Judicial discretion is the cornerstone of sentencing policy. That discretion cannot operate in a vacuum however and is subject to various statutory provisions as well as the binding judgements of higher courts. Bunreacht na hÉireann sets out a separation of powers – between the Judiciary, the Legislature and the Executive and the interplay between these entities is clearly evident in the context of sentencing.

Sentencing is a subject pertinent to the work of the Committee on Justice, Equality, Defence and Women’s Rights and is a much debated topic within society and the media, as is evidenced by calls for tougher penalties for crimes such as gangland killings and rape offences. Its current relevance is highlighted by several factors, including in particular the expansion of prison accommodation – the denial of liberty being the most serious of sanctions in Irish criminal law.

Mandatory sentencing has been shown not to work elsewhere, yet the debate persists in this jurisdiction. Fourteen years ago the Law Reform Commission recommended the introduction of non-statutory guidelines for judges to ensure consistency in sentencing. Clarification of the roles of Legislature, Executive and Judiciary is what we have attempted to achieve in this Spotlight and it is hoped that the focus on domestic policy together with some carefully selected comparisons from other common law jurisdictions will provide a spectrum of knowledge that will inform that debate.
Sentencing is best viewed as a process rather than a single event. Perceptions that the courts favour offenders over victims can often be coloured by a lack of understanding of exactly how the sentencing procedure works in our courts. Where no mandatory sentence is prescribed by statute the choice of appropriate penalty is the responsibility of the sentencing judge who is obliged to take various factors into account not least of which are the personal circumstances of the offender and the gravity of the offence.

Judges are umpires in the common law system; their role is to ensure a fair trial, and they have traditionally been vested with significant discretionary powers in carrying out this function. They have a responsibility to society and to the accused and it is in this context that the tension between individual justice and the public and political clamour for consistent sentencing can be starkly evident.

The formulation of policy in the context of sentencing has, according to numerous commentators suffered from the lack of comprehensive statistical data on sentencing, although some efforts have been made to address this shortfall. The experience of other jurisdictions, notably that of the Northern Territory in Australia, shows how data can be meaningfully used to demonstrate the success or failure of policies.

The courts have, on occasion, attempted an analysis of sentencing practice in the context of certain offences; in *The People (D.P.P.) v Drought* (Unreported, Central Criminal Court, 4th May 2007) Mr Justice Charleton included in his judgement a survey of sentences imposed in rape trials over a number of years. Additionally, the Irish Sentencing Information System (ISIS), a project chaired by Mrs Justice Susan Denham of the Supreme Court has been established for the purpose of providing information about sentencing to the Irish judiciary.

There are inherent problems associated with providing a tariff that does justice to the individual and provides reasonably similar penalties for reasonably similar offences. In procedural terms, the two most significant immediate factors that determine an offender’s sentence in Ireland are legislation and the jurisdiction of the sentencing court.

Both of these factors have an impact on the type of sentence which may be imposed as well as the severity of that sentence. Judges must also take aggravating and mitigating factors into account.

Irish law provides for various categories of punishment ranging from long-term custodial sentences to penalty points. Additionally, legislation may, and often does provide that a certain offence will attract a mandatory sentence which may be a mandatory minimum or maximum sentence. Irrespective of the nature and severity of the punishment, all forms of punitive sanction are based on one or more theoretical objectives. One such theory is that of deterrence which explains punishment in terms of its effect on reducing crime rates. Severity of punishment, it is argued, operates to disincline an individual from committing an offence and by extension, ought to have the same effect on society in general.

Alternative approaches to sentencing have been used in other common law jurisdictions. Some jurisdictions, notably New South Wales, the Northern Territory and Western Australia have experimented with mandatory sentencing and guideline judgements with varying degrees of success. In the case of the Northern Territory, data on mandatory sentencing provides a clear indication that mandatory sentencing is not an effective deterrent. The United Kingdom has pioneered the use of guideline judgements and has also established statutorily appointed but judicially controlled bodies to create a systematic sentencing policy. In the United States, Minnesota has adopted a strict ‘grid’ sentencing approach which yields statistical consistency but arguably does not provide the flexibility that the Irish judiciary are accustomed to.
Background

The jurisdiction of the Irish Courts is derived from our Constitution. 1 Article 38 sets out the principles concerning the conduct of criminal trials and provides that no person shall be tried on any criminal charge save in due course of law, that minor offences2 may be tried by courts of summary jurisdiction, and that subject to limited exceptions no person shall be tried on any criminal charge without a jury. Those exceptions being:

- indictable offences triable summarily;
- that special courts may be established for the trial of offences in cases where it may be determined that the ordinary courts are inadequate to secure the administration of justice and the preservation of public peace and order;
- that military tribunals may be established for the trial of offences against military law alleged to have been committed by persons while subject to military law and also to deal with a state of war or armed rebellion.

Sentencing is an integral part of the criminal trial process and as such an accused is entitled to the same constitutional right to fair procedures as apply throughout the criminal trial process. 3 Sentencing is a matter solely within the discretion of the trial judge having regard to the circumstances of the case and of the accused and subject to any limits as may be prescribed by law for a particular offence. The issue of sentencing is very important not only for convicted persons but also for victims, their families and the public at large.

Offences triable in Irish Courts

Criminal offences in Ireland can be divided into two broad categories:

Summary offences: These are offences which tend to be relatively minor4 in nature and are tried in the District Court by a judge sitting without a jury.

Indictable offences: Indictable offences are offences which are more serious than summary offences and consequently attract the right to be tried by a judge and jury. Indictable offences are usually tried in the Circuit Criminal Court or the Central Criminal Court by a judge and a jury or by the Special Criminal Court which is comprised of three judges and no jury.

There are however a number of indictable offences which may be tried summarily in the District Court pursuant to the Criminal Justice Act 19515. These offences are referred to as either-way offences and in order to be dealt with summarily in the District Court the District Court judge must be satisfied:

(a) that the facts proved or alleged constitute a minor offence fit to be tried summarily;
(b) that the accused on being informed of his/her right to be tried by a jury elects to being tried summarily;
(c) and that the Director of Public Prosecutions has consented to such summary disposal.

Most new legislation now makes provision for what are referred to as hybrid offences which are offences triable summarily or on indictment depending on the decision of the Director of Public Prosecutions, but subject to the overriding right of the District Court judge to decline jurisdiction.

If the Court deals with the case summarily its powers in relation to sentencing are restricted in terms of the length of sentence and/or the amount of the fine that can be imposed on conviction.

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1 Bunreacht na hÉireann 1937. See further: Walsh, D. Criminal Procedure (Thomson Round Hall, Dublin, 2002).
2 There is no statutory or constitutional definition of what constitutes a minor offence and it has been left to the Courts to decide. The term 'minor' has been interpreted by the Courts on the basis of the maximum amount of punishment that an offence can attract.
3 Box 2 below contains a diagram outlining the sentencing process which begins with conviction.
4 They include such things as public order offences and road traffic offences as well as less serious violent and drug crimes.
Jurisdiction of the Irish Courts

The District Court

The vast majority of criminal cases in Ireland are tried in the District Court, which is a court of summary jurisdiction, and therefore restricted as to the type of offence it can deal with and thus the length of sentence it may impose on conviction. Article 38.2 of the Constitution limits the jurisdiction of the District Court to dealing with criminal offences of a minor nature. Minor offences include summary offences but in practice the terms are used interchangeably.

Offences falling within the jurisdiction of the District Court

- Summary offences;
- Indictable offences triable either summarily or on indictment at the discretion of the Director of Public Prosecutions;
- Indictable offences in circumstances where
  - a) the accused has pleaded guilty to the offence;
  - b) the judge accepts the plea, and
  - c) the D.P.P. consents.

Table 1: District Court

<table>
<thead>
<tr>
<th>All Cases dealt with</th>
<th>2006</th>
<th>2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Summary Cases (17% change)</td>
<td>329,775</td>
<td>388,345</td>
</tr>
<tr>
<td>Indictable cases triable summarily (unchanged)</td>
<td>48,272</td>
<td>48,272</td>
</tr>
</tbody>
</table>

(Source: Courts Service Annual Report 2007)

Appeals: An appeal against sentence lies from the District Court to the Circuit Criminal Court, however the prosecution have no right to appeal an unduly lenient sentence imposed in a summary case. On appeal the Circuit Criminal Court may either:

(a) affirm;
(b) reverse;
(c) vary the sentence imposed.

In amending sentence the Circuit Criminal Court is bound by the same jurisdictional limits as apply to the District Court. Any sentence imposed on appeal must be one which could validly have been imposed in the District Court. Subject to these limits the Circuit Criminal Court can increase any sentence imposed in the District Court and its decision on appeal is final and unappealable.

