice for 2004 and 2005 indicate that minimum periods of imprisonment are imposed in around 11 percent of eligible cases.
  8. The fact that the current parole structure sets eligibility at one-third has created some problems, chiefly:
    - The potentially large disjunction between the sentence imposed by the judge and the actual time served gives rise to public anger and frustration, particularly on behalf of victims and their supporters. It is one of the principal drivers of calls for “truth in sentencing”, and may fuel the view that the system is unduly lenient.
    - It places pressure upon the Parole Board to revisit matters of punishment and deterrence in addition to risk; this is a problem because punishment and deterrence are the province of the sentencing judge and will have already been fully considered at the time of sentence.
    - The wide discretion available to the Board, combined with uncertainty about the effect of the current statutory tests governing release, produces inconsistent decision-making.
    - It also results in unpredictability, thus posing a problem for prison population forecasting and Department of Corrections’ sentence planning.
  9. These are not new issues. They have been features of New Zealand’s sentencing and parole system for a very long time. This paper considers what might be done to address them.

#### A SENTENCING COUNCIL AND SENTENCING GUIDELINES

10. We recommend the establishment of a Sentencing Council in New Zealand, to draft sentencing guidelines. Such a Council is the only vehicle that can address all of the necessary issues: the sentencing problems that we have identified; and shorter sentences to compensate for our proposed parole reforms, which are predicted to increase the proportion of time served from around 62 percent to over 80 percent of the sentence.
11. First, a Sentencing Council would broaden the base of responsibility for determining sentencing policy. Recommendations directed to this issue include the Council’s mix of judicial and non-judicial membership, and its consultation process.
12. Secondly, it is expected to promote sentencing consistency, because judges would be required to adhere to the guidelines unless satisfied that this would be contrary to the public interest. Furthermore, the Council would be in a position to issue guidelines in relation to the whole range of offences.

13. Thirdly, it would give the executive greater input into sentencing policy. Avenues for executive input include provision for a formal request by the Minister of Justice for consideration of a particular issue; official observers to the Council; informal dialogue channelled through the Chair; and ultimately the need for the Council to satisfy Parliament that its guidelines should proceed. In essence, the recommended process enables contributions to the development of sentencing policy from all three branches of government – the judiciary, Parliament, and the executive.
14. Finally, sentencing guidelines coupled with parole reforms are a proven mechanism for managing penal resources. We recommend that this should be a key consideration for the Council and for Parliament: the Council should undertake prison population modelling, to assess the effect of its recommendations, and attach a forecast to each set of draft proposals. The need for compensatory sentencing changes in the light of our proposed parole reforms has already been noted; this is an issue with which a Sentencing Council can assist, and from our perspective is a strong argument in favour of the establishment of such a body. However, it should also be noted that the establishment of a Council in itself will not guarantee or even indicate this outcome. Whether there is increased or decreased demand for penal resources will be wholly dependent upon the nature of the resulting sentencing guidelines.

## THE REFORM OF PAROLE

15. In relation to parole, we recommend the retention of parole for the purpose of reducing the risk of reoffending. Parole can achieve this purpose in three ways. First, its availability may prompt prisoners to participate in prison treatment programmes. Secondly, it is a tool for managing prisoners' release and reintegration: there is some evidence that parole postpones reoffending. Thirdly, it builds flexibility into the system for the purpose of identifying and differently managing high-risk prisoners.
16. However, substantial reform to the present parole arrangements is required. Prisoners serving long-term determinate sentences (sentences with a prison term of more than 12 months) should serve at least two-thirds. Those whose sentence is short (12 months or less) should not be eligible for parole and should serve their whole time.
17. In addition to the higher proportion of time served, we recommend a slightly different sentencing practice. For long-term sentences, offenders should be told when the sentence is imposed that the total sentence is (for example) six years; at least four years of the six must be served in custody; and there will be a further two years during which the offender may or may not be released, depending upon the Parole Board's assessment of his or her recidivism risk.
18. Both aspects of the parole reforms are intended to promote "truth in sentencing", and thereby enhance public confidence and alleviate discontent. Greater public confidence, coupled with a coherent legislative framework for parole, is expected to reduce the pressure upon the Parole Board to revisit sentencing considerations of punishment and deterrence. If the Board's task and approach are more focused, there will be smaller variation in release outcomes; this will in turn facilitate prison population forecasting, and Corrections' sentence planning.

THE INTEGRATED  
NATURE OF OUR  
PROPOSED  
REFORMS

19. Our proposed reforms to the sentencing and parole structures should not be undertaken unless they proceed in tandem, for two reasons.
20. If, as predicted, the parole changes increase the proportion of time served from around 62 percent to over 80 percent of the sentence, the sentences imposed in court will need to be around 25 percent shorter to ensure that the length (as opposed to proportion) of time served is the same and avoid substantial growth in the prison population. Sentencing guidelines can achieve this in a way that the present mechanism of amending maximum penalties cannot, because maximum penalties have little impact on sentencing in the average case: they address only the worst cases.
21. Conversely, the efficacy of sentencing guidelines would be fundamentally undermined in the absence of parole reform – that is, if the Parole Board was to retain its current discretion spanning two-thirds of the total sentence.

PARALLEL WORK  
ON MAXIMUM  
PENALTIES

22. Maximum penalties have emerged historically in an ad hoc fashion. They arguably contain a number of relativity problems and other anomalies. They have also been generally left untouched despite significant changes to the sentencing structure, including changes in remission and parole eligibility.
23. Sections 8(c) and (d) of the Sentencing Act 2002, respectively, codify the presumptions that the maximum penalty should be imposed in the most serious cases, and a penalty near to the maximum should be imposed for offending that is near to the most serious. If the development of guidelines was based upon the existing structure of maximum penalties – as sections 8(c) and (d) require – and if that structure remained untouched, the levels at which guidelines were set and the relativities between one offence and another would be likely to reflect the existing maximum penalty problems.
24. This would create something of a dilemma for the Council: it could seek to draft guidelines that were coherent and defensible by reference to all of the other relevant considerations, but then, in all likelihood, would be accused of acting contrary to law.
25. We therefore have asked for a reference to review the role, format and structure of maximum penalties in parallel with the development of the inaugural guidelines. As a corollary of this review, we recommend that sections 8(c) and (d) of the Sentencing Act 2002 should be repealed.



# Summary of recommendations

- R1 A Sentencing Council should be established with a mandate to draft sentencing guidelines.
- R2 The Council should have the following purposes:
- promote consistency in sentencing practice between different courts and judges;
  - ensure transparency in sentencing policy;
  - promote consistency and transparency in Parole Board practice;
  - foster the development of sentencing and parole policy, informed by a breadth of experience and expertise;
  - facilitate effective management of penal resources;
  - inform politicians and policy makers about sentencing and parole practice and reform options;
  - inform the general public about sentencing and parole policies and decision-making, and thereby promote public confidence in the criminal justice system.
- R3 The Council should have the following functions:
- draft sentencing guidelines;
  - draft parole guidelines;
  - assess and take account of the cost-effectiveness of the guidelines;
  - provide advice on sentencing and parole issues that relate to the development and use of the guidelines, either at the request of the Minister of Justice, or on its own initiative;
  - collate and provide information about the extent of compliance with the guidelines for sentencing judges and the Parole Board;
  - publish and make accessible information about sentencing and parole to the general public.
- R4 The purposes and functions listed above should be set out in legislation.
- R5 The Council should have a membership of 10, comprising:
- four judicial members: two from the District Court; one from the High Court; one from the Court of Appeal;
  - the Chair of the Parole Board;
  - five members with expertise or understanding in one or more of the following areas: criminal justice matters; policing; the assessment of risk; the reintegration of prisoners into society; the promotion of the welfare of victims of crime; the impact of the criminal justice system on Māori and minorities; community issues affecting the courts and the penal system; public policy.

- R6 In addition to the 10 members, one or more appropriate officials should be appointed to the Council as observers to ensure appropriate dialogue and information exchange.
- R7 EITHER the Head of the Sentencing Council should be a judge appointed from the Court of Appeal or the High Court; OR the Head of the Sentencing Council should be one of the non-judicial members.
- R8 The Council should be an independent statutory body, not a Crown entity.
- R9 Relevant provisions of the Crown Entities Act 2004 can and should be adapted accordingly when drafting the legislation that constitutes the Council, because the Council should have many of the characteristics of a Crown entity.
- R10 Appointments to the Council should be made as follows:
- the Chair of the Parole Board should be a member ex officio;
  - the judicial members of the Council should be appointed by the relevant Head of Bench, without executive involvement;
  - the five non-judicial members should be appointed by the Governor-General on the recommendation of the Minister of Justice.
- R11 For both judges and Ministerial appointees, the initial term of office should be either three or five years, with the option of one renewal, up to a total maximum term of seven years.
- R12 Accountability requirements upon the Council should include:
- it should be listed in the Fourth Schedule to the Public Finance Act 1989;
  - it should be required to file an annual report in Parliament;
  - it should be audited by the Auditor-General; and
  - it should be subject to the Official Information Act 1982.
- R13 The format of the sentencing guidelines should be either numerical or narrative or a combination of both, depending upon the objectives of the particular guideline.
- R14 The guidelines should apply only to sentences imposed in the District Court and High Court; they should not apply to the Youth Court.
- R15 The Council should draft one comprehensive set of inaugural sentencing guidelines before they come into force.
- R16 The inaugural sentencing guidelines should target imprisonable offences coming routinely before the courts that result in a significant number of sentences of imprisonment, to ensure that priority is initially given to offences where there is the greatest need for consistent and cost-effective sentencing.
- R17 An establishment unit should be set up prior to the passage of the legislation, attached to the Law Commission and responsible for presenting the draft inaugural sentencing guidelines to the Council, once established, for consideration and endorsement, so that the Council can present them to the Minister of Justice for tabling in Parliament within two years.
- R18 Once the Council is formally established, its first function should be to review and endorse the inaugural sentencing guidelines drafted by the establishment unit; after that the Council should contribute to the ongoing maintenance and development of guidelines generally, by governing the work of a secretariat (which should undertake the bulk of the work).

- R19 The Council should in general be empowered to consult as it considers appropriate on its draft guidelines; however, it should be required to publish draft guidelines in an accessible form with a prison population forecast attached, and seek public submissions.
- R20 Prior to the commencement of each set of guidelines, the Council should ensure that they are notified in the *Gazette* in a similar manner to regulations; published in hard copy; and made available on the internet.
- R21 The Council should collaborate with the Ministry of Justice and other justice sector agencies in relation to prison population forecasting and statistical analysis of sentencing and parole decisions; and should adhere to interagency protocols to ensure common data standards and consistent messages.
- R22 Guidelines should be endorsed by Parliament by way of the following process:
- the guidelines would be tabled in Parliament by the Minister of Justice and referred to the appropriate Select Committee;
  - for the inaugural guidelines the Select Committee would have 30 sitting days to table any report on the guidelines that it chose to make, and for subsequent iterations of the guidelines the Committee would have 15 sitting days;
  - if Parliament determined that the guidelines should not come into force, it would need to disallow them by way of a negative resolution on a notice of motion, within 30 sitting days in relation to the inaugural guidelines, and 15 sitting days in relation to subsequent iterations of the guidelines;
  - if this did not occur, the guidelines would automatically come into force 20 working days after the expiry of the specified disallowance period;
  - if the guidelines were disallowed, they would be sent back to the Council for revision; and
  - the guidelines would need to be accepted or rejected as a whole by Parliament.
- R23 Judges and the Parole Board should be required to adhere to the guidelines unless they are satisfied that it would be contrary to the public interest to do so; and should also be required to give reasons for departures from the guidelines.
- R24 As a measure of the efficacy of the guidelines and to encourage compliance, departure rates from the sentencing guidelines for each court district, and Parole Board departure rates from the parole guidelines, should be published in the Council's annual report.
- R25 There should be provision for Heads of Bench or the Minister of Justice to request consideration by the Council of a particular issue relating to the sentencing guidelines; and for the Chair of the Parole Board or the Minister of Justice to request consideration by the Council of a particular issue relating to the parole guidelines. The Council in revising the guidelines should be required to take into account such a request and the reasons for it.
- R26 Discretionary early release (parole) should be retained for the sole purpose of reducing the risk of reoffending.
- R27 Judges should articulate long-term sentences (to be defined as sentences with a prison term of more than 12 months) in a slightly different way: both the nominal sentence and its parole component should be stated in open court.
- R28 The parole eligibility date for long-term sentences should be 12 months, or two-thirds of the nominal sentence, whichever is the greater.

- R29 Section 86 of the Sentencing Act 2002, which currently provides for judges to impose a minimum term of imprisonment of up to two-thirds, should be repealed.
- R30 Short-term sentences (to be defined as sentences with a prison term of 12 months or less) should not include a parole component; the sentence should be served in full.
- R31 The “exceptional circumstances” threshold in section 25(1) of the Parole Act 2002 should be lowered very slightly, to “special circumstances relating to the offender”.
- R32 The Parole Board should continue to receive victim submissions in writing, as it does currently. However, it should have and exercise discretion about whether to hear them in person. Victims should only be heard in person if their written submissions indicate that they may be able to contribute to a risk-focused discussion about whether the prisoner should be released and, if so, how that person should be managed.
- R33 Prisoners who serve the full term of a long-term sentence should continue to be subject to conditions for a six-month period, as they currently are under section 18(2) of the Parole Act 2002.
- R34 Prisoners who are paroled within six months of their release date should also be subject to a six-month period of parole conditions.
- R35 Prisoners released from short-term sentences should be subject to conditions imposed at the discretion of the sentencing judge; if a judge chooses to impose conditions, it must be for a minimum of six months and may be for up to 12 months.
- R36 Upon releasing a prisoner, the Parole Board should be empowered to request a three-month progress report.
- R37 The provisions relating to back-end home detention should be amended, to provide that back-end home detention is only available after the parole eligibility date.
- R38 Sentencing and parole reform must occur together.
- R39 The inaugural sentencing guidelines, ongoing revisions to the guidelines, and changes to parole eligibility should apply to all offenders sentenced post-commencement; however, prisoners serving existing sentences will not be affected.
- R40 Section 6 of the Sentencing Act 2002 should be amended by inserting a subsection to provide that, for the avoidance of doubt, a sentencing guideline is not a penalty for the purposes of the section.
- R41 The Law Commission should be asked to review the role, format and structure of maximum penalties in parallel with the development of the inaugural guidelines, and recommend any changes that are required to correct existing anomalies and ensure consistency with the purposes and framework of a guidelines system.
- R42 As a corollary of this review, sections 8(c) and (d) of the Sentencing Act 2002 should be repealed.

# Chapter 1

## A Sentencing Council and sentencing guidelines

- INTRODUCTION**
26. In February 2006, the Law Commission was asked to consider whether improvements could be made to the existing sentencing and parole structures.
  27. More specifically, we were asked to consider whether New Zealand should establish a Sentencing Council to give greater guidance to sentencing judges, and whether there should be changes to parole to ensure a closer relationship between the sentence imposed in court and the time that a prisoner actually serves.
  28. In our view, one of the core problems with New Zealand's current sentencing and parole arrangements is their highly discretionary nature. The manifestations of this problem in relation to sentencing are described in this chapter; in relation to parole, they are described in chapter 2. We have concluded that a Sentencing Council should be established in New Zealand, for purposes that chiefly include drafting sentencing guidelines; and that parole should be reformed, so that at least two-thirds of a determinate sentence is served.

- PROBLEMS WITH THE CURRENT SENTENCING STRUCTURE**
29. Prior to the Sentencing Act 2002 there were few constraints upon, or guidance as to, the exercise of judicial discretion in sentencing. The legislature prescribed maximum penalties, typically set at a high level and reserved for the worst hypothetical class of case of its type. It also prescribed the available range of custodial, community-based and monetary penalties and stipulated the proportion of the prison sentence that needed to be served before parole eligibility. Although there were a very small number of statutory presumptions and semi-mandatory orders for specific offences, the judiciary were largely left to their own devices in determining the relevant purposes and principles of sentencing and sentencing levels or tariffs, both as a matter of overall policy and in the individual case.
  30. The Sentencing Act 2002 effected a significant change to this traditional approach. For the first time it articulated, in a non-prioritised and non-exhaustive manner, all of the major purposes and principles of sentencing and the relevant aggravating and mitigating factors to be taken into account in the individual case.

31. Some minimal guidance as to the choice of sanction was also provided in four respects:
  - Sections 8(c) and (d) stipulated that the maximum penalty was to be used for the worst offence of its type, and a sentence near to the maximum for an offence near to the worst of its type.
  - Section 104 prescribed a presumptive 17 year minimum term for an offence of murder accompanied by one or more specified aggravating factors.
  - Sections 11 to 16 established a hierarchy of sanctions.
  - Sections 46 and 56 specified the purposes for which the sentences of supervision and community work respectively could be used.
32. These provisions provide little or no assistance in determining the “tariff” custody threshold or sentence length appropriate for the average case of each type coming before the courts. In particular, the maximum penalty, being reserved for the worst class of case in the offence category, is of only indirect and sometimes marginal relevance to day-to-day sentencing. In that respect, the sentencing system remains a highly permissive one, characterised by substantial judicial discretion as to the way in which the purposes and principles of sentencing should be translated into sentencing levels.
33. Under the current structure, instead of legislative direction, the principal mechanism for guiding the exercise of judicial discretion as to appropriate sentence levels is appellate review.
34. Unlike many American jurisdictions, New Zealand has historically granted both prosecution and defence generous rights of appeal: the former on the basis that the sentence is manifestly inadequate or wrong in principle; and the latter on the basis that it is manifestly excessive or wrong in principle.
35. For the last few decades or so, appellate court decisions have increasingly been relied upon as sources of precedent. They have become more readily available, through the advent of specialised law reports such as the *Criminal Reports of New Zealand*; the publication of the *Sentencing Digest*, which is a regularly updated compilation of sentencing judgments grouped by offence category, available to judges and counsel; and looseleaf texts such as *Adams on Criminal Law* and *Halls Sentencing*, which collate and synthesise developments in sentencing law and practice.
36. However, the usefulness of individual appellate court decisions is limited. They provide little in the way of binding authority, and thus consistency, because the scope and outcome of each decision are dictated by the facts of the case. It is relatively easy for counsel and judges who wish to advocate for a different decision in a subsequent case, either at first instance or on appeal, to distinguish the earlier case on the facts or follow a divergent line of authority. Even a collation of sentencing precedents offers only a rough guide, at best, as to the appropriate type and range of sentence.
37. Accordingly, during this period, the Court of Appeal has developed a practice of issuing guidance for the benefit of lower courts, in the form of a slightly different kind of judgment that is known as a “guideline judgment”. Guideline judgments

offer authoritative guidance that is not fact-specific, and thus is intended to be of general application. For example, in *R v Taueki* [2005] 3 NZLR 372 the Court, in relation to grievous bodily harm, specified three sentencing categories of escalating seriousness, depending upon the number and nature of aggravating factors relating to the offending; listed examples of the aggravating factors; and gave a range of starting points for each category (three to six years, five to 10 years, and nine to 14 years respectively). In *R v A* [1994] 2 NZLR 129 the Court, in relation to rape, specified a starting point for a fully contested case of eight years, subject to aggravating or mitigating features.

