GUIDELINE JUDGMENTS IN VICTORIA: AN EXAMINATION OF THE ISSUES

BETH CRILLY*

The Sentencing (Amendment) Act 2003 *(Vic) commenced on 1 July 2004, giving the Victorian Court of Appeal the statutory power to hand down guideline judgments. This article examines the issues arising from this reform. In particular, it discusses whether guideline judgments can achieve their aim of improving consistency in sentencing, concluding that while guidelines are unlikely to increase consistency of result, they may lead to increased consistency of approach to sentencing. The aim of increasing public confidence is also examined, and it is found that guideline judgments have the capacity to act as an excellent tool for increasing public confidence in sentencing. The article also explores the specific legal difficulties that guideline judgments present for Victoria, including the hostility of the judiciary towards guidelines, the seeming incompatibility of guideline judgments with the instinctive synthesis approach to sentencing and the issues guideline judgments present for individualised justice. Finally, a range of suggestions are presented for how guideline judgments can be successfully and usefully implemented by the Court of Appeal. While the article is primarily aimed at the Victorian jurisdiction, much of its content can be extrapolated to other Australian jurisdictions, whether they currently use guideline judgments, or are considering utilising them in the future. This article endeavours to state the law to at least May 2005.*

I INTRODUCTION

On 8 August 2004, 6000 people rallied in Melbourne to convey their disappointment and frustration with sentencing in Victoria.[1] The rally was primarily fuelled by two recent sexual assault cases in which offenders received only suspended sentences, but it represented a culmination of concerns that Victorians have held for some time about their criminal justice system, and especially about lenient and inconsistent sentencing.

A month before the rally, on 1 July 2004, the *Sentencing (Amendment) Act 2003* (Vic) (the 'Amendment Act') commenced. In an attempt to increase consistency in sentencing and restore public confidence in the system, the legislation gives the Victorian Court of Appeal ('VCA') the power to deliver guideline judgments. It also establishes a Sentencing Advisory Council ('SAC') to assist the Court by providing statistics and advice after liasing with the public and other relevant

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1 Kelly Ryan and Jeremy Kelly, 'Thousands rally over sex crimes: Demand for mandatory jail sentences' *Herald Sun* (Melbourne), 9 August 2004 4.

bodies. This article examines guideline judgments and what their effect may be on sentencing in Victoria.

The article begins by describing Victorian sentencing as it was before the Amendment Act. Guideline judgments as they have developed in other jurisdictions are discussed and their capacity for achieving the government's aims of increased consistency and public confidence is appraised. The article then discusses the main challenges facing the implementation of guideline judgments in Victoria. Finally, some suggestions are offered as to how guideline judgments in Victoria can best be promulgated.

II GUIDELINE JUDGMENTS

The term 'guideline judgment' is a broad one:

> The expressions 'guidelines' or 'guidelines judgments' have no precise connotation. They cover a variety of methods adopted by appellate courts for the purpose of giving guidance to primary judges charged with the exercise of judicial discretion.[2]

Guideline judgments take many forms. Simple direction on a particular principle, for example, a reminder of the seriousness of an offence, may be called a guideline. A more complex guideline might describe aggravating and mitigating factors that should be considered in sentencing a particular offence. It may also direct the weight to be allotted to each of these factors. Guidelines may give indications of appropriate penalties, for example, imprisonment. 'Tariff' or 'numerical' guidelines expand on this and provide a starting point sentence, for example, six years imprisonment or a range of appropriate sentences for a particular crime.

Guideline judgments are not a new concept and have been utilised in a variety of different jurisdictions, overseas and in Australia. To fully understand guideline judgments, it is valuable to examine their development elsewhere.

A *United States of America and Canada*

The United States of America, federally and in approximately twenty states, uses guidelines created by politically appointed sentencing commissions. The Federal Commission responds to public sentiment and creates restrictive, numerical guidelines based on severity of offence and prior convictions. State guidelines are generally less formulaic and allow sentencing judges more discretion.[3]

Less constrictive than their United States equivalents, Canadian guidelines[4]

2 *Wong v the Queen* (2001) 207 CLR 584, 590 (Gleeson CJ) ('*Wong*').

3 For further discussion, see Judith Greene, 'Getting Tough in Crime: the History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act' in Cyrus Tata and Neil Hutton (eds), *Sentencing and Society: International Perspectives* (2002) 43; and United States Sentencing Commission, *US Sentencing Commission: Home Page* <http://www.ussc.gov> at 6 June 2005.

supply presumptive indications of sentence type for each crime, and a presumptive sentencing range for those crimes with presumed custodial sentences. These can be departed from if necessary. Victoria's SAC will not create guidelines and, therefore, commission-based guidelines have limited relevance to Victoria and are outside the scope of this article.[5]

B *England*

Guideline judgments have been promulgated by the English Court of Appeal since the 1970s under Lawton LJ without statutory authority, as an initiative of the Court. The guidelines are narrative in form and usually include a numerical starting-point in conjunction with aggravating and mitigating factors.[6] They vary widely in style. For example, relatively vague guidance is given in *R v Spence,*[7] which recommends imprisonment for at least eight years for a carefully planned kidnapping involving hostages or ransom demands but observes that at the other end of the scale, there are those incidents, often sequels to 'family tiffs', which could hardly be described as kidnapping. This can be contrasted with the prescriptive, detailed guidance of *Aramah v R,*[8] which divides illicit drugs into classes 'A' and 'B' and indicates a range of appropriate sentences for both classes for crimes ranging from large-scale importation to minor possession, and includes a range of aggravating and mitigating factors.

C *New South Wales*

The New South Wales Court of Criminal Appeal ('NSWCCA') was the first Australian Court to issue a guideline judgment. Six judgments have thus far been delivered.

The first, *R v Jurisic,*[9] was delivered on 12 October 1998 without statutory authority. The NSWCCA, like all Courts of Appeal, is responsible for the supervision of lower courts. It was this inherent appellate jurisdiction that the Court relied upon to issue the guideline. The *Jurisic* guideline states that non-custodial sentences for dangerous driving 'should be exceptional' and provides numerical starting points to be varied by reference to the presence or absence of aggravating factors.[10]

Shortly after *Jurisic*, the New South Wales Parliament passed the *Criminal Procedure Amendment (Sentencing Guidelines) Act 1998* (NSW), amending the *Criminal Procedure Act 1986* (NSW). This was soon repealed and replaced by substantially the same provisions in the *Crimes (Sentencing Procedure) Act 1999*

4 *Comprehensive Crime Control Act,* 1984.
5 Though note that in *R v McDonnell* [1997] 1 SCR 948 the Supreme Court of Canada held that it is permissible for Courts of Appeal to set out starting-point guidelines.
6 Typical examples are illustrated in *R v Boswell* [1984] Crim LR 502, *R v Taylor Others* [1977] 3 All ER 527 and *R v Roberts* (1982) 1 All ER 609.
7 (1983) 5 Cr App Rep (S) 413.
8 (1982) 4 Cr App R (S) 407.
9 (1998) 45 NSWLR 209 ('*Jurisic*').
10 Ibid 231.

(NSW), allowing the Attorney-General to apply for the promulgation of a guideline judgment.

Five guideline judgments have followed. *R v Henry*[11] provides a numerical starting-point of six years with aggravating and mitigating factors for armed robbery. *R v Wong*[12] guides the sentencing of heroin importers with a numerical grid based on weight of heroin involved. *R v Ponfield*[13] gives no numerical starting point because of the variety of types of burglary, but lists relevant aggravating and mitigating factors. *R v Thomson*[14] quantifies the utilitarian value of guilty pleas at a 10 to 25 per cent discount on sentence.