Children Court

The Children Act 2001 created the Children Court⁶ to deal with persons who are under 18 years of age and who have been charged with a criminal offence. The Children Court has the power to deal with most criminal offences committed by children. Child offenders are however subject to a distinct system of sanctions and penalties compared with adult offenders. Section 98 of the Children Act 2001 sets out the type of orders which the Court is empowered to make when sentencing. These

Table 2: District Court by offence

<table>
<thead>
<tr>
<th>All Cases dealt with</th>
<th>2006</th>
<th>2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public order/assault</td>
<td>38,700</td>
<td>35,964</td>
</tr>
<tr>
<td>Drugs</td>
<td>8,842</td>
<td>9,870</td>
</tr>
<tr>
<td>Larceny</td>
<td>24,463</td>
<td>22,937</td>
</tr>
<tr>
<td>Road Traffic Offences</td>
<td>224,848</td>
<td>281,641</td>
</tr>
<tr>
<td>Sexual offences</td>
<td>415</td>
<td>517</td>
</tr>
<tr>
<td>Other</td>
<td>80,779</td>
<td>85,688</td>
</tr>
<tr>
<td>Total</td>
<td>378,047</td>
<td>436,617</td>
</tr>
</tbody>
</table>

(Source: Courts Service Annual Report 2007)

⁶ In effect the District Court.
Table 3: Age of persons committed to prisons & places of detention 2001-2006.

<table>
<thead>
<tr>
<th>Year</th>
<th>15 - &lt;17yrs</th>
<th>17 - &lt;21yrs</th>
<th>21 - &lt;25yrs</th>
<th>25 - &lt;30yrs</th>
<th>30 - &lt;40yrs</th>
<th>40 - &lt;50yrs</th>
<th>&lt;50yrs</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>126</td>
<td>1,712</td>
<td>2,116</td>
<td>1,992</td>
<td>2,202</td>
<td>889</td>
<td>502</td>
<td>9,539</td>
</tr>
<tr>
<td>2002</td>
<td>155</td>
<td>1,702</td>
<td>2,144</td>
<td>1,902</td>
<td>2,323</td>
<td>976</td>
<td>514</td>
<td>9,716</td>
</tr>
<tr>
<td>2003</td>
<td>301</td>
<td>1,614</td>
<td>2,148</td>
<td>1,961</td>
<td>2,336</td>
<td>986</td>
<td>468</td>
<td>9,814</td>
</tr>
<tr>
<td>2004</td>
<td>139</td>
<td>1,460</td>
<td>1,884</td>
<td>1,803</td>
<td>2,156</td>
<td>945</td>
<td>433</td>
<td>8,820</td>
</tr>
<tr>
<td>2005</td>
<td>44</td>
<td>1,229</td>
<td>1,842</td>
<td>1,887</td>
<td>2,256</td>
<td>999</td>
<td>429</td>
<td>8,686</td>
</tr>
<tr>
<td>2006</td>
<td>136</td>
<td>1,492</td>
<td>2,013</td>
<td>2,113</td>
<td>2,473</td>
<td>1,038</td>
<td>435</td>
<td>9,700</td>
</tr>
</tbody>
</table>


orders include a parental supervision order, an order imposing a community sanction and a detention order. The Court is precluded from imposing a sentence of imprisonment on any child, and any period of detention imposed ‘should be imposed as a measure of last resort’, the Court being satisfied that detention is the only suitable way of dealing with the child. The period of detention which the Court can impose in a children detention school shall not be less than 3 months or more than 3 years.7

Circuit Criminal Court

The Circuit Criminal Court has the power to deal with almost all of the indictable offences, except the more serious offences such as murder, attempted murder and rape, which are exclusively within the jurisdiction of the Central Criminal Court.8 Criminal cases dealt with by the Circuit Criminal Court begin life in the District Court and are sent forward to the Circuit Court for trial, or for sentencing where the accused has pleaded guilty. Where a person is sent forward to the Circuit Criminal Court for trial the case is heard by a judge and jury. Judges in the Circuit Criminal Court, as in the Central Criminal Court and the Special Criminal Court have a wide jurisdiction in terms of the penalties which can be imposed following the conviction of an offender for an indictable offence, subject to any minimum, maximum or mandatory sentence set down by statute or law.

**Appeals:** An appeal by either side against sentence lies from the Circuit Criminal Court to the Court of Criminal Appeal.9 The decision of the Court of Criminal Appeal is final.10

Central Criminal Court

The High Court exercising its criminal jurisdiction is known as the Central Criminal Court and it tries all indictable offences which fall outside the jurisdiction of the Circuit Criminal Court, predominantly murder, rape and related offences. The Central Criminal Court has jurisdiction in relation to the entire country. Trials generally are conducted by a judge and jury.11

**Appeals:** As in the Circuit Criminal Court either side may appeal a sentence from the Central

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7 Pursuant to s.149 of the Children Act 2001. Section 155 of the Act provides a general exception to this maximum 3 year detention order but the Court must give its reasons for imposing such order in open court.

8 Other offences exclusively within the jurisdiction of the Central Criminal Court are aggravated sexual assault, conspiracy to murder, treason, piracy, and offences under the Geneva Convention 1962, the Genocide Act 1973, and the Criminal Justice (United Nations Convention Against Torture) Act 2000.

9 Pursuant to s. 2 of the Criminal Justice Act 1993 the Director of Public Prosecutions (DPP) may apply to the Court of Criminal Appeal for a review of sentence following conviction on indictment, where it appears to the DPP that the sentence imposed was unduly lenient.

10 Subject to s. 29 of the Courts of Justice Act 1924 as amended.

11 Two or more judges may sit together in some instances, if so directed by the President of the High Court.
Criminal Court to the Court of Criminal Appeal, and the decision of the Court of Criminal Appeal is final.12

Special Criminal Court
The establishment of the Special Criminal Court is provided for by Article 38.3 of the Constitution and Part V of the Offences Against the State Act 1939. The present Court was established in 1972 to deal with cases where the ordinary courts are deemed inadequate to secure the effective administration of justice and the preservation of public peace and order. The Special Criminal Court sits with three judges and no jury. Criminal cases will be transferred from the ordinary criminal courts to the Special Criminal Court if:

(a) the offence in question is a "scheduled offence". Cases involving a "scheduled offence" generally involve a "subversive crime."

(b) the offence in question is not a "scheduled offence" but the Director of Public Prosecutions issues a certificate stating that in his/her opinion, the ordinary courts are inadequate to secure the proper administration of justice and the preservation of public peace and order. Once such a certificate is issued, the case must be transferred from the ordinary courts to the Special Criminal Court.

Appeals: Either side may appeal against sentence from the Special Central Criminal Court to the Court of Criminal Appeal, and the decision of the Court of Criminal Appeal is final.13

Court of Criminal Appeal
A convicted person may appeal their conviction and sentence, their sentence only or their conviction only from the Circuit Criminal Court, the Central Criminal Court or the Special Criminal Court to the Court of Criminal Appeal. In cases where the conviction only has been appealed the Court of Criminal Appeal has no jurisdiction to vary sentence. The Court of Criminal Appeal may:

(a) dismiss the appeal;

(b) quash the conviction and release the defendant;

(c) quash the conviction and order a re-trial;

(d) quash the conviction and, where the person appealing is considered to be guilty of some other offence, substitute their verdict and impose a new sentence, which cannot be more severe than the original one;

(e) quash the sentence, and in its place impose any sentence, or make any order which the Court considers appropriate, provided that sentence or order could validly have been imposed by the trial court. This allows the Court of Criminal Appeal to increase as well as reduce the original sentence.

Prosecution appeals14 of unduly lenient sentences are a regular feature of the work of the Court of Criminal Appeal, but the grounds upon which the Court will interfere with a sentence are limited and are in practice confined to circumstances where the sentence was wrong in principle,15 unlawful or imposed in excess of the sentencing court's jurisdiction.

Appeal: The decision of the Court of Criminal Appeal is in the ordinary course of events final, however s. 29 of the Courts of Justice Act 1924 as amended16 provides for an appeal to the Supreme Court, but only in circumstances where the Court of Criminal Appeal, the D.P.P. or the Attorney General certify that a point of law of exceptional public importance arises and it is desirable that an appeal be taken.

What influences a judge's decision when sentencing?
Subject to the provision of any statutory scale of punishment for a particular offence, it is within the discretion of the sentencing judge to determine what precise punishment should be imposed on an offender. However, the judge

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12 Subject to s. 29 of the Courts of Justice Act 1924 as amended
13 Subject to s. 29 of the Courts of Justice Act 1924 as amended
14 ibid
15 For example, where the sentencing judge failed to consider or give credit for an accepted mitigating factor such as a guilty plea.
16 By s.22 of the Criminal Justice Act 2006
when doing so is obliged to take into account a number of important factors including but not limited to the gravity of the offence and the personal circumstances of the offender. These factors will have a positive or alternatively a negative effect on the judge’s decision, and are referred to as mitigating or aggravating factors. A non-exhaustive list of such aggravating and mitigating factors is contained in Box 1 below.

### Pre-Sentencing Reports

#### Probation Reports

The Probation Service prepares these reports for the courts to assist judges in deciding what type of sentence to impose on an offender. The report will contain information about the offender, their family circumstances and lifestyle, including whether or not they have an alcohol or drug problem, and any other previous convictions. The probation report will consider the attitude of the offender and whether they have accepted responsibility for their actions. It will discuss whether the offender is committed to improving his or her lifestyle or behaviour, including attending addiction treatment programmes. The report will also consider the possibility of imposing a non-custodial sentence eg. community service.