38. There is no statutory basis for the use of guideline judgments in New Zealand. However, their use was recognised and endorsed in a 2003 practice note.<sup>1</sup> They are a creation of the judiciary, devised with the aim of assisting sentencing judges and minimising disparity while leaving room for individual justice. The Court of Appeal has recently confirmed this objective when it said:<sup>2</sup>

*The principal objective of the guidelines set out in this judgment is consistency. Consistency has always been an objective of sentencing policy, and section 8(e) of the Sentencing Act 2002 now gives that statutory backing. We hope that this judgment will provide a single point of reference for sentencing Judges and counsel, and that this will lead to consistency in the sentencing levels imposed on offenders. What we seek to achieve is consistency in the approach adopted by sentencing Judges, which should in turn lead to consistency in sentencing levels. This does not override the discretion of sentencing Judges, but rather provides guidance in the manner of the exercise of that discretion.*

### Limitations of guideline judgments

39. Notwithstanding their advantages relative to individual appellate decisions, in our view guideline judgments have significant limitations:
- They are produced by the higher courts (typically the Court of Appeal) and therefore lack the input of the District Court judiciary (who are responsible for the vast bulk of sentencing, and are the principal users and thus the experts in relation to non-custodial sentencing options). The Court also lacks the range of perspective, experience and expertise that would be beneficial in the development of sentencing policy.
  - The Court of Appeal does not have the resources to undertake systematic research, nor to investigate the cost-effectiveness of different sentencing options and the wider impact of sentencing policy. Guideline judgments are thus largely dependent upon the quality and the nature of the information provided by counsel appearing in the particular case that is being used as the vehicle for a guideline judgment.
  - Since guideline judgments have been promulgated within the context of an individual case in which the parties to the appeal are awaiting the outcome, they are subject to time constraints. This means that, even if adequate resources were available, the sort of research that might be desirable in developing a policy as to sentencing levels cannot feasibly be undertaken.

<sup>1</sup> *Practice Note – Sentencing 2003* [2003] 2 NZLR 575.

<sup>2</sup> *R v Taueki* [2005] 3 NZLR 372, para 10.

- Because guideline judgments are delivered in the context of particular cases coming before the appellate courts, they tend to yield an unbalanced set of precedents. Serious crimes and severe sentences predominate in such appeals; consequently guideline judgments rarely address offences at the lower end of the spectrum of seriousness. Hence, for example, guidance as to the custody threshold for routine offences, such as repeated driving with excess blood alcohol or common assault, is difficult to find. The result is that comprehensive guidance that ensures a coherent sentencing policy across the full range of offences, or even those that result in imprisonment, cannot readily be pursued through the vehicle of guideline judgments.
- They are given as obiter dicta (that is, judicial comments of general application, which exceed the scope of what is necessary to reach a decision in the instant case). Obiter dicta do not have the standing of full legal precedent, although guideline judgments are put forward and generally accepted as high authority on sentencing matters.

### Lack of consistency

40. There is a great deal of anecdotal evidence about the degree of sentencing inconsistency between judges and courts. This is confirmed by the findings of a literature review conducted in 1991,<sup>3</sup> and recent empirical research conducted on behalf of the Law Commission. The latter research was conducted by Taylor Duignan Barry. It undertook a national comparison across court districts of imprisonment practices in relation to offence categories with sufficiently large numbers to enable a robust analysis. Some of the results are reproduced in the Appendix. They demonstrate substantial variations in practice. These are unlikely to be explicable on the basis of differences in offence or offender variables. Instead, they clearly indicate that some courts are systematically more severe than others, at least in relation to the percentage of convicted offenders who are imprisoned.

### Judicial control of sentencing policy, including the quantum of punishment

41. There is no mechanism whereby Parliament can alter sentencing policy, other than the blunt tool of amending maximum penalties. Maximum penalties have little impact on sentencing in the average case, because they address only the worst cases. There is also a limit to what can be achieved with other legislative provisions that attempt a greater degree of prescription, such as sections 103 and 104 of the Sentencing Act 2002 (which provide for minimum periods of imprisonment for murder). The upshot is that sentencing judges largely determine sentencing policy. The executive can neither determine nor reliably predict what sentence levels will flow from maximum penalties or other legislative prescriptions, and therefore is forced into a reactive rather than proactive position in relation to its management of penal resources. An important public policy matter thus evolves in a non-consultative, non-transparent, and essentially anti-democratic way.
42. In defence of this aspect of the status quo, we repeatedly encountered three responses: the importance of judicial independence in the sentencing area; the merits of individualised justice; and the impropriety of any structure

<sup>3</sup> Geoff Hall “Reducing Disparity by Judicial Self-Regulation: Sentencing Factors and Guideline Judgments” (1991) 14 NZULR 208.

that would promote consideration of resources in the context of setting punishment levels.<sup>4</sup> We do not consider any of the three to be convincing arguments against change.

### *Judicial independence*

43. Some, including many whom we consulted during the course of this project, contend that constraining sentencing discretion conflicts with the principle of judicial independence. We do not agree. There can be no dispute that the legislature possesses constitutional authority to enact laws that prescribe particular sentences, or otherwise fetter judicial discretion. In our view, judicial independence requires that judges should be able to pass sentence in each case without fear or favour, affection or ill-will – in other words, judges should decide individual cases impartially without interference from the other branches of government. However, it does not follow that it is exclusively for judges to determine the details of the overarching framework. If the legislature is constitutionally able to prescribe maximum, mandatory or mandatory minimum penalties, it is equally constitutionally able to dictate the nature or the range of penalties that ought to be applied in the ordinary run of cases.

### *Individualised justice*

44. There is also a prevailing view that broad and relatively unstructured judicial discretion is necessary to promote individualised justice. The argument is that legislative efforts to structure or constrain judicial discretion would result in undue rigidity that would prevent the judge from tailoring the sentence to the offender and the offence, or giving weight to all of the factors before the court. In other words, there would be insufficient room for account to be taken of legitimate differences between offences and offenders, such as the severity of the crime committed, the degree of contrition of the offender, or the extent of any redress offered to the victim. We agree that it is important to ensure that the sentencing system is sufficiently flexible to allow relevant differences between cases to be reflected in the choice of sentence, so that dissimilar cases are not treated in the same way. It must also be acknowledged that the experience, both in New Zealand and overseas, is that legislative constraints (in the form of mandatory, semi-mandatory, minimum or presumptive sentences) have usually resulted in undue rigidity. However, it is equally important that the system ensures that offenders committing similar offences in similar circumstances should receive roughly the same sentence, unless some relevant factor that distinguishes them can be found. It is unjust that an offender in Invercargill should be given a significantly harsher or more lenient sentence than an equivalent in Auckland. Yet, the existing structure allows that to occur. Individualised justice can easily become an excuse for inconsistent justice.

---

4 A fourth objection has been vigorously propounded in Australia, but has not found favour in New Zealand. It is that sentencing is a complex and ethereal exercise of “intuitive” or “instinctive” synthesis of all of the relevant purposes, principles and factors; therefore judges can neither be held to a particular approach, nor even required to articulate it. See *Markarian v R* (2005) 79 ALJR 1048 (HCA) for the most recent authority on, and debate of, this issue.

*Consideration of resources in the context of setting punishment levels*

45. A further oft-repeated objection to greater executive or Parliamentary involvement in this area is that resource considerations would inevitably become a factor that might dictate or influence decision-making as to punishment levels. The view was widely expressed to us that, in the punishment context, this would be improper. Those expressing such views agree that punishment is the only area of social policy that is set without reference to costs and benefits and without consideration of competing demands for the tax dollar; other elements of expenditure within the criminal justice system (e.g. policing, crime prevention, access to justice) are not exempt. As to why the same approach should not apply to punishment levels, there are typically two responses. The first is that punishment is a matter of justice, and justice should not be affected by cost. This seems to suggest, erroneously in our view, that there is some “right” punishment in absolute terms that ought to be imposed once we have identified what it is; in reality, punishment levels are a matter of values, and costs are one of the relevant factors informing those values. The second argument is that punishment is about community safety; however, if that were a sufficient response, there would be no limit on policing or crime prevention expenditure either. We have concluded that, in principle, it is right for the legislature to take account of resources in all aspects of criminal justice, including punishment levels. However, in practice it is presently unable to do so effectively, or indeed barely at all, because it cannot reliably determine the outcome of legislative interventions. This is not just an issue of principle: it is an immediate issue of practical concern. As has been demonstrated in recent years, changes in judicial approach to the use of imprisonment may have a significant prison population impact.

**SENTENCING  
REFORM  
OPTIONS**

46. We considered five options for sentencing reform, and rejected four of them, on the basis that none of the four would completely address the issues that we have identified above, and some are unsatisfactory for other reasons.

**Option 1: the provision of better sentencing information**

47. The first option is the provision of better sentencing information, for the benefit of both the judiciary and the public. In New Zealand, there is some information available in the products identified in para 35 above; in addition, the Ministry of Justice publishes aggregate information summarising conviction and sentencing outcomes. However, for daily judicial use and guidance, none of this material really suits the purpose.

48. Accordingly, one way forward might be to dedicate resources to the provision of information that is comprehensive, apt, and widely disseminated. An example of this kind of initiative is the online sentencing monitoring resource launched late in 2005 by the Victorian Sentencing Advisory Council. One of the Council’s main functions is to provide statistical information on sentencing to the public, the judiciary and the government, including information on current sentencing practices. Its website includes regularly updated data on the number of people sentenced; sentencing outcomes including historical sentencing trend data; trends in the composition of Victoria’s adult prisoner and youth detainee population; imprisonment rates and prison receptions; and community correctional statistics.

49. However, initiatives of this sort merely collate and present data on existing sentencing practices. In other words, they provide more information about the status quo.

Of the problems that we have identified with the status quo, lack of consistency is the only one with which an initiative of this sort might assist, and even in that respect it would probably be limited in its efficacy: it would illustrate inconsistency, but not offer judges any guidance about which of the different approaches should be preferred.

### Option 2: more legislative guidance

50. The second option is to build upon the Sentencing Act 2002 by offering a greater quantity of legislative guidance of a more detailed kind. Past attempts by the legislature to provide guidance as to sentencing levels, both in New Zealand and overseas, have been problematic. New Zealand examples include sections 5 and 6 of the Criminal Justice Act 1985 and section 104 of the Sentencing Act 2002.
51. Sections 5 and 6 of the Criminal Justice Act 1985 established a presumption in favour of custody for violent offenders and a presumption against custody for property offenders. Those provisions were abolished in 2002 because they established presumptive thresholds simply on the basis of generic offence categories. They did not necessarily reflect community perceptions of the relative seriousness of the offending in the particular case, and unsurprisingly judges routinely departed from them.
52. Section 104 of the Sentencing Act 2002, which establishes a presumptive 17-year minimum term for murder in specified aggravating circumstances, has caused problems when the aggravating factors that bring a murder within the section are combined with mitigating factors such as guilty pleas, which are routinely present in such cases. In addition, by virtue of the nature of the crime, the circumstances of many murders will meet the requirements of at least one of the aggravating factors. Consequently a clump of sentences is emerging just over the 17-year threshold: the distribution of sentences is not spread in a way that would truly reflect the varying culpability levels.
53. In short, neither legislation nor the legislative process is suited to providing detailed and nuanced guidelines that can be modified systematically and rationally in a timely way.

### Option 3: better-resourced and proactive appellate guidance

54. Some of the limitations of current forms of guidance could be overcome by the third option of empowering the Court of Appeal (either on its own initiative or at the request of some other party) to issue guidance without waiting for a suitable case to come before it, and by providing it with sufficient resources and access to external expertise to enable it to do so. That would provide the opportunity for better researched and informed guideline judgments, across the full range of offence types, without the need to await an appropriate case.
55. A number of overseas jurisdictions have introduced initiatives with the objective of enhancing the range and quality of appellate guidance, for example:
  - In Victoria, guideline judgments may be given after an application from a party to the appeal, or by the court on its own initiative. The Victorian Sentencing Advisory Council, established in 2004 and composed entirely of non-judicial

members, may provide the Court of Appeal with the Council's written views on the giving or review of a guideline judgment (although it has not yet done so).

- In New South Wales, the Attorney-General can request that the Court of Appeal give a guideline judgment on a particular sentencing matter.
  - In England and Wales, the Sentencing Advisory Panel, a non-departmental public body established under the Crime and Disorder Act 1998 with a broad-based judicial and non-judicial membership, was empowered to propose to the Court of Appeal that guidelines be framed or revised. Moreover, whenever the Court of Appeal decided to draft a guideline judgment, it was required to notify the Panel, which was in turn required to consult on the issue, form a view and provide its advice to the court. Before the structure was changed with the establishment of the Sentencing Guidelines Council in early 2004, the Panel played a significant role in the development of around a dozen guideline judgments.
56. There are two weaknesses with this option. The first is that the Court of Appeal is a body that is drawn from a small pool: better-resourced and proactive appellate guidance, without more, would not address the “democratic deficit” problem; nor would it facilitate the engagement of the District Court judges who are responsible for most of the sentencing. In theory, this could be addressed to some extent if the Court was to undertake a consultative approach. However, the reality is that judges are probably not well-placed to consult with the full range of interested parties. The only effective mechanism for resolving this issue would be for the Court to be supported by an expert non-judicial body – as it is in Victoria by the Sentencing Advisory Council, and was formerly in England by the Sentencing Advisory Panel.
57. This leads to the second weakness: the issue of whether sentencing guidance is an adjunct to the sentencing function, or a key policy function. Because of our unequivocal view that it is fundamentally a policy issue, we do not favour option 3. Ultimately this option would leave the higher judiciary as the arbiter of sentencing policy. Assuming that, as we have argued, there is an integral and defensible connection between sentence levels and penal resource considerations, judges are neither well-placed nor inclined to assess sentencing matters in this light. We also consider the English experience instructive: the Sentencing Advisory Panel as an adjunct to the Court of Appeal was abandoned in 2003, in favour of the option that we are recommending of a Sentencing Guidelines Council.

#### Option 4: an independent Sentencing Council for advice and information

58. A fourth option is to establish a government-funded but otherwise independent Sentencing Council, whose functions are to advise both the government and the judiciary on sentencing policy matters; to inform and consult with the public; and to monitor and report on sentencing trends and practices. Sentencing Councils of this kind have been introduced in Victoria, New South Wales, and to a lesser extent Scotland:

- In New South Wales, a Sentencing Council was established in February 2003 under the Crimes (Sentencing Procedure) Act 1999.<sup>5</sup> Its functions are to advise and consult with the Attorney-General on standard non-parole periods and guideline judgment matters; to monitor, and report annually to the Attorney-General on sentencing trends and practices; and, at the request of the Attorney-General, to prepare research papers or reports on particular sentencing matters.
  - The Victorian Sentencing Advisory Council has already been mentioned twice, in relation to its appellate court advisory and sentencing information functions (see paras 55 and 48 above).<sup>6</sup> Those are only facets of its role. In short, the Council was established to inform, and be informed by, public opinion on sentencing matters, and to act as a conduit between the public, the government, and the judiciary. Accordingly, in addition to the functions already mentioned, the Council has a broad remit to conduct research and disseminate information on sentencing matters; to gauge public opinion on sentencing; to consult on sentencing matters; and to advise the Attorney-General on sentencing issues.
  - In Scotland, the Sentencing Commission was launched in November 2003. It is an independent, judicially-led body, with a temporary remit to review and make recommendations to the Scottish Executive on the use of bail and remand; the basis on which fines are determined; the effectiveness of sentences in reducing reoffending; the scope to improve consistency of sentencing; and the arrangements for early release from prison, and supervision of prisoners on their release. In essence, the Scottish Commission is a Law Commission focused upon sentencing matters. It therefore differs somewhat from the Australian Councils.
59. Ultimately, as with option 3, our qualitative assessment simply is that more is required. The Victorian Council is the example with the widest remit, but notwithstanding its broad sphere of operation, responsibility for determining sentencing levels remains with the judiciary. In addition, although the Council is as we have said a conduit, it nonetheless largely preserves the separations between the various constitutional limbs. We believe that a forum to draw them together is what is required: the development of sentencing policy should be a well-informed enterprise, as it is in Victoria, but it should also be a joint enterprise.

### Option 5: an independent Sentencing Council with a mandate to draft sentencing guidelines

60. The fifth and final option is to establish a Sentencing Council along the lines of those that have been established in England and Wales, and in around

5 The New South Wales Council has 10 members, consisting of a retired judicial officer (to be chairperson); a person with expertise or experience in law enforcement; three people with expertise or experience in criminal law or sentencing (one in the area of prosecution and one in the area of defence); a person who has expertise or experience in Aboriginal justice matters; and four people representing the general community (two are to have expertise or experience in matters associated with victims of crime).

6 The membership of the Victorian Council must include one senior academic; two people with broad experience in community issues affecting the courts; one highly experienced defence lawyer; one highly experienced prosecution lawyer; one member of a victim of crime support or advocacy group; and people (an unspecified number) with experience in the operation of the criminal justice system.

20 United States jurisdictions. Although such a body might have many of the advisory and educative functions of the Councils described above, it would have the major additional task of devising a set of sentencing guidelines.

61. Sentencing guidelines were first conceived of in the United States. The first body responsible for drafting sentencing guidelines, the Minnesota Sentencing Commission, began work in 1982 and since then Sentencing Councils or Commissions have operated in a number of jurisdictions. The objectives of such bodies vary, as do their names, composition, and constitutional arrangements; however, the proven merit of this kind of initiative in managing penal resources is a key common driver (see further paras 221 to 223 below). In England and Wales, the Sentencing Guidelines Council was established in 2003, primarily motivated by sentencing inconsistency. The Council has overtaken much of the former appellate court function; the Sentencing Advisory Panel, formerly advisory to the Court of Appeal, continues in existence for the purpose of advising and resourcing the work of the Council.
62. In our view, the fifth option best meets New Zealand's needs at the present time. We recommend the establishment of a Sentencing Council in New Zealand, to draft sentencing guidelines. Such a Council is the only vehicle that can address all of the necessary issues: the shorter sentences that would be a necessary corollary to our proposed parole reforms, plus the other sentencing problems that we have identified.
63. We have drawn heavily on the United States' experience of "structured sentencing" (sentencing guidelines, coupled with parole reform) for evidence about whether reforms of this kind are capable of achieving our objectives. However, in developing indigenous reform proposals, we have preferred to focus on comparative models closer to home. We concluded that the United States had little to offer in terms of its particular approach to drafting guidelines: for our views as to the undesirability of the typical American "grid" system, see para 98 below. Setting to one side the nature of their outputs, the United States does offer a multiplicity of Sentencing Council and Sentencing Commission models in its various jurisdictions. However, there are now several such Councils operating in the United Kingdom and Australia, and we have preferred to turn to them for guidance. There were a number of reasons for this: they are jurisdictions with similar climate and objectives and thus their experiences may more readily transpose to New Zealand; it seemed to us desirable (in the event that a New Zealand Council was to proceed) to lay the groundwork for future networking; we have been required to progress this project in a fairly short space of time; and the American literature, while prolific, is somewhat scattered.
64. As noted, the Australian and Scottish Councils differ slightly in their purposes and approach, and we have concluded that more is required. That leaves the Sentencing Guidelines Council for England and Wales. A description and brief assessment of the utility of the English model for our purposes follows.

*One possible model: the Sentencing Guidelines Council for England and Wales*

65. The Sentencing Guidelines Council for England and Wales was established under the Criminal Justice Act 2003, and commenced business in March 2004.

