CROWN PROSECUTORS' CONFERENCE

POKOLBIN, HUNTER VALLEY

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SENTENCING IN THE 21ST CENTURY

The Hon Justice Peter McClellan AM
Chief Judge at Common Law
Supreme Court of NSW

I acknowledge the assistance of the Common Law Researcher Christopher Beshara in the preparation of the draft of this speech.

Thank you for inviting me.

Sentencing is a controversial subject. From time to time individual sentences prove controversial. At times the general pattern of sentencing provokes discussion in the community which carries over into the election manifestos of political parties.

Many of you will remember a time when sentencing was a less complex task than it is today. A judge addressed his remarks directly to the offender, commented on the quality of the offender's conduct, admonished the offender to mend his or her ways, and then imposed a sentence within the range derived from the wisdom of the relatively small pool of sentencing judges. The offender was then sent off to do their time. Sometimes the sentencing judge went a little further, trespassing into the mores of acceptable conduct and social activities. Judge Cameron-Smith was one such judge. When sentencing a drug offender in 1973, his Honour had this to say:

> Mackey, you have got many factors in common with the last prisoner, a very difficult matter and of course, you are associated with the drug scene too. You are quite a capable person, you can write books which are published and which can bring in a very good source of income, but I think you have reached a stage that so many people like you reach where there is that element of false pretences or forgery, such like things as they which ultimately reflect themselves in the way your mind operates.
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> You are starting to kid yourself and what you said to me in the witness box the other day is a clear indication to me that this is what is happening to you. It is about time you woke up to yourself and don't pull your own leg. You have committed many many crimes. Mr Rutherford has done all he could on your behalf, but dishonesty indicated itself some ten years or so ago. You have got a schedule as long as your arm and I have taken into consideration in sentencing you those matters – forgery and uttering, and stealing – considerable sums of money involved and persistently so over quite some period of time, a lot of money involved.

> Once again, of course, you are another one of those who live according to the permissive way of life; you embark on drugs, you live a life of permissiveness; people get married, divorced and they have a de facto relationship with somebody else who has been married or divorced or not married at all. And they have got children. It is like living like a lot of rabbits, as I see it. I was not much impressed by her, I might add; my note is "I am not much impressed". I think you could do a lot better. You give a lot of thought to what I have just said, not only as to drugs but also as to the company you keep and where you live. It is not good, this business of Balmain, Glebe, Croydon, and all the rest of it, suburbs are coming up in Court every day and you look like a typical sample of them. It is only to be hoped that you, both mentally and physically, by the time you are discharged from gaol – I have been told you look a lot better than when you were arrested, but this of course does not surprise me because you keep proper hours and are on decent food and off drugs. I was only thanked the other day by another prisoner for sending him off to gaol because he has not felt so well in years. So perhaps some of the theorists might bear in mind what you are told in Court, not enough people read carefully enough these case histories.

After making these remarks, Judge Cameron-Smith sentenced Mackey to a total of five years imprisonment with hard labour.

The method by which a judge is required to identify the appropriate length of an individual sentence has also proved controversial. Sufficient time has passed since the decision of the Victorian Court of Criminal Appeal in *R v Williscroft* in 1975, which has been followed by responses to perceived problems by parliaments and intermediate appellate courts, to allow a relatively clear understanding of the boundaries of the controversy. The High Court's insistence on "instinctive synthesis" as the only permissible method for the sentencing judge may be at odds with the approach sometimes preferred by the State Parliament and Court of Criminal Appeal.

As you know, the New South Wales Law Reform Commission is at present looking at sentencing and is considering, among other matters, the future role, if any, of

standard non-parole periods. It is timely that we reflect on the recent history of sentencing methodology.

The criminal appeal structure in New South Wales was formalised by the enactment of the *Criminal Appeal Act* in 1912. We celebrate its anniversary this year. The Act has remained largely unchanged since its inception.

Under the Act the Court of Criminal Appeal is constituted by the Chief Justice and such other judges as he may appoint.[1] It was the tradition for many years that the Chief Justice, the Chief Judge at Common Law, or on occasion a Court of Appeal judge, would sit with two Common Law judges who, because of their role in the Court, had a day-to-day working knowledge of sentencing principles and the "range" of sentences which the judges accepted to be appropriate for particular offences.

During its early years, the High Court did not generally concern itself with sentencing. The lack of early High Court authority in this area is not surprising. The High Court's first and foremost concern in its formative years was the interpretation of the *Constitution* and the law as it applied to the machinery of government.[2] As a consequence, it fell to the relevant appeal courts of the States to formulate sentencing principles. Just as the English House of Lords left the development of the substantive criminal law to the lower courts, so the High Court of Australia deferred to the experience of the intermediate appellate courts.[3]

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[1] *Criminal Appeal Act 1912* (NSW) s 3(1).
[2] Richard Edney, 'In Spite of Itself?: The High Court and the Development of Australian Sentencing Principles' (2005) 2 *University of New England Law Journal* 1, 8–9.
[3] Ibid 6 citing Louis Blom-Cooper QC and Gavin Drewry, *Final Appeal: A Study of the House of Lords in Its Judicial Capacity* (1972) 270.

Nevertheless, the High Court did on occasion venture into the field. It was in *House v The King* [1936] HCA 40; (1936) 55 CLR 499 that the Court confirmed principles of enduring force with respect to the limited role of an appeal court when considering a sentence appeal.[4]

The 1960s and 70s initiated a period of rapid change in Australian society, which continues today. There were significant changes to the law. There was also greater scrutiny of the intellectual foundations for the actions of government, including the actions of the courts. The volume of legislation enacted by parliaments increased significantly. Administrative appeal bodies were set up. Within the courts, the length and complexity of a judge's reasons increased, in part as a response to the complexity and volume of relevant legislation and in part to ensure that at least lawyers might better understand the reasoning process of the judge and the body of legal principles which supported it. The sentencing process was not immune from these changes.

