

SENTENCE INDICATIONS – SOME PRACTICAL CHALLENGES

TIM CONDER*

Sentence indications have formed part of the practice of criminal law in New Zealand for a number of years.¹ However, appellate courts have at times drawn the practice into question and have called such indications “troublesome” and “problematical”.² They have also been the frequent target of Solicitor-General’s appeals, which seek to respond to lenient sentences which have been seized upon by those defendants fortunate enough to receive them.³ Sentence indications have also been identified as carrying similar risks as plea bargaining, with the potential to encourage even innocent defendants to plead guilty.⁴

Despite these concerns, the practice has received legislative sanction in the form of the Criminal Procedure Act 2011 (the CPA) which introduced a detailed procedure to deal with such applications.

The procedure imposed by the CPA, which drew heavily on the procedure that had been developed by the District Court, is intensely practical. As with the informal regime which preceded it,⁵ it is based on principles of clarity and predictability⁶ and is designed to ensure that a defendant is not penalised for seeking an indication.⁷ In this way it has built upon the existing law that had developed around the former regime and improved on it.

However, despite this improvement a number of challenges remain. Many of those which were identified in the early years of the practice – including the concerns around plea bargaining and questions about how to deal with sentence indications on appeal – have not been resolved. New challenges have also developed – particularly in relation to the popular interest in certain cases.⁸ This paper seeks to identify these challenges, to review how the courts have responded to them to date, and to consider whether further improvements could create a more robust system in the future.

* Solicitor, Holland Beckett Lawyers, Tauranga.

¹ *R v Gemmell* [2000] 1 NZLR 695 (CA).

² *R v Edwards* [2006] 3 NZLR 180 (CA) [*Sipa*] at [53] and [46]. This case was heard together with *R v Sipa*.

³ *R v Smail* [2008] NZCA 6, [2008] 2 NZLR 448; *Sipa*, above n 2; *R v Gemmell*, above n 1.

⁴ *R v Smail*, above n 3, at [39].

⁵ As evidenced in the provisions of the District Court Bench Book, reproduced in full in *Sipa*, above n 2, at [41].

⁶ Criminal Procedure Act 2011, ss 61-62 and 64.

⁷ Sections 63 and 65.

⁸ The case of *Police v Filippo* [2016] NZHC 2573 is a recent and striking example of this, which is discussed in more detail below.

I. SENTENCE INDICATIONS: HISTORY AND PROCEDURE

Sentence indications are not a new feature of criminal procedure in New Zealand, but the CPA represents the first time that they have been given a clear legislative basis. However, the present practice owes more to the District Court bench, who developed the original scheme through experimentation and discussions with the profession, rather than a deliberate legislative design.

II. SENTENCE INDICATIONS PRE-CPA

Sentence indications have existed for many years with greater or lesser degrees of formality attached to the practice. In the decade or so prior to the passage of the CPA, courts both in New Zealand and abroad began to develop a more systematic approach to sentence indications which, in New Zealand and elsewhere, has now been codified.⁹ However, these early developments also reveal the issues which continue to threaten the validity of the practice.

Sentence indications appear to have arisen as a response to the inherent difficulties in predicting sentencing outcomes in different cases. The broad sentencing ranges available to judges create significant uncertainty about sentencing, and comparisons between cases provide limited assistance due to the uniqueness of particular facts.¹⁰ The existence of regional differences and individual differences between judges add to this complexity.¹¹

In response to this uncertainty, certain judges began the practice of indicating what sentence they might impose if a defendant was to plead guilty. This practice was not legislated or developed from a central authority, but rather began organically as individual judges saw fit. However, the appellate decisions in this area indicate a high degree of scepticism around the practice. In 1995, the Court of Appeal described the giving of a sentence indication as "very unusual" and went on to state that:¹²

[this practice] is one that we strongly deprecate in the absence of any settled guidelines covering plea bargaining involving a Judge. There is obvious scope for manipulation and

⁹ See, for example, Criminal Procedure Act 2009 (Vic), s 60; but compare the approach in the United Kingdom, where the relevant provisions are found in *R v Goodyear* [2005] EWCA Crim 888, [2005] 1 WLR 2532 and further expanded in the Criminal Practice Directions [2013] EWCA Crim 1631.

¹⁰ During the 1950s the Court of Appeal even commented that comparisons between cases were unlikely to prove helpful: *R v Brooks* [1950] NZLR 658 (CA) at 659; *R v Radich* [1954] NZLR 86 (CA).

¹¹ P Spier *An Examination of Regional Differences in the Use of Custodial Sentences in the District Courts* (Policy and Research Division Department of Justice, Unpublished Paper, Wellington, 1989) at 49; Sean J Mallett "Judicial Discretion in Sentencing: A Justice System That Is No Longer Just?" (2015) 46 VUWLR 533 at 542-543.

¹² *R v Reece* CA74/95, 22 May 1995 at 3-4.

erosion of public confidence in the administration of justice if this is seen to be done in the course of informal and unstructured discussions between counsel and the trial Judge.