In 2002, *R v Wong*[15] was appealed to the High Court. In *Wong*,[16] Gleeson CJ, Gaudron, Gummow, Hayne, Kirby and Callinan JJ strongly criticised the NSWCCA's guidelines. The majority (comprising Gaudron, Gummow, Hayne and Kirby JJ) decided the guidelines in question were 'legally impermissible' and so tainted the decision of the NSWCCA that the appeal would be allowed.[17] The New South Wales government countered by introducing the *Criminal Legislation Amendment Act 2001* (NSW)[18] to consolidate the NSWCCA's guideline judgments power and to confer retrospective validity on all guidelines previously delivered.[19]

In *R v Whyte*,[20] Spigelman J commented extensively on the effect of the *Wong*[21] decision and the recent legislative changes, entering into a spirited defence of the judgments. However, since *Whyte*,[22] there has been a marked change in the NSWCCA's promulgation of guidelines. Four applications for a guideline judgment have been made by the Attorney-General. Two have been refused.[23] Another application was granted only in small part, and was more a 'low profile practice direction'[24] than anything else.[25]

Dr Anderson suggests that this significant shift in approach may be due in part to the creation of legislative standard minimum non-parole periods.[26] Indeed, the

11 (1999) 46 NSWLR 346 ('*Henry*').
12 (1999) 48 NSWLR 340.
13 (1999) 48 NSWLR 327.
14 (2000) 49 NSWLR 383.
15 (1999) 48 NSWLR 340.
16 (2001) 207 CLR 584.
17 (2001) 207 CLR 584, 624 (Kirby J).
18 Amending the *Crimes (Sentencing Procedure) Act* (NSW) ss 37, 37A.
19 *Crimes (Sentencing Procedure) Act 1999* (NSW), sch 2, cl 41.
20 (2002) NSWLR 252 ('*Whyte*').
21 (2001) 207 CLR 584.
22 (2002) NSWLR 252.
23 The New South Wales Attorney-General lodged the first failed application for a guideline judgment on 13 September 2001. The court refused to issue a guideline and adjourned the matter. The application has since been withdrawn: Kate Warner, 'The Role of Guideline Judgments in the Law and Order Debate in Australia' (2003) 27 *Criminal Law Journal* 8, 11. See also *Re Attorney-General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 2 of 2002)* (2002) 137 A Crim R 196.
24 John L Anderson, '"Leading steps aright": Judicial guideline judgments in New South Wales' (2004) 16 *Current Issues in Criminal Justice* 140, 149.
25 *Attorney-General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146.
26 *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW).

only true guideline judgment delivered by the NSWCCA since the introduction of the legislation has been in *Application by Attorney-General under s 37 of the Crimes (Sentencing Procedure) Act (No 3 of 2002)*,[27] which guides the sentencing of driving with a high range prescribed concentration of alcohol. The offence is a summary one dealt with only by local court magistrates, and which is not covered by standard minimum sentencing.[28]

D *South Australia*

South Australia's guideline judgments were also initially an initiative of the judiciary.[29] Recently, the *Criminal Law (Sentencing) (Sentencing Guidelines) Amendment Act 2003* (SA)[30] was created to give guideline judgments statutory support. Since then, however, no guidelines have been issued, despite an application in *R v Payne*.[31]

E *Western Australia*

The Western Australia Court of Criminal Appeal ('WACCA') has had statutory jurisdiction to deliver guideline judgments since 1995.[32] The court is yet to hand down a guideline judgment, so named, though it has delivered some judgments containing guidance in relation to specific offences. For example, it commented on previous decisions and referred to common ranges of imprisonment in *R v Cheshire*[33] and *R v Podirsky*.[34] The fact that sentences for armed robbery had been 'firmed up' was noted in *R v Miles*.[35] The headnote of *R v Tognini*[36] even describes the decision as a 'guideline judgment', though no mention of such is made by the judges.[37]

III SENTENCING IN VICTORIA BEFORE THE AMENDMENT ACT

In order to understand how guideline judgments will affect Victorian sentencing, it is necessary to examine how sentencing occurred before the Amendment Act. Victorian sentencing is primarily governed by the *Sentencing Act 1991* (Vic) (the 'Sentencing Act'), which states the general principles of, and the reasons for, sentencing. It is used in conjunction with legislative maximum penalties.[38] Judges

27 [2004] NSWCCA 303.
28 Anderson, above n 24, 150.
29 See, eg, *Eldridge v Bates* (1989) 51 SASR 532; *Police v Cadd* (1997) 69 SASR 150; *Kovacevic v Mills* (2000) 76 SASR 4004; *R v Place* (2002) 81 SASR 395.
30 Amending the *Criminal Law (Sentencing) Act* (SA) ss 29A, 29B.
31 (2004) 89 SASR 49.
32 *Sentencing Act 1995* (WA), s 143.
33 [1989] WACCA (Unreported, Malcolm CJ, Brinsden and Pidgeon J).
34 (1989) 43 A Crim R 404.
35 (1997) 17 WAR 518, 521.
36 [2000] WASCA 31.
37 This was noted by Rowena Johns in New South Wales, *Sentencing Law: A Review of Developments in 1998-2001*, Briefing Paper 2/2002 (2002) [5.5.2].
38 Some common law crimes have no statutory maximum. In this case, the length of sentence is left to the discretion of the court: *Verrier v DPP* [1967] 2 AC 195.

exercise a wide discretion, guided by decisions of the VCA. Judges may also refer to the Victorian Sentencing Manual, which provides detailed sentencing guidance, setting out factors influencing sentencing both generally and in relation to common offences.[39] The new Judicial College of Victoria, which oversees judicial education, training and professional development,[40] has the capacity to further assist judges.

The discretion of Victorian judges is exercised using the 'instinctive synthesis' approach, which involves an intuitive approach to synthesising all factors relevant to sentencing in a single step:

> Now, ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process ... it is profitless ... to attempt to allot to the various considerations their proper part in the assessment of the particular punishments ...[41]

Proponents of instinctive synthesis argue that sentencing is an intensely complicated process of weighing numerous factors that cannot be done mechanically, or by calculation.[42] Victorian judges have traditionally resisted attempts to constrict their discretion, including the introduction of guideline judgments,[43] because of the threat they pose to instinctive synthesis.

IV THE VICTORIAN MODEL OF GUIDELINE JUDGMENTS

A *Sentencing Review*

In August 2001, a draft sentencing review written by Professor Arie Freiberg on reference from the Attorney-General was released for comment.[44] The draft review discussed public perceptions of leniency and inconsistency in sentencing and canvassed a range of options for informing judicial discretion. It recommended a system of guideline judgments be implemented to increase transparency and consistency in sentencing.

B Sentencing (Amendment) Act 2003 *(Vic)*

After consultation, the review ultimately recommended against guideline judgments. Despite this, the Amendment Act commenced on 1 July 2004, amending the Sentencing Act and giving the VCA the statutory power to hand down guideline judgments.

Guideline judgment is defined as:

39 Paul R Mullaly (ed), *Victorian Sentencing Manual* (2nd ed, 1999).
40 *Judicial College of Victoria Act 2001* (Vic).
41 *R v Williscroft* [1975] VR 292, 300; followed by *R v Young* [1990] VR 951, 955.
42 See, eg, *AB v R* (1999) 198 CLR 111, 121 (McHugh J).
43 Notably opposing the introduction of guideline judgments contained in an early version of the *Sentencing Bill 1990* (Vic): Arie Freiberg, *Pathways to Justice: Sentencing Review 2002* (2002) 206.
44 Arie Freiberg, *Sentencing Review* (2001).

> a judgment that is expressed to contain guidelines to be taken into account by courts in sentencing offenders, being guidelines that apply-
>
> (a) generally; or
>
> (b) to a particular court or class of court; or
>
> (c) to a particular offence or class of offence; or
>
> (d) to a particular penalty or class of penalty; or
>
> (e) to a particular class of offender.[45]

The legislation allows the VCA to give or review a guideline judgment either on its own initiative or on application made by a party to an appeal. The Court may give or review a guideline judgment even if it is not necessary for the purpose of determining an appeal. Judgments may be given by themselves or with any appeal judgment, and must be a unanimous decision of court.[46]

The VCA is under no obligation 'to give or review a guideline judgment if it considers it inappropriate to do so'.[47] Interestingly, the legislation provides no indication of how judges are to determine whether or not to give a guideline. In fact, there is no compulsion to even consider whether it is appropriate to hand down a guideline, even on application from a party. The Court

> *may* (on its own initiative or on an application made by a party to the appeal) consider whether-
>
> (a) to give a guideline judgment; or
>
> (b) to review a guideline judgment ...[48]

There is no provision for appeal against the court's decision in the legislation. However, if a guideline is promulgated as part of a judgment on a case, then that guideline may be subject to scrutiny, like the guideline in *Wong*[49] was when that case was appealed to the High Court. However, while the High Court may comment on the guideline, it can only determine the appeal on the case, and cannot invalidate the guideline.[50]

Before giving or reviewing a guideline judgment, the VCA must give the SAC an opportunity to make written submissions. The Director of Public Prosecutions and Victorian Legal Aid must be given opportunity to make submissions before the Court.[51] All submissions must be taken into consideration by the Court.[52] Unlike the New South Wales legislation,[53] there is no provision to allow the

45 *Sentencing Act 1991* (Vic) s 6AA.
46 *Sentencing Act 1991* (Vic) s 6AB.
47 *Sentencing Act 1991* (Vic) s 6AB(6).
48 *Sentencing Act 1991* (Vic) s 6AB(1) (emphasis added).
49 (2001) 207 CLR 584.
50 Ibid 598 (Gleeson CJ).
51 *Sentencing Act 1991* (Vic) s 6AD.
52 *Sentencing Act 1991* (Vic) s 6AE.
53 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 37.