66. The Council consists of the Lord Chief Justice as Chairman, seven judicial members, and four non-judicial members.<sup>7</sup>
67. The Council can self-refer matters. The Home Secretary and the Sentencing Advisory Panel (which was formerly advisory to the Court of Appeal, and continues in existence) may also propose that the Council should issue a guideline in a certain area. The Council must consult the Panel before issuing new or amended guidelines and, in practice, the Panel continues to play a core role in researching and developing the text and proposals on which the Council works: it was described to us as the “engine room” for the Council.
68. In drafting guidelines, the Council must have regard to the need to promote consistency in sentencing; the sentences imposed by the courts; the cost of different sentences and their relative effectiveness in preventing reoffending; the need to promote public confidence in the criminal justice system; and the views communicated to the Council by the Panel.
69. The Council is required to consult on its draft guidelines with a list of specified persons or bodies;<sup>8</sup> other persons or bodies at the direction of the Lord Chancellor after consultation with the Home Secretary; and others whom it considers appropriate (which, in practice, includes the Home Affairs Select Committee).
70. Once a guideline is published as final by the Council, it is definitive. There is no requirement of legislative approval, or appellate court endorsement. The Council has taken an incremental approach to the creation of guidelines, as anticipated by its founding statute. Since its institution in March 2004, it has finalised four guidelines, and drafted six further guidelines and released them for public consultation.<sup>9</sup>

7 The current membership includes the Lord Chief Justice; the President of the Queen’s Bench Division; a Lord Justice of Appeal; a member of the Court of Appeal (Criminal Division); two Recorders; a Senior District Judge; the Chairman of the Wiltshire Branch of the Magistrates’ Association; a Recorder of the Crown Court and Director of Public Prosecutions; a Chief Constable; a senior partner and criminal law specialist; the Head of Policy at Victim Support; the Commissioner for Correctional Services; and the first Chief Executive of the National Offender Management Service. A Professor of Criminal Justice and the Director of Offender, Law and Sentencing Policy in the National Offender Management Service sit as observers.

8 There are 28 statutory consultees: Council of Her Majesty’s Circuit Judges; Council of District Judges (Magistrates’ Courts); Justices’ Clerks’ Society; Magistrates’ Association; Crown Prosecution Service; Association of Chief Police Officers; Police Superintendents’ Association; Police Federation of England and Wales; General Council of the Bar; Law Society; National Offender Management Service; National Probation Service; National Association of Probation Officers; Probation Managers’ Association; HM Prison Service; Prison Governors’ Association; Prison Officers’ Association; Parole Board; Youth Justice Board; Victim Support; Victims Advisory Panel; Justice; Liberty; NACRO; Prison Reform Trust; Penal Affairs Consortium; Howard League for Penal Reform; Commission for Racial Equality; Equal Opportunities Commission; Disability Rights Commission; Law Commission; Centre for Crime and Justice Studies; Association of Directors of Social Services.

9 The four finalised guidelines relate to manslaughter by reason of provocation; reduction in sentence for a guilty plea; new sentences under the Criminal Justice Act 2003 (UK); and the overarching principle of seriousness. The six draft guidelines relate to the Sexual Offences Act 2003 (UK), which contains around 50 sexual offences; breach of a protective order; domestic violence; custodial sentences of less than 12 months; the allocation of “either-way” offences, which can be tried in either the Magistrates’ or Crown Courts; and robbery.

71. Courts are required by the statute to have regard to the Council's guidelines. They must give reasons for imposing a particular sentence, and must explain to the offender the effect of the sentence. If the court departs from relevant guidelines, it must give reasons for doing so.
72. The Council is in its early days and it is therefore difficult to satisfactorily evaluate its progress and success. While we think that the English model offers a great deal, we have identified the following potential weaknesses in it from the New Zealand perspective:
  - Employing two bodies for the task (a Panel and a Council) seems unnecessarily bureaucratic. It is, in all likelihood, an historical accident arising from the fact that the Sentencing Advisory Panel was established first. While the combination of the two memberships provides a broad base of experience for the development of the guidelines, we consider that this should be able to be achieved by one appropriately constituted body.
  - In large part as a result of the existence of two bodies, the process of getting guidelines introduced is cumbersome. Separating the consultation duties between the two bodies has introduced unnecessary exchanges and a duplication of process. Perhaps this is the reason why, after more than two years, the Council has finalised only four guidelines.
  - The incremental approach employed by the Council would not achieve one of the principal purposes for which we believe such a body should exist in New Zealand: an analysis of the cost-effectiveness of the guidelines, by reference to (among other things) their projected prison population impact.
  - There is an overrepresentation of judges on the Council. There are many other valid interests that need to be incorporated into sentencing policy; furthermore, a body which has eight judicial members out of a total membership of 12 gives the overriding impression that it is a judicial body. Given that it is making policy decisions which are inherently political and will inevitably be the subject of some public debate and criticism, we consider this undesirable. Nevertheless, we do regard judicial experience on such a body as absolutely essential if it is to succeed.
  - The format of the guidelines themselves could be improved. The guidelines are long – six pages of text precede the suggested tariff ranges in the Council's manslaughter guidelines. Guidelines in this form for all offences and sentencing matters would constitute a sizeable document which is unlikely to be readily useable by sentencing judges, particularly those working in busy District Courts. We favour a more succinct approach.
  - Finally, we consider that the process by which the costs and benefits of sentencing form an express part of the Council's deliberations is not sufficiently robust for our purposes. The lack of any Parliamentary oversight of the promulgation of the guidelines introduces a significant fiscal risk, since clearly the guidelines can have a marked impact on penal resources.

## RECOMMENDATION

- R1 A Sentencing Council should be established with a mandate to draft sentencing guidelines.

### PURPOSES AND FUNCTIONS OF THE NEW ZEALAND SENTENCING COUNCIL

73. The proposed purposes and functions are designed to address the problems and objectives previously identified.
74. The Council should have the following purposes:
- **Promote consistency in sentencing practice between different courts and judges.** It is not necessarily desirable to dispose of different instances of like offending in a precisely identical way. However, sentencing guidelines and the provision of information about how they are being applied should aim to ensure that there is, at a minimum, a consistent judicial approach and a predictable pattern in sentence severity. The guidelines issued by the Council are expected to promote sentencing consistency, because judges would be required to adhere to the guidelines unless satisfied that this would be contrary to the public interest. Furthermore, the Council would be in a position to issue guidelines for a much greater range of offences than the current mechanism of guideline judgments.
  - **Ensure transparency in sentencing policy.** Guidelines would promote “truth in sentencing” because sentencing benchmarks would be transparent to everybody, including the general public.
  - **Promote consistency and transparency in Parole Board practice.** At present, the practice of different Parole Board panels varies somewhat according to their membership. If there were presumptions about the timing of Parole Board release decisions, this would promote both transparency and consistency of approach. See further paras 77 and 78 below.
  - **Foster the development of sentencing and parole policy, informed by a breadth of experience and expertise.** A body with a varied membership would be able to utilise judicial expertise, but also assist the development of sentencing and parole policy by reference to a broader base of knowledge and perspective, including community sentiment and legislative and governmental priorities. This would occur by reason of the Council’s proposed membership (five judges and five others, plus official observers); and the expectation that it would consult extensively and publicly on its draft proposals. This ought to enhance public acceptance of the policy and, by distributing responsibility for its development, reduce public pressure upon judges and the Parole Board.
  - **Facilitate effective management of penal resources.** Sentencing guidelines coupled with parole reforms are a proven mechanism for managing penal resources. Further to the discussion in para 45 above, we believe that the legislature can properly say that a Sentencing Council must draw up guidelines that meet particular requirements, including consideration of the likely impact of those guidelines on the prison population. This would ensure that, at the level of imposition of individual punishment, judges need not take capacity

matters into account. The sentence would be guided by the guidelines, which would have already been set by reference to cost-effectiveness and any other matters specified by the legislature. In this regard, the Council would undertake prison population modelling to assess the effect of its recommendations, and would attach a forecast to each set of draft proposals. This, in turn, would give the executive somewhat greater control of sentencing policy. Provided there is a sufficiently high degree of compliance with sentencing guidelines, the impact of sentencing and parole policy proposals on the prison population are more likely to be accurately forecast. In the light of these predictions, the government would be able to make submissions on draft guidelines and ultimately, through the power of Parliamentary veto, to determine whether any given set of guidelines proceeds. The government would thus have significantly enhanced control of its Corrections budget.

- **Inform politicians and policy makers about sentencing and parole practice and reform options.** If the Council were to foster politicians' and policy makers' understanding of sentencing and parole practice and the costs and benefits of reform options, this would assist them to accurately identify where there is a need for reform, and respond with effective interventions.
  - **Inform the general public about sentencing and parole policies and decision-making, and thereby promote public confidence in the criminal justice system.** If the public were better informed about the nature and cost-effectiveness of sentencing and parole options, confidence in sentencing and parole decision-making would be enhanced, as would public confidence in the judiciary and the wider criminal justice system.
75. To achieve these purposes, the Council should have the following functions:
- **Draft sentencing guidelines.** The Council should draft guidelines as to both sentencing principles and sentencing levels. See further para 96 below.
  - **Draft parole guidelines.** It should also draft parole guidelines about matters relating to prisoners' risk and release (as opposed to day to day operational matters). See further paras 77 and 78 below.
  - **Assess and take account of the cost-effectiveness of the guidelines.** In drafting its guidelines, the Council should be required to assess the cost-effectiveness of its proposals. This should include modelling of the impact on the prison population. With each set of draft and final guidelines, the Council should provide a forecast of the impact of its proposals on penal resources.
  - **Provide advice on sentencing and parole issues that relate to the development and use of the guidelines.** The Council should provide such advice either at the request of the Minister of Justice (which has the potential, in the light of the Council's broad base of expertise, to add significant value to the quality of the advice being received by government on these issues); or on its own initiative (so that government attention can be drawn to matters undermining the operation of the guidelines).

- **Collate and provide information for sentencing judges and the Parole Board.** The Council would monitor sentencing practice in each district and provide specific information on adherence to and departures from the guidelines, and the more general application of sentencing principles. It would do the same for the Parole Board.
- **Publish and make accessible information about sentencing and parole to the general public.** It would provide more general information about sentencing and parole practice, and the nature and cost-effectiveness of particular sanctions, to the general public, and would have a role in commenting on sentencing and parole issues through the media.

76. The purposes and functions listed above should be set out in legislation.

#### RECOMMENDATION

- R2 The Council should have the following purposes:
- promote consistency in sentencing practice between different courts and judges;
  - ensure transparency in sentencing policy;
  - promote consistency and transparency in Parole Board practice;
  - foster the development of sentencing and parole policy, informed by a breadth of experience and expertise;
  - facilitate effective management of penal resources;
  - inform politicians and policy makers about sentencing and parole practice and reform options;
  - inform the general public about sentencing and parole policies and decision-making, and thereby promote public confidence in the criminal justice system.

#### RECOMMENDATION

- R3 The Council should have the following functions:
- draft sentencing guidelines;
  - draft parole guidelines;
  - assess and take account of the cost-effectiveness of the guidelines;
  - provide advice on sentencing and parole issues that relate to the development and use of the guidelines, either at the request of the Minister of Justice, or on its own initiative;
  - collate and provide information about the extent of compliance with the guidelines for sentencing judges and the Parole Board;
  - publish and make accessible information about sentencing and parole to the general public.

## RECOMMENDATION

R4 The purposes and functions listed above should be set out in legislation.

### The additional Council function of drafting parole guidelines

77. At present, detailed parole policy is set by the Parole Board itself. The Board should undoubtedly continue to regulate itself in respect of day to day operational matters.
78. However, the Sentencing Council should have responsibility for setting some parole guidelines, in addition to its sentencing guidelines function (e.g. guidelines about risk assessment tools and techniques, and presumptions about the timing of release for particular groups of prisoners). Parole guidelines set by the Council would:
  - Ensure that sentencing policy and parole policy are properly integrated.
  - Strike a balance between informed parole policy development, and policy that is independently set, thus minimising the likelihood that those responsible for policy development are thinking primarily in anecdotal terms.
  - Increase the consistency of parole decision-making. Although it was intended that the 2002 establishment of a national Parole Board (as opposed to the former District Prisons Boards) would achieve this, inconsistencies are still apparent.
  - Facilitate prison population modelling, and other decisions around parole such as prisoner eligibility for rehabilitation programmes. One key disadvantage of parole is the uncertainty about the precise point at which prisoners will actually be released. If parole policy is executed in accordance with guidelines, it may alleviate this problem.

### COMPOSITION OF THE COUNCIL

79. The reputation of the Council will determine the extent of its success with its task, and that reputation will to a large extent turn on its composition. There are three key issues:
  - the size of the Council;
  - the nature and distribution of representation on the Council; and
  - who should take the chair.

### The size of the Council

80. Sentencing Councils overseas vary in their size. The Sentencing Guidelines Council in England and Wales has 12 members; the Victoria Sentencing Advisory Council currently has 11 (the number may vary slightly from time to time, due to a requirement for an unspecified number of “people with experience in the operation of the criminal justice system”); the New South Wales Sentencing Council has 10 members; and the size of equivalent bodies in the United States ranges from 11 members in Minnesota to 30 members in North Carolina.
81. The greater the size of the Council, the more representative it can be. However, it is likely to be correspondingly less cohesive. The Council needs to operate efficiently and be publicly credible. For that to be achieved, it needs to be sufficiently large to be inclusive, but not so large that it becomes ungovernable.

82. On balance, we have decided upon a membership of 10. The received wisdom of effective governance is that this is the maximum optimal number; indeed, it may still even be a little large, but against that must be weighed the need to ensure the right Council dynamics and a sufficiency of representation.

### The nature and distribution of representation

83. Overseas commentators are divided as to the appropriate proportion of judicial membership for bodies of this kind. There are arguments for and against appointing a majority of judges. Judges are at the coalface of sentencing decisions and need to have a significant input into the guidelines, for two reasons. The guidelines need to be fit for the purpose – that is, both in the interests of justice, and tailored to the range of circumstances that confront sentencing judges on a daily basis. Furthermore, if not bolstered by judicial confidence, which is likely to flow from significant judicial input, they would likewise be unworkable. However, after undertaking extensive consultation with the judiciary, we did not discern a strong judicial view that a judicial majority on the Council would be necessary to achieve these ends. In addition, since the New Zealand Council’s responsibility for developing guidelines gives it a significant policy function, it would not be desirable for it to be a body that is wholly or chiefly judicial. Nor should it be perceived as such, since that would fundamentally undermine another of the Council’s objectives: to be more representative and thus more democratic. We have therefore concluded that the Council should not be dominated by judges.
84. We believe that a minimum of four judges is necessary to ensure appropriate judicial representation – that is, coverage of all courts, and an appropriate balance between the District Court and higher courts. We thus recommend that there should be four judicial members (two from the District Court, one from the High Court, and one from the Court of Appeal). The Chair of the Parole Board, who is also a judge, should be a member, because of our recommendation that the functions of the Council should include drafting parole guidelines.
85. The remaining five members should have expertise or understanding in one or more of the following areas, which are all both relevant and necessary in relation to sentencing and parole:
- criminal justice matters;
  - policing;
  - the assessment of risk;
  - the reintegration of prisoners into society;
  - the promotion of the welfare of victims of crime;
  - the impact of the criminal justice system on Māori and minorities;
  - community issues affecting the courts and the penal system;
  - public policy.
86. The inclusion of officials as members of the Council would be inappropriate, because it would undermine the Council’s independent status. However, senior government officials (e.g. from the Ministry of Justice and the Department of Corrections) should be appointed as observers, to facilitate ongoing dialogue between the Council and the government. This is the practice followed in England and Wales.

## RECOMMENDATION

- R5 The Council should have a membership of 10, comprising:
- four judicial members: two from the District Court; one from the High Court; one from the Court of Appeal;
  - the Chair of the Parole Board;
  - five members with expertise or understanding in one or more of the following areas: criminal justice matters; policing; the assessment of risk; the reintegration of prisoners into society; the promotion of the welfare of victims of crime; the impact of the criminal justice system on Māori and minorities; community issues affecting the courts and the penal system; public policy.

## RECOMMENDATION

- R6 In addition to the 10 members, one or more appropriate officials should be appointed to the Council as observers to ensure appropriate dialogue and information exchange.

### Who should take the chair

87. There are arguments for and against appointing a member of the judiciary to chair the Council. As we have not felt able to finally determine this issue, alternative recommendations are presented for government decision. These are that the Chair should either be a judge appointed from the Court of Appeal or the High Court; or alternatively that it should be one of the non-judicial members. The argument in favour of a judicial chair is that, as the head of the Council, a senior and well-regarded judge would provide the right kind of profile and leadership to facilitate the development and implementation of the guidelines. He or she might enhance the confidence of the judiciary in the Council's work. The argument against is that the Council would be engaged in policy development and robust public debate, and would also need to liaise with the executive and take account of executive concerns if it is to achieve its long-term goals. It may be undesirable for a judicial chair, as the spokesperson for the Council, to be seen to be doing either of these things.

## RECOMMENDATION

- R7 EITHER the Head of the Sentencing Council should be a judge appointed from the Court of Appeal or the High Court; OR the Head of the Sentencing Council should be one of the non-judicial members.

ORGANISATIONAL  
FORM OF THE  
COUNCIL

88. We propose that the Council should have many of the characteristics of a Crown entity, and relevant provisions of the Crown Entities Act 2004 can and should be adapted accordingly. However, for other reasons, it is thought that the Council should be an independent statutory body.
89. The Council would directly affect and have daily working relationships with both the executive and the judiciary. Its structure should reflect that. There are three policy choices: an autonomous Crown entity (ACE), which would give the executive power to direct the Council to have regard to government policy, and therefore would be a robust mechanism from the government's point of view; an independent Crown entity (ICE), which would not be subject to Ministerial direction, but would have other generally applicable accountability requirements under the Act; or the independent statutory body that is proposed. Aspects of both of the ACE and ICE accountability arrangements may have the appearance of undue executive influence, and for this reason those options have been rejected. (See further the discussion of risks: paras 210 to 212 below.)
90. The Chair of the Parole Board should be a member of the Council *ex officio*. Other than that exception, the appointment of members on the grounds of holding a particular office is not favoured because it is not necessarily a good proxy for identifying members with appropriate knowledge and experience. Instead, judges should be appointed on the basis of particular expertise or interest in the area by the relevant Head of Bench, without executive involvement. The five other appointments, including the Chair, should be made by the Governor-General on the recommendation of the Minister of Justice.
91. Section 28 of the Crown Entities Act sets out a method of appointment which, for the purpose of the Ministerial appointments, should be adapted and included in the legislation constituting the Council. Section 29 of the Crown Entities Act sets out certain criteria according to which appointments should be made. That section should be reproduced, with an additional specification that the Ministerial appointees should have expertise or understanding of the kind identified above in para 85. The legislation should also have a provision similar to section 30 of the Crown Entities Act, which lists certain factors which can disqualify a potential appointee from membership of an entity (including bankruptcy and criminal record).
92. Sections 39 to 43 of the Crown Entities Act provide for removal from office, and there should be equivalent provisions in respect of the Ministerial appointees to the Council. However, section 42, which provides for the removal from office of judges serving as members of a Crown entity, should not be reproduced. In relation to judicial removal, we propose very limited powers. A judge would be removed from the Council in only two circumstances: when they are removed from or cease to hold judicial office by reason of any other enactment; or at the instigation of the Head of Bench responsible for their appointment to the Council.
93. We propose that both judges and Ministerial appointees should be appointed for an initial term of either three or five years, with the option of one renewal, up to a total maximum term of seven years. In this regard, we are seeking to strike a balance between the need for continuity (and thus to stagger new appointments to the Council); and the competing need for breadth and freshness of perspective.

94. Accountability requirements should be established by listing the Council in the Fourth Schedule to the Public Finance Act 1989. Associated consequences would include a Ministerial power to request information relating to the operations and performance of the Council, which the Council may refuse for specified reasons (see sections 133 and 134 of the Crown Entities Act 2004). The Council should be required to file an annual report in Parliament, and should be audited by the Auditor-General. It should be subject to the Official Information Act 1982.

## RECOMMENDATION

- R8 The Council should be an independent statutory body, not a Crown entity.

## RECOMMENDATION

- R9 Relevant provisions of the Crown Entities Act 2004 can and should be adapted accordingly when drafting the legislation that constitutes the Council, because the Council should have many of the characteristics of a Crown entity.