The intellectual foundations for sentencing were discussed by the Victorian Court of Criminal Appeal in 1975 in terms which resonate today. In *R v Williscroft* [1975] VR 292, Adam and Crockett JJ said: "ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process".[5] Their Honours were somewhat disarming as to the practical operation of this sentencing method. They said: "We are aware that such a

[4] *House v The King* [1936] HCA 40; (1926) 55 CLR 499, 504–5.
[5] *R v Williscroft* [1975] VR 292, 300 ('*Williscroft*'). Though the *Williscroft* Court was the first to use the term "instinctive synthesis", the Court in turn took inspiration from the earlier case of *R v Kane* [1974] VR 759, where it was thought "profitless … to attempt to allot the various [sentencing] considerations their proper part in the assessment of the … punishments": *Williscroft* [1975] VR 292, 300 ('*Williscroft*').

conclusion rests upon what is essentially a subjective judgment largely intuitively reached by an appellate judge as to what punishment is appropriate".[6] They then quoted with approval a remark by Jordan CJ in *R v Geddes* (1936) 36 SR(NSW) 554, where the Chief Justice said that in matters of sentencing, "the only golden rule is that there is no golden rule".[7]

In a society which increasingly seeks transparent decision-making founded upon logical reasoning, these statements may have been thought controversial. And so they have proved to be.[8]

The Victorian Court of Criminal Appeal reaffirmed the intuitive approach to sentencing in *R v Young* [1990] VR 951, where the Court pointed to the New South Wales case of *R v Holder* [1983] 3 NSWLR 245.[9] In *Holder*, Priestley JA cited *Williscroft* with approval. However, his Honour did recognise the difficulties that might follow if intuition was not tempered by consistency. He said: "reported decisions show a constant effort by the courts to reduce the sentencing process to a reasonable degree of regularity and order and to eliminate so far as possible the idiosyncrasies of individual judges in arriving at the 'instinctive synthesis'".[10]

It is not difficult, but perhaps easier with hindsight, to see that the formalisation of an instinctive approach to sentencing was likely to run into problems. When the issue at stake was the length of time that a person should serve as "punishment" for an

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[6] *Williscroft* [1975] VR 292, 300 (Adam and Crockett JJ).
[7] *Williscroft* [1975] VR 292, 301 (Adam and Crockett JJ) quoting *R v Geddes* (1936) 36 SR(NSW) 554, 555 (Jordan CJ) ('*Geddes*').
[8] *Williscroft* [1975] VR 292, 301 (Adam and Crockett JJ).
[9] *R v Young* [1990] VR 951, 955 (Young CJ, Crockett and Nathan JJ) ('*Young*').
[10] *R v Holder; R v Johnston* [1983] 3 NSWLR 245, 270 (Priestley JA) cited in *Young* [1990] VR 951, 955.

offence, it was always likely that Parliament would intervene to ensure that the sentencing process was transparent and that sentences were adequate and consistent. In New South Wales, the response from Parlilament and the Court of Criminal Appeal has included guideline judgments, identified ratios of non-parole periods to the overall sentence ("truth in sentencing"), a structured approach to discounts for pleas of guilty and assistance to the authorities, standard non-parole periods, and legislation stating that "life means life".

By the early 1970s, the role of the media, in particular radio, had begun to change. "Talkback" radio was emerging as a powerful medium for the development of public opinion, requiring a response from government. Crime and the effective responses to it were compelling topics for John Laws and Alan Jones, and the others who have followed.

By the late 1980s, community concern about the incidence of crime and the punishments which were imposed were also accepted as requiring a response from government. The origins of these concerns are complex. In part they can be found in changes in the nature of criminal offending, born of the increased availability of illegal drugs and the corresponding increase in crime, as well as a significant increase in the availability of guns in the community.

"Truth in sentencing", as it was then known, was introduced by the Greiner government in 1989.[11] It came as a response to the fact that although judges were imposing non-parole periods, because of the manner in which sentences were

[11] *Sentencing Act 1989* (NSW) ss 5, 6, 8.

administered by parole authorities, many offenders were released well before the non-parole period had expired. Truth-in-sentencing laws were the first significant step in New South Wales towards harsher penalties and a more structured and transparent sentencing regime.[12]

Although the validity of truth-in-sentencing laws has not been challenged, when the New South Wales Court of Criminal Appeal suggested that a similar structured approach may be appropriate for Commonwealth offences, the High Court took a different view: *Hili v The Queen* [2010] HCA 45; (2010) 242 CLR 520. The Court in *Hili* said: "There neither is, nor should be, a judicially determined norm or starting point … for the period of imprisonment that a federal offender should actually serve in prison before release on a recognizance release order".[13]

Guideline judgments were developed when there was a real possibility that the State government would adopt grid sentencing or mandatory sentencing regimes.[14] There was a sense that if the courts did not act to make sentencing more obviously consistent and reflective of community expectations of increased penalties, Parliament would act, but in a manner which the judges may find totally unpalatable. The first guideline judgment was *R v Jurisic* (1998) 45 NSWLR 209, where the Court established sentencing guidelines for the offence of dangerous driving occasioning death or grievous bodily harm.[15] The Court issued the guideline without any statutory basis. Spigelman CJ, with whom the other members of the Court agreed,

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[12] See *R v Maclay* (1990) 19 NSWLR 112, 113 (Gleeson CJ, Hunt and Loveday JJ); *Putland v The Queen* [2004] HCA 8; (2004) 218 CLR 174, 183–4 (Gleeson CJ).
[13] *Hili v The Queen* [2010] HCA 45; (2010) 242 CLR 520, 534 [44] ('*Hili*').
[14] G Zdenkowski, 'Sentencing Trends: Past, Present and Prospective', in D Chappell and P Wilson (eds), *Crime and the Criminal Justice System in Australia: 2000 and Beyond* (2000) 179.
[15] *Crimes Act 1900* (NSW) s 52A.

acknowledged the importance of consistency in the sentencing of offenders.[16] The Chief Justice accepted that "[p]ublic criticism of particular sentences for inconsistency or excessive leniency is sometimes justified".[17] Against this background, Spigelman CJ proposed to adopt the English Court of Appeal practice of issuing guideline judgments, "in which the Court formulates general principles and, sometimes, an indication of appropriate range, to guide trial courts".[18] The Chief Justice pointed out that guideline judgments were consistent with the Court's role in articulating sentencing principles of general application. He reasoned that the formal step of issuing guideline judgments was but "a logical development of what the Court has long done".[19] The Chief Justice also hoped that guidelines judgments might "reinforce public confidence in the integrity of the process of sentencing".[20] At the same time, he said that guidelines "are a mechanism for structuring discretion, rather than restricting discretion".[21]

In New South Wales, sentencing courts now have the benefit of guidelines for the offences of break and enter,[22] armed robbery,[23] drug trafficking,[24] dangerous driving,[25] and driving under the influence.[26] The Court of Criminal Appeal has also

[16] *R v Jurisic* (1998) 45 NSWLR 209, 216 (Spigelman CJ) ('*Jurisic*').
[17] *Jurisic* (1998) 45 NSWLR 209, 221 (Spigelman CJ).
[18] *Jurisic* (1998) 45 NSWLR 209, 216 (Spigelman CJ).
[19] *Jurisic* (1998) 45 NSWLR 209, 217 (Spigelman CJ).
[20] *Jurisic* (1998) 45 NSWLR 209, 220 (Spigelman CJ).
[21] *Jurisic* (1998) 45 NSWLR 209, 221 (Spigelman CJ).
[22] *R v Ponfield* [1999] NSWCCA 435; (1999) 48 NSWLR 327.
[23] *R v Henry* [1999] NSWCCA 111; (1999) 106 A Crim R 149.
[24] *R v Wong; R v Leung* [1999] NSWCCA 287; (1999) 48 NSWLR 340. But see *Wong v The Queen* (2001) 207 CLR 584 ('*Wong*').
[25] *R v Whyte* [2002] NSWCCA 343; (2002) 55 NSWLR 252 ('*Whyte*').
[26] *Application by the Attorney-General under Section 37 of the* Crimes (Sentencing Procedure) Act *for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol under Section 9(4) of the* Road Transport (Safety and Traffic Management) Act 1999 [2004] NSWCCA 303; (2004) 61 NSWLR 305.