Attorney-General to apply for, or make submissions in regard to, any guideline judgment.

A guideline judgment may set out:

> (a) criteria to be applied in selecting among various sentencing alternatives;
>
> (b) the weight to be given to the various purposes specified in section 5(1) for which a sentence may be imposed;
>
> (c) the criteria by which a sentencing court is to determine the gravity of an offence;
>
> (d) the criteria which a sentencing court may use to reduce the sentence for an offence;
>
> (e) the weighting to be given to relevant criteria;
>
> (f) any other matter consistent with the principles contained in this Act.[54]

In giving a judgment, the Court must have regard to the need to promote public confidence in the justice system and the need to increase consistency.[55]

The VCA is yet to hand down a guideline judgment.

V GUIDELINE JUDGMENTS: IMPROVING CONSISTENCY AND PUBLIC CONFIDENCE?

The aims of guideline judgments are to increase consistency and public confidence in sentencing.[56] This chapter addresses whether guideline judgments are likely to achieve these aims in Victoria by considering their impact in New South Wales.

A *Consistency*

Guideline judgments are aimed at making sentencing more consistent. There are two types of consistency – that of results, which involves examining sentencing outcomes, and that of approach, which involves the way judges go about sentencing.[57] Guideline judgments may help to increase either or both kinds of consistency.

Guideline judgments promote consistency of approach by providing detailed sentencing guidance. They may also be used to clarify areas of confusion or

54 *Sentencing Act 1991* (Vic) s 6AC.
55 *Sentencing Act 1991* (Vic) s 6AE.
56 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 March 2003, 479 (Robert Hulls, Attorney-General).
57 Paul Byrne, 'Guideline Sentencing: A Defence Perspective' (1999) 11 *Judicial Officers Bulletin* 81, 82.

uncertainty in the law, or to guide judges to adjust their sentencing practices where necessary. As the court may deliver guidelines of its own volition, and without having to wait for a relevant case, these functions may be carried out in a timely fashion. Additionally, guidelines force courts to consider the relationship between different kinds or forms of offence, with the intended effect of ensuring like cases are treated alike and unlike cases treated differently, on an appropriate and constant sliding scale.[58] Therefore, individualised justice is more likely to be served by increasing consistency of approach. Consistency of result seems more likely to be achieved by guideline judgments, which provide a numerical starting point or range of appropriate sentences.

It seems reasonable to predict that guideline judgments will have the effect of increased consistency. However, this does not seem to have occurred in New South Wales,[59] where studies have been done into the effect of the *Jurisic*[60] and *Henry*[61] guidelines. Both guidelines were aimed at increasing both severity and consistency, and as such the studies examine both.

1 *Severity*

A 2002 study compared dangerous driving sentencing statistics for the three years preceding the *Jurisic* guideline to statistics for the three years after it in order to gauge the effect of the guideline.[62] The guideline in *Jurisic* was aimed at increasing sentences for dangerous driving.[63] It stated that non-custodial sentences should be exceptional and specified minimum starting points of three years imprisonment for dangerous driving causing death, and two years imprisonment for dangerous driving causing grievous bodily harm ('GBH').[64]

The study found that despite there being no large differences in offenders' personal characteristics,[65] severity in sentencing had indeed increased post-*Jurisic*.[66] The percentage of offenders receiving full-time custodial sentences rose 18.47% from 49.47% to 67.94%, whilst the use of other forms of custodial

58 Andrew Ashworth, 'Techniques of Guidance on Sentencing' [1984] *Criminal Law Review* 519, 521.

59 Consistency studies have also been performed in England. See Andrew Ashworth '*Techniques on Guidance in Sentencing*' [1984] *Criminal Law Review* 519, which found the effect of English guidelines in *Bibi* (1980) 2 Cr App R (S) 177 and *Upton* (1980) 71 Cr App R 102 to be 'slight and not selective.' Also see Robert Tarling, Home Office Research Study 56/1979, *Sentencing Practice in Magistrates' Courts*; Prison Reform Trust *Sentencing: A Geographical Lottery* (1997); and Claire Flood-Page, C and Alan Mackie, Home Office Research Study 180/1998, *Sentencing Practice: An Examination of Decisions in the Magistrates' Courts and the Crown Court in the mid-1990's*, all of which found that despite guidelines produced by the Magistrates' Association, inconsistency remains a serious problem in Magistrates' Courts, the major factor in determining form and length of punishment being the geographical location of the court. These studies have not been included in this article because of the difficulty of extrapolating the findings to the Victorian method of guidelines delivered by Court of Appeal.

60 (1998) 45 NSWLR 209.

61 (1999) 46 NSWLR 346.

62 Judicial Commission of New South Wales, *Sentencing Dangerous Drivers in New South Wales: Impact of the Jurisic Guidelines on Sentencing Practice*, Research Monograph 21 (2003) [3.1].

63 (1998) 45 NSWLR 209, 229.

64 Ibid 231.

65 Judicial Commission of New South Wales, above n 62, Table 1.

66 (1998) 45 NSWLR 209.

sentence (home detention, periodic detention and suspended sentence) dropped by 4.69%, and the use of non-custodial options dropped by 13.78%.[67] Terms of imprisonment also rose - prior to *Jurisic*,[68] 69.6% of aggravated dangerous drivers causing death were imprisoned for three or more years, after the guideline, 100% were. Similarly, before the guideline, 50% of aggravated dangerous drivers causing GBH were sentenced to two years or more in jail, post *Jurisic*,[69] that figure was 77.8%.[70] However, while an upwards trend in the median length of prison terms across most forms of the offence is clear,[71] the average median term of imprisonment across all forms of the offence remained constant at 36 months[72] as did average non-parole periods at 18 months.

A later study examined the impact of the guideline in *Henry*[73] by comparing sentencing statistics for armed robbery and robbery in company for the two and a half years preceding the guideline, to the statistics for the two and a half years following it.[74] The *Henry* guideline was also intended to increase severity in sentencing.[75] The study found a 6.8% rise in custodial sentences, which is attributed to the *Henry* guideline.[76]

2 Consistency

While it seems that guideline judgments are capable of increasing severity, whether they can improve consistency is debatable. Consistency, at least of result, can be judged by reference to the range of sentences given – the larger the range, the less consistent sentencing is. In the *Jurisic* study, the middle 50% range of sentence lengths tightened slightly from 24-52 months to 24-48 months, yet the full range expanded from 4-84 months to 3-96 months. Non-parole period ranges also showed slight increases: the middle 50% range increased from 12-28 months to 12-30 months, while the full range increased from 3-43 months to 2-63.[77] While it is suggested by the authors that this range expansion may be attributed to the increase in the number of offenders being imprisoned,[78] these statistics show quite clearly that consistency of result was not improved by the *Jurisic* guideline. While severity has increased overall, sentencing results have become more varied since the introduction of the guidelines.

67 Judicial Commission of New South Wales, above n 62, Table 2.
68 (1998) 45 NSWLR 209.
69 Ibid.
70 Judicial Commission of New South Wales, above n 62, Table 3.
71 Ibid Figures 1-6.
72 Ibid Table 4.
73 (1999) NSWLR 346.
74 Lynne Barnes and Patrizia Poletti 'Sentencing Trends for Armed Robbery and Robbery in Company: The Impact of the Guideline in *R v Henry*' (2003) 26 *Sentencing Trends and Issues* 1.
75 *Henry* (1999) 46 NSWLR 346, 371.
76 During the same time period, however, the study shows there was a rise in offenders whose sentencers took Form I matters into account. This means that the sentence handed down was not only for the principle crime, but for other crimes, which the offender had been charged with, admitted to, but not yet been found guilty of committing. Offenders whose sentence took in Form I matters rose from 31.7% to 39.1% during the study, which this writer imagines may at least partially account for the rise in custodial sentences over the same time period.
77 Judicial Commission of New South Wales, above n 62, Table 4.
78 Ibid [4.2].