## RECOMMENDATION

- R10 Appointments to the Council should be made as follows:
- the Chair of the Parole Board should be a member ex officio;
  - the judicial members of the Council should be appointed by the relevant Head of Bench, without executive involvement;
  - the five non-judicial members should be appointed by the Governor-General on the recommendation of the Minister of Justice.

## RECOMMENDATION

- R11 For both judges and Ministerial appointees, the initial term of office should be either three or five years, with the option of one renewal, up to a total maximum term of seven years.

## RECOMMENDATION

- R12 Accountability requirements upon the Council should include:
- it should be listed in the Fourth Schedule to the Public Finance Act 1989;
  - it should be required to file an annual report in Parliament;
  - it should be audited by the Auditor-General; and
  - it should be subject to the Official Information Act 1982.

95. Broadly speaking, there are two kinds of guidelines: narrative and numerical. Numerical guidelines set out the nature and range of applicable penalty (e.g. amount of fine, or length of prison term). Narrative guidelines offer a textual commentary. Narrative guidelines, alone, cannot achieve the present objectives: they could only be an embellishment of what already exists in New Zealand in statutory form in relation to sentencing principles, and in isolation are likely to add little to the existing legislation.
96. The format of the sentencing guidelines should thus be either numerical or narrative or a combination of both, depending upon the objectives of the particular guideline. For each offence type (e.g. burglary, assault), the guidelines should provide sentencing judges with clear direction as to sentence type and ranges. This is the numerical element. They may also contain a brief commentary to provide context for those ranges. This is the narrative element. At the lower end of the spectrum, the guidelines are likely to concentrate on the factors relevant to the custody threshold (the “in/out decision”). The Council should also draft purely narrative guidelines as it sees fit about matters such as the general principles of sentencing, sentencing philosophy, and the sentencing discount principle. There would, from time to time, be other matters in respect of which guidelines may assist (e.g. home detention, the interface between restorative justice outcomes and court-imposed sentences, and discharges without conviction under section 106 of the Sentencing Act 2002).
97. We anticipate that to achieve the best outcome for the particular issue in question, the approach would need to vary for each guideline. It would need to vary in at least two respects: the style of the guideline (i.e. numerical and/or narrative); and the balance to be struck between prescriptiveness and flexibility (i.e. the degree of detail expressed). On the one hand, guidelines – particularly those relating to sentence levels – need to be sufficiently prescriptive to enhance sentencing consistency and transparency and the ability to manage penal resources. On the other hand, they need to be sufficiently flexible to enable judges to cater for the variety of circumstances that they confront daily in individual cases, and to experiment with sentencing innovations.
98. It is important to note that the numerical guidelines that we are proposing for New Zealand differ significantly from the method typically employed in the United States; we have in mind an approach that is not dissimilar to that currently taken by the Court of Appeal in its guideline judgments. By comparison, United States guidelines in most cases have been in the form of a two-dimensional numerical grid, with one axis devoted to offence seriousness and the other to criminal history or offender risk score. Within each box on the grid is a sentence range (typically expressed as a number of prison months) delineated as appropriate for offenders whose offence seriousness and criminal history bring them within that box. The number of levels on each axis of the grid tends to be fairly small. For example, Oregon sets out 11 levels of offence seriousness on one axis, and nine criminal history categories on the other.<sup>10</sup> We believe such

10 The most extreme example is the Federal sentencing guidelines. There is a wealth of literature relating to these guidelines. They have been widely reviled and recently held by the Supreme Court of the United States to be unconstitutional in some aspects of their operation: *United States v Booker*; *United States v Fanfan* (No 04–104; No 04–105) 543 US 220; 125 S Ct 738 (2005). There is currently significant debate in United States legal literature about the implications of *Booker* for individual states’ guideline systems.

guidelines to be too crude and blunt to ensure justice in the individual case. They also unduly undermine the role of sentencing judges.

### Youth justice

99. The sentencing guidelines should apply only to sentences imposed in District Courts and the High Court. They should not apply to sentences imposed in the Youth Court, since dispositions in that court are based on a different philosophy and approach.

### Restorative justice

100. In New Zealand, where restorative justice is expanding and showing some evidence of success,<sup>11</sup> and where it has particular relevance to Māori and Pacific Island cultures, it is important to ensure that this valuable initiative is not overtaken or stifled by the implementation of sentencing guidelines.
101. We believe that a careful distinction needs to be drawn between the availability and execution of restorative justice processes (which are not the province of sentencing guidelines) and the way in which restorative justice outcomes should be taken into account in sentence decision-making. In relation to the latter, there appears to be no reason why a guideline could not be drafted for the explicit purpose of recognising the validity and relevance of such outcomes, and indicating how they may properly be taken into account on sentence. Examples of this kind of approach are found in sections 8(j), 9(2)(f) and 10 of the Sentencing Act 2002.

#### RECOMMENDATION

- R13 The format of the sentencing guidelines should be either numerical or narrative or a combination of both, depending upon the objectives of the particular guideline.

#### RECOMMENDATION

- R14 The guidelines should apply only to sentences imposed in the District Court and High Court; they should not apply to the Youth Court.

### HOW SHOULD THE COUNCIL UNDERTAKE THE WORK?

#### Comprehensive inaugural guidelines

102. The approach in England and Wales has been to introduce guidelines incrementally and somewhat slowly. We do not believe that an incremental approach would

11 Ministry of Justice, “New Zealand Court-referred Restorative Justice Pilot: Two Year Follow-up of Reoffending” (December 2005) <http://www.justice.govt.nz/pubs/reports/2005/nz-court-referred-restorative-justice-pilot-2-year-follow-up/index.html> (last accessed 27 July 2006); Ministry of Justice “The Rotorua Second Chance Community-Managed Restorative Justice Programme: An Evaluation” (January 2005) <http://www.justice.govt.nz/pubs/reports/2005/rotorua-second-chance-community-managed-restorative-justice/index.html> (last accessed 27 July 2006); Ministry of Justice “The Wanganui Community-Managed Restorative Justice Programme: An Evaluation” (January 2005) <http://www.justice.govt.nz/pubs/reports/2005/wanganui-community-managed-restorative-justice/index.html> (last accessed 27 July 2006).

achieve the purposes for which guidelines are proposed. Apart from anything else, it would not enable their impact on penal resources to be accurately predicted. It would also take some time to achieve sufficient guideline coverage for them to have a meaningful impact. We recommend a concentrated and resource-intensive effort upfront, to draft a relatively comprehensive set of inaugural guidelines.

103. The inaugural sentencing guidelines should target imprisonable offences coming routinely before the courts that result in a significant number of sentences of imprisonment. This would ensure that priority is initially given to offences where there is the greatest need for consistent and cost-effective sentencing. Such offences are likely to include (among others) some but not all Crimes Act offences; Misuse of Drugs Act offences; a small number of Land Transport Act offences; common matters such as tax fraud; and some regulatory matters such as Fisheries offences.
104. It should be noted that, by “comprehensive”, we do not mean to imply that every matter that is potentially susceptible to guidelines will in fact be dealt with when the first set of guidelines come into force. It will be for the establishment unit (and the Council in reviewing the unit’s work) to decide the scope of its first phase of work, by reference to the parameters proposed above (high-volume imprisonable offences). The Council’s ongoing work will be to amend the inaugural guidelines, but in all likelihood it will also continue to incrementally add to the body of guidelines.

#### RECOMMENDATION

R15 The Council should draft one comprehensive set of inaugural sentencing guidelines before they come into force.

#### RECOMMENDATION

R16 The inaugural sentencing guidelines should target imprisonable offences coming routinely before the courts that result in a significant number of sentences of imprisonment, to ensure that priority is initially given to offences where there is the greatest need for consistent and cost-effective sentencing.

### An establishment unit attached to the Law Commission

105. For the purpose of drafting the inaugural guidelines, we propose that resources should be allocated to an establishment unit attached to the Law Commission prior to the passage of the legislation. The unit would be responsible for drafting and presenting the draft inaugural sentencing guidelines to the Council for consideration and endorsement when it is established, so that the Council can present them to the Minister of Justice for tabling in Parliament within two years. Its work would be overseen by the Commission, and it would comprise full-time staff employed or seconded for the purpose, together with a small number of judges to assist with the writing of the guidelines on a part-time basis.
106. The alternative would be to wait for the Council itself to be established before undertaking any work. As this would require the passage of legislation,

the earliest it could occur would be late in 2007. There is a significant time lag attached to this work: even if some is undertaken up front by an establishment unit, it is unlikely that guidelines could be brought into force before 2009. In our judgement, it would be preferable to get started immediately.

#### RECOMMENDATION

R17 An establishment unit should be set up prior to the passage of the legislation, attached to the Law Commission and responsible for presenting the draft inaugural sentencing guidelines to the Council, once established, for consideration and endorsement, so that the Council can present them to the Minister of Justice for tabling in Parliament within two years.

### The ongoing work of the Council

107. Once the Council is formally established, its first function would be to review and endorse the inaugural sentencing guidelines developed by the establishment unit. After that, we envisage that the Council would contribute to the ongoing maintenance and development of guidelines generally, by governing the work of a secretariat (which would undertake the bulk of the work).
108. We considered whether the Council, like some of its counterparts overseas, should be required to engage with a specified list of interested parties. We concluded that it would be preferable to leave this to the discretion of the Council, in the interests of flexibility: relevant persons or bodies and the level of engagement required may vary, depending upon the nature of the guideline. We therefore recommend that the Council should be empowered to consult as it considers appropriate on its draft guidelines. The form and extent of that consultation should be determined by the Council, but it is expected to be both extensive and public. As a minimum, the Council should be required to publish draft guidelines in an accessible form, together with a statement of the likely impact of those guidelines on the prison population, and seek public submissions.
109. Prior to the commencement of each set of guidelines (see further para 113 below), the Council should ensure that they are notified in the *Gazette* in a similar manner to regulations; published in hard copy; and made available on the internet.
110. At present the Ministry of Justice is responsible for prison population forecasting, developing a “pipeline” model of the justice system, and the collection of conviction and sentencing data (with associated functions such as the publication of *Conviction and Sentencing in New Zealand*); the Department of Corrections is responsible for data collection in relation to parole decisions. These functions of Justice and Corrections respectively should remain unchanged. However, the Council would need to be able to do two things: model the impact of its guidelines on the prison population and other parts of the justice system; and monitor sentencing and parole decision-making to assess compliance and/or problems with the guidelines. The Council should collaborate with the Ministry of Justice and other justice sector agencies in relation to these matters. It would need to adhere to interagency protocols, to ensure common data standards and consistent messages.

#### RECOMMENDATION

R18 Once the Council is formally established, its first function should be to review and endorse the inaugural sentencing guidelines drafted by the establishment unit; after that the Council should contribute to the ongoing maintenance and development of guidelines generally, by governing the work of a secretariat (which should undertake the bulk of the work).

#### RECOMMENDATION

R19 The Council should in general be empowered to consult as it considers appropriate on its draft guidelines; however, it should be required to publish draft guidelines in an accessible form with a prison population forecast attached, and seek public submissions.

#### RECOMMENDATION

R20 Prior to the commencement of each set of guidelines, the Council should ensure that they are notified in the *Gazette* in a similar manner to regulations; published in hard copy; and made available on the internet.

#### RECOMMENDATION

R21 The Council should collaborate with the Ministry of Justice and other justice sector agencies in relation to prison population forecasting and statistical analysis of sentencing and parole decisions; and should adhere to interagency protocols to ensure common data standards and consistent messages.

#### RELATIONSHIP BETWEEN THE COUNCIL, THE EXECUTIVE, AND PARLIAMENT

111. The Council would be required to work within the existing legislative framework (e.g. the maximum penalties for individual offences, and the Sentencing Act lists of purposes, principles, and aggravating and mitigating factors).
112. Broadly, there are three options for the constitutional arrangements of the Council. First, it might be wholly autonomous, as the Council is in England and Wales. This would have the consequence of removing sentencing policy from the political arena. We believe that for both democratic and governance reasons, Parliament needs to be involved. Secondly, it might be made subject to executive direction. Our extensive consultation indicates that this would make it difficult for judges to be involved in the Council's work, and would thus be counter-productive. Thirdly, mechanisms can be provided for executive input, with a final requirement of some form of Parliamentary endorsement. This is the option we have chosen.

113. We propose that each set of draft sentencing or parole guidelines issued by the Council should be endorsed by Parliament by way of the following process:
- the guidelines would be tabled in Parliament by the Minister of Justice and referred to the appropriate Select Committee;
  - for the inaugural guidelines the Select Committee would have 30 sitting days to table any report on the guidelines that it chose to make, and for subsequent iterations of the guidelines the Committee would have 15 sitting days;
  - if Parliament determined that the guidelines should not come into force, it would need to disallow them by way of a negative resolution on a notice of motion, within 30 sitting days in relation to the inaugural guidelines, and 15 sitting days in relation to subsequent iterations of the guidelines;
  - if this did not occur, the guidelines would automatically come into force 20 working days after the expiry of the specified disallowance period;
  - if the guidelines were disallowed, they would be sent back to the Council for revision; and
  - the guidelines would need to be accepted or rejected as a whole by Parliament.
114. There would be no formal Ministerial involvement. However, government influence upon the outcome of the Parliamentary process would be possible by way of the Parliamentary negative resolution. Although this would be a back-end procedure, mechanisms by which the government might seek to have more timely influence upon the Council's deliberations include: provision for the Minister of Justice to request a revision of the guidelines and a requirement for the Council to have regard to that request and the reasons for it; the presence of officials as observers to the Council; government and/or departmental submissions on draft guidelines during the public consultation round; and ongoing informal dialogue channelled through the Chair. Taking into account the views of judges strongly expressed to us in consultation, and the importance of judicial involvement in this work, we believe that this strikes the appropriate balance between the need to maintain some distance between the executive and the Council, while at the same time ensuring that its work properly takes into account the policy and fiscal concerns of the executive.

## RECOMMENDATION

- R22 Guidelines should be endorsed by Parliament by way of the following process:
- the guidelines would be tabled in Parliament by the Minister of Justice and referred to the appropriate Select Committee;
  - for the inaugural guidelines the Select Committee would have 30 sitting days to table any report on the guidelines that it chose to make, and for subsequent iterations of the guidelines the Committee would have 15 sitting days;
  - if Parliament determined that the guidelines should not come into force, it would need to disallow them by way of a negative resolution on a notice of motion, within 30 sitting days in relation to the inaugural guidelines, and 15 sitting days in relation to subsequent iterations of the guidelines;
  - if this did not occur, the guidelines would automatically come into force 20 working days after the expiry of the specified disallowance period;
  - if the guidelines were disallowed, they would be sent back to the Council for revision; and
  - the guidelines would need to be accepted or rejected as a whole by Parliament.

## ENFORCING AND MONITORING COMPLIANCE WITH THE GUIDELINES

115. The threshold beyond which judges passing sentence in individual cases would be permitted to depart from the sentencing guidelines is clearly integral to their success. As has been noted in relation to the framing of the guidelines themselves, a balance needs to be struck between prescriptiveness and flexibility.
116. We considered and consulted upon several possible formulations for the departure test. These included departure in the “interests of justice” (which some judges considered would put too much emphasis upon the exercise of individual discretion, at the expense of the guidelines); and departure where compliance with the guidelines would be “manifestly unjust” or “inappropriate due to special circumstances relating to the offence or the offender” (both rejected as too inflexible). Ultimately we settled upon a test of departure where the sentencing judge is satisfied that compliance with the guidelines would be “contrary to the public interest”. The advantage of this approach is that it is entirely even-handed in relation to departure in both directions, whereas the other formulations considered tended to imply departures for the benefit of the offender.
117. We therefore propose that judges should be required to adhere to sentencing guidelines unless they are satisfied that it would be contrary to the public interest to do so. Judges should be required to give reasons for departing from a guideline; section 31 of the Sentencing Act 2002 should be amended accordingly.
118. The Parole Board, like sentencing judges, should be required to adhere to parole guidelines unless they are satisfied that it would be contrary to the public interest to do so; and should also be required to give reasons for departures from the guidelines.

119. It should be noted that in the parole context, greater certainty has trade-offs: the inherent uncertainty is a key advantage of parole, as well as a disadvantage. It would not be desirable to create and enforce presumptions about the likely timing of parole release to such an extent that the parole exercise in effect is transformed into a de facto automatic early release regime. For example, the Department of Corrections has empirical evidence that the willingness of violent offenders to engage in treatment programmes has altered significantly since the Parole Act 2002 replaced automatic two-thirds release for these offenders with one-third parole eligibility. Formerly, the Violence Prevention Unit at Rimutaka Prison was grossly undersubscribed; since 2002, referrals to the programme have exceeded capacity and the treatment completion rate for the last 12 months has been in excess of 80 percent. Whatever presumptions are put in place about the timing of release for prisoner categories, these need to be subject to the efforts and progress of the particular prisoner. One might not, therefore, expect or wish for the same degree of compliance with parole guidelines as one would with sentencing guidelines.
120. As a measure of the efficacy of the guidelines and to encourage compliance, departure rates from the sentencing guidelines for each court district should be published in the Council's annual report. In a similar manner to sentencing departures, Parole Board departure rates should be published in the Council's annual report.

## RECOMMENDATION

R23 Judges and the Parole Board should be required to adhere to the guidelines unless they are satisfied that it would be contrary to the public interest to do so; and should also be required to give reasons for departures from the guidelines.

## RECOMMENDATION

R24 As a measure of the efficacy of the guidelines and to encourage compliance, departure rates from the sentencing guidelines for each court district, and Parole Board departure rates from the parole guidelines, should be published in the Council's annual report.

## UPDATING THE GUIDELINES

121. The updating of the guidelines should be a mutual and iterative process. For its part, the Council should take account of departure rates (where they are high, this may be indicative of a problem with the guideline). There should be provision for the Heads of Bench collectively or the Minister of Justice to request consideration by the Council of a particular issue relating to the sentencing guidelines. There should likewise be provision for the Chair of the Parole Board or the Minister of Justice to request consideration by the Council of issues relating to the parole guidelines. When a request of this kind is received, the Council should have regard to the request, and the reasons for it, in its revision of the guidelines.

## RECOMMENDATION

- R25 There should be provision for Heads of Bench or the Minister of Justice to request consideration by the Council of a particular issue relating to the sentencing guidelines; and for the Chair of the Parole Board or the Minister of Justice to request consideration by the Council of a particular issue relating to the parole guidelines. The Council in revising the guidelines should be required to take into account such a request and the reasons for it.



# Chapter 2

## The reform of parole

### THE RATIONALES FOR PAROLE

122. “Parole” refers to the discretionary early release of a prisoner. It has two rationales.
123. One of these is the explicit and widely recognised rationale for parole – that parole is a method of administering sentences with a view to reducing the risk of reoffending. It achieves this by providing:
  - an incentive for prisoners to participate in prison treatment programmes;
  - an opportunity to manage the release and reintegration of prisoners, with the effect of postponing their recidivism (according to empirical evidence); and
  - a vehicle for identifying and differently managing high-risk prisoners, by either detaining them for a greater proportion of their sentence, or managing them more closely upon release bolstered by the threat of recall.
124. The other, which we have dubbed the implicit rationale, is rarely articulated or perhaps even thought of as a rationale by anyone other than academics.<sup>12</sup> It is that parole mitigates the social and fiscal costs of the severe sentences that satisfy a punitive public, by allowing prisoners to be released at an earlier date.

### PROBLEMS WITH THE CURRENT PAROLE STRUCTURE

125. Under the Parole Act 2002, most offenders sentenced to a determinate sentence of more than two years are eligible for release on parole after serving one-third of their sentence.<sup>13</sup> The sentencing judge can impose a longer minimum period of imprisonment under section 86 of the Sentencing Act 2002, but this happens fairly infrequently: figures supplied by the Ministry of Justice for 2004 and 2005 indicate that minimum periods of imprisonment are imposed in around 11 percent of cases.