issued guidelines in respect of guilty pleas[27] and the overall sentence that ought to be imposed where an offender has admitted to multiple offences on a Form 1.[28]

There is empirical evidence to suggest that guideline judgments are achieving their purpose. Studies by the New South Wales Judicial Commission have found that the guideline judgments with respect to drink driving and armed robbery have resulted in more consistent sentences, in addition to ameliorating problems of undue leniency.[29] Academic commentators have also welcomed the use of guideline judgments in New South Wales. Some have observed that the guidelines promulgated by the Court of Criminal Appeal have structured judicial discretion without abolishing it.[30]

Despite the evidence supporting their utility, guideline judgments have had a chequered history in the High Court. Some members of the Court view them as an unwelcome intrusion into judicial discretion. The guideline judgment in *R v Wong; R v Leung* [1999] NSWCCA 287; (1999) 48 NSWLR 340 provoked a decisive reaction from the High Court. The Court was troubled by the constraints that the guidelines apparently imposed on the instinctive synthesis method of sentencing.

Wong involved drug trafficking offences under Commonwealth law. The offenders were convicted of being knowingly concerned in the importation into Australia of a

[27] *Thomson* [2000] NSWCCA 309; (2000) 49 NSWLR 383.
[28] *Attorney-General's Application under Section 37 of the* Crimes (Sentencing Procedure) Act 1999 *No 1 of 2002* [2002] NSWCCA 518; (2002) 56 NSWLR 146.
[29] Patrizia Poletti, 'Impact of the High Range PCA Guideline Judgment on Sentencing Drink Drivers in NSW' (Sentencing Trends and Issues No 35, Judicial Commission of New South Wales, September 2005) 18; Lynne A Barnes and Patrizia Poletti, 'Sentencing Robbery Offenders since the *Henry* Guideline Judgment' (Research Monograph 30, Judicial Commission of New South Wales, June 2007) 148.
[30] John L Anderson, '"Leading Steps Aright": Judicial Guideline Judgments in New South Wales' (2004) 16 *Current Issues in Criminal Justice* 140, 151; Kate Warner, 'The Role of Guideline Judgments in the Law and Order Debate in Australia' (2003) 27 *Criminal Law Journal* 8; Daraius Schoff, 'The Future of Guideline Judgments' (2003) 14 *Current Issues in Criminal Justice* 316, 321.

quantity of heroin, contrary to what was then s 233B of the *Customs Act 1901* (Cth). At first instance, they were each sentenced to 12 years' imprisonment, with a non-parole period of seven years. The Director of Public Prosecutions appealed against the sentences, at the same time inviting the Court to develop guidelines for the sentencing of offenders knowingly involved in the importation of drugs. The Attorney-General intervened in support of the application for a guideline judgment. The Court accepted the latter invitation. On appeal, each offender was resentenced to 14 years' imprisonment, with a non-parole period of nine years.[31]

The *Wong* guideline was "quantitative" in nature, in the sense that the length of sentence under the guideline bore a relationship to the quantity of the drug imported. Spigelman CJ explained why the Court had expressed the guideline judgment in a quantitative way. The Chief Justice observed that the structure of the Commonwealth legislation – which distinguished between less than traffickable quantities, traffickable quantities, and commercial quantities – strongly told in favour of a quantitative sentencing rationale.[32] The Chief Justice also pointed out that a quantitative approach was justified "on the basis of first principles".[33] His Honour said: "The adverse effects of drugs such as heroin and cocaine on the community are directly related to the quantity of drugs available in the community. Accordingly, quantity is an exceptionally important aspect of the objective seriousness of the crime".[34] At the same time, the Court endeavoured not to overstate the importance of quantity. The Chief Justice conceded that "[n]otwithstanding the significance of quantity, it is not determinative of the appropriate sentence. Other aspects of the

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[31] *R v Wong; R v Leung* [1999] NSWCCA 420; (1999) 48 NSWLR 340.
[32] *R v Wong; R v Leung* [1999] NSWCCA 420; (1999) 48 NSWLR 340, 364 [130] (Spigelman CJ).
[33] *R v Wong; R v Leung* [1999] NSWCCA 420; (1999) 48 NSWLR 340, 364 [130] (Spigelman CJ).
[34] *R v Wong; R v Leung* [1999] NSWCCA 420; (1999) 48 NSWLR 340, 364 [130] (Spigelman CJ).

crime, including objective and subjective considerations, remain relevant in the exercise of the setencing discretion".[35]

The offenders successfully appealed to the High Court.[36] A majority in the High Court criticised the guidelines for attaching primary importance to the quantity of the narcotics imported. Gaudron, Gummow, Kirby and Hayne JJ held that the undue focus on the weight of the narcotic did not take into account the presence of many conflicting and contradictory elements in the sentencing process, nor did it address the issue of proportionality.[37] For these reasons, the majority held that the Court of Criminal Appeal had fallen into error. The High Court set aside the sentences imposed by the Court below and remitted the matter to the Court of Criminal Appeal for resentencing.[38] The judges in dissent also expressed disquiet about the effect that the guidelines might have on the sentencing discretion, but they were not of the opinion that the Court of Criminal Appeal's decision was materially affected by error.[39]

The judgment of the pluralilty went beyond overruling the *Wong* guideline judgment. Gaudron, Gummow and Hayne JJ held that the Court of Criminal Appeal did not have jurisdiction under the *Criminal Appeal Act 1912* (NSW) to formulate guideline judgments on its own motion.[40] In this regard, their Honours noted that s 5D(1) empowered the Court of Criminal Appeal to "vary the sentence and impose such

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[35] *R v Wong; R v Leung* [1999] NSWCCA 420; (1999) 48 NSWLR 340, 364 [131] (Spigelman CJ).
[36] *Wong* [2001] HCA 64; (2001) 207 CLR 584.
[37] *Wong* [2001] HCA 64; (2001) 207 CLR 584, 611 [75] (Gaudron, Gummow and Hayne JJ). It should be noted that in Kirby J's view, the relevant error did not stem from the adoption of a two-stage sentencing methodology. Rather, it was because the guidelines "went beyond permissible judicial elaboration" that their application by the Court of Criminal Appeal resulted in error: 631 [129].
[38] *Wong* [2001] HCA 64; (2001) 207 CLR 584, 644 [169].
[39] *Wong* [2001] HCA 64; (2001) 207 CLR 584, 597 [31] (Gleeson CJ), 643–4 [168] (Callinan J).
[40] *Wong* [2001] HCA 64; (2001) 207 CLR 584, 615 [84] (Gaudron, Gummow and Hayne JJ).