3 *Increase in Appeals*

Even more concerning is the statistical information (which is conveyed but surprisingly not commented on in either paper) that indicates large increases in successful severity appeals following the promulgation of the guidelines.

After *Henry*,[79] Crown appeals were unsurprisingly reduced (pre-*Henry* 36.1% of matters were appealed, afterwards only 23.8%) and the outcomes of those appeals remained steady (61.5% were successful before, 62.1% after). On the other hand, appeals against severity rose 12.3% from 63.9% of sentences appealed to 76.2%. The success rate of these appeals also rose from 30.4% success before *Henry*, to 47.3% post-*Henry*.[80]

Likewise, in the *Jurisic* study, Crown appeals dropped from 51.6% to 30%, and their success rate dropped from 81% to 66.7%. Severity appeals on the other hand, rose from 48.4% to 70%, with the success rate rising from 13.3% to 37.1%.[81]

The increase in severity appeals overall probably indicates an increase in severity, which is a positive result, given that this was the aim of these two guidelines. However, the large increases in *successful* appeals indicates that the guidelines have lead to less accurate and less just sentencing. It should also be noted that the increase in appeals has administrative consequences of increased expenditure of court time and resources.

4 *Consistency Versus Leniency*

In both the *Henry* and *Jurisic* studies, the word 'inconsistency' is used almost interchangeably with the term 'excessive leniency'. In coming to the conclusion that both leniency and inconsistency have been improved by the guideline, the *Henry* paper cites five pieces of statistical evidence from the study all indicating that sentences are more severe post-*Henry* but gives no evidence to show an increase in actual consistency.[82] Similarly, the *Jurisic* paper's conclusion reports that an increase in consistency has been achieved, a conclusion which is followed by the report's 'five main findings' which all indicate an increase in severity, not necessarily consistency.[83]

5 *Analysis*

The *Jurisic* and *Henry* guidelines have been effective in their stated aims of raising sentencing levels. The issue of leniency, however, has been confused with that of inconsistency. There is no evidence to show that consistency of result has increased in New South Wales as a result of guideline judgments.

79 (1999) 46 NSWLR 346.
80 Barnes and Poletti, above n 74, 10.
81 Judicial Commission of New South Wales, above n 62, Table 5.
82 Barnes and Poletti, above n 74, 11.
83 Judicial Commission of New South Wales, above n 62 [5].

On the other hand, whether consistency of approach has improved is very difficult to assess. It is increased consistency of approach that is the most desirable outcome of guideline judgments as this ensures that like cases are treated alike and that each offender receives a fair and individualised sentence. It is the type of consistency specified as an aim in the Amendment Act.[84] Because each case is different, increased consistency of approach will not necessarily translate into increased consistency of result. Therefore, guideline judgments, while not achieving increased consistency of result in NSW, may well have increased consistency of approach. Guidelines are capable of doing the same in Victoria by providing detailed and clear guidance that is available to all judges.

B *Public Confidence*

The public and the media have become increasingly vocal about sentencing in Victoria, especially in regards to leniency and inconsistency. In addition to increasing consistency, the other major aim of guideline judgment reform is to increase public confidence in sentencing by making it more transparent and understandable.

Increased public confidence seems to have been achieved in New South Wales. The *Jurisic* guideline was aimed at addressing public concern:

> At times ... it will be appropriate for this Court to lay down guidelines so as to reinforce public confidence in the integrity of the process of sentencing. Guideline judgments, formally so labelled, may assist in diverting unjustifiable criticism of the sentences imposed in particular cases, or by particular judges.[85]

The judgment was co-ordinated as a very public event. On the day the decision was handed down, Spigelman CJ appeared on television to explain it, and the next day he authored an article in the *Daily Telegraph*.[86] The New South Wales guidelines have been generally well received by the community as well as by the media.[87]

There has been minimal media coverage of the Victorian guideline judgment reform, and much of what little has been said has been negative.[88] Media coverage is unlikely to increase unless and until a guideline is handed down. Nevertheless, Victorian guidelines are an invaluable opportunity for Victorian judges to promote positive public discussion about sentencing, and to educate the public about the way judges sentence.

84 *Sentencing Act 1991* (Vic) s 6AE(a).
85 *Jurisic* (1998) 45 NSWLR 209, 220 (Spigelman CJ).
86 Chief Justice James Jacob Spigelman, 'Making the Punishment Fit the Crime', *The Daily Telegraph* (Sydney), 13 October 1998, 4.
87 Morgan and Murray state that Jurisic was met with 'unprecedented media approval': Neil Morgan and Belinda Murray, 'What's In a Name? Guideline Judgments in Australia' (1999) 23 *Criminal Law Journal* 90, 90. For a particularly glowing report, see Babette Smith, 'Courting Change with Care', *Australian Financial Review* (Australia), 16 October 1998, 24.
88 See, eg, Norrie Ross, 'Sentencing Plan Fails to Appeal', *Herald Sun* (Melbourne), 18 August 2004, 27. In this article, Ms Ross quoted Professor Freiberg reiterating his opinion that the judiciary are hostile to the reform and labelled guideline judgments 'likely to fail'.

A Victorian Community Council Against Violence review of sentencing in 1997 stated that many members of the community were concerned with perceived leniency and inconsistency in sentencing, and concluded that many of the public's fears about sentencing stemmed from a lack of information about it:

> It was widely suggested that the lack of information readily available to the community and the reliance upon the media's reporting of individual cases, leads to misconceptions and fears about the process.[89]

Perhaps information that comes from the judiciary rather than the media can go some way to alleviating the public's concerns about sentencing and increase its confidence in the justice system.

While guideline judgments may be used to increase public confidence by making sentencing more comprehensible and transparent, there is a danger that they may be used as a 'quick fix' to the current crisis of confidence in the Victorian justice system.

In New South Wales, guideline judgments seem to be aimed more at dealing with the public's complaints about sentencing rather than addressing purely legal issues. New South Wales Director of Public Prosecutions, Nicholas Cowdery QC, tellingly praised guideline judgments not for redressing an actual consistency problem, but for redressing the public's impression of one:

> Guideline judgments go some way to redressing the unfortunate impression, driven by the media's concentration on specific instances of unusually lenient sentences, that sentences in general are too lenient.[90]

His praise of *Jurisic* focused not on whether it had increased consistency in sentencing but that since that case '[t]here has been a blessed relief from the hysterical and uninformed outpourings of the media, for which we should all be grateful'.[91] *Jurisic* urged a substantial increase in sentence severity for dangerous drivers; it would be very troubling indeed if this was done only to appease an 'unfortunate impression' of the public and media.

Shortly after the High Court's *Wong* decision, the same political attitude was evident in Premier Bob Carr's remarks to ABC radio on the 30 November 2001:

> I'd introduce minimum sentencing overnight ... We are not going to have High Court decisions get in the way of giving this community what it's asking for and what it's beginning to get, and that is sentences for serious crimes that reflect the seriousness of those crimes.[92]

89 Victorian Community Council Against Violence, *Community Knowledge and Perceptions of Sentences in Victoria: A Report on the Findings of Consultations* (1997) 10.

90 Nicholas Cowdery, 'Guideline Sentencing: A Prosecution Perspective' 11 *Judicial Officer's Bulletin* 57, 58.

91 Ibid 59.

92 Cited in New South Wales, above n 37, 56.

In Victoria, the reasons for introducing guideline judgments are just as political as they are legal. There had been public dissatisfaction with sentencing in Victoria for some time, culminating in the opposition Liberal party's promises to introduce minimum sentences for serious crime in late 2002.[93] Despite strong recommendations from Professor Freiberg against guideline judgments, the media was informed only one day after his final report was distributed in early 2003 that changes would be made to Victoria's sentencing laws to introduce guideline judgments.[94] One must ask why this occurred against such strong recommendations. On reading the second reading speech of the Bill, which places great emphasis on a modernised system allowing 'properly ascertained and informed public opinion to be taken into account in the criminal justice system on a permanent and formal basis',[95] one comes to the conclusion that reassuring the public was high on the government's agenda in introducing the Bill.