### Victim Impact Statements

The victim of a criminal offence is not a party to criminal proceedings but simply a witness. Section 5 of the *Criminal Justice Act 1993* introduced victim impact statements whereby victims can provide information to the court on the impact that the crime has had on them, emotionally, physically, and economically. That Act does not set out what if any weight is to be attributed to such statements. This is left entirely within the discretion of the trial judge. The Court of Criminal Appeal has however, suggested that formal restrictive guidelines should be put in place governing the use of victim impact statements. ¹⁷

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¹⁷ *D.P.P. v Wayne O'Donoghue* [2007] 2 IR 336
**Box 1: Mitigating and Aggravating Factors**

<table>
<thead>
<tr>
<th><strong>Mitigating factors</strong></th>
<th><strong>Aggravating Factors</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>It is a matter for an accused's legal team to urge the judge to consider any factors which may have a positive effect on the sentencing decision, thereby reducing the severity of the sentence imposed. These include:</td>
<td>There are also a number of factors which can have a negative effect on the judge’s decision when sentencing, thereby increasing the severity of the sentence imposed. These include:</td>
</tr>
<tr>
<td>• The facts surrounding the commission of the offence, for example, provocation, duress, or recovery of stolen property;</td>
<td>• The facts surrounding the commission of the offence, such as use of a weapon, use of violence, committing an offence while on bail;</td>
</tr>
<tr>
<td>• The attitude of the accused, for example, remorse;</td>
<td>• The attitude of the accused, for example, lack of remorse;</td>
</tr>
<tr>
<td>• Co-operation with the Gardaí, in particular helping the Gardaí to catch other offenders;</td>
<td>• Non co-operation with the Gardaí;</td>
</tr>
<tr>
<td>• Early admission of guilt. A sentence will be reduced in circumstances where an accused has pleaded guilty, saving the court time and sparing the victim of sexual or other violent offences the trauma of having to give evidence in court;</td>
<td>• While a guilty plea is a mitigating factor, an accused is entitled to fight his/her case without it being seen as an aggravating factor. There is a constitutional right to be tried in due course of law and an accused can not be penalised for exercising this constitutional right;</td>
</tr>
<tr>
<td>• The personal circumstances of the offender, for example, addictions, family circumstances, other penalties resulting from conviction (such as losing a job), evidence of previous good character. Personal circumstances are one of the most important factors a judge considers prior to sentencing and in many cases a judge will request a probation report to assist in this regard;</td>
<td>• The personal circumstances of the offender, for example, previous convictions.</td>
</tr>
<tr>
<td>• Whether the offender is a non-Irish national. A custodial sentence is thought to have harsher consequences for offenders who are non-Irish nationals.</td>
<td></td>
</tr>
</tbody>
</table>
Table 4: Breakdown of sentence length for persons sentenced to imprisonment 2001-2006.

<table>
<thead>
<tr>
<th>Year</th>
<th>&lt; 3 months</th>
<th>3 - 6 months</th>
<th>6 - 12 months</th>
<th>1 - 2 years</th>
<th>&lt; 2 years</th>
<th>Total sentenced committals</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>2,006</td>
<td>986</td>
<td>1,097</td>
<td>519</td>
<td>552</td>
<td>5,160</td>
</tr>
<tr>
<td>2002</td>
<td>1,909</td>
<td>923</td>
<td>1,029</td>
<td>514</td>
<td>661</td>
<td>5,036</td>
</tr>
<tr>
<td>2003</td>
<td>2,018</td>
<td>1,083</td>
<td>1,232</td>
<td>402</td>
<td>675</td>
<td>5,410</td>
</tr>
<tr>
<td>2004</td>
<td>2,000</td>
<td>1,196</td>
<td>1,023</td>
<td>283</td>
<td>562</td>
<td>5,064</td>
</tr>
<tr>
<td>2005</td>
<td>1,962</td>
<td>1,020</td>
<td>962</td>
<td>465</td>
<td>679</td>
<td>5,088</td>
</tr>
<tr>
<td>2006</td>
<td>2,253</td>
<td>1,220</td>
<td>1,134</td>
<td>458</td>
<td>737</td>
<td>5,802</td>
</tr>
</tbody>
</table>


Table 5: Offence by Sentence Length of Offender 2006

<table>
<thead>
<tr>
<th>Offence Category</th>
<th>&lt; 3 months</th>
<th>3 - &lt;6 months</th>
<th>6 - &lt;12 months</th>
<th>1-2 years</th>
<th>&gt;2 years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>17</td>
</tr>
<tr>
<td>Manslaughter</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>18</td>
</tr>
<tr>
<td>Sexual Offences</td>
<td>1</td>
<td>3</td>
<td>7</td>
<td>11</td>
<td>68</td>
</tr>
<tr>
<td>Other Offences Against the Person</td>
<td>76</td>
<td>152</td>
<td>167</td>
<td>106</td>
<td>154</td>
</tr>
<tr>
<td>Offences Against Property</td>
<td>322</td>
<td>338</td>
<td>476</td>
<td>219</td>
<td>270</td>
</tr>
<tr>
<td>Drug Offences</td>
<td>73</td>
<td>64</td>
<td>79</td>
<td>35</td>
<td>144</td>
</tr>
<tr>
<td>Road Traffic Offences</td>
<td>765</td>
<td>354</td>
<td>244</td>
<td>62</td>
<td>27</td>
</tr>
</tbody>
</table>

Box 2: The Sentencing Process

CONVICTION

SENTENCING FACTORS

AGGRAVATING FACTORS

MITIGATING FACTORS

JUDICIAL DECISION

PRECEDENT

DISCRETION

STATUTE
**Background**

‘Sentencing is the judicial determination of a legal sanction to be imposed on a person found guilty of an offence’. The determination of the appropriate sanction is an integral part of the administration of justice which, under the terms of Bunreacht na hÉireann, is the sole preserve of the judiciary.

While the Constitution sketches a robust vision of judicial control of sentencing there is increasing pressure for the fettering of that discretion in the interest of establishing either a more consistent sentencing structure or one with more pronounced punitive overtones.

The sentencing process is subject to various statutory provisions and to the binding decisions of the courts. Underpinning the entire process, whether legislative or judicial, are the constitutional requirements of Bunreacht na hÉireann. The process is also informed by the various theoretical perspectives on punishment. This section will offer an outline description of the constitutional challenges facing any attempt at reform of the sentencing division of labour.

**The Separation of Powers**

The doctrine of the separation of powers is constitutionally mandated under the terms of Bunreacht na hÉireann which requires that the three organs of state, the Legislature, the Executive and the Judiciary each operate independently of one another with the aim of ensuring that no one organ of state is possessed of unfettered power. The operation of the doctrine in Ireland is less rigid than elsewhere and as a consequence, a certain ‘blurring of the lines of separation’ can often be seen. In the context of sentencing however, each of the three organs of state have a specific role.

The Oireachtas as the Legislature is exclusively mandated to enact legislation. In this capacity, the Oireachtas may determine that certain forms of conduct should be deemed unlawful and set down sanctions to be imposed in the event of a conviction.

The role of the Judiciary is then to impose such sanctions in the event of a conviction for the unlawful conduct. Finally, the enforcement of the sentence is the responsibility of the Executive. It is therefore, impermissible for any organ of state to purport to carry out any function that is constitutionally ascribed to one of the others.

Under the terms of Articles 34-37 of Bunreacht na hÉireann, the courts and the administration of justice are matters which are within the exclusive jurisdiction of the judiciary. Article 38 provides that anyone charged with a criminal offence will be tried ‘in due course of law’.

Bunreacht na hÉireann is silent on the issue of what precisely constitutes ‘trial in due course of law’ and thus, the elaboration of criteria for a fair trial has been left to the courts. Box 3 below sets out the most relevant of these constitutional provisions.

In the context of sentencing, the courts have determined that the choice of sentence, where there is no mandatory sentence prescribed by the Oireachtas, is a matter for the trial judge, or for an appellate court, as appropriate.

The courts have also held that in the determination of sentence, the sentencing judge is obliged to take the gravity of the offence into account and also the personal circumstances of the offender.

There is thus an inherent tension between the Constitution’s charge to the judiciary to do justice in the individual case, and the legislature’s mandate to legislate for mandatory tariffs irrespective of the circumstances of the individual case.

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17 Ryan, F. *Constitutional Law* (Round Hall Sweet and Maxwell, Dublin, 2001) p. 67
As the recent High Court decision of Ms Justice Irvine in *Whelan and Another v Minister for Justice, Equality and Law Reform and Others*\(^{20}\) makes clear, mandatory sentencing and the judicial function are not necessarily constitutionally incompatible and any constitutional tension that exists is alleviated by a legislative recognition that to impose mandatory sentence in all circumstances would be unjust. With the exception of the mandatory life sentence for murder and treason, none of the mandatory sentences on the Irish statute book are couched in imperative terms. In the case of mandatory minimum sentences, most, if not all, delegate to the sentencing judge the power to decide whether a particular set of circumstances is ‘exceptional’ for the purposes of the offence thus allowing the sentencing judge to impose a sentence appropriate to the circumstances. Having weighed up the offence, the nature of the offender’s circumstances and any aggravating and mitigating circumstances, a judge may choose to depart from the mandatory sentence under the auspices of ‘exceptional circumstances’. One of the clearest examples of this in Irish law is the 10 year mandatory sentence for certain drug trafficking offences inserted into the *Misuse of Drugs Act 1977* by Part 8 of the *Criminal Justice Act 2006*\(^{21}\).