sentence" on *particular* offenders as was proper, as distinct from a class of yet to be identified offenders. The plurality held that the publication of a table of future punishments exceeded the powers conferred on the Court of Criminal Appeal by s 5D(1).[41] Callinan J, though not deciding the point, also cast doubt on the validity of the guidelines. His Honour suggested that the promulgation of sentencing guidelines by a court exercising federal jurisdiction was unconstitutional. According to his Honour, it was not a proper exercise of the judicial power of the Commonwealth to predetermine the sentence to which future offenders would be subject.[42]

The New South Wales Parliament did not see the issue the same way as the High Court. Parliament amended the *Sentencing Procedure Act* to give the Court of Criminal Appeal the power to issue guideline judgments on its own motion. The amendments retrospectively validated the guideline judgments that the Court had already handed down.[43] In his Second Reading speech introducing the amendments, the Attorney-General said:

> The promulgation of guideline judgments is an integral part of the Government's strategy to provide guidance to the courts and the community about sentencing practices and principles. These amendments ensure the continued use and effectiveness of these judgments … It is not, and has never been, any secret that sentencing guidelines are preferred Government policy … Certainty and consistency are the key to community confidence in sentencing. Sentencing guidelines, which have, after all, been operating in one form or another for 20 years in the United Kingdom, actually implement a regime of certainty.[44]

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[41] *Wong* [2001] HCA 64; (2001) 207 CLR 584, 615 [84] (Gaudron, Gummow and Hayne JJ).
[42] *Wong* [2001] HCA 64; (2001) 207 CLR 584, 642 [165] (Callinan J).
[43] *Criminal Legislation Amendment Act 2001* (NSW).
[44] New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2001, 19300 (Mr Debus, Attorney-General).

The joint judgment of Gaudron, Gummow and Hayne JJ in *Wong* expressly endorsed the instinctive synthesis approach to sentencing. However, their Honours gave more content to the expression than was previously the case. They said:

> [T]he task of the sentencer is to take account of *all* of the relevant factors and to arrive at a single result which takes due account of them all. That is what is meant by saying that the task is to arrive at an "instinctive synthesis". The expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which … balances many different and conflicting features.[45]

The debate about guideline judgments and the obligation to sentence intuitively by instinctive synthesis has brought a different issue into focus. It is referred to as "two-tier" or "two-stage" process of sentencing".[46] This approach has been described as one where "a judge first determines a sentence by reference to the 'objective circumstances' of the case … [and] then increases or reduces this hypothetical sentence incrementally or decrementally by reference to other factors, usually, but not always, personal to the accused".[47] The proponents of two-stage sentencing believe that this method promotes consistency in sentencing and transparent decision-making. The guideline judgment in *Wong* was criticised as involving a two-stage process of reasoning.

In *R v Markarian* [2003] NSWCCA 8; (2003) 137 A Crim R 497, in a judgment in which Heydon JA, as he then was, agreed, the Court of Criminal Appeal expressly adopted a two-stage sentencing approach. The case concerned an offender who had pleaded guilty to knowingly taking part in the supply of a commercial quantity of

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[45] *Wong* [2001] HCA 64; (2001) 207 CLR 584, 611 [75] (Gaudron, Gummow and Hayne JJ) (citations omitted).
[46] See, eg, *R v Markarian* [2003] NSWCCA 8; (2003) 137 A Crim R 497, 505 [33] (Hulme J).
[47] *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357, [51] (McHugh J) ('*Markarian*'). See also *R v Thomson; R v Houlton* [2000] NSWCCA 309; (2000) 49 NSWLR 383, 397–8 [59]–[62] (Spigelman CJ) ('*Thomson*').

heroin, contrary to s 33(2) of the *Drug Misuse and Trafficking Act 1985* (NSW). The offender was a driver for a heroin dealer. At first instance, he was sentenced to two years and six months' imprisonment, with a non-parole period of 15 months.

A Crown appeal against sentence to the Court of Criminal Appeal succeeded.[48] The Court resentenced the offender to eight years' imprisonment with a non-parole period of four years and six months.[49] In arriving at this sentence, the Court took as its starting point the maximum penalty applicable to a less serious drug offence.[50] It then made certain deductions and increases to the sentence based on matters specific to the accused.[51] Hulme J explained why the Court had adopted this method. His Honour said: "in a significant number of the cases which come to this Court, the instinctive synthesis approach adopted in the cases under appeal have made me wonder whether figures have not just been plucked out of the air".[52]

The offender appealed to the High Court. A majority comprising Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ upheld the appeal. The majority's reasoning was similar to that of the majority in *Wong*: the Court of Criminal Appeal had failed to consider the sentencing considerations holistically.[53] The joint judgment also criticised the Court of Criminal Appeal for using as its starting point the

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[48] *R v Markarian* [2003] NSWCCA 8; (2003) 137 A Crim R 497.
[49] *R v Markarian* [2003] NSWCCA 8; (2003) 137 A Crim R 497, 509 [57] (Hulme J, Carruthers AJ and Heydon JA agreeing).
[50] *R v Markarian* [2003] NSWCCA 8; (2003) 137 A Crim R 497, 505–6 [37]–[38] (Hulme J, Carruthers AJ and Heydon JA agreeing).
[51] *R v Markarian* [2003] NSWCCA 8; (2003) 137 A Crim R 497, 505–6 [37]–[40] (Hulme J, Carruthers AJ and Heydon JA agreeing).
[52] *R v Markarian* [2003] NSWCCA 8; (2003) 137 A Crim R 497, 505 [33] (Hulme J, Carruthers AJ and Heydon JA agreeing).
[53] *Markarian* [2005] HCA 25; (2005) 228 CLR 357, 372–3 [32] (Gleeson CJ, Gummow, Hayne and Callinan JJ), 380–1 [56]–[57] (McHugh J).

maximum penalty for an offence other than the one for which the offender had been convicted.[54]

Their Honours confirmed the applicability of the instinctive synthesis method, although the difficulties in articulating its content in a meaningful way became apparent. Gleeson CJ, Gummow, Hayne and Callinan JJ said:

> Following the decision of this Court in *Wong* it cannot now be doubted that sentencing courts may not add and subtract item by item from some apparently subliminally derived figure, passages of time in order to fix the time which an offender must serve in prison. *That is not to say that in a simple case, in which, for example, the circumstances of the crime have to be weighed against one or a small number of other important matters, indulgence in arithmetical deduction by the sentencing judges should be absolutely forbidden.* An invitation to a sentencing judge to engage in a process of "instinctive synthesis", as useful as shorthand terminology may on occasions be, is not desirable if no more is said or understood by what that means. The expression "instinctive synthesis" may then be understood to suggest an arcane process into the mysteries of which only judges can be initiated. The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public. *There may be occasions when some indulgence in an arithmetical process will better serve these ends.* This case was not however one of them because of the number and complexity of the considerations which had to be weighed by the trial judge.[55]