While the public must be consulted to some extent in order to ensure public confidence in the criminal justice system, this writer agrees that 'it is legal commentators, practitioners and other experts who should be educating the public about how to frame a sentencing system, not the other way around'.[96] Though the introduction of guideline judgments may have been somewhat political, it is important that they are used to guide judges in accordance with legal principles rather than the public's whims. The public interest in not necessarily in a more punitive system, it is in an effective one. In the long term, legally principled guidance that is effective is more likely to inspire public confidence than ineffective guidance based on populism. It may take some time, but guideline judgments are an opportunity to provide sound, legally principled guidance to judges and thus improve sentencing, and at the same time, make sentencing more comprehensible to the public.

VI CHALLENGES FACING GUIDELINE JUDGMENTS

While guideline judgments may be able to achieve, at least partially, their aims of improved consistency and public confidence in sentencing, there remain three particular challenges facing the successful implementation of guideline judgments in Victoria. These are the hostility of the judiciary and the profession towards guidelines, the incompatibility of guidelines with the instinctive synthesis approach to sentencing, and the threat of guideline judgments to individualised justice.

93 Ian Munro, 'An Emotional Debate Short on Facts', *The Age* (Melbourne), 20 November 2002, 10.
94 Geoff Wilkinson, 'Public to Get Greater Say on Jail Terms You be the Judge', *Herald Sun* (Melbourne), 20 March 2002, 5.
95 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 March 2003, 478 (Robert Hulls).
96 Mirko Bagaric and Richard Edney, 'What's Instinct Got to Do With It? A Blueprint for a Coherent Approach to Punishing Criminals' (2003) 27 *Criminal Law Journal* 119, 133.

A *Hostility of Judiciary and Profession*

Professor Freiberg's sentencing report recommended against guideline judgments because consultation revealed that '[t]he legal profession was strongly and overwhelmingly hostile to the introduction of guideline judgment [sic] in Victoria.'[97] The judiciary were particularly hostile – the VCA's Winneke P and Vincent J and the Magistrates' Court submitted responses opposing guideline judgments, as did Patrick Tehan QC of the Criminal Bar Association.[98]

While there were some positive responses, including some from the judiciary,[99] Freiberg's report concluded that

> [i]t would be extremely unwise to introduce such an important reform to the sentencing process in the face of such strong opposition from those who would be obliged to implement it, namely the Court of Appeal and the Criminal Bar. Experience has shown legal reforms imposed upon a reluctant or hostile constituency are likely to be ineffective, or worse, undermined.[100]

The VCA views itself as a corrector of error rather than as a maker of policy.[101] As there is nothing in the Amendment Act that compels the Court to promulgate guidelines, there is a real possibility that the Court will simply refuse to do so.

The impact of judicial hostility is evident in Western Australia, where no guidelines have been issued in the nine years the WACCA has had statutory authority to do so,[102] notwithstanding four Director of Public Prosecutions ('DPP') and one defence counsel application.[103] In *R v GP*, Murray J, with whom Steyler J agreed, advocated the power's conservative use, stating that the '[C]ourt should use its power to give guideline judgments sparingly'.[104] On each application, the Court has found not altogether consistent reasons for declining to issue guideline judgments.

In *R v GP*, the Court declined to lay down specific guidelines because of the Court's limited experience with the relevant crime. However, in the opposite situation, in *R v Halliday*[105] and *R v Lowndes*,[106] guidelines weren't given because the Court had previously provided plenty of authority on the matters involved. In *R v GP*, the recommended guidelines were found to be too narrow, but in

97 Freiberg, *Pathways to Justice: Sentencing Review 2002*, above n 43, 209.
98 Ibid 209-11.
99 Ibid 211.
100 Ibid 212.
101 Ibid.
102 *Sentencing Act 1995* (WA) s 143.
103 *R v GP* (1997) 18 WAR 196; *R v Lowndes* (1997) 95 A Crim R 516; *R v Halliday* (Unreported, Supreme Court of Western Australia, Crminal Court of Appeal, Franklyn, Murray and Anderson JJ, 3 April 1998); *R v Kerr* (Unreported, Supreme Court of Western Australia, Crimınal Court of Appeal, Kennedy J, 15 August 1997); *R v Simcock* (Unreported, Suprreme Court of Western Australia, Criminal Court of Appeal, Pidgeon, White and Hennan JJ, 27 May 1997).
104 (1997) 18 WAR 196, 235.
105 (Unreported, Supreme Court of Western Australia, Crminal Court of Appeal, Franklyn, Murray and Anderson JJ, 3 April 1998).
106 (1997) 95 A Crim R 516.

R v Kerr,[107] domestic violence was found to be too broad and varied an area in which to issue a guideline. In *R v Simcock*,[108] it was found to be inappropriate to give a guideline judgment merely because there was no error in the trial judge's comments.

It seems that the WACCA is adverse to handing down guideline judgments so labelled. In 1998, perhaps in response to the Court's continued refusal to hand down guideline judgments, the Western Australian government proposed a sentencing matrix.[109] The original matrix scheme created three different types of offence: 'Reporting offences' required the judiciary to report to the executive on their decisions in a prescribed form. 'Regulated offences' were the subject of indicative sentences, departure from which had to be justified. 'Controlled offences' were the subject of prescribed sentences from which judges had 'virtually no scope for departure'.[110] After much controversy, the matrix provisions were eventually passed in attenuated form, without the most restrictive controlled offences provisions.[111] With a change of government in February 2002, however, the legislation was repealed before it was proclaimed.[112] While it seems that the sentencing matrix is off the agenda in Western Australia for the time being, this experience shows that sentencing matrices are not out of the question in Australia.

Nor it seems are mandatory sentences, another feature of Western Australian sentencing.[113] With next year being an election year in Victoria, the introduction of mandatory minimum sentences has recently been proposed by Victorian Opposition Leader Robert Doyle.[114] Both Premier Steve Bracks[115] and Attorney-General Robert Hulls[116] have stated their opposition to mandatory sentences, but with the prospective change of Government comes the possibility that mandatory sentences will be imposed. This may be especially likely if the VCA thwarts the current attempt at sentencing reform by refusing to hand down guideline judgments.

107 (Unreported, Supreme Court of Western Australia, Criminal Court of Appeal, Kennedy J, 15 August 1997).
108 (Unreported, Suprreme Court of Western Australia, Criminal Court of Appeal, Pidgeon, White and Hennan JJ, 27 May 1997).
109 *Sentencing Legislation Amendment and Repeal Bill 1998* (WA), which failed and was followed by the *Sentencing Matrix Bill 1999* (WA).
110 Neil Morgan, 'Going Overboard: Debates and Developments in Mandatory Sentencing June 2000 to June 2002', (2002) 26(5) *Criminal Law Journal* 293, 297. For more information about what the matrix proposals consisted of see this article; see also Neil Morgan, 'Accountability, Transparency and Justice: Do We Need a Sentencing Matrix?' [1999] *University of Western Australia Law Review* 259.
111 *Sentencing Amendment Act 2000* (WA).
112 *Sentencing Legislation Amendment and Repeal Bill 2002* (WA).
113 For further discussion about mandatory sentencing, see generally, Neil Morgan, 'Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?' (2000) 24(3) *Criminal Law Journal* 164; Morgan, above n 110, 293.
114 Geoff Strong, 'Anger Pours Out at Rally Backing Tougher Sentencing', *The Age* (Melbourne), 9 August 2004, 1; Ian Haberfield and Carly Crawford, 'We'll be Tougher Libs Vow on Crime', *Herald Sun* (Melbourne), 19 December 2004, 1.
115 Norrie Ross, 'Crime Council Blasted', *Herald Sun* (Melbourne), 11 August 2004, 14.
116 Ryan and Kelly, above n 1, 4.

B *Guideline Judgments and the Instinctive Synthesis Approach*

One of the main reasons for the Victorian judiciary's hostility towards guideline judgments is guidelines' seeming incompatibility with Victoria's instinctive synthesis approach to sentencing, described above.