Nevertheless, by the late 1990s the practice had become well established, at least in the District Court.¹³ The Guidelines set out in the District Court Bench Book give an indication of how the process operated. These guidelines established certain principles that remain the core of sentence indications even under the CPA scheme. Sentence indications must be requested by the defendant; they are not to be referred to in subsequent proceedings if the matter goes to trial. Giving a sentence indication is discretionary and should only be offered if the judge has sufficient information to give an appropriate sentence. The views of the police and victims must also be considered.¹⁴ While the guidelines operated only in the summary jurisdiction, a similar process was followed in the indictable jurisdiction as well.¹⁵

Despite the guidelines that were developed, a number of issues arose with sentence indications. In many cases, defendants would rely upon statements made by judges about the likely sentence that would be imposed,¹⁶ however, the informality of many of these indications made it difficult to differentiate between a simple offhanded remark and a sentence indication which could later be relied upon. For example, the Court of Appeal refused an appeal in *R v Mohi* where the purported "sentence indication" consisted of a comment by a judge at a bail hearing that if the trial was not held before Christmas, the defendant may be on remand longer than the eventual sentence he could expect to receive.¹⁷ Equally problematic, in some cases sentence indications were given, in the absence of a defendant who later sought to rely upon it.¹⁸ Despite clear directions, some judges also continued to give sentence indications unilaterally, without a request from the defendant.¹⁹

Informational challenges were also common. Without clear processes existing for obtaining victim impact statements and pre-sentence reports in advance of a sentence indication, these reports were generally missing.²⁰ As a result, sentence

¹³ *R v Gemmell*, above n 1, at [15]-[16]; Law Commission *Reforming Criminal Pre-Trial Processes* (NZLC PP55, 2004) at 218.

¹⁴ District Court Bench Book, as recorded in *Sipa*, above n 2, at [41].

¹⁵ *Reforming Criminal Pre-Trial Processes*, above n 13; Law Commission *Criminal Pre-Trial Processes: Justice Through Efficiency* (NZLC R89, 2005) at [307].

¹⁶ *R v Smail*, above n 3, at [18]; *Sipa v R* [2006] NZSC 52, [2006] 3 NZLR 349; the same has been recognised in other jurisdictions: *R v Glass* (1994) 73 A Crim R 299.

¹⁷ *R v Mohi* [2007] NZCA 139.

¹⁸ *R v Smail*, above n 3, at [20].

¹⁹ *Criminal Pre-Trial Processes: Justice Through Efficiency*, above n 15, at [305]; *Solicitor-General v Bickerton* HC Auckland A34/01, 10 April 2004. This was directly at odds with the guidelines provided by the District Court Bench Book.

²⁰ *R v Gemmell*, above n 1, at [13]; *Criminal Pre-Trial Processes: Justice Through Efficiency*, above n 15, at [327]-[328].

indications were sometimes given on the basis that they were conditional on this information being suitable. However, there were several appeals against such “conditional” sentence indications which were later varied.²¹ As a result, the Court of Appeal established a rule that in such cases, the defendant must be offered the opportunity to vacate his or her plea before a different sentence was imposed.²² A similar rule was also developed in cases where the sentence was increased on appeal.²³ However, in *Sipa v R*, the Supreme Court suggested that this should not be automatic and actually required the appellants to file affidavits stating whether they intended to defend the charges in the District Court. Leave was refused when the defendants indicated that they had no intention of going to trial.²⁴

Even after the systematisation of the practice in the District Court, the Court of Appeal continued to describe such indications as “troublesome” and “problematical”²⁵ and repeatedly made reference to the risk that such indications would result in “plea bargaining”.²⁶ The apparent fear here was that defendants would either interpret the judge’s indication as a sign that they were likely to be found guilty, or like Mr Mohi above, conclude that the sentence would be better than continuing on remand. It also risked discouraging defendants from contesting discrete issues, such as the level of a charge or a particular sentencing fact, if the end sentence remained one the defendant could accept. The issue of guilty plea discounts also raises a particular concern, and has attracted significant attention in other jurisdictions.²⁷ The Court of Appeal of England and Wales, for example, ruled that sentence indications could not make any reference to the possibility of a plea discount, in order to avoid undue pressure on a defendant to plead.²⁸

These concerns, although frequently repeated, did not appear to discourage judges in the District Court from continuing to give such indications. Indeed, the comments of some judges, recorded by the Law Commission in their 2004 report into criminal procedure, tend to indicate that many judges saw this as beneficial, rather than detrimental to the criminal justice system.²⁹ While lawyers who were interviewed

²¹ See, for example, *R v Gemmell*, above n 1.

²² *R v Gemmell*, above n 1; *R v Edwards* (2000) 17 CRNZ 604 (CA); *Ferguson v Police* HC Auckland A99/00, 14 July 2000 at [6].

²³ *R v Smail*, above n 3, [48]-[50].

²⁴ *Sipa v R*, above n 16, at [6]-[7].

²⁵ *Sipa*, above n 2, at [53] and [46].

²⁶ *R v Smail*, above n 3, at [39]-[40], *R v Reece*, above n 12, at 3-4.

²⁷ *R v Marshall* [1981] VR 725 (FCSC) at 732; *R v Turner* [1970] 2 QB 321 (CA).