It is apparent that notwithstanding endorsing the process of instinctive synthesis, the joint judgment accepted that, in some cases, there was a role for exposing the arithmetic involved in arriving at a sentence. It is easy to see why. As any judge who has carried out the sentencing task will appreciate, "doing numbers in your head" is the only rational way in which disparate sentencing considerations can be combined or synthesised to arrive at a rational and intellectually rigorous outcome. It is not possible to identify the appropriate weight to give the disparate elements which must

[54] *Markarian* [2005] HCA 25; (2005) 228 CLR 357, 373 [33] (Gleeson CJ, Gummow, Hayne and Callinan JJ).
[55] *Markarian* [2005] HCA 25; (2005) 228 CLR 357, 375 [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ) (emphasis added).

be considered without “doing the numbers”, at least in your head, to see where you end up. This is particularly the case with discounts for pleas of guilty or assistance to the authorities. The guideline judgment of *R v Thomson; R v Houlton* [2000] NSWCCA 309; (2000) 49 NSWLR 383 says that offenders who plead guilty are to be given a discount on sentence of up to 25 per cent.[56] In the words of Spigelman CJ, “there will be cases in which a specific element can be the subject of quantification, without turning the process into a mechanical or mathematical exercise”.[57] The Chief Justice described cases of this type as “qualifications on the [instinctive synthesis] approach to sentencing”.[58]

Having an identifiable and easily understood parameter for guilty plea discounts has had enormous benefit for the administration of criminal justice. One only has to compare the state of the criminal lists in countries where a plea brings no discount to understand the benefits of a structured sentencing approach. Legislation now requires the courts to quantify the discount given to offenders for their assistance to law enforcement authorities.[59]

The joint judgment in *Markarian* did recognise the importance of transparent and consistent decision-making. A “gut feeling” that a sentence is correct does not absolve the judge of the responsibility to articulate the underlying reasons for the

[56] *Thomson* [2000] NSWCCA 309; (2000) 49 NSWLR 383.

[57] *Thomson* [2000] NSWCCA 309; (2000) 49 NSWLR 383, 400 [67] (Spigelman CJ, Foster AJA, Grove and James JJ agreeing). And at 396 [57]: “The instinctive synthesis approach is the correct general approach to sentencing. This does not, however, necessarily mean that there is no element which can be taken out and treated separately, although such elements ought be few in number and narrowly confined. As long as they are such, their separate treatment will not compromise the intuitive or instinctive character of the sentencing process considered as a whole”.

[58] *Thomson* [2000] NSWCCA 309; (2000) 49 NSWLR 383, 396 [55] (Spigelman CJ, Foster AJA, Grove and James JJ agreeing).

[59] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23(4). See also *R v Ehrlich* [2012] NSWCCA 38, [9] (Basten JA).

decision. Quantified discounts make the reasoning of sentencing judges more comprehensible to offenders, victims, the public, and the appellate courts.

Kirby J dissented in *Markarian*. He characterised the debate between instinctive synthesisers and two-stage sentencers as a "semantic" one.[60] But semantics matter, as Kirby J recognised. His Honour said that the use of terms such as "instinct" and "intuition" is inconsistent with "the standards of reasoning in sentencing that we have come to expect in Australia".[61] "Honesty and transparency in the provision of reasons", his Honour continued, "is the hallmark of modern judicial administration".[62] Talk of judicial instinct, on the other hand, "runs contrary to the tendency in other areas of the law, notably administrative law, to expose to subsequent scrutiny the use of public power by public officials".[63] His Honour's remarks, with respect, seem to align with the efforts of the Parliament and the intermediate appellate courts, on which his Honour formerly sat.

Non-parole periods are another area in which the legislature and the Court of Criminal Appeal have endeavoured to add structure to the sentencing process. In 2002, the New South Wales Parliament introduced standard non-parole periods for certain offences.[64] In the Second Reading speech which introduced the relevant amendments to the *Sentencing Procedure Act*, the Attorney-General described the standard non-parole period as a "reference point" that would "provide further

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[60] *Cameron v The Queen* [2002] HCA 6; (2002) 209 CLR 339, 362 [71] (Kirby J); *Markarian* (2005) [2005] HCA 25; 228 CLR 357, 405 [132] (Kirby J). One academic has also formed this view. He writes that after *Markarian*, "any difference between the two approaches may be largely academic in significance" because they have "a strong compatibility with one another": Terry Hewton, 'Instinctive Synthesis, Structured Reasoning, and Punishment Guidelines: Judicial Discretion in the Modern Sentencing Process' (2010) 31 *Adelaide Law Review* 79, 92–3.
[61] *Markarian* [2005] HCA 25; (2005) 228 CLR 357, 406 [135] (Kirby J).
[62] *Markarian* [2005] HCA 25; (2005) 228 CLR 357, 406 [135] (Kirby J).
[63] *Markarian* [2005] HCA 25; (2005) 228 CLR 357, 403 [129] (Kirby J).
[64] *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*.

guidance and structure to the exercise of the sentencing discretion".[65] They were intended to lead to an increase in non-parole periods for the relevant offences, and to ensure greater consistency in sentencing.

Section 54A(2) of the *Sentencing Procedure Act* specifies that standard non-parole periods, which are listed in the Table to Div 1A of Pt 4 of the Act, are indicative of "the non-parole period for an offence in the middle of the range of objective seriousness". Section 54B(2) of the Act further provides:

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

In *R v Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168, the Court of Criminal Appeal said that it understood that section to mean that a sentencing court was to ask itself whether there were reasons *not* to impose the standard non-parole period.[66] That question was to be answered by considering the objective seriousness of the offence, so as to determine whether it fell in the mid range of seriousness, as well as the circumstances of aggravation and mitigation.[67] The Court accepted that in considering those issues, it might become immediately apparent that an offence is not one to which the standard non-parole period applies.[68] In addition, the Court expressly rejected the idea that a judge should begin with the standard non-parole period, irrespective of the seriousness of the offence, and then "oscillate about it by

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[65] New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5816–7 (Mr Debus, Attorney-General).

[66] *R v Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168, 191 [117]–[119] (Spigelman CJ, Wood CJ at CL and Simpson J) ('*Way*').

[67] *Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168, 191 [118].