As a result of this inbuilt facility to deviate from apparently mandatory legislative provisions, the vast majority of offences are typically deemed to be exceptional and thus receive as wide, and inconsistent, a range of tariffs as existed before the introduction of the legislation. The imposition of a lengthy custodial sentence to prevent the offender committing further offences has traditionally been considered anathema by the courts. In the case of *The People (D.P.P.) v. Carmody*\(^{22}\) the Court of Criminal Appeal quashed a sentence of six years imposed on two offenders who pleaded guilty to charges of burglary. The Court of Criminal Appeal said the sentencing judge was attempting to procure reform by prevention but that, in the absence of statutory provisions, this was not acceptable. As Mr Justice Walsh noted in the seminal case of *The People (Attorney General) v. O’Callaghan*:

‘... it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter upon which he has not been convicted or that in any circumstances he should be deprived of his liberty upon only the belief that he will commit offences if left at liberty, save in the most extraordinary circumstances carefully spelled out by the Oireachtas and then only to secure the preservation of public peace and order or the public safety and the preservation of the State in a time of national emergency or in some situation akin to that.’\(^{23}\)

### Rationale for Punishment\(^{24}\)

The question of punishment for any offence raises the issue of the purpose behind punishment and the rationales put forward to justify the imposition of legal sanctions. Clearly, the first aim of punishment is to punish an individual whose conduct is deemed sufficiently wrong to warrant it. Other theories have also been put forward in this regard each of which is outlined below.

A theory of punishment based solely on retribution, which is also referred to as ‘just deserts’ focuses on whether an individual deserves to be punished and is based on the idea that the punishment should be proportionate to the offence in respect of which it is imposed. This is not the same as asserting that the punishment should be equal to the crime, but rather that the punishment should be in proportion to it, having regard to all the circumstances.

Punishment that is founded on a theory of deterrence operates in two ways. Firstly, it may specifically deter the individual from committing an offence and secondly, it may operate in a more general way such as to deter society at large from engaging in criminal activity. In both cases the severity of the punishment attracted

\(^{20}\) *Whelan and Another v Minister for Justice, Equality and Law Reform and Others* [2007] I.E.H.C. 374

\(^{21}\) *Criminal Justice Act 2006* ss. 80-86 introduced a number of amendments to the *Misuse of Drugs Act 1977*.

\(^{22}\) *The People (D.P.P.) v. Carmody* [1988] I.L.R.M. 370

\(^{23}\) [1966] I.R. 501

\(^{24}\) O’Malley, T. *Sentencing Law and Practice* 2\(^{nd}\) ed. (Thomson Round Hall, Dublin, 2006)
by the offence, in theory, discourages criminal activity. However, research conducted in jurisdictions which have severe penalties for certain offences, including the death penalty, does not support the assertion that a reduction in criminal activity can be definitively attributed to them.\textsuperscript{25}

The theory of rehabilitation is based on the premise that a sentence should include some means of providing the offender with the incentive to desist in engaging in criminal activity thus ensuring the future welfare of the offender and society in general. Rehabilitation may comprise \textit{inter alia} education, training or the provision of help with drug addiction and is obviously dependent on available funding and other resources.\textsuperscript{26}

Custodial sentences are also based on the perceived need to incapacitate the offender, particularly so in the case of long-term custodial sentences. Incapacitation, according to the theory, prevents the future commission of crime by the offender although in this regard, O’Malley points out that:

‘…there is no guarantee that an offender will remain law-abiding while in custody. It is often forgotten that there are few serious crimes that cannot be committed in prison. Less draconian measures may also have an incapacitative effect.’

There are inherent difficulties with this particular theory of punishment, not least of which is that of proportionality and the courts have traditionally been very strident in their rejection of any notion of preventative justice which in

\begin{table}[h]
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\begin{tabular}{|c|c|}
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Retribution / Just Deserts & Deterrence \\
\hline
Denunciation & Incapacitation \\
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\textbf{Theories of Punishment} & Rehabilitation \\
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\textbf{Punishment} &  \\
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Thus, denunciation focuses on the conduct of the offender rather than the offender himself. The theories outlined above whilst different, clearly contain a certain amount of overlap.

\textbf{Categories of Punishment}

There are two types or categories of punishment; primary and secondary. The former is viewed as being punitive in nature whereas the second category is not, strictly speaking, viewed as such but rather as being consequential or ancillary to the primary punishment.

\textsuperscript{26} Information about training facilities available in all Irish prisons may be obtained by reading the Annual Reports of the Prison Visiting Committee compiled in respect of each prison. The reports are published on the website of the Department of Justice, Equality and Law Reform and may be accessed here http://www.justice.ie/en/JELR/Pages/Prison_Visiting_Committee_Annual_Reports_2007 (last accessed 19th September 2008).

\textsuperscript{27} The People (A.G.) v O’Callaghan \citeyear{1966} I.R. 501 (Mr Justice B. Walsh)
\textsuperscript{28} O’Malley, \textit{op cit} p.43
\textsuperscript{29} \citeyear{1996} 1 S.C.R. 500 at para. 81, cited in O’Malley, \textit{op cit} p. 43
The former category referred to above relates to the sanction or range of sanctions which may be imposed upon conviction, which may be custodial or non-custodial and includes imprisonment, fines, community service orders, curfews and exclusion orders. The latter comprises a number of ancillary orders which may, and sometimes must, be made in conjunction with sentence. These include disqualification, forfeiture, confiscation, compensation and more recently, registration requirements where an offender sentenced for certain offences must, in addition to his sentence register his details with An Garda Síochána.

While the choice of appropriate sanction is a matter for the court, the choice must be made having regard to the seriousness of the offence and the personal circumstances of the offender. Proportionality as a doctrine has its constitutional origins in the decision of the High Court in *Heaney v Ireland*30 and has more recently been ruled upon by the Supreme Court in *D.P.P. v M.*31 where the proportionality requirement was outlined in the following terms by Mrs Justice Denham:

‘…sentences must also be proportionate to the personal circumstances of the appellant. The essence of the discretionary nature of sentencing is that the personal situation of the appellant must be taken into consideration by the court.’

Where a range of punishment is provided for by statute, the judiciary may exercise discretion in selecting the precise nature of the punishment. An offence worthy of note in this regard is that which is provided for by s. 15 of the *Misuse of Drugs Act 1977* which section relates to the possession of controlled drugs for unlawful sale or supply. Section 15 of the *Misuse of Drugs Act 1977* was amended by s. 4 of the *Criminal Justice Act 1999* by the insertion of a new s. 15(A). The effect of this amendment was to create a specific offence of possession of drugs which have a market value of €13,000 or more. The *Misuse of Drugs Act 1977* was amended again by s. 33 of the *Criminal Justice Act 2007* which sets down a minimum sentence of 10 years’ imprisonment upon conviction under s. 15(A) of the *Misuse of Drugs Act 1977*. Although often referred to as a mandatory sentence, it is in fact prescriptive rather than mandatory given that the 10 year sentence need not be imposed in circumstances where the sentencing judge is satisfied that:

‘…by reason of exceptional and specific circumstances relating to the offence, or the person convicted of the offence, it would be unjust in all the circumstances to do so.’32

### Custodial Sentences

A court is never obliged to impose a custodial sentence unless such sentence is mandatory.33 The imposition of a custodial sentence in most cases involves the incarceration of an offender. Custodial sentences may, however, be suspended either in whole or in part by the sentencing judge. A suspended sentence will become operational if the offender breaches any of the conditions laid down by the court when the sentence is being imposed.

Custodial sentences may be either mandatory or be subject to maximum or minimum terms. As previously mentioned, a mandatory sentence permits of no judicial discretion. Arguably, this has the benefit of eliminating inconsistency but equally, it may give rise to questions of proportionality since the availability of only one sentencing option presupposes that the offence in question always carries the same level of moral responsibility. Clearly, the facts of each case may well demonstrate that this is not the case. Any sentence that is not mandatory will involve judicial discretion and it is in this context that allegations of inconsistency of approach are invariably made.

A maximum sentence is by definition the severest form of punishment which may be imposed for the commission of a given offence. A minimum sentence sets out the lowest level of punishment which may be imposed. Both involve the removal of a certain amount of judicial discretion but have the benefit of meeting the requirement that a sentence must not only fit the crime but must also fit the individual circumstances of the offender.

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31 *D.P.P. v M.* [1994] 3 I.R. 306
33 *The People (D.P.P) v R.O.D.* [2000] 4 I.R. 361
The Mandatory Life Sentence

A small number of offences attract a mandatory life sentence in Irish law, these being murder and treason.

A conviction for murder in this jurisdiction will result in the mandatory imposition of a life sentence. The former offence of capital murder, which involved the unlawful killing of certain individuals in the course of their duties carried the death penalty as did a conviction for treason. The death penalty was abolished by s. 3 of the Criminal Justice Act 1990 and s.2 of that Act prescribes that:

‘A person convicted of treason or murder shall be sentenced to imprisonment for life.’