Instinctive synthesis is the method of sentencing currently endorsed by the High Court[117] and Victorian courts are firmly set against the alternative, two-tiered sentencing, preferring a purely instinctive synthesis approach.[118] However, it seems that many Australian States are moving away from the strict application of the instinctive synthesis approach, towards a more two-tiered method.[119]

The term 'two-tiered' encompasses any more mathematical or sequential approach to sentencing.[120] Guideline judgments, especially numerical ones, often direct a mathematical or multi-staged approach to sentencing. *R v Thomson*[121] recommends a 10-25% discount on penalties for pleas of guilty, which requires a two-step approach to sentencing: first, the penalty which would be imposed but for the guilty plea must be considered, then a reduction is made. Three of the other five New South Wales guidelines[122] have featured specific numerical penalties, which are to be used as starting points and then altered by reference to a range of aggravating and mitigating factors. These judgments seem far more suited to the two-tiered method.

The question then is whether guideline judgments can be accommodated into the strict application of the instinctive synthesis method. The NSWCCA is confident that they can. In *Thomson*[123] and *R v Sharma*,[124] the Court argues that the instinctive synthesis approach does not preclude particular elements of sentencing being isolated and treated separately. In *Whyte*, Spigelman J commented:

> [t]he use of a guideline judgment as a 'check' or 'guide' or 'indicator' is a 'two stage' approach that is consistent with the ultimate application of an 'instinctive synthesis' approach ... I do not see any necessary inconsistency. The crucial sentence in *R v Williscroft* (at 300) is: 'Now, *ultimately* every

117 See *Markarian v The Queen* (2005) 215 ALR 213. While the majority (Gleeson CJ, Gummow, Hayne and Callinan JJ, with whom McHugh J agreed), indicated that two tier sentencing does not, of itself, reveal error at 220-1, they reiterated Gaudron, Gummow and Hayne JJ's comments in *Wong* (2001) 207 CLR 584 at 611-2 stating that it is 'not only apt to give rise to error, it is an approach that departs from principle. It should not be adopted' at 223-4.

118 See Winneke P's submission in Freiberg, *Sentencing Review*, above n 43, 210.

119 See Sally Traynor and Ivan Potas, 'Sentencing Methodology: Two-Tiered or Instinctive Synthesis?' (2002) 25 *Sentencing Trends and Issues* 1. The authors describe the standpoints of a variety of Australian jurisdictions, which, while not completely dismissing instinctive synthesis, are moving towards a two-tiered approach. They cite New South Wales (*R v Whyte* (2002) 55 NSWLR 252), Western Australia (*McKenna v The Queen* (1992) 7 WAR 455), and South Australia (*R v Powell* (2001) 126 A Crim R 137).

120 For a more thorough examination of the two-tiered approach, see Traynor and Potas, above n 119.

121 (2000) 49 NSWLR 383 ('*Thomson*').

122 *Jurisic* (1998) 45 NSWLR 209; *R v Wong* (1999) 48 NSWLR 340; *Henry* (1999) 46 NSWLR 346.

123 (2000) 49 NSWLR 383, 396.

124 (2002) 54 NSWLR 300.

> sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process'.[125]

This may be true of New South Wales judiciary's broader interpretation of instinctive synthesis. However, a numerical guideline that gives a 'starting point' that the sentencer varies depending on the circumstances obviously requires some separate, mathematical consideration, done in a separate stage. It is inescapably two-tier sentencing and logically not compatible with Victoria's strict instinctive synthesis approach which requires a single, instinctive step. It is difficult to see how any numerical judgment could not be incompatible with the strict instinctive synthesis approach.

On the other hand, guideline judgments, *per se*, need not be incompatible with the instinctive synthesis method. Non-numerical judgments may summarise the law in a particular area, or indicate relevant considerations to be taken into account, such as aggravating and mitigating factors. These judgments can act as an efficient way for sentencing judges to take account of all relevant precedent, and an excellent guide on how to weigh the factors before them, as part of the one-step instinctive synthesis process.

The instinctive synthesis method is not without its flaws. It has been condemned because of its inherent subjectivity and lack of transparency,[126] and Kirby J has warned that 'so-called "instinctive synthesis" can become a hiding place for legal error, prejudice and sloppy work'.[127] Guideline judgments have the capacity to compliment the instinctive synthesis process by making it clearer and more intelligible to the public, and ensuring all judges sentence with the same approach. Guideline judgments may be an ideal way in which a balance can be struck between unbounded discretion and tight constraint, allowing for instinctive synthesis that is more transparent, comprehensible and consistent.

C *Guideline Judgments and Individual Justice*

'Individual justice is possibly more important than some more abstract notion of systemic fairness.'[128] Guideline judgments, in the pursuit of systemic fairness, must allow for individual justice. Individualised justice is attainable only if sentencing judges retain sufficient judicial discretion to take each case on its merits and hand down an appropriate sentence in all the circumstances of the offence and the offender.

Two kinds of discretion are relevant to guideline judgments: first, judges must have discretion to depart from guidelines where departure is appropriate, and secondly, guideline judgments must be sufficiently internally flexible to allow for adaptation to each individual case.

125 (2002) 55 NSWLR 252, 278 (emphasis in original).
126 Bagaric and Edney, above n 96, 130.
127 *Johnson v The Queen* (2004) 205 ALR 346, 358.
128 Arie Freiberg, 'Three Strikes and You're Out - It's Not Cricket: Colonization and Resistance in Australian Sentencing' in Michael Tonry and Richard Frase (eds), *Sentencing and Sanctions in Western Countries* (2001) 35.

1 *Discretion to Depart*

Guideline judgments 'have, and in practice will inevitably come to assume, in some circumstances, a prescriptive tone and operation'.[129] While guideline judgments are not technically binding,[130] their creators intend them to be seriously considered and followed in most circumstances.[131] A judgment from the VCA cloaked in the authoritative title 'guideline judgment' will be a highly persuasive piece of authority to any sentencing judge whose decision is subject to review by that very court. It is highly likely that guidelines will be followed.

Even if a guideline judgment is not followed in a particular case, guidelines are likely to set the standard from which sentences can found manifestly inadequate or excessive, which, unless there is a specific error, is the criteria for interference by an appeal court.[132] In *R v Snider*,[133] an armed robbery case, the sentencing judge indicated that the *Henry* guideline was irrelevant because it related to offenders without prior convictions, and the offender in question had committed earlier crimes. The offender received a less severe sentence than that recommended in the *Henry* guideline. On appeal, it was found that the *Henry* guideline should have been taken into consideration and, as the present case was 'a worse case than that contemplated in the guideline', the sentence was found to be manifestly inadequate.[134] Indeed, in *R v Horne*, Mason P, with whom Newman J agreed, stated:

> Judges who turn the blind eye to an applicable guideline judgment must realise that a Crown appeal is very likely to succeed, with the consequence that the offender is placed into custody or returned to custody … Misguided judicial kindness thus becomes unintended cruelty.[135]

It is important, therefore, that judgments state the circumstances to which they apply and clearly indicate that they may departed from where it is appropriate. Unless there is clear opportunity for departure where a guideline is inappropriate, there is a real danger that trial judges will adhere to guideline judgments at the expense of individual justice.

2 *Flexibility Within Judgments*

Judges must not only have discretion to depart from guidelines altogether. Where a guideline is appropriate for use in a case before a sentencing judge, the judge must retain sufficient judicial discretion to mould that guideline to the circumstances of that particular case.

129 *Wong* (2001) 207 CLR 584, 642 (Callinan, J).
130 *Norbis v Norbis* (1986) 161 CLR 513, 537 (Brennan J) followed in *R v Henry* (1999) 46 NSWLR 346, 357 (Spigelman J).
131 *Johnson* (1994) 15 Cr App R (S) 827, 830; *R v Henry* (1999) 46 NSWLR 346, 357.
132 *House v King* (1936) 55 CLR 499, 504-5.
133 [2004] NSWCCA 134.
134 *R v Snider* [2004] NSWCCA 134 [41].
135 [1999] NSWCCA 391 [15].