[68] *Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168, 191 [119].

reference to the aggravating and mitigating factors".[69] The Court recognised that the problem with such an approach is that the standard non-parole period "will tend to dominate the remainder of the exercise".[70] With this observation, the Court disclaimed any reliance on a two-stage approach to sentencing.[71] The Court maintained that the approach it had outlined was consistent with the instinctive synthesis method.[72]

On an interesting sidenote, to which I will later return, the Court in *Way* held that the objective seriousness of an offence might include factors specific to the accused to the extent that they "explain why [the offence] was committed".[73]

Until the High Court decision in *Muldrock v The Queen* [2011] HCA 39; (2011) 85 ALJR 1154, *Way* went unquestioned and had been routinely applied by criminal courts in New South Wales. The High Court refused special leave to appeal against the decision in 2005, albeit for reasons unrelated to correct sentencing methodology.[74] However, in *Muldrock*, the High Court unanimously held that *Way* had been wrongly decided.

Muldrock is an intellectually disabled man who suffered homosexual sexual abuse as a child. As an adult, he displayed sexual interest in male children. He was convicted of sexual assault of a young boy in 2000 in Queensland. In March 2007, he committed a similar offence when he befriended and sexually abused a nine-year-old

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[69] *Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168, 193 [131].
[70] *Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168, 193 [131].
[71] *Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168, 193 [128].
[72] *Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168, 192 [127].
[73] [2004] NSWCCA 131; (2004) 60 NSWLR 168, 191 [118].
[74] *Way v The Queen* [2005] HCATrans 147 (11 March 2005).

boy.[75] He was charged with sexual intercourse with a child under the age of ten, an offence carrying a maximum penalty of 25 years' imprisonment and a standard non-parole period of 15 years.[76] Muldrock pleaded guilty to the offence in the New South Wales District Court. He was sentened to nine years' imprisonment, with a non-parole period of 96 days. As the offender had already spent three months on remand, the non-parole period expired as soon as it was imposed. The sentencing judge attached a condition to the offender's parole, which required him to remain in a treatment facility until the Parole Authority approved his discharge.[77]

The Crown appealed against the sentence on the ground that it was inadequate, and the respondent unsuccessully sought leave to appeal on the ground that it was too severe. As it happened, the sentencing judge's discretion had miscarried for a reason unrelated to the length of the sentence – his Honour was not empowered by statute to impose parole conditions on a sentence of three or more years.[78] Howie and Harrison JJ and I upheld the Crown's appeal.[79] The Court concluded that the sentencing judge had given too much weight to the offender's rehabilitation, and not enough to the standard non-parole period and the objectives of denunication, punishment, and general and specific deterrence.[80] In this regard, the Court noted evidence that the offence was premeditated, that the offender knew his conduct was wrongful, and that the offender had previously committed a similar offence.[81] In our

[75] *Muldrock v The Queen* [2011] HCA 39; (2011) 244 CLR 120, 123 [1] ('*Muldrock*').
[76] *Crimes Act 1900* (NSW) s 66A; *Crimes (Sentencing Procedure) Act 1999* (NSW) Table to Div 1A of Pt 4.
[77] *Muldrock* [2011] HCA 39; (2011) 244 CLR 120, 124 [3].
[78] *Muldrock* [2011] HCA 39; (2011) 244 CLR 120, 124 [4].
[79] *R v Muldrock; Muldrock v R* [2010] NSWCCA 106, [46] (McClellan CJ at CL, Howie and Harrison JJ agreeing).
[80] *R v Muldrock; Muldrock v R* [2010] NSWCCA 106, [34]–[35] (McClellan CJ at CL, Howie and Harrison JJ agreeing).
[81] *R v Muldrock; Muldrock v R* [2010] NSWCCA 106, [28], [34] (McClellan CJ at CL, Howie and Harrison JJ agreeing).

view, the offence, while serious, fell below the middle of the range of objective seriousness.[82] The Court resentenced the offender accordingly, imposing a non-parole period of six years and eight months.[83] The standard non-parole period for the offence is 15 years.[84]

Muldrock appealed to the High Court, his ground of appeal being that the standard non-parole period is irrelevant when an offender pleads guilty. That ground failed. However, the DPP for the first time submitted that *Way* had been wrongly decided. Perhaps surprisingly, with respect, although the issue had not been raised in the Court of Criminal Appeal, the High Court entertained the argument. The High Court has previously questioned whether it has jurisdiction "to set aside a judgment [of the Court of Criminal Appeal] correctly and regularly pronounced when the only ground which might warrant the allowing of an appeal is raised for the first time" in the High Court.[85]

The High Court accepted that *Way* had been wrongly decided. The Court criticised the decision for assuming that s 54B(2) was framed in "mandatory terms" because it directed a court "to set" the standard non-parole period "unless" there were reasons not to.[86] The High Court explained that s 54B(2), when read in conjunction with other provisions that preserve the entire body of judicially developed sentencing principles,[87] merely requires a sentencing court to be "mindful" of the standard non-

[82] *R v Muldrock; Muldrock v R* [2010] NSWCCA 106, [34] (McClellan CJ at CL, Howie and Harrison JJ agreeing).
[83] *R v Muldrock; Muldrock v R* [2010] NSWCCA 106, [46] (McClellan CJ at CL, Howie and Harrison JJ agreeing).
[84] *Crimes (Sentencing Procedure) Act 1999* (NSW) Table to Div 1A of Pt 4.
[85] *Pantorno v The Queen* [1989] HCA 18; (1989) 166 CLR 466, 475 (Mason CJ and Brennan J).
[86] *Muldrock* [2011] HCA 39; (2011) 244 CLR 120, 131 [25].
[87] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1), 21A(4), 54B(2)–(3).

parole period when carrying out the instinctive synthesis.[88] Contrary to what the Court of Criminal Appeal had said in *Way*, a court is not required "to commence by asking whether there are reasons for not imposing the standard non-parole period nor to proceed to an assessment of whether the offence is within the midrange of objective seriousness".[89] In reaching this conclusion, the High Court was concerned that *Way* required a two-stage approach to sentencing.[90]

Apart from overturning *Way*, the practical consequences of *Muldrock* are significant. Legal Aid is reviewing some 3,000 cases to determine if a "*Muldrock* error" has affected the sentence. *Way* stood as the correct interpretation of the non-parole period legislation for seven years and thousands of people have been sentenced in accordance with the decision.

In *Re Bolton; Ex parte Beane* [1987] HCA 12; (1987) 162 CLR 514, the High Court declined to overrule a 1969 decision[91] of the Victorian Supreme Court that had interpreted the *Defence (Visiting Forces) Act 1963* (Cth) in a particular way. Deane J, in the majority, acknowledged the importance of upholding a long-established decision of an inferior court where "people may well have regulated their lives upon the basis of the earlier decision which was allowed to remain unchallenged and where the relevant statutory provision was allowed to remain on the statute book for years without significant amendment".[92] And in *Thompson v Byrne* [1999] HCA 16; (1999) 196 CLR 141, McHugh J declined to overrule what he thought was an erroneous interpretation of legislation by the High Court, as the decision had stood

[88] *Muldrock* [2011] HCA 39; (2011) 244 CLR 120, 132 [3].
[89] *Muldrock* [2011] HCA 39; (2011) 244 CLR 120, 131 [25].
[90] *Muldrock* [2011] HCA 39; (2011) 244 CLR 120, 132 [28].
[91] *R v Peterson; Ex parte Hartmann* [1969] VR 411.
[92] *Re Bolton; Ex parte Beane* [1987] HCA 12; (1987) 162 CLR 514, 531 (Deane J).

for nine years without legislative interference.[93] Perhaps sentencing statutes require a more rigid approach where error in interpretation is revealed.