Section 3 of the Criminal Justice Act 1990 provides for a category of murder carried out in aggravating circumstances and replaces the older offence of capital murder. The mandatory life sentence for this offence is subject to the condition that at least 40 years must be served.34

A life sentence, whether mandatory or discretionary and regardless of the offence in respect of which it is imposed means life imprisonment. It is an indeterminate sentence which lasts for the duration of the offender’s life. That is not to say that such offenders will remain in prison for the rest of their lives, most do not but may be released on licence granted at the discretion of the Minister for Justice, Equality and Law Reform on the advice of the Parole Board.35 Frequently made assertions that ‘life means 12 years’ or some other definitive duration are therefore erroneous.

Where an offender is released on licence, conditions are invariably attached and breach of any of the stipulated conditions will result in the revocation of the licence and the recalling of the offender to serve the remainder of his sentence. The indeterminate duration of the life sentence places the offender in the position of not knowing how long s/he will actually spend in prison. This contrasts with offenders who are sentenced to determinate terms who can, with some degree of accuracy, calculate the amount of time they will have to serve.36

Issues of remission of sentence and temporary release in the context of any sentence are the prerogative of the Minister for Justice, Equality and Law Reform exercising the power of Pardon provided for by s. 23(1) of the Criminal Justice Act 1951 as amended by s.9 of the Criminal Justice Act 1990.37

The constitutionality of mandatory sentences was put beyond question in Deaton v A.G.38 In the context of the mandatory life sentence for murder, the issue was revisited relatively recently by the High Court in Whelan and Others v Minister for Justice, Equality and Law Reform,39 where the High Court rejected a challenge to the constitutionality of the mandatory life sentence.

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34 In the case of an attempted murder contrary to s. 3 of the Criminal Justice Act 1990, the minimum term is 20 years’ imprisonment. Children and young people are not subject to these timescales in the event that they are convicted of treason, murder or attempted murder under this section.
35 The Parole Board was established in 2001 on an interim administrative basis by the Minister for Justice, Equality and Law Reform. The Board reviews the sentences of long term prisoners and provides the Minister with advice on those sentences. The Board replaces the Sentencing Review Board and is limited to dealing with prisoners serving sentences of 8 years or more. The latest report of the Parole Board deals with the activities of the Board for the year 2007 and may be accessed online at http://www.justice.ie/en/JELR/PB%20Annual%20Report%202007%20Eng.pdf/Files/PB%20Annual%20Report%202007%20Eng.pdf
37 Article 13(6) of Bunreacht na hÉireann vests in the President the right of pardon and the power to commute or remit a sentence imposed by the courts. Section 23(1) of the Criminal Justice Act 1951 granted these rights and powers to the Government in all but capital cases and the amendment effected by s.9 of the Criminal Justice Act 1990 permits the exercise of this power in all types of cases and by virtue of s. 17 of the Criminal Justice (Miscellaneous Provisions) Act, 1997 delegation of this power to the Minister was permitted.
It had been argued in *Whelan* that the mandatory life sentence was unconstitutional on a number of grounds. It was alleged that s. 2 of the *Criminal Justice Act 1990* insofar as it mandates the imposition of the life sentence, amounted to a sentencing exercise on the part of the Oireachtas, that s.2 of the *Criminal Justice Act 1990* offended against the constitutional requirement of proportionality, that the ultimate decision with regard to setting a release date was made by the Minister and as such involved the Minister in carrying out a judicial function contrary to the doctrine of the separation of powers. Arguments were also made on various grounds pertaining to the European Convention on Human Rights. The Court rejected all arguments and held that the Oireachtas was acting within its power in prescribing a penalty for an offence and in the case of murder, the offence itself is regarded as being the most grievous offence in Irish law, thus warranting the harshest of sentences.

Critics of the mandatory life sentence for murder argue that its mandatory nature may well have the effect of disinclining a person charged with murder to enter a plea of guilty. Given that the sentence is mandatory regardless of any other considerations, there is no logical reason why a guilty plea should be entered. According to Mr Justice Carney, this has a significant impact on the workload of the courts but also has a detrimental impact on the families of murder victims.40

Further, removing the mandatory nature of the life sentence for murder would not preclude the imposition of a life sentence where the judge would deem that to be an appropriate and proportionate sentence.41 Research in other jurisdictions, notably the United States and Australia indicates that mandatory sentences may not have as high a deterrent effect as is sometimes supposed.42 There has thus far not been any comprehensive research carried out in the area of sentencing in Ireland; research where it has been conducted has tended to focus on a particular offence or category of offences or a particular penalty.43

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40 The Hon. Mr Justice Paul Carney *Decriminalising Murder* Address to the Law Faculty, NUI Galway (2003) available online at http://www.nuigalway.ie/law/documents/working/2%20CPS%202003.pdf


42 See e.g. McCutcheon, J.P. and Coffey, G. *op cit* at note 36 above and Mr Justice Charleton’s analysis of sentencing in rape trials in *The People (D.P.P.) v Drought* (Unreported, Central Criminal Court, 4th May 2007, Mr Justice Charleton)
### Relevant Constitutional Articles

#### Article 34.1
Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.

#### Article 34.3.1
The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal.

#### Article 34.3.4
The Courts of First Instance shall also include Courts of local and limited jurisdiction with a right of appeal as determined by law.

#### Article 35.2
All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law.

#### Article 35.3
No judge shall be eligible to be a member of either House of the Oireachtas or to hold any other office or position of emolument.

#### Article 37.1
Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or body of persons is not a judge or a court appointed or established as such under this Constitution.

#### Article 38.1
No person shall be tried on any criminal charge save in due course of law.

#### Article 38.2
Minor offences may be tried by courts of summary jurisdiction.

#### Article 38.3.1
Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.
While sentencing in Ireland is often criticised for its lack of coherency, other common law jurisdictions have experimented with various sentencing strategies.

A brief sample of these jurisdictions is provided here. Each jurisdiction has opted for a different means to overcome the vexed issues inherent in formulating a sentencing policy. Some of them have opted for mandatory sentencing (Northern Territory, Minnesota), while other jurisdictions have instead opted to stress the paramount requirement of doing justice in each individual case, and have counselled against the use of prescriptive legislation (New South Wales, New Zealand and the United Kingdom).

Although our European neighbours operate a variety of sentencing and penal regimes in some cases, the civil law system of adjudication and judgement offers little useful comparative material. Even though judicial independence is valued in the individual case, the civil law system prescribes strict statutory guidelines for offences that are expected to be followed in a reasonably mechanistic fashion by judicial officers.

While only a brief sample of the alternative approaches to sentencing, these jurisdictions offer a partial glimpse of the sentencing strategies available.

**Australia**

**New South Wales**

The Australian States have adopted varied approaches to the issue of structuring sentencing discretion. In New South Wales, the *Criminal Law Amendment Act 1883 (NSW)* prescribed a very rigid series of steps or grid that almost entirely removed judicial discretion in sentencing. The perceived injustices of the system caused it to be repealed within a year, and since then legislative solutions have not found favour with the State judiciary.\(^{44}\) Although emphasising that their preference for guideline decisions rather than legislation was not motivated by constitutional considerations, senior State judges have consistently reiterated that this preference is inspired by the pragmatic realities of the common law system. In particular, the fact that guidelines drafted by the superior courts will flow, like any other precedent, down the court hierarchy has been stressed.

The crucial difference between legislative and judge-driven sentencing reform, as argued by Chief Justice of New South Wales, Mr Justice Spigelman, is that the legislative enactments restrict judicial discretion whereas guideline pronouncements structure but do not inhibit that necessary discretion:

> ‘The continued existence of sentencing discretion is an essential component of the fairness of our criminal justice system. Unless judges are able to mould the sentence to the circumstances of the individual case then, irrespective of how much legislative forethought has gone into the determination of a particular regime, there will always be the prospect of injustice. No judge of my acquaintance is prepared to tolerate becoming an instrument of injustice. Guideline judgments are preferable to the constraints of mandatory minimum terms or grid sentencing.’\(^{45}\)

In reaching this conclusion, the Chief Justice was bulwarked by earlier decisions of the Federal High Court which had consistently opposed legislative interference in sentencing. Justices Mason and Deane, in a 1986 decision, decided that while legislative interference with the judicial discretion implicitly envisaged by the Constitution would have a deleterious effect on the provision of just sentences, the same could not be said about guideline decisions:

> ‘The point of preserving the width of the discretion which parliament has created is that it maximises the possibility of doing justice in every case. But the need for consistency in judicial adjudication, which is the antithesis of arbitrary and capricious decision-making, provides an important countervailing consideration supporting the giving of guidance by appellate courts, whether in the form of principles or guidelines…’\(^{46}\)

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\(^{45}\) Ibid. See also the decision of Mr Justice Mason in *Norbis v Norbis* (1986) 161 CLR 513

\(^{46}\) *Norbis v Norbis* [1986] HCA 17; (1986) 161 CLR 513 (30 April 1986), at 538 (Justices Mason and Deane)
It should be noted that the system of guideline judgements used in New South Wales so robustly defended by the Chief Justice, has now received Parliamentary approval. A recently amended Part 8 of the Criminal Procedure Act 1986 allows the Attorney General to apply to the court to give a guideline judgment. Section 26(2) specifies that:

‘An application may be made with respect to sentencing of persons found guilty of a particular specified indictable offence or category of indictable offences and may include submissions with respect to the framing of the guideline.’

The Act was subsequently amended to allow the New South Wales Court of Criminal Appeal to give a guideline judgement on its own motion.