---

12 It is articulated in some of the parole literature. See, for example, Kevin R Reitz “Questioning the Conventional Wisdom of Parole Release Authority” in Michael Tonry (ed) *The Future of Imprisonment* (Oxford University Press, New York, 2004) 199–235; Andrew Ashworth *Sentencing and Criminal Justice* (3rd ed, Butterworths, United Kingdom, 2000) 256; Rt Hon Lord Carlisle of Bucklow QC (Chairman) *The Parole System in England and Wales: Report of the Review Committee* (HMSO, London, 1988) paras 22, 45.

13 One-third parole eligibility was not a 2002 innovation. Under Part 6 of the Criminal Justice Act 1985, as amended in 1993, prisoners serving determinate sentences of more than 12 months were eligible for parole at one-third, with the exception of “serious violent” offenders. The latter were automatically released at two-thirds or, in some instances, detained full term. Prior to 1993, prisoners were eligible for parole at one-half. The key development in 2002 was to clarify and simplify parole by setting a one-third threshold for every prisoner, with provision for minimum periods of imprisonment and detention, if necessary, full term.

126. The current parole structure, by providing for universal parole eligibility at one-third, appears to better serve the implicit than the explicit rationale. We do not intend by this to suggest that it was adopted for cosmetic, or fraudulent, or anything other than policy purposes that at the time were sound. However, in our view, if a parole system was designed solely by reference to the explicit rationale of risk management the eligibility threshold would not be set at one-third. The fact that the current structure does set eligibility at one-third has given rise to a number of problems.

### Calls for “truth in sentencing”

127. It hardly needs to be said that the propriety of the argument that the penalty pronounced in open court will sound much more formidable than the system will actually produce is dubious. It has been described, disparagingly, as “bark and bite” sentencing, in which the judge’s bark bears little relation to prison’s bite.<sup>14</sup>
128. The following example illustrates the stark difference that can occur between the appearance and reality of sentences. Although this is an entirely hypothetical example, those with whom we consulted widely agreed that it was neither unrealistic nor uncommon:

*The sentence imposed upon the offender is nine years’ imprisonment. This is the sentence stated by the judge in open court. No minimum period of imprisonment (MPI) is imposed. In the absence of an MPI, the prisoner is eligible for parole at one-third of the sentence – that is, after three years. However, the prisoner has already spent 18 months remanded in custody. The effect of the 18-month custodial remand is to halve the prisoner’s pre-parole eligibility custodial time to 18 months. In addition, prisoners eligible for parole may also apply for “back-end” home detention five months prior to their parole eligibility date. In the circumstances of this example, that means 13 months post-sentence. Victims are notified a couple of months before Parole Board hearings (which include back-end home detention hearings) of their entitlement to attend and contribute. Therefore, in this hypothetical case, victim notification of an upcoming Parole Board hearing would occur little more than a year post-sentence – that is, approximately one year after a nine-year sentence.*

129. Of course, the fact that a prisoner is being considered for back-end home detention or parole does not mean that he or she will be released. Although insufficient time has elapsed to determine long-term patterns in parole decision-making under the Parole Act 2002, it appears that so far, on average, inmates are serving around 62 percent of their sentence which is longer than the average time served under the previous legislation. However, that reality does little to mitigate the anger and frustration of victims and others who believe that court-imposed sentences do not mean what they say. They may not realise that release of the particular prisoner is

<sup>14</sup> Martin Wasik and Ken Pease (eds) *Sentencing Reform: Guidance or Guidelines?* (Manchester University Press, Manchester, 1987) 23; Reitz, above n 12, 205.

unlikely at an early parole hearing; even if they do, it may well be the potential for release that assumes a larger profile. More generally, there probably is no very precise public knowledge about the proportion of sentences served on average; in the absence of such information, and in the light of particular anecdotes, there is an understandable perception that the problem is worse than it is, which in turn fuels the view that the system is unduly lenient.

130. This has been a source of public comment and frustration in New Zealand for well over a decade and, we suggest, is one of the principal drivers of calls for “truth in sentencing”. “Truth in sentencing”, in the public discourse, has become a synonym for harsher sentencing. More accurately, it means that the prison sentence imposed by a judge in open court should correspond closely with the amount of time that an inmate actually serves. In this latter sense, there is some force to the oft-repeated criticism that New Zealand lacks “truth in sentencing”, which in turn undermines the credibility of the system and public confidence in it.

### **Parole Board approach to release decisions**

131. Parole Board members are aware of the public frustration – indeed, they cannot escape it in their daily work – and it is a factor driving them to interpret the Parole Act conservatively. The Act provides that the paramount consideration for the Parole Board is “the safety of the community”. Prisoners must not be detained any longer than is consistent with that objective, but at the same time the Parole Board may release a prisoner only if satisfied that he or she will not pose an undue risk.
132. Panel members whom we consulted gave examples of cases in which they considered that, notwithstanding a low risk of reoffending by the individual inmate, social pressures arising from the nature of the case (e.g. drunk driving causing death) would make it very difficult for them to agree to release at one-third. Some members of the Board believe that continued detention in such cases can be justified by reference to the “safety of the community” objective – in particular, to considerations of punishment and deterrence. Under the former section 7 of the Criminal Justice Act 1985, it was held that “the safety of the community” did encompass wider deterrent considerations and was not confined to the prisoner’s individual risk.
133. Taking such considerations into account entails a resentencing exercise, and involves the Parole Board in a function that should be the sole province of sentencing judges. The judge who originally imposed the sentence, and elected not to impose a minimum period of imprisonment, has already implicitly signalled that a minimum of one-third will suffice for these purposes. However, giving weight to factors other than risk is arguably a position to which the Parole Board has been driven by the long parole eligibility span, from which it might be inferred as a matter of common sense that risk should not be the sole consideration.
134. The approach that should be taken by the Board is currently under consideration by the Court of Appeal. Whatever the outcome of that case, it will pose an insoluble dilemma for the Parole Board. If the Court determines that prisoners should be released by reference solely to their risk, it may mean that more are released closer to one-third, which would increase the disjunction between the sentence and actual time served. If the Court determines that the Parole Board

may engage in resentencing, it will have ongoing undesirable effects on sentence relativity. Assuming that judges at the sentencing stage are applying the provisions of the Sentencing Act 2002 in a relatively consistent way (or, to the extent that this is not presently the case, that it can be achieved by sentencing guidelines), relativities between offences and offenders established at the sentencing stage are likely to be upset by subsequent Parole Board decision-making.

### Repeated Parole Board appearances

135. The long span of parole eligibility leads to repeated Parole Board appearances for prisoners who are not released. This undermines victims' attempts to move on from the offence, and has significant resource implications for the Parole Board and the Department of Corrections. In addition to the hearing itself, the Parole Board is required to notify victims who have requested notification, and go through the process of meeting them and receiving their submissions. The Department of Corrections (more specifically, the Community Probation Service and Psychological Services) prepares and presents a pre-release report for each appearance of an eligible prisoner.

### Problems with sentence management

136. It also causes problems for sentence management. The Department of Corrections recognises that it is best practice for rehabilitation programmes to be delivered as close as possible to the release of the prisoner. The Department has a "66 percent" rule of thumb, based on an approximation of the likely time of release. This is to some extent a self-fulfilling prophecy, since the Parole Board in many instances is reluctant to consider release until the prisoners have done the programmes. Corrections notes that it has an agreement with the Parole Board to the effect that, if the Board will give a firm indication that a prisoner is likely to be released at the next hearing, the Department will undertake to make provision for that person to attend a programme. However, the Department also notes that greater certainty in all cases about release timing would assist it with sentence management.

### Problems with prison population forecasting

137. Early parole eligibility, and therefore wide Parole Board discretion, also poses a problem for prison population forecasting. This problem is partly historical, in the sense that the Parole Board's current approach was not predicted at the time that the Parole Act 2002 was passed: on average, prisoners are serving longer than predicted. Assuming that the Board, over time, establishes a relatively consistent approach, it may become easier to build that into forecasting, and parole guidelines would assist in this regard. However, parole guidelines alone would not address all of the other problems identified with parole.

### MINIMUM PERIODS OF IMPRISONMENT

138. Section 86 of the Sentencing Act 2002 attempted to mitigate at least some of these problems with the parole structure by providing that a judge imposing a determinate sentence of imprisonment may also specify a minimum period of imprisonment (MPI) of between one-third and two-thirds of the sentence (up to a maximum of 10 years). This empowers sentencing judges to override the general Parole Act policy that all prisoners should be eligible for parole after one-third of their sentence, if the prospect of release at one-third would be inappropriate in the circumstances of the case.

139. This is not a sentencing option that has been widely used by judges. Figures provided to us by the Ministry of Justice for 2004 and 2005 indicated that an MPI is imposed in approximately 11 percent of cases where the determinate sentence exceeds two years. It therefore has not significantly assisted in enhancing certainty and transparency around parole eligibility; nor has it mitigated the resulting public anger and frustration.
140. The reasons for the relatively low frequency of MPIs are speculative. It is likely that all of the following are contributing factors.
141. The legislative intention, as expressed in the Parliamentary debates, was that MPIs were: “likely to be used in serious cases only, usually involving violence or sexual offending where a relatively long sentence has been imposed”. It was also noted that, since early parole was in any event unlikely for such prisoners, MPIs probably would not ensure their longer detention, although they would provide some certainty and security for victims.<sup>15</sup> It is therefore not entirely surprising that judges have chosen to use the measure sparingly, either because that is exactly what was intended, or because it is in effect a redundant safeguard, in light of Parole Board practice.
142. However, it is also widely agreed that there are significant problems in principle with MPIs. They are perceived as requiring judges to “double count”. The nominal sentence is set by reference to all of the relevant sentencing considerations. A judge who is considering whether to impose an MPI then must assess whether the offending is sufficiently serious that the ordinary one-third minimum period provided for in the Parole Act would not be long enough, by reference to the same set of considerations that led to the selection of the nominal sentence. However, if he or she reaches that view, it arguably tends to suggest that a longer nominal sentence should have been imposed. The use of MPIs as an alternative to imposing longer sentences thus has the effect of disrupting sentence relativity:<sup>16</sup>

*Depending on parole expectations, a six year sentence with a three year non-parole period is a more severe sanction than a seven year sentence with no non-parole period fixed. Yet this seems incongruous because, in orthodox sentencing practice, the overall culpability of the offender is primarily reflected in the nominal sentence.*

143. It is our understanding, anecdotally, that judges differ widely in their use of MPIs. A few judges impose them relatively frequently, for a wide range of offending including property and drug offending, while others never do. This means that their disruptive effect upon sentence relativity is exacerbated by differences in individual judicial practice. It also tends to suggest that the overall low incidence of MPIs may be driven more by the issues of principle, than by the legislative intent.

#### THE RETENTION OF PAROLE

144. We considered whether parole should be replaced by a different kind of release arrangement for those serving determinate sentences. More specifically, we considered the abolition of parole in the light of the comparative advantages of two alternative options: no early release, or automatic early release. We concluded

15 Hon Phil Goff, Minister of Justice 599 NZPD 15452 (28 March 2002).

16 Hon Justice William Young, President of the Court of Appeal “Judicial Implementation of Legislative Policy: Ruminations on the Impact of the Sentencing Act 2002 on Sentencing Practice and Prison Musters” (paper for Legislation Advisory Committee seminar, Wellington, 3 April 2006).

that there is value in retaining a parole system, solely for the purpose of reducing the risk of reoffending – that is, the explicit justification for parole previously described. Our reasons for reaching this view are summarised briefly below.

### Arguments in favour of some form of early release

145. The alternative to having some form of early release is, of course, no early release – that is, the sentence means entirely what it says. We gave serious consideration to this option. It appeared to us to be politically attractive: it wholly aligns with the goal of “truth in sentencing”; it is immediately comprehensible; and it might well be perceived as an acceptable trade-off against a move towards some shorter or non-custodial sentencing.
146. However, against that must be weighed the arguments in favour of early release – that is, the extent to which early release can achieve defensible and desirable ends in the pursuit of criminal justice, which could not be achieved if prisoners were required to serve their full term. We have already addressed, and rejected as unsustainable, the notion that early release can be used to serve prison population management objectives. There are arguably two other advantages: custodial discipline; and risk management. These are discussed below.

### *Early release as a disciplinary tool*

147. The first argument in favour of early release is that it is a disciplinary tool that facilitates better prison management: provision for early release builds in room for time to be added as a punishment for in-prison criminal offending or breaches of prison discipline.
148. It may well be that early release is one possible incentive to better inmate behaviour. That is certainly the view taken in a number of overseas jurisdictions. For example, in the United States, jurisdictions that have abolished parole and advocate “truth in sentencing” generally retain a remission component (known in the United States as “good time”) of up to 15 percent. This is consistent with the federal definition of “truth in sentencing” which, if complied with, ensures federal funding for state prison building programmes. In England, section 257 of the Criminal Justice Act 2003 (UK) provides that inmates who would otherwise have been automatically released at one-half may have additional days added to their custodial time for punishment purposes.
149. However, we doubt whether early release is required, or can be justified, for this purpose. Early release is not in practice used as a disciplinary tool in New Zealand prisons at the present time. Those serving short-term sentences are released automatically after one-half of the sentence, whether or not they have behaved badly or have been model prisoners. Similarly, while the in-prison behaviour of inmates serving long-term sentences may be the subject of submissions to the Parole Board, it was also said to us that even if such submissions are made and taken into account by the Board, they are unlikely to be an effective conditioning device so long after the event, because the cause-and-effect relationship will not be brought home to the inmate.

150. There is no evidence that any adverse effects flow from the absence of an early release behavioural incentive. Other avenues for the discipline of inmates exist in the Corrections Act 2004 (including confinement, forfeiture of earnings and removal of privileges). These, plus the informal mechanism of Parole Board submissions, appear generally to suffice for the purpose of behaviour management. It should also be noted that any behaviour that amounts to a criminal offence may be the subject of prosecution and punishment through the court; a prison sentence imposed as a result may be cumulative and render the inmate liable to extra time.
151. On the basis of the evidence provided by the status quo in New Zealand, we do not believe that disciplinary purposes offer a sufficiently sound justification for early release.

#### *Early release as a risk management tool*

152. The remaining arguments in favour of early release are broadly encompassed by the objective of risk management – that is, management of the ex-prisoner’s recidivism risk or risk of reoffending. By “risk management”, we mean to include both rehabilitative and preventive measures. In principle, risk management is a highly desirable goal. Its desirability in principle is such that one should be extremely cautious about abandoning it, as long as any hope exists that it can be achieved in practice.
153. The following section explores the relative merits of two early release options from a risk management perspective, bearing in mind also their ability to address two other key problems: the public demand for “truth in sentencing”; and the ability to better predict and manage the prison muster. The options are automatic early release and discretionary early release (parole).

#### **Option 1: automatic early release**

154. By “automatic early release”, we mean a release arrangement whereby all inmates are automatically released at a fixed point of their sentence (for example, one-half or two-thirds). The remainder of their sentence is served in the community, subject to release conditions and recall for breach of those conditions.

#### *A form of “truth in sentencing”?*

155. Automatic early release offers one kind of “truth in sentencing”, in the sense that the sentence has a custodial component and a community component, and at all times until sentence expiry the former inmate is in jeopardy of being returned to custody. However, in this limited semantic sense we already have “truth in sentencing” in New Zealand; it is an approach which does not please the public, and which can also be achieved by parole.

#### *Certainty about point of release*

156. Automatic early release ensures absolute certainty about the point of release for all prisoners, which is desirable for both sentence management and prison population forecasting. It is preferable to parole in this regard.

### *Targeting of resources?*

157. One arguable advantage of automatic early release from a risk management perspective is that it does not waste resources on discretionary release decisions; they can all be devoted to post-release reintegration and risk management. Except for very long sentences, discretionary release decisions make a relatively small difference to the amount of time served and it is arguably better to redirect the resources. However, a decision to manage the release of determinate sentence prisoners by way of automatic rather than discretionary release would not remove the need to resource a Parole Board. The Board would still need to be involved in setting release conditions. Overall, it seems to us that involving the Parole Board in discretionary release decision-making as well as setting conditions would have negligible resource implications.

### *Reintegrative community-based time*

158. Automatic early release offers reintegrative community-based time within the scope of the sentence, bolstered by the power of recall. However, it does not differ from parole in this regard.

### *No rehabilitation incentive*

159. In risk management terms, automatic early release has two significant disadvantages relative to parole. The first is that it offers no incentive for inmates to attempt to rehabilitate while in custody. The evidence about whether this objective can be achieved by parole is equivocal. However, it is self-evident that automatic early release offers no such incentive, because inmates will all be released at the same point regardless.

### *No differentiation between high-risk and low-risk prisoners*

160. The second disadvantage of automatic early release, relative to parole, is that it does not offer the flexibility to differently manage high-risk prisoners. The effect of a universally applicable automatic release date would be that high-risk prisoners would serve shorter sentences than is currently the case for those who stay full term. In our view, it would be difficult to convince the public of the merits of this approach.
161. The recently reformed parole arrangements in the United Kingdom are an example of an automatic early release regime that attempts to resolve this difficulty. Under the Criminal Justice Act 2003, offenders sentenced after 4 April 2005 to a prison sentence of 12 months or more will be automatically released at one-half. Automatically released offenders will remain on licence until the end of their sentence, subject to conditions set by the Parole Board, and recall for breach of those conditions. However, there is an exception for offenders classified as “dangerous” by reference to a schedule of specified sexual and violent offences; these offenders will continue to be paroled. It therefore appears that the United Kingdom has attempted to manage the above problem by a bifurcated approach. This kind of approach, whereby different release arrangements apply depending chiefly upon the nature of the instant offence, was tried in New Zealand over approximately a 10-year period between 1993 and 2002, and abandoned in light of empirical evidence that there is no

correlation between the risk that an inmate poses to the community, and the nature of their instant offending. We therefore do not advocate the United Kingdom approach, and we consider this disadvantage of automatic early release to be virtually insurmountable – particularly in light of the fact that, relative to parole, its only merit is certainty about the point of release.

### Option 2: discretionary early release (parole)

162. From a risk management perspective, we believe that the advantages of parole make it clearly preferable to automatic early release. We also believe that, if reformed as we suggest, parole can achieve a high degree of “truth in sentencing” and facilitate prison population management: see further paras 177 and 78.

#### *Parole may be an incentive for rehabilitation while in custody*

163. There are mixed views, both in the literature and amongst stakeholders, about whether the prospect of parole – that is, a discretionary release arrangement that chiefly turns upon risk – offers an effective incentive to rehabilitate. Some say that the prospect of parole acts as a carrot for inmates to try to rehabilitate, or at least to participate in prison programmes. Even if their participation is not entirely genuine, they may gain something from it, and we should continue to offer them this opportunity. Others say that prisons do not and cannot rehabilitate. Those prisoners who do achieve rehabilitation largely do so under their own steam, not by being offered carrots. Inmates therefore should simply serve their time. We are not in a position to definitively answer this issue; however, we believe that at this stage, parole should be given the benefit of the doubt.

#### *Parole may have a beneficial effect upon recidivism*

164. There is some, albeit slender and equivocal, evidence that the mere fact of parole may have a beneficial effect upon recidivism. For prisoners judged to be an acceptable risk who are released early from custody, parole itself may therefore be regarded as a rehabilitative tool. Some of the literature on this issue is briefly reviewed below.
165. Stephen Shute has recently reviewed the United Kingdom literature spanning several decades, with a view to establishing whether there is a “parole effect” – that is, whether the early release by a parole board of a prisoner on licence has a beneficial impact on the probability of recidivism.<sup>17</sup> A fairly clear trend emerges from the literature that parolees are, on average, less likely to be reconvicted than non-parolees (at least in the short term); less clear is the reason why. Questions explored in the literature reviewed by Shute include whether it is the selection process around release, or post-release supervision. If the former, what is it about the selection process? Are Parole Boards able to accurately discern which prisoners are more likely to succeed on release? Alternatively, do paroled prisoners respond positively to the faith that the Board places in them? There are no clear answers to any of these questions. Shute concludes that:<sup>18</sup>

17 Stephen Shute “Does Parole Work? The Empirical Evidence from England and Wales” (2004) 2 *Ohio State Journal of Criminal Law* 315.