The High Court's discussion of the concept of "objective seriousness" has also given rise to difficulties. The High Court held that the offender's intellectual disability had no bearing on the objective seriousness of the offence.[94] According to the High Court, the only way to give "meaningful content" to the concept of objective seriousness is to construe it "without reference to matters particular to an offender or class of offenders".[95] Objective seriousness is to be determined "wholly by reference to the nature of the offending".[96] That statement is of course at odds with the suggestion in *Way*'s case that factors personal to the offender may objectively affect the seriousness of an offence "because of their causal connection with its commission".[97] The *Way* Court cited intellectual disability and other mental conditions as factors of this type. The Court in *Way* reasoned that these diabilities might affect "the offender's capacity to reason, or to appreciate fully the rightness or wrongness of a particular act, or to exercise appropriate powers of control".[98] Hence, the objective seriousness of his or her crime may be diminished.

There are presently different views as to whether *Muldrock* has overruled this aspect of the *Way* decision. Some decisions suggest that in light of *Muldrock*, it is wrong to

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[93] *Thompson v Byrne* [1999] HCA 16; (1999) 196 CLR 141, 160 [53] (McHugh J). See also D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (7th ed, 2011) 11: "There is a strong influence constraining a court to adhere to a previously stated interpretation of an Act … [L]egislation emanates from the parliament and can be altered somewhat more easily than the common law. Accordingly, if a legislature has chosen not to make any change in an Act following upon its interpretation by the judiciary, that may be regarded as strong ground for thinking that the legislature is satisfied with the court's ruling".
[94] *Muldrock* [2011] HCA 39; (2011) 244 CLR 120, 132 [27].
[95] *Muldrock* [2011] HCA 39; (2011) 244 CLR 120, 132 [27].
[96] *Muldrock* [2011] HCA 39; (2011) 85 ALJR 1154, 1163 [27].
[97] *Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168, 186 [86].
[98] *Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168, 186 [86].

have regard to an offender's mental condition, or any other matter personal to the offender, when determining the objective seriousness of an offence.[99] Other decisions suggest that *Muldrock* has not altered the practice of including in the assessment of objective seriousness a consideration of factors pesonal to the offender, so long as they are casually connected to the commission of the offence.[100]

In *Markarian*, McHugh J, who was probably the most firm of the judges in embracing instinctive synthesis, observed that judicial instinct does not operate in a "vacuum of random selection" but involves a discretion controlled by judicial practice, appellate review, legislative indicators, public opinion and community values.[101] Many of these concepts raise difficulties for a sentencing judge.

For the most part, legislative indicators are easily understood and identified, as are appellate decisions and guidelines. But judicial practice is less easy to discern. Its effectiveness as a constraint on discretion is dependent on the judge being aware of the decisions that all of his or her colleagues are making. Sentencing by instinctive synthesis was more likley to give rise to consistent outcomes when the offending population was smaller and the sentencing judges were drawn almost entirely from a pool of experienced criminal lawyers. That may have been the case 50 years ago, but it is rather different today. I considered these issues in the guideline judgment in *Whyte*, where I said:

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[99] *R v Biddle* [2011] NSWSC 1262, [88] (Garling J).

[100] *R v Cotterill* [2012] NSWSC 89, [30] (McCallum J); *R v Fahda* [2012] NSWSC 114, [50] (Harrison J); *MDZ v R* [2011] NSWCCA 243, [67] (Hall J, Tobias AJA and Johnson J agreeing); *R v Tuan Anh Tran* [2011] NSWSC 1480, [13] (Rothman J). See also *Yang v R* [2012] NSWCCA 49, [37]–[38] (R A Hulme J, Macfarlan JA and R S Hulme J agreeing); *Ayshow v R* [2011] NSWCCA 240, [39] (Johnson J, Bathurst CJ and James J agreeing).

[101] *Markarian* [2005] HCA 25; (2005) 228 CLR 357, 390 [84] (McHugh J).

> Any judge who has been required to sentence a person for committing a crime, will be aware of the signifcant burdens which the making of the decision imposes. An experienced judge, particularly one with access to colleagues constantly involved in the sentencing process and the benefit of exchanges in an appellate court, may find the task less burdensome. However, many sentences must be imposed by judges with less experience and the majority of sentencing judges will never be involved in sentence appeals.
>
> The structure of the modern legal profession, which demands specialisation by practitioners in particular areas of the law, will have the effect that a person who is, without doubt, appropriate for judicial appointment, may not have any, or significant experience, in the sentencing process.
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> …
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> The increasing number of sentences which are imposed and … the great many appeals in relation to sentences, has meant that the ideal of the individual sentencing judge being abreast of all of the sentences which are being imposed, is impossible. Even keeping abreast of the decisions of this Court is immensely difficult. The task is more difficult for the judge who has, as yet, limited experience in the sentencing process.[102]

Modern technology has made it possible for judges to access up-to-date sentencing statistics. The Judicial Commission maintains the 'JIRS' database, which gives judicial officers access to detailed sentencing statistics. JIRS is widely used and referred to by sentencing judges. While "bald statistics"[103] cannot determine a sentence, the Court of Criminal Appeal has observed that statistics "may provide indications of general sentencing trends and standards, assist in assuring consistency and be useful in determining whether a sentence is manifestly excessive or manifestly inadequate".[104]

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[102] *Whyte* [2002] NSWCCA 343; (2002) 55 NSWLR 252, 291 [263]–[264], 292 [266] (McClellan CJ at CL).
[103] *R v Bloomfield* (1998) 44 NSWLR 734, 739 (Spigelman CJ).
[104] *R v Ryan* (2003) 141 A Crim R 403, 441 [46] (Grove J, Ipp JA and Shaw J agreeing). See also *R v AEM Snr*; *R v KEM*; *R v MM* [2002] NSWCCA 58, [110], where it was said: "The use of sentencing statistics is one tool which a court can use to assist it in its task of ascertaining the pattern of sentences".