The Director of Public Prosecutions for New South Wales, Mr Nicolas Cowdery has been particularly positive about the supporting role that the Legislature had played in what has been primarily a judge-driven overhaul of the State’s sentencing policies. For example, he noted that s. 21A of the Crimes (Sentencing Procedure) Act 1999 prescribes lists of aggravating and mitigating factors, similar to those employed in guideline decisions, but stipulates that they are:

‘…in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law.’

The statutory provision thereby preserves all the traditional common law flexibility to take the full circumstances of individual and offence into account before passing sentence.

The use of guideline judgements in New South Wales is now widespread and has attracted both significant criticism and praise. In the former camp, academics have highlighted that guideline judgements are blindly followed by many judges without any consideration of the facts of the case in front of them. The developing guideline judgement system has, however, been broadly welcomed. The D.P.P. has observed, for example, that continuing statistical discrepancies for crimes covered by guideline judgements should not be regarded as an indictment of the system. Rather these disparities should be regarded as the statistical inevitability of judges moulding sentences to each offender. The D.P.P. also indicated that for serious offences guideline judgements have yielded significant advantages across the criminal justice spectrum:

‘There are significant benefits for the prosecution from effective guidelines – more consistent and appropriate sentences moulded by reference to known criteria, fewer Crown appeals and less pressure on the executive to respond to media hype. The defence also benefits, being able to predict more accurately just what the offender will receive and how best to take advantage of the guideline considerations.’

Northern Territory

In the Northern Territory a different approach was adopted and the Territory now stands out in the Australian federation for what has been described as exceptionally punitive mandatory sentencing legislation. In 1997 mandatory sentences of imprisonment were created for property crimes committed by all adults and juveniles. The mandatory sentences affected a broad range of property offences including: unlawful entry with intent; unlawful use of motor vehicles; property damage; and stealing. Offenders found guilty of certain property offences were subject to a mandatory minimum sentence of 14 days for the first offence, 90 days for the second conviction and one year for the third offence.

When these sentences were associated with the tragic deaths of a number of offenders in custody a widespread grassroots campaign led to their amendment. First, in 1999, courts were allowed to depart from imposing the mandatory sentence when exceptional circumstances justified such a departure. In 2000, legislation was passed to mitigate the impact of the mandatory penalty regime, and in 2001, the mandatory minimum sentencing regime for property offenders was replaced by a new scheme that is more flexible.

47 Section 21A(1) Crimes (Sentencing Procedure) Act 1999

49 Nicholas Cowdery, Guideline Judgements: It seemed like a good idea at the time, Delivered to the 20th Annual Conference of International Society for the Reform of Criminal Law, April 2006, discussing R v Jurisic (NSW Supreme Court, Court of Criminal Appeal) 12 October 1998 at p.17.

There are currently three categories of offences for which a minimum term of imprisonment is mandatory: murder, which carries a mandatory life sentence of imprisonment; "violent offences" (such as assault) which carry a mandatory prison sentence; and, "sex offences" (such as rape) which also carry a mandatory prison sentence.

As is the case in some other jurisdictions, the mandatory sentencing legislation in the Northern Territory has affected Aboriginal offenders to a disproportionate degree. As of 2001 Aboriginal offenders were represented in the population of mandatory sentencing offenders at a rate of 3,728 per 100,000 adult population compared to 432 for non-Aboriginal peoples. Women were also disproportionately affected by the introduction of mandatory sentences. Averaged out, Northern Territory imprisoned 552 people per 100,000 adults, compared to 98 for Victoria or 176 for New South Wales.

These laws were criticised by three different U.N. bodies as failing to meet Australia’s obligations under Article 14 of the International Covenant on Civil and Political Rights which provides for a convicted person’s right to the imposition of punishment by a higher tribunal. The Constitutional Reference Committee of the Australian Senate issued a critical report in 1999 which compared the statistical and legal justifications for the mandatory sentencing regimes operative in Western Australia and Northern Territories:

“The Committee is convinced by the submissions and arguments that mandatory minimum sentencing is not appropriate in a modern democracy that values human rights, and it contravenes the Convention on the Rights of the Child. Whilst there are differences between the Western Australian and Northern Territory mandatory sentencing regimes, the Committee accepts the views as expressed by the Law Council of Australia, "We are comparing bad with bad and we are trying to prioritise badness.”

With respect to the issue of deterrence, the Northern Territory’s experience suggests that mandatory sentences of imprisonment do not act as an effective deterrent reference. A report on the mandatory sentencing laws published by the Office of Crime Prevention in that jurisdiction concluded that:

‘The data...do not support the idea that the threat, or experience of a longer sentence reduced the likelihood of a person being reconvicted for a mandatory sentencing related offence.’

The experience of the Northern Territory is that the mandatory sentence laws had drawn a much larger number of people into the prison system. When combined with high levels of recidivism, the Northern Territory Office of Crime Prevention concluded that the mandatory sentence laws had, ‘undoubtedly increased the flow of individuals through the prison system’.

The Australian Bureau of Statistics reported that the Northern Territory prison population had increased by 42% since the inception of mandatory sentencing, but that crime rates had not been affected. The Office of Crime Prevention Report did not draw firm conclusions about the effects of the legislation on crime rates, although the researchers concluded that:

‘Available data suggests that sentencing policy does not measurably influence levels of recorded crime.’

Despite these assessments however, recent political changes have placed a renewed emphasis on law-and-order policies and the Northern Territory has recently reinforced its mandatory sentencing regime for serious offences. The Sentencing (Crime of Murder) and Parole Law Reform Act has removed the discretion of the High Court of the Northern Territory and provides that in the presence of any of the aggravating factors listed in the Act neither the D.P.P. nor the Court will have any

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51 Northern Territories Office of Crime Prevention, Annual Statistics 2003
52 See Mandatory sentencing - impact on imprisonment rates of women in the NT, Jenny Hardy, National Women’s Justice Coalition, (April 1999)
54 The three bodies were the Committee on the Rights of the Child, the Committee on the Elimination of Racial Discrimination and the Human Rights Committee. For full details see speech in the Parliament of New South Wales by The Hon. John Hatzistergos.
55 Recommendation No. 8.16 of the Senate Legal and Constitutional References Committee inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999
57 Ibid at p. 9
discretion in applying a minimum tariff of 25 years without parole.

**Western Australia**

Western Australia is now the sole Australian State that maintains mandatory sentencing laws for a wide range of minor offences. These laws were introduced in November 1996, with what was described as having ‘unfortunate tones of pre-19th Century punishment’ requiring that offenders should ‘pay’ for their crimes. Section 401 of the Western Australian Criminal Code provides that for a third home burglary an adult offender shall receive a 12-month prison sentence. The section also abridges earlier child welfare provisions such that young offenders will receive a similar mandatory minimum sentence. This aspect of the legislative scheme was criticised by the Australian Law Commission as breaching several human rights instruments. In particular the Commission opined that it breached the principle that in the cases of children detention should be a sentence of last resort. The section is phrased in imperative terms and contains no opt-out for exceptional circumstances. This aspect of the law was extensively criticised when the law was introduced, in most vociferous terms, by the United Nations Human Rights Committee. The Committee observed that:

‘...legislation regarding mandatory imprisonment in Western Australia...leads in many cases to imposition of punishments that are disproportionate to the seriousness of the crimes committed...and raises serious issues of compliance with various articles of the Covenant.’

The law was introduced to widespread judicial antipathy. Sir Gerard Brennan, a former judge of the High Court wrote that:

‘A law which compels a magistrate or judge to send a person to jail when he doesn't deserve to be sent to jail is immoral....Sentencing is the most exacting of judicial duties because the interests of the community, of the victim of the offence and of the offender have all to be taken into account in imposing a just penalty’.  

Evaluating the impact of the sentencing regime operated by Western Australia is difficult owing to the absence of any empirical data. However a review of the available literature led Ruth McColl to note that the original justifications of deterrence and punishment had been abandoned, and replaced by justifications such as ‘community concern’, ‘don’t forget the victims’ and ‘no money for alternatives’. A comprehensive review of the available data, led Professor Arie Freiberg, a leading Australian academic and criminologist, to conclude that the Western Australian experiment was ‘a failure on almost every criminological criterion on which they were measured’. The Aboriginal Justice Council in Western Australia noted that the legislation had had no effect on the burglary rate despite a massive increase in the prison population, a population in which indigenous Australians were seriously over-represented. Finally, citing examples of individuals being sentenced to custodial sentences for minor crimes from Western Australia, Professor David Brown indicated that the State’s experiment with a broad base of mandatory offences had been unsuccessful:

‘...mandatory sentencing does not produce the effects of deterrence, selective incapacitation and crime reduction which are its stated justifications and does produce a range of damaging side effects in terms of distortion of the judicial process, widely disproportionate

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61 Section 401 expressly abrogates section 46(5a) of the Young Offenders Act 1994 (WA) which had provided an exemption from any mandatory sentencing acts for juvenile offenders.


63 As quoted by Gordon Hughes, Chief of the Law Council of Australia in a speech entitled, 'The Mandatory Sentencing Debate', delivered August 2000. He also cited critical comments by current and serving members of the federal and state judiciaries. For example, see criticism of the law by seven former High Court judges published in the Herald Sun, 8 March 2000. In the same vein the Human Rights and Equal Opportunities Commission, in its 1999 Social Justice Report indicated that mandatory sentencing provisions in Western Australia was the ‘antithesis of social justice’. The Law Council of Australia reached similar conclusions.