18 Shute, above n 17, 321.

*After thirty-five years of research, can it now be said with confidence that parole either does or does not have a beneficial effect on recidivism? Sadly, at least as far as England and Wales are concerned, the answer is no.*

166. However, he also quotes Professor Keith Bottomley, writing in 1990, whose conclusion in our opinion remains apt:<sup>19</sup>

*It would seem unwise to dismiss out of hand the claim that parole release might have some positive effects on those to whom it is granted – certainly during the period of supervision, if not beyond. To disentangle the particular aspects of parolee status that might be responsible for these effects is very much more challenging ...*

167. In Joan Petersilia's discussion of comparable Canadian and American literature, the positive correlation between parole and lower (or later) recidivism is clear; the reasons, again, remain largely a matter for speculation:<sup>20</sup>

*Important new data also show that, in every year between 1990 and 1999, state prisoners released by a parole board had higher success rates than those released through mandatory parole ... more than half (54 percent) of those released on discretionary parole successfully completed their parole terms, compared to one-third (33 percent) of mandatory releases.*

*[These results] may be interpreted in two ways. Perhaps those released discretionarily are less serious in their crimes or criminal record to begin with, and hence are released early in states using discretionary parole release. Or, it may mean that having to earn and demonstrate readiness for release and being supervised postprison have some deterrent and rehabilitation benefits.*

*The second interpretation seems to have merit. Using logistic regression, which controlled for offense type, prior record, age, ethnicity, education, and gender, Stivers (2001) discovered a consistent and significant relationship between parole success and method of release. She found that those released from prison via discretionary parole were more than twice as likely to complete their parole period successfully than those released mandatorily. This finding was consistent across all offense types.*

*These scientific findings buttress the arguments made by advocates of parole. They argue that discretionary release ultimately leads to greater public safety, since it encourages both inmates and prison officials to focus more heavily on reintegration programs. Further research on the effects of discretionary versus mandatory parole release should be given highest priority.*

19 A Keith Bottomley "Parole in Transition: A Comparative Study of Origins, Developments, and Prospects for the 1990s" in Michael Tonry and Norval Morris (eds) 12 *Crime and Justice* 319, 338; cited by Shute, above n 17, 320.

20 Joan Petersilia *When Prisoners Come Home: Parole and Prisoner Reentry* (Oxford University Press, New York, 2003) 69–71, referring to Connie Stivers *Impacts of Discretionary Parole Release on Length of Sentence Served, Percent of Imposed Sentence Served, and Recidivism* (Masters thesis, University of California, 2001). Petersilia also discusses (at 68–69) findings by Stivers and others that, on average, the length of prison time served is greater in states with discretionary parole than in states where parole release is mandatory. Discretionary parole release therefore better facilitates the detention of dangerous offenders than a blanket statutory threshold; it is not, as commonly supposed, a mechanism for going soft on offenders or letting them out early.

168. Petersilia and some of the related literature have been critiqued by Kevin Reitz.<sup>21</sup> Like Petersilia, Reitz concluded that further research in this area is essential. Unlike her, he was not yet prepared to conclude that the beneficial effects of parole are sufficiently established to justify its retention; he concluded that: “we should not design entire sentencing systems on unsupported hopes”. However, he does not address the literature relied upon by Petersilia, nor any of the other literature we have canvassed. Furthermore, the quoted sentence can equally well be used to support the opposite conclusion. We should not design entire sentencing systems on unsupported hopes; but nor should we be hasty about abolishing existing systems when the evidence is marginally positive, even if we cannot be precise about the reason.
169. Mark Brown monitored the outcomes for a cohort of inmates either released early on parole, or automatically released to supervision that was similar in scope to that experienced by the parolees.<sup>22</sup> The inmates were matched for risk; in other words, the confounding factor of the higher likelihood of low risk inmates being paroled was catered for. Brown found some evidence to suggest that the early release aspect of parole was more important for its impact on recidivism than supervision alone. Parole appeared to have a postponement effect on both reconviction and reimprisonment – that is, inmates who were automatically released to supervision were both reconvicted and reimprisoned significantly earlier than parolees. However, in the long-term, reconviction and reimprisonment rates for the two groups did not significantly differ. Parole, according to this finding, does not terminate reoffending; it simply delays its onset. Further analysis also revealed that this effect was being produced by the prisoners actuarially assessed as high-risk; this therefore was the only group upon whom parole was having a beneficial effect. Brown’s findings raise the important question of whether a postponement effect amongst a small group (albeit the highest risk group) is sufficient to make the parole exercise worthwhile. However, although his thesis is a key piece of New Zealand research in this area, it is a single study. In this regard, it can be distinguished from the conclusions of Shute, and to a lesser extent Petersilia, which are the result of literature reviews.
170. In summary, it seems fairly clear from the literature that parole at least postpones recidivism; however, it may not prevent it. The reason for the postponement effect is unclear. It is debatable whether this is enough to justify retaining parole, particularly in light of Brown’s findings that the only inmates who benefit significantly from early release are those least likely to receive it (the high risk inmates). However, we believe that the evidence is sufficient to warrant caution about abandoning it.

*Parole is a vehicle for identifying and managing high-risk prisoners*

171. This, in our opinion, is the chief reason to retain parole. As well as being a rehabilitative tool, parole is simultaneously an incapacitative tool for inmates whose risk is judged to be too high to justify release, and who therefore remain in prison for the full term of their sentence. It builds flexibility into the system for

21 Reitz, above n 12, 208–210.

22 Mark Brown “Serious Offending and the Management of Public Risk in New Zealand” (1996) 36(1) *BJ Crim* 18, 27–29, 30; Mark Brown *Decision Making in District Prisons Boards* (Department of Justice, Wellington, 1992).

the purpose of managing high-risk prisoners. The quid pro quo of flexibility is that it makes the timing of release less predictable. However, on balance, we believe that flexibility within narrow confines is preferable to no flexibility at all.

172. If risk is to be taken into account at all, it needs to happen relatively close to release, particularly for inmates serving longer sentences. It is neither fair nor realistic to make final determinations as to prisoners' risk at the time of their sentence, because the individual circumstances of those prisoners may change (e.g. some may rehabilitate). Parole is a vehicle for making these decisions at the appropriate time.
173. To sum up, the availability of parole may prompt inmates to participate in pre-release rehabilitation programmes, and may have a beneficial effect upon recidivism. More importantly, parole builds flexibility into the system for the purpose of identifying and managing high-risk inmates. It facilitates their longer detention if necessary; it enables closer management of them if or when they are released; and decisions about both of these things can be made at the appropriate time. These are advantages that the other options under consideration – automatic early release and no early release – cannot offer. We therefore recommend the retention of parole, although not in its current form.

#### RECOMMENDATION

R26 Discretionary early release (parole) should be retained for the sole purpose of reducing the risk of reoffending.

#### PAROLE REFORM: DIFFERENT SENTENCING PRACTICE AND HIGHER PROPORTION OF TIME SERVED

174. At present, only the nominal sentence is stated in open court, which does nothing to inform the victim, the offender, and the general public about what the sentence means in practice.

#### Long-term sentences

175. We propose that judges should articulate long-term sentences (to be defined as sentences with a prison term of more than 12 months) in a slightly different way. Both the total sentence and its parole component should be spelt out in open court. The parole eligibility date for long-term sentences should be 12 months, or two-thirds of the nominal sentence, whichever is the greater. Section 86 of the Sentencing Act 2002 (whereby judges can impose a minimum period of imprisonment of up to two-thirds) would no longer be necessary, and should be repealed.
176. This means that offenders would be told when the sentence is imposed that the total sentence is (for example) six years; at least four years of the six must be served in custody; and the offender may or may not be released during the remaining two years, depending upon the Parole Board's assessment of his or her recidivism risk.

177. This approach would promote “truth in sentencing”, in two ways:
- The practical effect of the sentence is spelt out in open court.
  - Prisoners would be required to serve a higher proportion of their sentence. As a result of this change to parole eligibility, it is expected that the average time served by prisoners would increase from around 62 percent to more than 80 percent of the sentence.
178. This is a key reason for the setting of the threshold at two-thirds. Two-thirds, we believe, gives substantial effect to the court-imposed sentence and thus to “truth in sentencing”, while at the same time allocating a sufficient proportion of the sentence to administrative purposes – that is, risk management and reintegration. While a higher threshold might achieve better “truth in sentencing”, it in all likelihood would also undermine the utility of parole. Either sufficient time needs to be allowed to achieve the advantages that have led us to recommend the retention of parole, or it should be abandoned altogether. Our proposed approach would also to some extent address the current anomaly, whereby an offender who receives a 24-month prison sentence is automatically released at 12 months, whereas an offender who receives a 30-month prison sentence is eligible for release after 10 months. In other words, at present, there is a problem with the relativities of low-end nominal sentences: sentences which are *prima facie* longer, and were presumably intended to be more punitive, may not be in practice. We recommend that every prisoner who is eligible for parole should serve at least 12 months.

## RECOMMENDATION

R27 Judges should articulate long-term sentences (to be defined as sentences with a prison term of more than 12 months) in a slightly different way: both the nominal sentence and its parole component should be stated in open court.

## RECOMMENDATION

R28 The parole eligibility date for long-term sentences should be 12 months, or two-thirds of the nominal sentence, whichever is the greater.

## RECOMMENDATION

R29 Section 86 of the Sentencing Act 2002, which currently provides for judges to impose a minimum term of imprisonment of up to two-thirds, should be repealed.

### Short-term sentences

179. We propose that short-term sentences (to be defined as sentences with a prison term of 12 months or less) should not have a parole component.

180. At present, under section 86 of the Parole Act 2002, all inmates serving sentences of two years or less are automatically released at one-half of the sentence. We instead recommend that the sentence imposed should be served in full, thus ensuring total “truth in sentencing”. Since 12 months’ actual time served equates to a current two-year sentence, this approach should capture approximately the same groups of offenders as currently.
181. Short-term sentences need to be approached differently from long-term sentences because parole is logistically unworkable in very short timeframes. Furthermore, where only very small differences in time are involved – a few months spent in custody, as opposed to a few months subject to recall – the transaction costs of Parole Board involvement probably outweigh the individual benefits.

#### RECOMMENDATION

R30 Short-term sentences (to be defined as sentences with a prison term of 12 months or less) should not include a parole component; the sentence should be served in full.

#### Should any other category of case be excluded?

182. Having excluded short sentence cases, it does not necessarily follow that parole should be available for every other category of offence and/or offender. For example, some types of offending might be excluded from parole (as in England and Wales, where parole is only available for sexual and violent offenders). However, an offence-based method of differentiating cases has already been tried and abandoned in New Zealand.
183. The parole provisions in the Criminal Justice Act 1985, which were amended in 1993 and abandoned in 2002, comprised an offence-based classification of dangerousness. Offenders were designated as either “ordinary”, or “serious violent”, depending upon the offence for which they were being sentenced – that is, whether it was one of a list of specified statutory offences, and if so, whether a sentence of more than two years’ imprisonment was imposed. Serious violent offenders were not eligible for parole; they were automatically released at two-thirds, with some detained for the full term of their sentence on application by the Chief Executive of the Department of Corrections. Implicit in this approach was the idea that future harmful behaviour is best predicted by the current offence, which in turn justifies a more robust state intervention in the interests of community protection by way of more restrictive release arrangements.
184. This approach has been discredited. It assumes that offending patterns follow a standard trajectory and that serious offenders, having reached that point in their “careers”, will continue to specialise. In practice, Mark Brown has demonstrated that serious violent offenders are generally not specialists; they participate in a wide range of offending behaviour and thus tend to move in and out of the serious offender classification. He has also established that serious offences tend to be followed by ordinary ones (and vice versa): most serious offences are committed by offenders originally imprisoned for relatively minor offending (either by reference to its category or, where the offending was of a prima facie

more serious kind, the penalty that has actually been imposed). In short, therefore, the Criminal Justice Act approach did not do a good, or even an adequate, job of accurately targeting those offenders who pose the greatest future risk to public safety.<sup>23</sup>

#### CIRCUMSTANCES THAT MAY JUSTIFY EARLIER CONSIDERATION BY THE PAROLE BOARD

185. Under section 25(1) of the Parole Act 2002, the Chair of the Parole Board may, in exceptional circumstances, refer a prisoner for early consideration by the Parole Board. There is a separate provision for release on compassionate grounds – specifically, the birth of a child or terminal illness.
186. No change is proposed to the provision for release on compassionate grounds. However, the “exceptional circumstances” threshold in section 25(1) should be lowered very slightly, in recognition of the fact that, in occasional cases, it may not be in the overall public interest to require a prisoner to serve the statutory two-thirds. The test should instead be “special circumstances relating to the offender”.

#### RECOMMENDATION

- R31 The “exceptional circumstances” threshold in section 25(1) of the Parole Act 2002 should be lowered very slightly, to “special circumstances relating to the offender”.

#### PAROLE BOARD DECISION-MAKING CRITERIA

187. The Court of Appeal is currently considering the approach that the Parole Board should be taking to its release decisions. If the approach settled upon by the Court of Appeal is inconsistent with the rationale recommended in this paper for retaining parole (i.e. that parole is solely about reducing recidivism risk), change to sections 7 and 28 of the Parole Act is likely to be required. If the Court’s approach is consistent with the recommended rationale, this appellate authority coupled with parole guidelines should be sufficient to address any current inconsistencies in Parole Board practice.

#### IMPLICATIONS FOR VICTIMS

188. If the Parole Board is to focus solely upon risk, this has implications for victims. In the vast majority of cases victims are not qualified to comment on anything other than the circumstances of the offending. Certainly they will rarely be able to inform an assessment of risk. Victims will feel slighted and frustrated if they perceive that their input is not being given sufficient weight. However, they will also feel slighted and frustrated if they are excluded.
189. At present, sections 29 and 47 of the Victims’ Rights Act 2002 provide that victims may participate in the process for making decisions about home detention and parole if the offending involved sexual violation, serious injury, or death. Sections 47(1) and 49(4) of the Parole Act 2002 provide that where the Board elects to conduct an attended hearing, every victim of the offender is entitled to appear and make oral submissions, and where the Board elects to conduct an unattended hearing, every victim must be given the opportunity to have a prior interview with a member of the panel. Victims can be expected to have a sense of grievance if these opportunities are removed from them.

<sup>23</sup> Mark Brown “Serious Violence and Dilemmas of Sentencing: A Comparison of Three Incapacitation Policies” [1998] Crim LR 710, 712–715; Brown (1996), above n 22, 24–25.

190. The Parole Board should continue to receive written submissions from all victims. However, it should have a discretion about whether to hear them in person, and should do so only if the written submissions indicate that the victim may be able to contribute to a risk-focused discussion about whether the prisoner should be released and, if so, how that person should be managed. It should be noted that the Parole Act 2002 went significantly further than the Victims' Rights Act 2002, in the entitlements that it conferred on victims, and would do so even if it was amended in this way. It is arguably a reasonable quid pro quo that prisoners will serve most of the sentence imposed, but victims will have a somewhat more focused task in relation to their participation in release decisions.

#### RECOMMENDATION

R32 The Parole Board should continue to receive victim submissions in writing, as it does currently. However, it should have and exercise discretion about whether to hear them in person. Victims should only be heard in person if their written submissions indicate that they may be able to contribute to a risk-focused discussion about whether the prisoner should be released and, if so, how that person should be managed.

#### POST-RELEASE CONDITIONS

191. The Department of Corrections has advised that, for prisoners released from both short-term and long-term sentences, time spent in the community on conditions is ineffective for any shorter period than six months. Sometimes longer is required, to facilitate the completion of community-based treatment programmes.

#### Long-term sentences

192. At present, under section 18(2) of the Parole Act 2002 prisoners who serve the full term of a long-term sentence remain subject to standard conditions, and any special conditions imposed by the Parole Board, for six months following their release. This is not intended to change.
193. However, legislative amendment is required to ensure that prisoners who are paroled within six months of their release date also receive the minimum six months of time spent in the community on conditions. This new provision should be drafted in the same terms as section 18(2) – that is, mandatory standard conditions, with additional special conditions at the discretion of the Parole Board.

#### RECOMMENDATION

R33 Prisoners who serve the full term of a long-term sentence should continue to be subject to conditions for a six-month period, as they currently are under section 18(2) of the Parole Act 2002.

## RECOMMENDATION

R34 Prisoners who are paroled within six months of their release date should also be subject to a six-month period of parole conditions.

## Short-term sentences

194. Section 93 of the Sentencing Act 2002 provides for the imposition by a sentencing judge of standard and special post-release conditions for offenders being sentenced to short-term sentences. Conditions may be imposed for up to six months following the end of the sentence. Since prisoners serving short-term sentences are currently released at one-half, in theory the effect may be a period of up to 18 months spent in the community on conditions. However, in practice, the average period for which post-release conditions is imposed is 6.6 months.
195. If a prisoner serving a long-term sentence serves his or her full term, the maximum time to which he or she can be subject to conditions upon release is six months. For prisoners serving short-term sentences, which we recommend should be served in full, Corrections advises that a slightly longer period of up to 12 months may be necessary. This arises from the unlikelihood that those serving short-term sentences will be eligible for or have time to engage in rehabilitative programmes while in prison; this therefore needs to occur in the community instead. It is consistent with the current average.
196. To ensure sufficient time for community-based rehabilitation, section 93 should therefore provide that if a sentencing judge chooses to impose conditions on a short-term sentence, this must be for a minimum of six months and may be for up to 12 months.

## RECOMMENDATION

R35 Prisoners released from short-term sentences should be subject to conditions imposed at the discretion of the sentencing judge; if a judge chooses to impose conditions, it must be for a minimum of six months and may be for up to 12 months.

**PAROLE BOARD  
FOLLOW-UP  
POST-RELEASE**

197. We consulted upon a proposal whereby the Parole Board could require regular post-release appearances before it by some ex-prisoners, with a view to closer Parole Board management of them. This was based upon the United States re-entry court model and, we thought, had the potential to achieve a number of desirable ends relating to the management of the ex-prisoner, and the confidence of both the general public and the Parole Board. However, those whom we consulted identified a number of reasons that led us to conclude that the proposal was both undesirable and impracticable. Parole Board panels would not achieve personalised hands-on management of ex-prisoners, due to their composition which varies between sittings. The extended Board (which deals with prisoners serving indeterminate sentences) has a more constant membership, but sits in Wellington, which raised logistical difficulties such as the availability of video-conferencing. There were similar

logistical difficulties in relation to the regular panels which sit in prisons, because ex-prisoners in many instances would not live locally. Finally, the role of the Board, it was thought, might undermine the role of probation officers.

198. However, there was nonetheless agreement that the ability for the Parole Board to initiate some follow-up would be valuable, independent of the power of a probation officer to seek variation of conditions or recall. We therefore recommend that, upon releasing a prisoner, the Parole Board should be able to request a three-month progress report. This report would initially be filed on the papers by a probation officer. Depending upon its contents or other circumstances of the ex-prisoner, the Board might then wish to require an attended hearing, and/or vary parole conditions. The purpose of this follow-up procedure would be two-fold. First, the gravitas of a follow-up Parole Board appearance might contribute to some small extent to the management of ex-prisoners' recidivism risk. Secondly, it would provide a feedback loop for the Board about outcomes for those on the cusp. At present, panel members only observe recalls, which skews their perceptions; the Board's confidence in making release decisions might be enhanced by observing positive outcomes for ex-prisoners whom it considered borderline.