Although the Court of Criminal Appeal endorsed the utility of sentencing statistics, the High Court has cautioned against placing too much importance on them. In *Wong*, the plurality said:

> [R]ecording what sentences have been imposed in other cases is useful if, but only if, it is accompanied by an articulation of what are to be seen as the unifying principles which those disparate sentences may reveal. The production of bare statistics about sentences that have been passed tells the judge who is about to pass sentence on an offender very little that is useful if the sentencing judge is not also told *why* those sentences were fixed as they were.[105]

The High Court referred to this statement with approval in *Hili*,[106] where the plurality said that consistency in sentencing refers to consistency in the application of the relevant legal principles, not consistency in the sense of "numerical equivalence" between sentences imposed for the same offence.[107] It was for this reason that the plurality said:

> Presentation of the sentences that have been passed on federal offenders in numerical tables, bar charts or graphs is not useful to a sentencing judge. It is not useful because referring only to the lengths of sentences passed says nothing about why sentences were fixed as they were. Presentation in any of these forms suggests, wrongly, that the task of a sentencing judge is to interpolate the result of the instant case on a graph that depicts the available outcomes.[108]

It may be accepted that consistency in the application of sentencing principles is of paramount importance. Judges do not, and should not, apply a crude form of grid sentencing when they make use of the available sentencing statistics. But it may also be the case that a lack of "numerical equivalence" between sentences will, beyond a certain point, contribute to the perception that the length of a sentence depends on the idiosyncrasies of the sentencing judge. A judge who under-utilises sentencing statistics is more likely to impose a sentence affected by error than one

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[105] *Wong* [2001] HCA 64; (2001) 207 CLR 584, 606 [59].
[106] *Hili* [2010] HCA 45; (2010) 242 CLR 520, 537 [55].
[107] *Hili* [2010] HCA 45; (2010) 242 CLR 520, 527 [18], 535 [48].
[108] *Hili* [2010] HCA 45; (2010) 242 CLR 520, 535 [48].

who does not. It was with this in mind that Simpson J, in a recent case, described sentencing statistics as "a yardstick against which to examine a proposed sentence".[109]

It is also difficult to discern "public opinion" and "community values". Recent decisions in Victoria and Western Australia have affirmed that courts must impose a sentence that reflects community values and expectations.[110] These are not concepts about which a judge can have a "gut feeling" or instinct. To borrow a phrase from Hulme J in *Markarian*, they cannot be "plucked out of the air". Courts need to have an appreciation of the different views that members of the community have in relation to crime and sentencing – not just from people like you and I, but from people who live in communities where violent crime may be a more frequent occurrence. The attitude of those who live in a community which is disturbed by drive-by shootings may be somewhat different to the attitude of a person living in a less troubled neighbourhood.

This is not the occasion for a discussion of the law on how a sentencing court ought to gauge community expectations. I have addressed that issue elsewhere.[111] The accepted approach requires judges to take into account *informed* community expectations as to the appropriate sentence for an offender.[112] The question is whether the test, expressed in this manner, takes sufficient account of the diversity of emotional and moral responses to crime that exists in the community. It may

[109] *DPP (Cth) v De La Rosa* [2010] NSWCCA 194, [304] (Simpson J) quoted in *Hili* [2010] HCA 45; (2010) 242 CLR 520, 537 [54].
[110] See, eg, *WCB v The Queen* [2010] VSCA 230 ('*WCB*'); *Scolaro v Shephard [No 2]* [2010] WASC 271.
[111] McClellan CJ at CL, Speech delivered to the NSW Legal Studies Association Conference, Rule of Law Institute of Australia, 29 March 2012.
[112] *WCB* [2010] VSCA 230, [37] (Warren CJ and Redlich JA).

attribute to members of the community a level of knowledge about the criminal law and sentencing principles that they simply do not have. Furthermore, it may ignore the moral dimensions of wrongdoing. The “informed community” may be indistinguishable from, and confined to, the legal and academic community.

The difficulties in sentencing offenders in Australia have been confronted in other countries. The United Kingdom has adopted an approach that relies heavily on sentencing guidelines. However, the guidelines are issued not by the courts but by a government sentencing council comprised of judicial, academic and lay members. The practice began with the creation of the Sentencing Advisory Panel in 1998,[113] followed by the Sentencing Guidelines Council in 2003.[114] The functions of both of these bodies have since been subsumed into a single Sentencing Council for England and Wales.[115]

The Sentencing Council is intended to promote greater transparency and consistency in sentencing, while maintaining the independence of the judiciary. Under the *Coroners and Justice Act 2009* (UK), the Council’s primary role is to issue guidelines with which the courts must comply unless it is in the interests of justice not to do so. The Council has also been tasked with monitoring the effect of the guidelines on sentencing and raising public awareness of the realities of sentencing.[116]

[113] *Crime and Disorder Act 1998* (UK) ss 80–81.
[114] *Criminal Justice Act 2003* (UK) ss 169–170.
[115] *Coroners and Justice Act 2009* (UK) ss 118, 120.
[116] *Coroners and Justice Act 2009* (UK) ss 128, 129.

The Sentencing Council has already issued a significant body of guidelines that cover offences as diverse as assault, sexual assault, attempted murder, burglary, robbery, fraud, deadly driving, drug possession and supply, knife crime, and manslaughter. The Council has also articulated "overarching principles" with respect to domestic violence offences, youth sentencing, assaults on children, and the assessment of the seriousness of an offence.[117]

It is early days yet for the Sentencing Council, but there may be a couple of lessons we can take from the UK experience. The first is that a standalone body dedicated to the preparation of sentencing guidelines may be able to produce guidelines more expeditiously than a Court of Criminal Appeal with a long docket. The second lesson from the Sentencing Council is that it provides a forum where the wider community can have input into sentencing outcomes. The Sentencing Council's membership includes not just judicial officers and legal practitioners, but a former Deputy Commissioner of the Metropolitan Police, a former executive of a victim support group, and a respected professor of criminology.[118] Of course, if this approach was adopted in Australia, the legislation underpinning it would require careful consideration to ensure that it does not conflict with the constitutional powers and duties of a Chapter III court.

[117] Sentencing Council for England and Wales, *Guidelines*, <http://sentencingcouncil.judiciary.gov.uk/guidelines/guidelines-to-download.htm> (accessed 1 April 2012).

[118] Sentencing Council for England and Wales, *Council Members*, <http://sentencingcouncil.judiciary.gov.uk/about/council-members.htm> (accessed 1 April 2012). For a critical assessment of the provisions of the *Coroners and Justice Act* relating to sentencing guidelines and the new Sentencing Council, see Andrew Ashworth, 'Sentencing Guidelines and the Sentencing Council' [2010] *Criminal Law Review* 389.

I do not mean by my short analysis of the recent history of sentencing to constrain or diminish the significance of a sentencing judge's discretion. No one doubts that discretion is essential if justice is to be done in a particular case. But the sentencing discretion is a particular type of discretion. It is a discretion resposed in the courts by the community acting through the legislature. The history of the last 30 years reflects the concerns of the Parliament and intermediate appellate courts that "instinctive synthesis" and reliance on judicial intuition alone may not meet the community's expectations.

The formulation of sentences that are consistent and in line with community expectations may require judges to accept the assistance available in the form of guidelines and legislated standards which have been, and no doubt will continue to be, developed. It may even be that parliaments will in some way mandate a "two-stage" sentencing process.