It is estimated that between 200-300 factors influence sentencing.[136] Of course, creating guidelines allowing for all possible individual differences between offences and offenders would be an extremely difficult task because 'numerical guidelines either take account of only some of the relevant considerations or would have to be so complicated as to make their application difficult, if not impossible'.[137]

Where guidelines are merely used as guides, any special characteristics of a particular case not mentioned in the guideline can be considered and given their correct weight in the exercise of judicial discretion. Where guidelines are overly prescriptive, however, there is less scope for discretion. A good example is the guideline in *Wong*, which sets out a table of sentences for drug importation based on drug weight. Judges using this guideline have no option but to hand down sentences where the 'starting point' is based on drug weight alone. Other considerations, such as involvement in the importation process, moral blameworthiness and personal characteristics, are a secondary consideration. The guideline's focus on drug weight, especially in cases where mitigating factors are present, could easily lead to inappropriate sentences. There is also a risk that overly prescriptive guidelines may be followed so strictly that important aggravating or mitigating factors are overlooked entirely because they are not mentioned in the guideline.[138]

It is important then that guidelines are not made in a prescriptive style. Rather, they should be internally flexible enough to allow judges to use their discretion to take into account each offender's merits and ensure that individual justice in delivered.

D *Guideline Judgments and the Constitution*

The High Court is yet to make a conclusive ruling on the whether guideline judgments comply with the *Commonwealth Constitution*.[139] It is beyond the scope of this article to discuss the constitutionality of guidelines beyond a cursory indication of the several Constitutional pitfalls to which guideline judgments may be subject.

First, guidelines will only apply to sentencing performed in the State in which they have been promulgated. The sentencing of a single federal offence may be subject to a number of different guidelines varying from State to State. Such guidelines may contravene s 117 of the *Commonwealth Constitution* because they discriminate against citizens on the basis of the State in which they live.[140]

Guidelines may also be unconstitutional where they specify sentencing

136 Mirko Bagaric, *Punishment and Sentencing: A Rational Approach* (2001), the author cites two studies - Shapland (1981) and Douglas (1980) which respectively estimate the number of factors relevant to sentencing at 229 and 292.
137 *Wong* (2001) 207 CLR 584, 612.
138 Austin Lovegrove, 'Intuition, Structure and Sentencing: an Evaluation of Guideline Judgments' (2002) 14 *Current Issues in Criminal Justice* 182, 198.
139 See *Wong* (2001) 207 CLR 584.
140 Ibid 528-9 (Kirby J).

considerations for federal offences which federal sentencing legislation does not envisage. This inconsistency could cause State guideline legislation to be invalidated under s 109 of the *Commonwealth Constitution*.[141] The Victorian legislature has cleverly attempted to dodge the inconsistency by legislating that guideline judgments are to be used *in addition* to other legislative provisions.[142] Whether this is effective remains to be seen.

Lastly, guideline judgments may violate the rule in *Kable v Director of Public Prosecutions (NSW)*.[143] State courts vested with federal jurisdiction may not act in a way incompatible with the *Commonwealth Constitution*, and thus, must observe the separation of powers. Sentencing guidelines, particularly very prescriptive ones or ones that are promulgated by themselves with no connection to a controversy, are perhaps not an entirely judicial activity and may contravene *Kable*.

VII GUIDELINE JUDGMENTS IN VICTORIA

Having examined the capacity of guideline judgments to achieve consistency and increase public confidence in sentencing, and canvassed the possible legal and other difficulties arising from the implementation of guidelines, this part seeks to make some useful, practical suggestions about how guideline judgments may best be promulgated in Victoria.

A *How Guidelines Should Be Made*

Most importantly, the VCA should create guideline judgments in a way that takes full advantage of their benefits, using guidelines as a forum in which to consolidate sentencing authority, and as a tool with which to clarify points of contention. They may also be used to correct areas of error and guide judges to change their sentencing practices where appropriate.

To avoid inconsistency and discrimination on the basis of state and thus avoid invalidity under s 109 and s 117 of the *Commonwealth Constitution*, it may be advisable for the VCA to create guidelines only for Victorian offences and avoid federal crimes.

In order to achieve consistency, it is necessary that guideline judgments are detailed and specific. Vague guidance is unlikely to have much impact. Guidelines should discuss substantive issues, including aggravating and mitigating factors relevant to sentencing, how to reconcile these, and what weight should be given to each factor. Professor Ashworth suggests this may profitably be done by reference to case examples.[144] This writer suggests that to avoid

141 Ibid 597 (Gleeson CJ); 610 (Gaudron Gummow and Hayne JJ); 633 (Kirby J); 643 (Callinan J, though without deciding); *Johnson v R* (2002) 26 WAR 336, 352-3.

142 *Sentencing Act 1991* (Vic) s 6AG. See also *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 3 div 4 s 42A.

143 (1996) 189 CLR 51 (*'Kable'*).

144 Ashworth, above n 58, 527-8.

difficulty with extrapolation of principles, case examples should not be overly specific, but rather serve as illustrations of broad sentencing principles.

The legislation states that guidelines are aimed at increasing consistency of approach rather than of result.[145] It is consistency of approach that should be aimed for and we should be mindful that while consistency of approach does not necessarily lead to consistency of result, it is the former that is preferable to the latter. It should also be remembered that an increase in severity does not necessarily equate to an increase in consistency.

It has been argued that guidelines tend to increase severity because they change sentencing culture and make prison a conventional sentence – the question becomes not whether to send an offender to jail but for how long.[146] This has occurred in New South Wales, where guidelines are heavily prison oriented and sentences have risen. However, the use of guideline judgments need not necessarily result in increased severity. In England, judgments like *Bibi*[147] and *Upton*[148] have recommended *reducing* prison sentences. The effect of guideline judgments is very much dependant on what sort of guidelines are promulgated. If guidelines advocating increased severity are promulgated in Victoria, then severity may well increase. Conversely, guidelines advocating leniency would probably cause sentence levels to drop.

If the court decides to promulgate judgments advocating more and lengthier custodial sentences, corrections issues may arise. The amount of New South Wales dangerous driving prisoners has risen from 66 in 1997 to 149 in 2001, seemingly as a result of the *Jurisic* guideline.[149] Guidelines such as this must at some point begin to impact negatively on corrections. The Government will need to consider the impact of guidelines that encourage increased severity on sentencing levels and make appropriate changes to corrections.

In increasing severity, the VCA must be mindful of the possibility of increased successful severity appeals. Obviously, this is a major issue for individual justice, and would also impact heavily on the Court's limited time and resources. On the other hand, appeals against sentence in Victoria are done on a leave to appeal basis,[150] and guideline judgments have the capacity to act as a 'filter' on appeals, increasing administrative efficiency.

B *Discretion*

While guidelines need to be specific and detailed in order to be effective, they must leave room for the exercise of judicial discretion so individual justice may be obtained.

145 *Sentencing Act 1991* (Vic) s 6AE(a).
146 Byrne, above n 57, 81.
147 (1980) 2 Cr App R (S) 177.
148 (1980) 71 Cr App R 102.
149 Judicial Commission of New South Wales, above n 62 [4.4].
150 *Crimes Act 1958* (Vic) s 567.

Victoria may follow South Australia, where it has been held that the word 'tariff' should not be used, and that guidelines should not be worded such that they are used in all but 'exceptional' circumstances, for fear of misleading lower courts into believing guideline judgments are more binding than they are.[151] Internally, guidelines should not prescribe results, but rather the approach to be used in sentencing, specifying not what sentence should follow in which circumstances, but how circumstantial factors should be weighed in coming to a sentence. The VCA should use guidelines as a 'sounding board' or 'check' against discretion[152] rather than attempting to govern that discretion too tightly.

C *Numerical Guidelines*

The issue of numerical ranges or starting points would logically seem likely to promote consistency, at least of result, in sentencing. However, numerical judgments are more likely to be overly prescriptive, in that they are results rather that approach based. To ensure individual justice, it is preferable that they be avoided.

A non-numerical, 'sounding board' approach will also surmount some of the constitutional problems of guideline judgments. Non-numerical judgments used only as a check against discretion are unlikely to discriminate on the basis of state, or be in contravention of the *Kable* rule.

Additionally, numerical guidelines are incompatible with Victoria's strict instinctive synthesis approach to sentencing. In issuing numerical judgments, the VCA would be endorsing a more flexible form of instinctive synthesis in Victoria, which allows for the separate consideration of individual parts of sentence. If the VCA wishes to retain the use of strict instinctive synthesis, then only non-numerical judgments should be issued.