#### RECOMMENDATION

R36 Upon releasing a prisoner, the Parole Board should be empowered to request a three-month progress report.

#### BACK-END HOME DETENTION

199. At present, under section 33(2) of the Parole Act 2002, an application for back-end home detention may be made five months prior to the parole eligibility date; under section 35(4) of the Act, release to back-end home detention may then occur in the final three months of the sentence. It is therefore perceived as a late-stage alternative to prison (i.e. a device to facilitate the release of prisoners prior to their first parole eligibility date) rather than a staged release on parole.
200. In fact, it is only used in this way in a small minority of cases. Of the approximately 300 cases per annum that receive back-end home detention, a substantial majority receive it only after their parole eligibility date. Back-end home detention is primarily being used by the Parole Board as a method of managing the transition back into the community of high-risk prisoners who need greater control than can be provided by ordinary conditions of supervision.
201. To the extent that back-end home detention is used as a device for releasing prisoners earlier than their parole eligibility date, we think that it is inappropriate. It further undermines the credibility of the sentence imposed by the judge, and runs counter to our general proposals to introduce greater "truth in sentencing" into the parole structure. We therefore propose that back-end home detention should be available only as a condition of parole after the prisoner has become eligible for it. As we have noted, that is how it is already primarily being used; consequently most back-end home detainees would not be affected by the proposed change. However, those who are currently granted home detention before their parole eligibility date would be required to serve more time in prison. There are approximately

60 prisoners per annum in this category. On the assumption that they presently serve about two months on home detention prior to their parole eligibility date, that will be the equivalent of approximately 10 prison beds. The change that we propose will thus have a small adverse effect upon the prison population.

RECOMMENDATION

R37 The provisions relating to back-end home detention should be amended, to provide that back-end home detention is only available after the parole eligibility date.

# Chapter 3

## Miscellaneous matters

### THE INTEGRATED NATURE OF OUR PROPOSED REFORMS

202. A review of jurisdictions illustrates that reforms to ensure better sentencing guidance often go hand in hand with parole reforms, and vice versa.<sup>24</sup> Our proposed reforms to the sentencing and parole structures should not be undertaken unless they proceed in tandem, for two reasons.
203. Parole reform cannot occur without contemporaneous sentencing reform,

24 In the United Kingdom, the desirability of this kind of contemporaneous reform was discussed in the Report of the Carlisle Committee, above n 12, paras 231–235, 295–298. Ultimately, because it did not have a remit to consider wholesale sentencing reform, the Carlisle Committee was forced to pin its hopes on less formal methods of adjusting sentencing tariffs to take into account the practical effect of its parole reforms: see Lord Taylor of Gosforth CJ *Practice Note (Sentence: Early Release of Prisoners)* [1992] 1 WLR 948. For a similarly informal approach, see also Sentencing Commission for Scotland *Early Release from Prison and Supervision of Prisoners on their Release* (2006) <http://www.scottishsentencingcommission.gov.uk/publications.asp> (last accessed 3 March 2006) paras 5.19–5.22, and section 10 of the Sentencing Act 1991 (Vic).

The United Kingdom Sentencing Guidelines Council was established in the same legislation that contains the parole reforms – that is, the Criminal Justice Act 2003 (UK). However, the extent to which the two parts of the reform were approached as a package is unclear; for example, the Council is not explicitly directed to consider either prison capacity, or the implications of the parole reforms for the time that offenders will actually serve, in formulating sentencing guidelines.

The Association of Paroling Authorities International conducts a wide-ranging annual survey of parole jurisdictions and practices, which in recent years has included most United States jurisdictions including the armed forces, some Canadian provinces, the Australian states of New South Wales and Victoria, and the United Kingdom (England and Wales). This shows that, of the 20 United States jurisdictions that had abolished parole by 2004, 13 were, or had previously been, jurisdictions that also have a Sentencing Commission or equivalent body. In short, slightly more than half of the states that have abolished parole are guideline states; and likewise slightly more than half of all guideline states have chosen to abolish parole: Association of Paroling Authorities International “Parole Board Survey 2003” <http://www.apaintl.org/Pub-ParoleBoardSurvey2003.html> (last accessed 3 March 2006); Association of Paroling Authorities International “Parole Board Survey 2004” <http://www.apaintl.org/Pub-ParoleBoardSurvey2004.html> (last accessed 3 March 2006); “National Association of State Sentencing Commissions Contact List” <http://www.ussc.gov/states/nascaddr.htm> (last accessed 3 March 2006).

Some years ago the Canadian Sentencing Commission (a body temporarily established for the purpose of reviewing Canada’s sentencing and parole arrangements) recommended the establishment of an equivalent permanent body to provide ongoing sentencing guidance. In conjunction with this, the Commission recommended the abolition of parole: Report of the Canadian Sentencing Commission *Sentencing Reform: A Canadian Approach* (February 1987) ch 10. The Commission’s recommendations were not taken up.

because a shorter parole component would adversely affect the prison population in the absence of sentencing reform. It is estimated that the parole changes would increase the proportion of time served from around 62 percent to over 80 percent of the nominal sentence. If the desired outcome is that prisoners do not serve more actual time as a result of the parole changes – the alternative being substantial growth in the prison population – the parole changes would require shorter sentences to be imposed in court (a reduction of around 25 percent). Sentencing guidelines can facilitate this compensatory adjustment in a way that the present mechanism of amending maximum penalties cannot. This is because maximum penalties bear little relationship to day to day sentencing practice: they relate only to the worst cases.

204. Similarly, sentencing reform on its own would be largely futile. The efficacy of sentencing guidelines would be fundamentally undermined in the absence of parole reform. This is because there is no point in offering more guidance to judges at the front end of sentencing, with a view to ensuring consistency and the ability to better manage penal resources, while leaving the Parole Board at the back end with its current discretion spanning two-thirds of the total sentence.

#### RECOMMENDATION

R38 Sentencing and parole reform must occur together.

#### RISK ANALYSIS AND MITIGATION

#### Changing judicial thinking and practice

205. The proposed changes to the parole eligibility and final release dates of short-term and long-term sentence prisoners will require a change in judicial practice, which in all likelihood can only be partly addressed by sentencing guidelines.
206. We recommend that short-term prisoners should serve the full term of the sentence imposed by the judge, rather than the current one-half. Without any other change in policy settings, the sentence imposed by the judge would therefore need to be half of the current length in order to compensate for these changes. We further recommend that long-term prisoners should not be eligible for parole or back-end home detention until two-thirds of their sentence has been served, which again would require a compensatory adjustment in judicial sentencing practice.
207. Sentencing guidelines should be set at a level that takes into account these changes. However, there is nonetheless a risk that the guidelines will not be sufficiently precise to achieve the required degree of change in judicial practice. That risk may be exacerbated by a judicial and public perception that nominal sentences adjusted as required (e.g. half of the previous level for short-term sentences) do not sound sufficiently severe for the offence in question – particularly until people become accustomed to the new levels.
208. While these risks should not be understated, the Sentencing Council can be expected to issue a specific guideline about the way in which sentencing practice should be adjusted in the light of changes to parole eligibility and final release dates. It should be in a position to calculate the expected average proportion of

the sentence that is likely to be served – especially if it also sets parole guidelines – and thus to indicate to judges how sentencing practice should be adjusted accordingly. The existence of such a guideline would require judges to turn their minds to the effects of the parole and release changes, which ought to produce the required change in their practice.

### Sufficiency of executive influence

209. There is also a risk that the creation of the Sentencing Council, and the guidelines that it promulgates, will not be as effective as anticipated in providing a governance mechanism.
210. In the first place, the Council may develop guidelines which are not sufficiently sensitive to the policy concerns of the government. That is because the mechanisms for executive input are largely indirect; they are heavily reliant upon the effectiveness of ongoing informal dialogue between the executive and the Council. There is the opportunity for direct executive input by virtue of a provision empowering the Minister of Justice to request the Council to consider a particular issue, and requiring the Council to take into account that request, and the reasons for it, in revising the guidelines. Ultimately, too, it would be open to a government Minister to table a notice of motion in the House that a set of guidelines be disallowed, and thereby regulate which guidelines are permitted to come into force. However, any such motion would come at a late stage; would carry a political cost; and, in view of the likely consequences for public confidence in the Council, would ideally be used sparingly.
211. Secondly, the judiciary may not adhere to the guidelines to the extent anticipated, so that they fail to achieve the degree of predictability and consistency intended. The guidelines would necessarily be drafted in a sufficiently flexible way to allow justice to be done in the individual case, and they would also allow room for departure where that is required in the public interest. There will inevitably be some uncertainty about how that plays out in practice. It is likely to be influenced by such intangible factors as the degree of judicial support for the new arrangements, their views about the “mana” of the Council, and the extent to which they agree with the approach taken by the particular guideline.
212. The Law Commission has conducted an extensive process of consultation with the judiciary at all levels of the bench, and the development of the proposals has greatly benefited from their input. It is clear that there would be considerable opposition to more direct executive involvement or more prescriptive guidelines. A great deal of care has been taken to try to ensure that the proposals put forward in this paper achieve the right balance between the judiciary and the executive, and thus have the greatest chance of resolving the issues that we have identified.
213. While the proposed solution may indeed have some imperfections from the government’s point of view, those imperfections need to be viewed in the light of the risks attached to the status quo. At present, the executive has little effective control over sentencing policy and thus its penal resources: while there is a risk, albeit a small one, that the executive’s ability to influence policy under our proposed arrangements will prove more limited than expected, or may vary as the composition of the Council changes, that is simply a risk that the benefits of the proposal may not be fully realised. However, they will still represent an advance on the status quo.

214. Furthermore, in relation to the dynamics between the executive and the Council, there will be an opportunity during the establishment phase to ensure that, from everybody's perspective, this promises to be a workable arrangement. In the unlikely event that obstacles arise that cannot be resolved, the only tangible loss incurred by government will be the establishment unit's resourcing: until that work has occurred, none of the other matters can progress to any significant degree. In particular, the bulk of the legislation need not be brought into force: we are proposing that most of it should commence by Order in Council.

### Perceptions of the parole changes and sentence reductions

215. There is a further risk that the parole changes will not be seen to introduce sufficient "truth in sentencing" – that is, a system in which the sentence imposed by the judge bears a close relationship to the time actually served. The proposals for parole eligibility at two-thirds of the nominal sentence, combined with a requirement that the judge articulate the components of the sentence in open court, may satisfy many, but undoubtedly it will not satisfy all. Those for whom "truth in sentencing" is a synonym for tougher sentencing may consider it a subterfuge to lay claim to the slogan, while at the same time reducing nominal sentences to ensure that no greater time is actually served.
216. A response that would partly address this concern, in the sense of removing any suggestion that the proposals involve a subterfuge, would in any event be necessary to address a separate, and much larger, risk. There needs to be an intensive and prolonged campaign of public information and education to promote these changes, so that there is understanding and acceptance of the fact that nominal sentences at a much lower level than those previously imposed are not necessarily resulting in a reduction in the amount of time actually served in prison.

### Litigation risks

217. There are litigation risks attached to several aspects of these proposals, which steps have been taken to mitigate. First, issues may be raised about the constitutionality of the guidelines and/or the Council, in the light of adverse constitutional rulings in the United States, and the Council's novel organisational form. However, the guidelines proposed for New Zealand differ significantly from the highly prescriptive United States grid systems that have been discredited in some jurisdictions. As to the status of the Council, the Parliamentary negative resolution procedure is intended to address the issue, since any guidelines that proceed would do so with an implicit legislative mandate.
218. Secondly, it is proposed that the guidelines should govern sentences for offences committed prior to the commencement of the guidelines. Section 6 of the Sentencing Act 2002 and section 25(g) of the New Zealand Bill of Rights Act 1990, consistent with international obligations, prohibit retrospective penalty changes to the detriment of an offender. A provision is therefore proposed to explicitly exclude the guidelines from the scope of section 6; section 25(g) of the Bill of Rights is likely to be construed in accordance with this clearly expressed legislative intent.
219. Thirdly, we recommend that judges should articulate the components of each sentence – that is, the two-thirds that must be served, plus the one-third parole component that may or may not be served, depending upon the Parole Board's

assessment of the prisoner's risk. However, there is a subtle but important legal distinction between the judicially-imposed sentence and matters relating to the administration of it, which needs to be maintained. Parole falls into the latter category: provision for parole is provision for early release where that would assist risk management, as opposed to extra time imposed for preventive purposes. It would be inappropriate and dangerous for the impression to be given that this long-accepted formula has been abandoned, and the manner of articulation of the sentence has been crafted with this in mind.

220. Finally, if these changes proceed, Corrections would be required to administer three streams of sentenced prisoners: those to whom the Criminal Justice Act 1985 provisions continue to apply; those sentenced under the Sentencing and Parole Acts 2002; and those sentenced under guidelines. Mistakes in sentence administration carry a risk of habeas corpus applications and damages. This is a matter of degree rather than kind – it is a constant risk for Corrections, which may be exacerbated by the increased complexity.

## PRISON POPULATION IMPLICATIONS

221. The United States' experience gives some confidence that the proposed reforms offer a potential solution to the problem of penal resource management, but only when they occur as a package. Recent research that considered sentencing developments across all United States jurisdictions over a 30-year period noted that, between 1975 and 2002, 26 states adopted some form of structured sentencing system, including nine with presumptive sentencing guidelines. These states varied in their approach to parole: some retained discretionary parole release; others abolished it. The researchers concluded that a combination of the abolition of parole and presumptive sentencing guidelines – and only this combination – consistently produced smaller growth in incarceration rates, and thus lower incarceration rates than states with different sentencing systems.<sup>25</sup>
222. This phenomenon has been explained by other authors as follows. Guidelines are the only proven mechanism available for structuring judges' discretion and thereby making their sentencing decisions predictable. Only if sentences become predictable can policy makers know how many prison beds will be needed, and when, and how many prison officers. And, conversely, only if discretion is meaningfully structured can policy makers who do not wish to spend more taxpayers' money on prisons have the option to change sentencing policies instead, with some confidence that judges and magistrates will follow suit.<sup>26</sup> Similar reasoning applies to the abolition of parole.
223. It is important to note that reforms of this kind do not preclude penal severity: they instead promote penal resource management, in either direction. In the United States, the typical state that has sustained this kind of sentencing system for any length of time has experienced some years in which the legislature sought to turn the system towards greater severity, and other years in which different priorities prevailed. Overall, the need for policy makers to make conscious

25 Don Stemen et al "Of Fragmentation and Ferment: The Impact of State Sentencing Policies on Incarceration Rates 1975–2002" (Vera Institute of Justice, August 2005) pp 66–67, 80–81, 142–143. See also Reitz, above n 12, 218–227; Daniel F Wilhelm and Nicholas R Turner "Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration?" (Vera Institute of Justice, 2002) [http://www.vera.org/publication\\_pdf/167\\_263.pdf](http://www.vera.org/publication_pdf/167_263.pdf) (last accessed 26 January 2006).

26 Michael Tonry *Punishment and Politics: Evidence and Emulation in the Making of English Crime Control Policy* (Willan Publishing, 2004) 94.

decisions about where to direct their funds will tend to retard punitive expansionism, which ends up being significant even if it does not happen every year. Over the long term, the broken cadence of punitiveness in some years, and restraint in others, seems to yield a pattern of slower prison growth. However, it does not preclude it.<sup>27</sup>

224. It should also be noted that the parole recommendations under consideration differ from those found to be optimally effective in the above research. We do not recommend the abolition of parole because, on balance, the literature, empirical evidence, and policy considerations all tend to suggest that parole offers advantages in terms of risk reduction that outweigh the benefits of abolishing it. It seems worth first exploring whether sufficient certainty from a prison population management perspective can be achieved by shortening the span of parole, and introducing parole guidelines. It should be noted that if parole was abolished, nominal sentence reductions would need to be correspondingly greater.
225. For long-term sentences, if the parole changes that we propose are to have a neutral effect on the prison population, there would need to be an average reduction of 25 percent in the length of court-imposed sentences. Without that reduction, 1,137 additional beds would be required.
226. If Parliament wishes to go further, and effect a real change in the prison population, the Sentencing Council provides a mechanism by which that can be achieved by managing the length of sentences. For example, even without any change in the number of prison sentences imposed, a 10 percent increase or decrease in the average term served would correspondingly increase or decrease the demand on prison beds by 600. It is important to note that these are averages: policy decisions would need to be made by the Council (and by Parliament, in the process of determining whether to disallow the guidelines) about the extent to which the sentences for particular offences should change. However, since prisoners serving long sentences comprise a significant majority of the prison population, top-end offences could not be excluded from the exercise if a significant impact was desired.
227. However, we reiterate that our proposals would not in themselves achieve a prison population change. They are simply a mechanism whereby sentencing and parole policy can be more directly managed and linked to likely outcomes with a greater degree of certainty than the present arrangements offer.
228. For this reason, these proposals have not been costed in terms of projected prison bed savings. The number of beds avoided (or gained) is entirely dependent upon the shape of the sentencing guidelines.

## TRANSITIONAL PROVISIONS

### Sentencing guidelines

229. Both the inaugural guidelines, and ongoing revisions to the guidelines, should be wholly retrospective in their effect. That is, they should apply to all offenders sentenced from the date that the guidelines come into force. We have been advised by the Crown Law Office that this is consistent with the weight of authority in

<sup>27</sup> Reitz, above n 12, 226–227.

like-minded jurisdictions (including England, Canada, and the United States), which holds that “tariff” changes do not constitute a penalty.

230. Section 6 of the Sentencing Act 2002 provides that, where a penalty is varied between the date of the commission of the offence and the date of sentence, the offender should receive the benefit of a lesser penalty. To confirm the common law position, we recommend that this should be amended. A subsection should be inserted to provide that, for the avoidance of doubt, a sentencing guideline is not a penalty for the purposes of the section. This will not preclude counsel, in the individual case, from submitting in first instance or on appeal that the guidelines should be departed from. However, that will be a matter for judicial discretion, not a point of law.

### Parole reforms

231. If offenders are to retrospectively receive the benefit of sentencing guideline changes, they should conversely be subject to the parole changes, because the latter would be one of the key drivers of any reduction in the length of the sentence. Accordingly, the parole changes should likewise be wholly retrospective in their effect, and thus applicable to all offenders sentenced from the date that the guidelines come into force.
232. However, prisoners serving existing sentences are entitled to have their sentences administered in accordance with the law applicable at the time that the sentence was passed. That is, prisoners serving pre-2002 commencement date sentences should remain subject to the Criminal Justice Act regime; and prisoners serving post-2002 commencement date sentences should continue to be dealt with under the Sentencing and Parole Acts 2002 as they currently stand. For some time going forward, Corrections would therefore be required to administer three different streams of sentences.
233. There may be one exception to this. As noted in para 134 above, depending upon the outcome of an appellate case in progress, Parole Act amendments may be required to ensure that the Board’s release decisions turn solely upon risk. Should this prove necessary, all subsequent Board decisions should be made by reference to the same criteria, regardless of which regime the prisoner was sentenced under.

#### RECOMMENDATION

- R39 The inaugural sentencing guidelines, ongoing revisions to the guidelines, and changes to parole eligibility should apply to all offenders sentenced post-commencement; however, prisoners serving existing sentences will not be affected.

## RECOMMENDATION

R40 Section 6 of the Sentencing Act 2002 should be amended by inserting a subsection to provide that, for the avoidance of doubt, a sentencing guideline is not a penalty for the purposes of the section.