64 Former Senior Counsel and now a judge of the Supreme Court of New South Wales

65 McColl, ibid page 9


67 Emeritus Professor of Criminal Law, University of New South Wales
sentencing, additional financial and social costs and deepening social exclusion of individuals and particular communities.’

The United Kingdom

In the United Kingdom, sentencing policy has undergone two major shifts. The Court of Appeal pioneered the use of guideline judgements as the primary strut of sentencing policy in 1969. In that year they passed the first of a series of judgements which were expressed to be for the purpose of providing sentencing guidance to the courts beneath. Although hundreds of these decisions have been passed by the Court of Appeal dealing with both serious and trivial offences, they tend to be united by three distinct features.

Firstly, they are always described as ‘guideline decisions’, so as to provide clarity as to which decisions are designed to provide guidance. Secondly, they identify the punishment spectrum for each particular offence, at both the upper and lower end. Thirdly, they exhaustively identify the mitigating and aggravating factors that are to be borne in mind for each offence. A consideration of these factors should provide an indication as to where on the spectrum each individual offence is to be placed.

However, while the network of guideline decisions is extensive, numerous studies have indicated that these Court of Appeal decisions have not brought about statistical consistency in sentencing. In an influential 1997 report, the Prison Reform Trust noted that while the decisions had made the process of sentencing more transparent and welcomed the promulgation of offence-specific guidelines, they noted that guideline decisions had had a negligible effect on the problem of inconsistent sentencing. In particular they noted the inability of the Court of Appeal to disrupt entrenched local practice and prejudice and argued that the most significant factor in the tariff a prisoner received was not what they were charged with but where the offender was charged. However, the Court of Appeal responded to attacks premised on highlighting statistical or geographic inconsistency on the

system of guideline judgements by arguing that they were simply designed to place a structure on judicial thinking, rather than to impose a unified tariff for any particular offence. The Lord Chief Justice, Lord Woolf commented on the use and limitations of guideline decisions:

‘...guidelines such as we have set out above can produce sentences which are inappropriately high or inappropriately low if sentencers merely adopt a mechanistic approach to the guidelines. It is essential that having taken the guidelines into account, sentencers stand back and look at the circumstances as a whole and impose the sentence which is appropriate having regard to all the circumstances. Double accounting must be avoided and can be a result of guidelines if they are applied indiscriminately. Guideline judgments are intended to assist the judge arrive at the current sentence. They do not purport to identify the correct sentence. Doing so is the task of the trial judge.’

However, despite the increasing prevalence of guideline decisions, the United Kingdom has gone through an explosion in its prison population, with its rate of imprisonment the highest in Europe by some margin. For example, in 2006 England imprisoned 167 people per 100,000 of the adult population, while the equivalent figure for Ireland was 78. In 2003, the then Lord Chief Justice, Lord Woolf noted that these figures were partially the result of a consistent upward pressure on sentencing from the media, from politicians and public opinion. As a result of this, there was considerable political pressure on Parliament to increase tariffs for crimes regarded as particularly heinous by the media. The knock on effect of new legislative measures was to increase the tariff for all crimes because of the need to keep sentencing for different, but similar, offences in proportion with each other.

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68 Professor David Brown, Mandatory Sentencing, a Criminological Perspective, paper delivered to the University of New South Wales Symposium 2000: Mandatory Sentencing Rights and Wrongs, p.11.
70 R v Millberry [2003] 1 Cr. App. R. 396
71 Speech by the Lord Chief Justice, Lord Woolf, “A New Approach to Sentencing”, delivered to the Anglo-Australian Lawyers Society, Sydney, April 2003 where he noted that the United Kingdom had a prison population of 73,000, an increase of 30,000 in 10 years. By November 2007 this reached 81,500 prisoners.
72 Judicial Commission for New South Wales, Trends in the Use of Imprisonment. op cit. at p. 3
73 Jesuit Centre for Faith and Justice Annual Report 2006
While enthusiastically supporting the use of guideline judgements as a means of precisely calibrating sentences to the context of the offence and the offender, the Lord Chief Justice noted that this inflationary pressure entailed a situation where judicial officers and Parliament were frequently operating at loggerheads. As an example he noted that in Offen, the Court of Appeal had been forced to stretch credulity in their interpretation of the exemptions provided by Parliament to mandatory life sentences for murder:

“The policy and intention of Parliament was to protect the public against a person who had committed two serious offences. It therefore can be assumed that the section was not intended to apply to someone in relation to whom it was established there would be no need for protection in the future. In other words, if the facts showed the statutory assumption [that is: of the mandatory penalty] was misplaced, then this, in the statutory context, was not the normal situation and in consequence, for the purposes of this section the position was exceptional.”

The Lord Chief Justice summed up the sentencing landscape in the United Kingdom in early 2003. He observed that while guideline decisions were valuable tools in obliging judges to explain their decisions against a universal framework it had not succeeded in leavening profound geographic disparities. At the same time he noted that representative democracy was weakened by judges, albeit for reasons of imposing a just tariff in the individual case, constructively refusing to impose sentences mandated by Parliament. Lord Woolf therefore enthusiastically welcomed the creation of the Sentencing Guideline Council in 2003. Entrusting this statutory body with overall responsibility for sentencing competence represents the second major shift in the United Kingdom’s approach.

This body is composed of two separate entities. The Sentencing Advisory Panel (SAP) provides expert advice and dedicated research support on all matters relating to sentencing in England and Wales. The SAP consults widely and provides draft guidelines to the Sentencing Guideline Council (SGC). The Council appraises, revises and publishes these sentencing guidelines in their final format. The Council is composed of seven judges and magistrates from all levels of the court hierarchy. In addition four non-judicial members with expertise in policing, victims, defence and prosecution are appointed to provide a range of viewpoints.

These sentencing guidelines are offence specific. Unlike guideline decisions they are not framed against the facts of a particular case and are therefore extremely comprehensive. Although they must have regard to them, judges are not bound by the guidelines and retain final discretion over the sentence to be imposed.

As responsibility gradually shifts from the Court of Appeal to the SGC, it is anticipated that by September 2008 comprehensive sentencing guidelines for all major offences in the Magistrates and Crown Courts will have been issued. While no data on the success of the SGC project is available, the SGC is currently building an extensive system of internally consistent sentencing procedures that are accessible to all. However, research has indicated that the creation of the sentencing bodies has had little impact on the negative public perception of the relationship between soft sentencing and increasing crime rates.

While preserving judicial discretion as the primary value in a fair sentencing regime, the comprehensiveness of the SGC’s reports will allow offenders, the public and judicial officers to predict, with a relative degree of certainty, the broad spectrum into which an individual offence will fall. Finally, as the SGC is dominated by judges, no separation of powers issues arise.

United States of America

Minnesota

Minnesota is represented here because of its use of a sentencing regime which places great stress on predictability both of sentence and of prison population. To this end Minnesota pioneered the use of so-called ‘grid’ sentencing.

Grid sentencing works by using legislation and the exponential increase in the prison population.

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75 R v Offen [2001] 1 Cr App R 372
76 See ss.172 and 174(2) of the Criminal Justice Act 2003.
77 See, “An Evolutionary Approach”, ibid, at para 4.15 for an explanation of this.
79 For a full explanation of the Minnesotan system see Wasik, M. (2008) Sentencing Guidelines in England and...
two axes. The offence for which the offender is to be sentenced will fall into one of the vertical categories of seriousness (10 such categories in Minnesota for example). The range of sentence for the offence will be defined by the number and type of previous convictions represented by the horizontal axis at the top of the grid. Each offence is categorised according to its seriousness and offenders are assigned a criminal history score ranging from zero to six or more. The offender’s criminal history score is determined by consideration of four measures – prior felony sentences, prior misdemeanour sentences, prior serious juvenile record and custody status (whether the offender was under supervision when the current offence was committed). The box where the seriousness of the offence and the number of points for criminal conviction intercept will decide the range of sentence. The ranges within each box are comparatively narrow.

The grid system does provide a presumptive sentence however, that the judge is expected to impose unless there are justifiable reasons for departing from it, which the court must record in writing.Presumptive sentences are based on typical cases and while departure is permitted (and even acknowledged to contribute to proportionality when used appropriately), substantial and compelling circumstances must exist before the judge can justify departure. Any departure from the presumptive sentence can be appealed by either the prosecution or the defence. The commentary to the Minnesota Guidelines, published by the Minnesota Sentencing Commission makes clear that ‘the purposes of the sentencing guidelines cannot be achieved unless the presumptive sentences are applied with a high degree of regularity.’

However, as with other jurisdictions with rigid sentencing patterns discretion has largely been removed from the judges and it has devolved largely onto prosecutors. As stake-holders can accurately predict what sentence will be passed, offenders are more amenable to pleading guilty in return for a lower tariff. This enables a prosecutor to have a very considerable influence on the sentence and for both the prosecution and the defence to agree the severity level by negotiation. Although this yields significant savings in costs and court time, wrongly accused individuals face the familiar pressure to plead to a lower charge rather than hazard being placed in a much higher ‘penalty box’ after trial. In Minnesota the vast majority of offences (approximately 95%) are now disposed of via plea-bargains between prosecution and defence.