If numerical judgments are issued, they should not be purely results focused. The *Wong* table, because based upon results and not the principles from which to arrive at a result, gives little guidance on how to adjust the tariffs for each offender.[153] Even numerical guidelines should find their basis in principles rather than numbers:

> The reasons [in *Police v Cadd*, a South Australian guideline judgment] focused upon the nature of the offence, the consequences of its commission, and the purpose of punishing its commission … the Court articulated the reasons which it had for disposing of the appeals before it by reference to the principles which informed those dispositions. It is those principles which properly guide future sentencers.[154]

151 *R v Place* (2002) 81 SASR 395, 408.
152 *R v Ngui* (2000) 1 VR 579, 583.
153 *Wong* (2001) 207 CLR 584, 601-2.
154 Ibid 607.

D *Delivering Guidelines: Separately or in a Controversy?*

Most cases before the VCA are on appeal because they are not 'normal' cases, but have some unusual features that have made sentencing problematic. They are, therefore, not an ideal base for guidelines that are intended to apply broadly.[155] The fairness of using cases like *Jurisic*, a particularly blameworthy example of culpable driving, as a yardstick is questionable.[156] For this reason, and to avoid the outcome of *Wong* (where the judgment on the case was so tainted by an inappropriate guideline that it was remitted back to the NSWCCA), it is perhaps best to deliver guidelines separately.[157] For this reason, it seems that New South Wales will only promulgate guidelines by themselves from now on.[158]

On the other hand, guidelines promulgated alongside an appeal decision on a case need not use that case alone as a 'yardstick'. They may use it as one example, and provide other case studies alongside it to illustrate appropriate sentencing. Additionally, as long as guidelines are promulgated as a check against discretion, rather than a constraint on it, it is unlikely that they will be impermissible and taint the appeal case heard at the same time. In this writer's opinion, the constitutional issues of separation of powers and non-judicial activities, referred to briefly above, that arise in connection with judges promulgating guidelines unrelated to a controversy are far more concerning that those which arise in relation to guideline judgments given alongside an appeal judgment. For this reason, it is submitted that creating guidelines based on a case before the court is preferable.

E *The Range of Guidelines*

English guidelines generally deal only with the serious crimes that come before the Court of Appeal, not the more common offences sentenced by lower courts.[159] This is probably due to the ad hoc manner in which guidelines have developed and may be improved by the *Crime and Disorder Act 1998*, which allows the Court to deliver judgments on application from the Attorney-General or the Sentencing Advisory Panel (a body similar to Victoria's SAC).

Notwithstanding, the VCA's experience does lie in serious crime and this concern may be duplicated in Victoria. The VCA should consider promulgating guidelines for common crimes as well as more serious ones in order to achieve increased consistency throughout the justice system.

F *Tracking Guideline Judgments*

The numerous English guideline judgments are contained in four updated loose-

155 Justice PW Young, 'Current Issues' (1999) 73 *Australian Law Journal* 9.
156 Byrne, above n 57, 83.
157 (2001) 207 CLR 584, 623-4 (Kirby J).
158 See New South Wales, above n 37. The author cites a personal communication to this effect from the Registrar of the NSWCCA dated 13 December 2001.
159 Gavin Dingwall, 'The Court of Appeal and Guideline Judgments' (1997) 48 *Northern Ireland Law Quarterly* 143.

leaf volumes of case law.[160] The sheer number of judgments is becoming difficult to manage, and a system for monitoring and revising guideline judgments, including codifying the guidelines and making them available in a more regularly updated form, has been suggested.[161] If guidelines become prolific in Victoria, this may be necessary here too.

G *Using the Sentencing Advisory Council*

Part 9A of the Sentencing Act establishes a SAC that will provide statistics and information to the VCA after undertaking research and consultation with the public and interested bodies.

Justice Spigelman believes that

> [t]he *sine non qua* of the ability of the Court of Criminal Appeal in New South Wales to assess the need for a Guideline Judgment is the systematic collection of sentencing statistics ... of a comprehensiveness that is not readily available in all Australian states.[162]

Victoria is one of those less fortunate States, with statistical and other sentencing information that is 'episodic and less than comprehensive'.[163] The SAC has a key responsibility to ensure adequate sentencing statistics and information are available so effective guideline judgments can be promulgated.

The SAC may also serve a valuable purpose in improving public confidence in sentencing through public education.[164] In conjunction with the delivery of guideline judgments, the SAC has the capacity to provide accurate and understandable information about sentencing to the community and to promote community discussion about criminal justice.

The SAC has received some media attention to date, most of it negative.[165] At first, there were no victims' representatives on the Council, though there are two representatives from the Court Network, which offers information and support to all court attendees, including victims. Nevertheless, there was a media-driven backlash against the perceived lack of victim representation,[166] culminating in a newspaper poll showing that 96.8% of the 954 respondees believed victims should have greater say in sentencing.[167] A resignation from the SAC provided

160 David Thomas, *Current Sentencing Practice* (2005).

161 Great Britain, Home Office Commission Directorate, *The Halliday Report: Making Punishments Work: Review of the Sentencing Framework for England and Wales* (2001) 54.

162 Chief Justice James Jacob Spigelman, 'Sentencing Guideline Judgments' 11 *Current Issues in Criminal Justice* 5, 9.

163 Freiberg, above n 43, 194.

164 See Mirko Bagaric and Richard Edney, 'The Evolution of Sentencing' (2004) 78(4) *Law Institute Journal* 38, 39 in which the authors argue that the SAC needs to ignore public opinion and focus instead on public education.

165 See, eg, 'Editorial' *Herald Sun* (Melbourne) 3 August 2004, 18; Norrie Ross, 'Crime Council Blasted', *Herald Sun* (Melbourne), 11 August 2004, 14.

166 See, especially, Norrie Ross, 'Crime Victims Left Standing in the Wings', *Herald Sun* (Melbourne), 3 August 2004, 7.

167 'Voteline', *Herald Sun* (Melbourne), 5 August 2004, 19.

Attorney-General Rob Hulls with an ideal opportunity to appoint a victim's representative to the council, resulting in more favourable media representations of the SAC.[168] As the SAC becomes more established, it is hoped that it will continue to receive more positive media recognition.

H *Future Sentencing Reforms*

The SAC cannot request the delivery of a guideline judgment. This is a reform Parliament may wish to consider. Requesting a guideline is likely to involve time consuming and expensive research and preparation. Considering the judiciary's evident hostility towards promulgating guidelines, the DPP may choose to use their limited resources elsewhere. The SAC, with its existing role of performing sentencing research, may be in a better position than the DPP to request appropriate guidelines.

Another possible reform is for the SAC to issue sentencing guidelines themselves.[169] The judiciary are hostile towards guidelines and their promulgation is not a true judicial function, particularly when delivered on the Court's own initiative without a relevant controversy. The function of promulgating guidelines, especially in this manner, is probably better suited to a statutory body like the SAC. Given legislative authority, in perhaps the Sentencing Act, SAC created guidelines would be binding on sentencing judges. If the judiciary refuse to issue guidelines, or constitutional problems arise from them, this reform may be a valid solution for Parliament as an intermediate step between judicial guidelines and more extreme measures, like mandatory sentencing.

VIII CONCLUSION

The impact of guideline judgments on Victorian sentencing is difficult to predict. In light of the Victorian judiciary's opposition to the scheme it is likely that the VCA will simply decline to hand down any guidelines.

There are many potential pitfalls associated with guideline judgments, in particular, the threat they pose to individual justice and their possible unconstitutionality. It is hoped that, if the VCA does choose to promulgate them, it does so in a manner that avoids the disadvantages, and takes full advantage of the benefits that guidelines have to offer.

If the court does issue guidelines, their effect will depend on the sort of guidelines the court hands down. New South Wales has shown that guidelines can be successful in prompting increased severity, and it may also be the case that they

168 Geoff Wilkinson, 'Victims of Crime Take Stand', *Herald Sun* (Melbourne), 20 August 2004, 1; Geoff Wilkinson, 'Carmen Joins Sentencing Advisory Panel [sic] Police Widow is Voice for Victims', *Herald Sun* (Melbourne), 27 August 2004, 3.

169 This idea was originally suggested to me by Dr Jonathan Clough.

are successful in lowering sentences. Guideline judgments are unlikely to lead to a marked increase in consistency of result, but they may well lead to improved consistency of approach. They have the capacity to improve sentencing in Victoria by making it more consistent and transparent. Guideline judgments are an excellent opportunity to inform the public about sentencing practices and in doing so, build their confidence in the justice system. Whether or not guidelines will be successful in completely restoring public confidence remains to be seen.