**PARALLEL WORK  
ON MAXIMUM  
PENALTIES**

234. Sentencing guidelines will need to be developed within the legislative framework that exists at the time. They will thus need to be consistent with the statutory purposes and principles of sentencing, and with the maximum penalties that are prescribed by statute for particular offences.
235. Maximum penalties have emerged historically in an ad hoc fashion. They arguably contain a number of relativity problems and other anomalies. They have also been generally left untouched despite significant changes to the sentencing structure, including changes in remission and parole eligibility.
236. Sections 8(c) and (d) of the Sentencing Act 2002, respectively, codify the presumptions that the maximum penalty should be imposed in the most serious cases, and a penalty near to the maximum should be imposed for offending that is near to the most serious. Even though those provisions reflect the prior case law, there is some evidence that since the passage of the legislation they have increased sentence ranges in guideline judgments in an unintended way, because the Court of Appeal has perceived a need to achieve a greater alignment between sentencing in “ordinary” cases and sentences in the “worst” cases for each offence type.
237. If the development of guidelines was based upon the existing structure of maximum penalties – as sections 8(c) and (d) require – and if that structure remained untouched, the levels at which guidelines were set and the relativities between one offence and another would be likely to reflect the existing maximum penalty problems. This would create something of a dilemma for the Council: it could seek to draft guidelines that were coherent and defensible by reference to all of the other relevant considerations, but then, in all likelihood, would be accused of acting contrary to law.
238. We therefore propose that:
- the Law Commission should be directed to review the role, format and structure of maximum penalties in parallel with the development of the inaugural guidelines, and recommend any changes that are required to correct existing anomalies and ensure consistency with the purposes and framework of a guidelines system; and
  - as a corollary of this review, sections 8(c) and (d) of the Sentencing Act 2002 should be repealed.

#### RECOMMENDATION

R41 The Law Commission should be asked to review the role, format and structure of maximum penalties in parallel with the development of the inaugural guidelines, and recommend any changes that are required to correct existing anomalies and ensure consistency with the purposes and framework of a guidelines system.

#### RECOMMENDATION

R42 As a corollary of this review, sections 8(c) and (d) of the Sentencing Act 2002 should be repealed.

#### COMMUNITY-BASED SANCTIONS

239. Widespread concern was expressed to us in consultation about the credibility and effectiveness of existing community-based sanctions. There were calls for a greater array of sanctions; more judicial control over the execution of these sentences; and better enforcement of them. This concern has a bearing on the success of a sentencing guideline system, because guidelines around the custody threshold, which presumptively require judges to impose community-based sentences in which they lack confidence, simply will not be adhered to. We are advised that the Ministry of Justice is undertaking some work in this area, and suggest that it should be given a high priority.



# Appendix

## Regional analysis of variations in District Court sentencing

As one component of the research undertaken for this project, the Law Commission engaged corporate finance and economics experts Taylor Duignan Barry to undertake an analysis of current New Zealand sentencing practice. We wanted to assess the degree of variation, if any, between court districts, with a view to identifying whether anecdotal evidence of inconsistent sentencing approaches was substantiated empirically. A report was provided, the full version of which is available on our website at [www.lawcom.govt.nz](http://www.lawcom.govt.nz). The material that follows is an extract of the key findings.

The graphs below illustrate, for five sample offence types, the regional variations in District Court sentencing, measured in terms of the percentage of convictions for which a prison sentence was imposed. The offence types illustrated are:

- “grievous assault”;
- “theft”;
- “conversion”;
- “breach of community work”; and
- “driving under the influence”.

Each of the five offence types presented below had well over 1,000 convictions across the country during the two years under review. Only those regions with more than 500 convictions (for theft, breach of community work, and driving under the influence) or more than 100 convictions (for grievous assault and conversion) are included in the graphs below.

When interpreting the data it should be noted that:

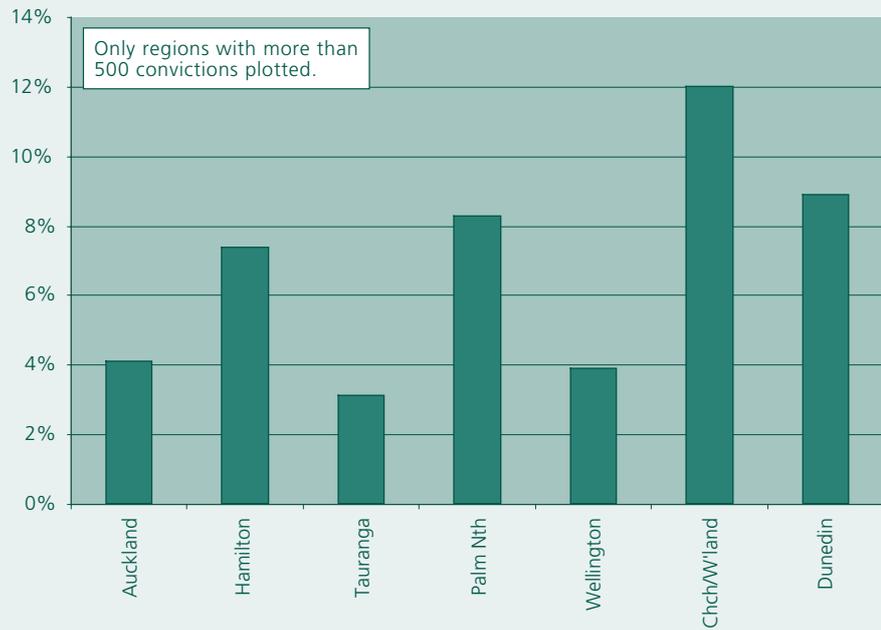
- The data does not permit allowance to be made for the effect of the number of previous offences of the offender on the term of the prison sentence. However, given the large numbers of convictions considered for the offence types presented above (with over 100 to over 500 convictions recorded in

each region), it may not be unreasonable to assume that the numbers of previous offences would not be markedly dissimilar across the regions.

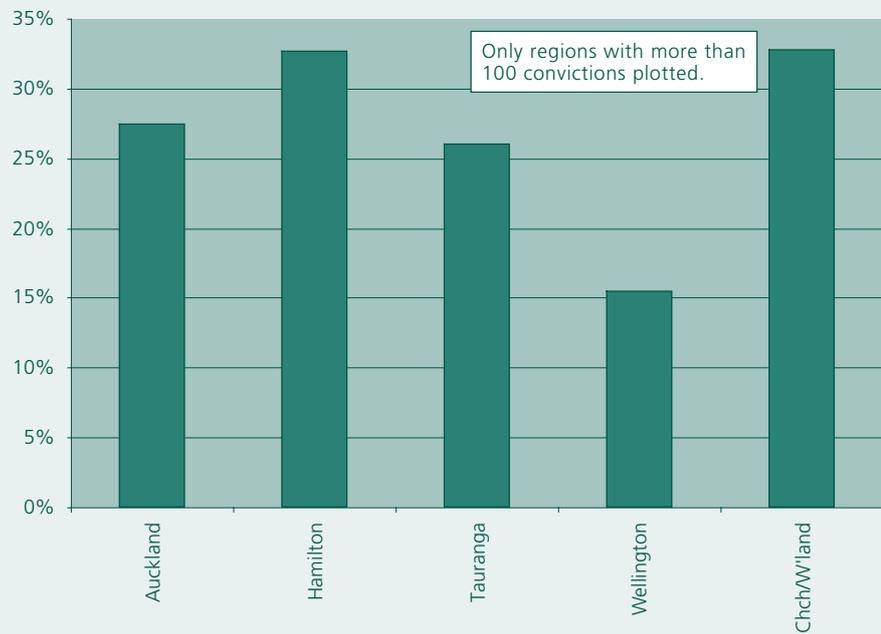
- The breadth of the classes used when categorising the different offences may affect the degree of variability of the sentencing terms recorded across the regions. If, for example, offences of a given type are consistently more serious in a particular region or regions, the average sentence imposed in the region would be expected to be more severe. However, the large numbers of convictions for the regions and offences presented above may also lead to differences in the severity of the offence across the regions tending to wash out.
- Examining the data at the regional level (i.e. the 17 regions) will tend to understate the degree of variability in sentencing at the individual District Court level.
- There may be differences in classifications across the regions that distort the data. For example, an offence that is classified as a serious assault in one region may be classified as a minor or a grievous assault in other regions.
- In cases of multiple offences, the most serious offence for each case has been used.
- The 2005 data is provisional and sentences may be subject to appeal.



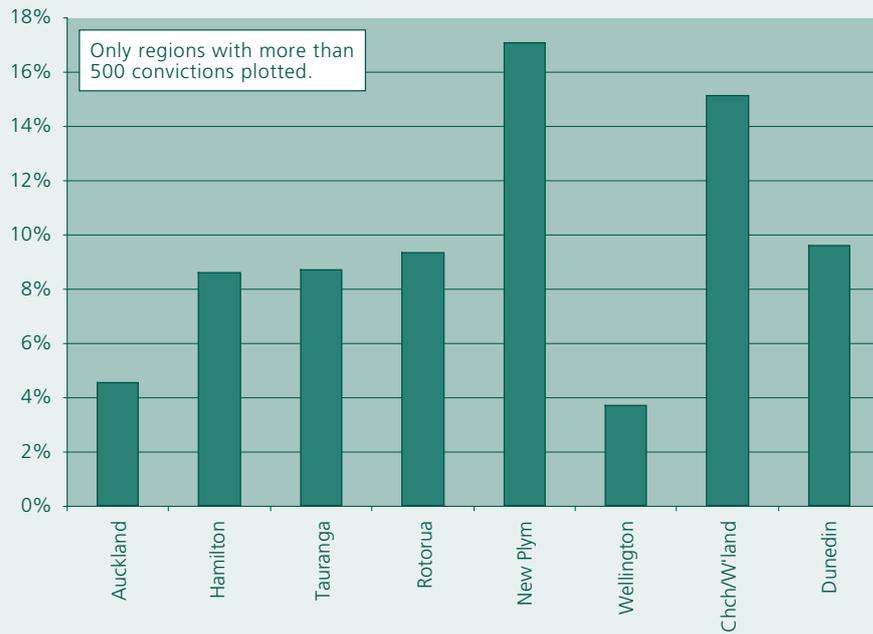
% IMPRISONED - THEFT



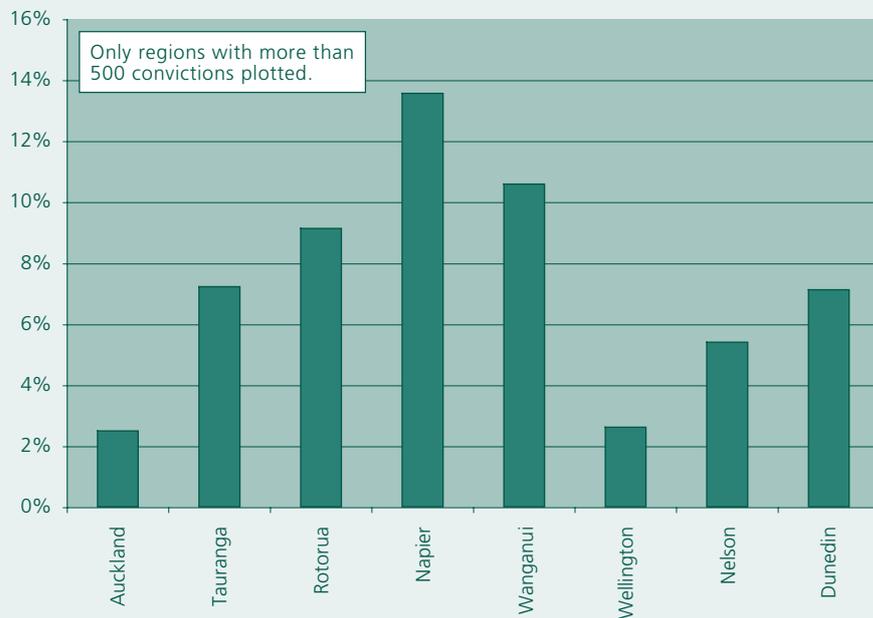
% IMPRISONED - CONVERSION



### % IMPRISONED - BREACH OF COMMUNITY WORK



### % IMPRISONED - DRIVING UNDER INFLUENCE



To allow, at least in part, for the possible distortions to the data from systematic differences in the number of previous convictions and/or the degree of seriousness of the offences across the regions, the regional variations in sentencing for 12 “sub-categories” of offence were also analysed.

The sub-categories covered four different offence types:

- “driving under the influence”;
- “driving while disqualified”;
- “receiving”; and
- “theft”.

In the case of “driving under the influence” and “driving while disqualified”, the sub-categories permit some allowance to be made for the number of previous offences of the offender, with sentencing data recorded separately for those who have recorded three or more previous offences.

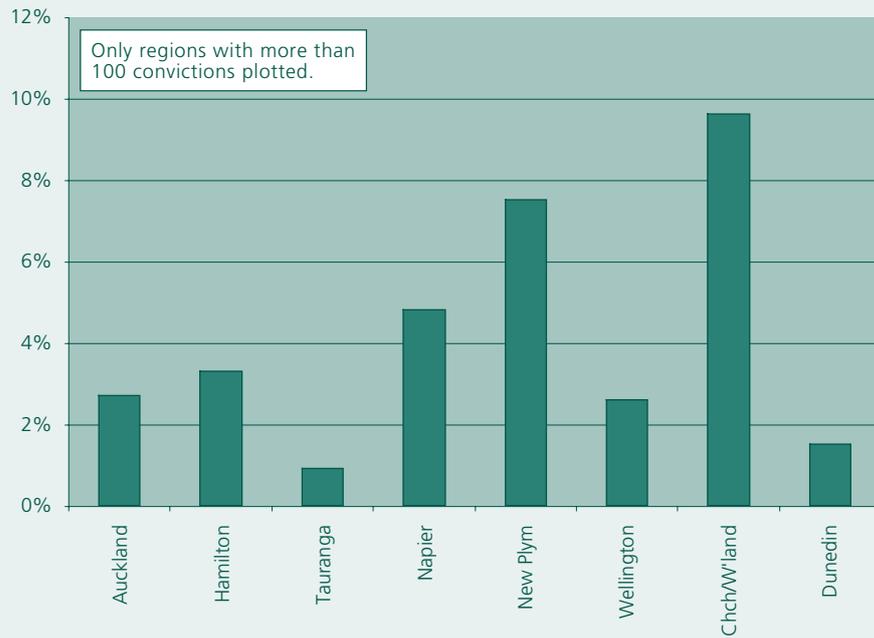
In the case of “receiving” and “theft”, the sub-categories permit some allowance to be made for the severity of the offence, with sentencing data recorded separately for three different categories according to the value of the property involved (e.g. less than \$500, greater than \$500).

The graphs below illustrate the regional variations in sentencing, measured in terms of the percentage of convictions for which a prison sentence was imposed, for three sample sub-categories of offences. Each of these three offence sub-categories had over 900 convictions recorded across the country during the period under review. Only regions with 100 or more convictions are included in the graphs.

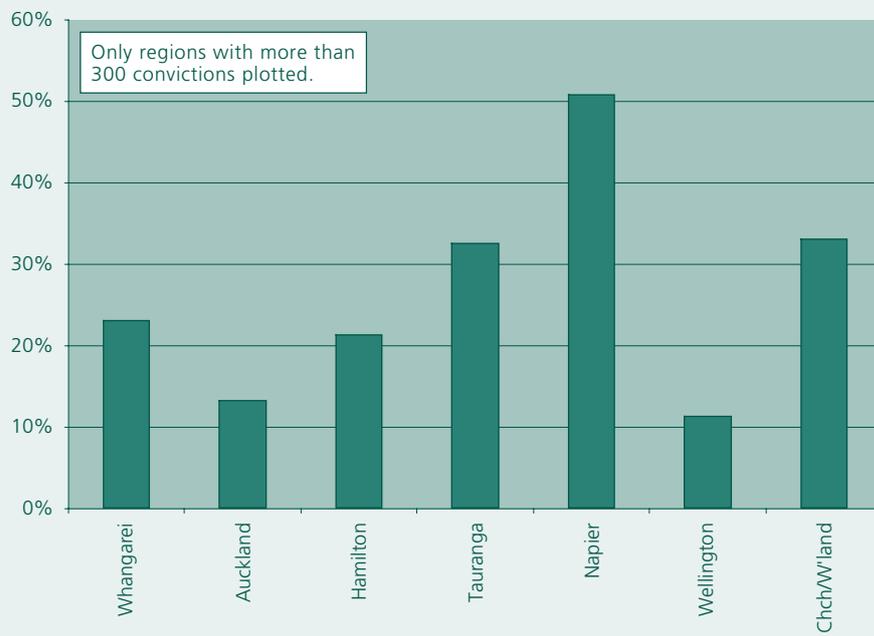
The offence types illustrated below are:

- theft of property (with a value of less than \$500);
- driving with excess breath alcohol (third or subsequent offence); and
- driving while disqualified (third or subsequent offence).

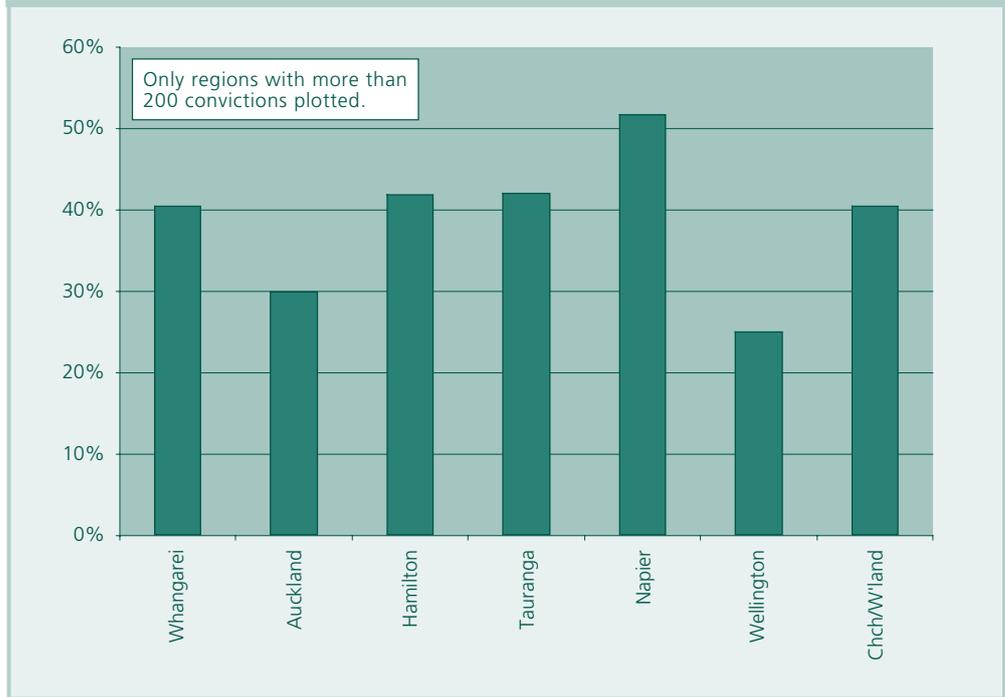
% IMPRISONED - THEFT PROPERTY (UNDER \$500)



% IMPRISONED - EXCESS BREATH ALCOHOL (3RD OR SUB)



% IMPRISONED - DRIVING WHILE DISQUAL (3RD OR SUB)



This document was printed on Novatech Paper. This is an environmentally friendly stock that originates from sustainable well managed forests. Produced at Nordland Papier paper mill, which holds both FSC and PEFC chain of custody certificates. (Reg. No. SGS-COC-2249) ISO 14001 environmental management systems certified. The mill is registered under the EU Eco-management and Audit Scheme EMAS. (Reg. No.D – 162 – 00007). The paper bleaching process is Elemental Chlorine Free, and Acid Free.

The HIT Pantone inks used in production of this report are vegetable oil based with only 2 percent mineral content, and are created from 100% renewable resources. The wash used with these inks was Bottcherin 6003, which is entirely CFC and Aromatic free.



EMAS