As well as devolving considerable power onto individual prosecutors these grid frameworks impose very serious restrictions on judicial discretion. The vertical scale of seriousness, as constructed in these frameworks, forces offences which vary widely in seriousness across a very large range of criminality into narrow bands. The horizontal axis places excess weight on previous convictions in the sentencing process and has a disproportionate effect in comparison with other factors such as aggravating and mitigating factors. In addition there are restrictions on the use of some mitigating factors and a necessity for a jury to determine all aggravating factors, giving the ‘grid’ a pronounced pro-incarceration bias.

Furthermore it should be noted that the primary reason for the development of the grid system was to eradicate the perennial problem of predicting the size of future prison populations.81 ‘Certainty in sentencing cannot be obtained if departure rates are high. Prison populations will exceed capacity if departures increase imprisonment rates significantly above past practice.’

Implementation of the sentencing guidelines (together with other changes in sentencing policy such as the introduction of mandatory minimum sentences, and changes in the distribution of cases) have resulted in a significant increase in the average length of imprisonment in Minnesota. In 1987 felony offenders served an average of 36.3 months, by 1999 this had increased to 47.9 months.83 Although the grid system promotes statistical consistency, it is frequently argued that determinate sentencing systems such as those

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81 In Sentencing in England and Wales: An Evolutionary Approach’ Lord Justice Gage rejected this American approach for, amongst other things, its promotion of logistical and fiscal concerns at the expense of justice in the individual case. Ibid, at para 6.5
82 Minnesota Sentencing Guidelines and Commentary, p.34. It should be noted that in this goal Minnesota has been quite effective and that their prison population predictions are generally accurate to within a figure of 2% on a per annum projection.
83 Ibid
created by the use of sentencing guidelines can reduce proportionality and increase sentence disparity by not allowing the particular circumstances of individual cases to be taken sufficiently into account.

Experience from Minnesota shows that while sentencers are able to depart from the presumptive sentence, in the majority of cases they do not. In 1999, 75% of felony offenders received the sentence recommended by the sentencing guidelines. While uniformity has been purchased at the price of higher tariffs for offenders, it might be argued that the use of the comparatively strict grid structure has reduced the susceptibility of Minnesota’s sentencing regime to factors of gender, socio-economic considerations and in particular, race which plague other States.

New Zealand

Sentencing policy in New Zealand is slowly developing from an almost entirely unstructured position to a sophisticated position based on a mixture of judicial and legislative innovation.

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. These were 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.84

In casting about for a means to respond to a 1999 referendum in which the people had clearly expressed their dissatisfaction at the inconsistent sentencing of serious offenders, the New Zealand legislators recognised the impossibility of promulgating legislation which would pre-determine the tariff to be imposed in an individual case.85 The Sentencing and Parole Reform Act 2002 is thus unusual in that, with the exception of murder, it does not deal with the specifics of any offence. The Act instead opts to establish a general structure to guide all sentencing decisions, while recognising that the inflexibility inherent in primary legislation can render it a blunt instrument for tariff determination in an individual case.

As an example of this generalist approach, s. 7(1) of the Act sets out a series of distinct purposes of sentencing. A sentence can be imposed for any one, or a combination of two of these purposes.

- Hold the offender accountable for harm done to the victim and the community;
- Promote in the offender a sense of responsibility for, and acknowledgement of, that harm;
- Provide for the interests of the victim of the offence;
- Provide reparation for harm done by the offending;
- Denounce the conduct in which the offender was involved;
- Deter the offender or other persons from committing the same or a similar offence;
- Protect the community from the offender.

Section 8(1) of the Act establishes, in a similar vein, the principles which are to guide a judge in imposing sentence. The court must:

- Take into account
  - the gravity of the offending;
  - the degree of culpability of the offender;
  - the seriousness of the type of offence.
- Impose the maximum penalty available for the offence if the offending is within the most serious cases for which that penalty is available (unless circumstances relating to the offender make that inappropriate);

84 See further Law Reform Commission of New Zealand, Sentencing Guidelines and Parole Reform (Report, August 2008)

• Impose a penalty near to the maximum available for the offence if the offending is near to the most serious of cases for which that penalty is available (unless circumstances relating to the offender make that inappropriate);

• Take into account the general desirability to have consistency in sentencing for similar offenders committing similar offences in similar circumstances.

The Act also sets out the aggravating and mitigating factors that the court ‘may’ take into account in sentencing the offender and specifies that the court may take into account any offer, agreement, response, or measure taken by the offender to make amends. The Act also specifies the types of sentences that the court can impose as reparation, fines, community-based sentences and imprisonment but emphasises that reparation and fines should be the preferred sentencing options in every case. Where a court is entitled to impose a sentence of reparation, it is obliged to do so unless there are specific reasons for not doing so. Similar provisions relate to the imposition of fines.

The Act provides that a sentence of imprisonment may not be imposed on an offender under the age of 17 years unless they have been convicted of a purely indictable offence. The minimum periods of imprisonment that offenders must serve in cases where they are convicted of murder or qualifying, sufficiently serious, sexual and violent offences are also laid down in the Act. A person convicted of a qualifying sexual or violent offence must be sentenced to preventive detention to protect the community from a significant and ongoing risk to the safety of its members.

An offender who is convicted of murder must be sentenced to life imprisonment unless, given the circumstances of both the offence and the offender, a sentence of life imprisonment would be manifestly unjust. Where a life sentence is not imposed, a court must provide written reasons for not doing so. In sentencing for murder, the court may order that the offender serve a minimum period of imprisonment of more than 10 years if it is satisfied that the circumstances of the offence are sufficiently serious to justify doing so and may consider imposing a minimum period of imprisonment of at least 17 years if one of a series of aggravating factors is met. If none of these factors is met then the judge may, but not must, impose a sentence of imprisonment of 17 years or more.

However, as the New Zealand Law Reform Commission pointed out, these guidelines are of limited practical application in determining what sentence will actually be imposed in a particular case. They noted that generalist legislative guidelines like these only reduce to legislative form the process by which judges had habitually reached their decisions previously, without actually giving any indication of the tariff that will be levied in an individual case.

The Commission also observed that, in particular, the legislative approach of nominating a maximum tariff only served to obscure what the average tariff to be imposed for the average offence is likely to be. They suggested that providing maximal figures was only of indirect and sometimes of marginal relevance to day-to-day sentencing. In particular the presumptive 17 year tariff for murder, fettered the discretion of the judge to give credit for mitigating circumstances such as an early guilty plea. They noted empirical evidence to suggest that the reality of the post-2002 scheme was to leave judicial discretion substantially undisturbed.

The Commission further noted that the Act of 2002 despite its comprehensive intentions, had not supplanted the practice of appellate judges issuing guideline judgements. The Commission noted that the exact relationship between the Act and the guideline judgements had never been defined, despite the obvious potential for conflict. Thus in one 2005 decision the Court of Appeal issued a judgement that made no reference to the Act of 2002 and professed the hope that it would be a:

‘…single point of reference for sentencing Judges and counsel and that this will lead to improved levels of consistency in the penalty levels imposed on offenders’

Although acknowledging these shortcomings in the Act of 2002, the Law Reform Commission was equally circumspect about the place of these guideline judgements. They argued that as these decisions were framed against the occluded factual matrix of a particular case and typically framed for very serious offences, they

86 The Act does not impose an obligation to take aggravating and mitigating factors into account.

87 Ibid, at p. 18.
88 R v Taukei [2005] 3 NZLR 372
were of limited use in the day-to-day business of offences.

The Commission rejected the arguments that tighter legislative control of sentencing policy would inhibit the possibility of providing individuated justice and would infringe impermissibly upon the judicial function. Addressing the second argument in particular the Commission argued that judicial independence to pass sentence without fear or favour should not be confused with Parliament's unquestioned right to legislate for minimum or maximum tariffs. As they stated:

‘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.’ 89

Given the unsatisfactory nature of the Sentencing Act 2002 and the continued, and contradictory reliance on guideline judgements, the Commission considered a number of proposals to address the perceived short-falls of the sentencing regime.

- They considered a more structured system of guideline judgements but rejected this on the grounds that it would fail to address the democratic deficit present in all such ‘judge-led’ systems. In particular they noted that guideline judgements were framed in very narrow legal terms, and took no account of sociological, fiscal or community concerns;

- They also considered an option analogous to the Australian State of Victoria’s Sentencing Advisory Council, which provides comprehensive statistical information on the numbers sentenced and the tariffs imposed90, as well as providing comprehensive research support and advice for government departments. However, the Law Reform Commission indicated that this approach merely reported on the status quo, and gave no necessary guarantee that sentencing would become more transparent or consistent.

Rather they advocated a hybrid approach which would combine, in a statutory body, a research function with the power to draft sentencing guidelines. They recommended that this Council would be dominated by judicial appointments, but would be in a position to draw upon a wide range of voices in the Community. While their work would take the form of guidelines, the Commission recommended that there should be a mandatory obligation on judges to explain any deviations from these guidelines, and to give reasons why they had imposed sentences outside the suggested parameters.

The Commission’s recommendations have not thus far been acted upon. However, a new sentencing statute is in preparation that will enact the bulk of these sophisticated sentencing reforms.

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89 Ibid, at p. 21
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