²⁸ *R v Turner*, above n 27; the evident absurdity of this rule was finally reversed after 35 years in *Goodyear v R* [2005] EWCA Crim 888, [2005] 1 WLR 2532, although that case also sought to lay down detailed guidelines, similar to the Bench Book guidelines, to prevent abuse of the practice.

²⁹ *Reforming Criminal Pre-Trial Processes*, above n 13, at [217].

tended to share this view, they also acknowledged there were risks with the practice. As one prosecutor observed:³⁰

There are times, and probably at every status hearing, you see probably one person come through and they just take the better deal ... especially if the judge has sort of said to them "look, I don't think your defence is a good defence. If you plead guilty now I am going to offer you this. If you go to defended hearing you are probably going to get this". And the defendant thinks "I may as well take this, even though I don't think I did it". That is where they are disadvantaged especially if they are unrepresented.

Ultimately, it appears that the apparent efficiency which sentence indications offered was seen as outweighing the risk that it would put undue pressure on defendants to plead guilty. Even as the Court of Appeal was critical of the practice, it continued to uphold and enforce it – including overruling the District Court when it departed from its earlier indications.³¹

III. SENTENCE INDICATIONS UNDER THE CPA

The benefits offered by sentence indications also drew considerable attention from Parliament and the Law Commission, both of which were eager supporters of the sentence indication process. While in its 2004 and 2005 reports the Law Commission identified the risk that sentence indications could lead innocent defendants to be pressured into pleading guilty, the Commission considered that this risk was easily mitigated and supported the practice as creating greater efficiency in the courts' processes.³²

Parliament's praise for the practice was even more effusive, with opposition members Charles Chauvel and Hon Lianne Dalziel expressing particularly strong support for sentence indications when the Criminal Procedure (Reform and Modernisation) Bill was being considered.³³ The objective of placing the practice on a strong legislative footing was seen as a clear benefit of the proposed reforms.³⁴ There were also repeated references to the increased efficiency provided by the practice.

The legislation largely adopted the scheme that had been developed by the District Court, and consistently applied the same principles. Sentence indications are to be given at the request of the defendant;³⁵ they are to be given only when there is

³⁰ At [235].

³¹ *R v Gemmell*, above n 1.

³² *Reforming Criminal Pre-Trial Processes*, above n 13, [235]-[236]; *Criminal Pre-Trial Processes: Justice Through Efficiency*, above n 15, at [304].

³³ (27 September 2011) 676 NZPD 21420, 21422 and 21428; (29 September 2011) 676 NZPD 21584.

³⁴ (29 September 2011) 676 NZPD 21584.

³⁵ Criminal Procedure Act 2011, s 61(1).

sufficient information for the Court to reach a positive conclusion;³⁶ and the fact that a sentence indication has been requested cannot later be used as evidence against a defendant.³⁷ As with the former District Court practice, the content of a sentence indication is to be suppressed until the conclusion of the matter.³⁸ However, contrary to the former official practice in the District Court, the Court is to be empowered not only to indicate the type of sentence that would be imposed, but also the quantum of a sentence.³⁹

As passed, the legislation also confirmed that the fact that a sentence was imposed following a sentence indication would not alter the right of either the defendant or the Solicitor-General to appeal the sentence,⁴⁰ and the ability of the appellate courts to impose a different sentence than that indicated was confirmed.⁴¹ Significantly, the legislation also explicitly altered the former practice, by removing the automatic right for a defendant to withdraw his or her plea when a more severe sentence was imposed on appeal. Now, the defendant can only withdraw the plea if the Court grants leave on the basis that it is in the interests of justice to allow the plea to be withdrawn.⁴²

In adopting the pre-existing procedures, the legislation benefited from the mechanisms that had already been developed to deal with obvious concerns with the practice – in particular the rules around suppression and when the plea could be withdrawn. However, the legislation did not seek to repair any of the difficulties which had arisen under the District Court procedure. The issues with appeals, and the considerable concerns about the risk of undue pressure on defendants to plead guilty, remain unaltered.

IV. SENTENCE INDICATIONS: UNRESOLVED ISSUES

The CPA provides clear guidance to judges who are sentencing an offender following a sentence indication in the same Court. In such cases, Judges are required to either impose the same sentence as was indicated, or must otherwise invite the defendant to withdraw his or her plea.

However, as distinct from the former practice, the CPA now makes it clear that an appellate court is not bound by a sentencing indication. The CPA provides both that

³⁶ Section 61(2).

³⁷ Section 63.

³⁸ Section 65.

³⁹ Section 60.

⁴⁰ Section 245.

⁴¹ Section 252.

⁴² Section 252.

a different sentence may be imposed on appeal, despite an earlier indication,⁴³ and also that the appellate court is not required to allow the defendant to vacate his or her plea simply because a more severe sentence is to be imposed.⁴⁴ However, the Court may allow a defendant to vacate his or her plea if it is in the interests of justice to do so.

Broadly, appeals can arise in three ways following a sentence indication. First, the defendant may consider that the sentence is manifestly excessive and appeal in the usual way. This would seem highly unusual, as the defendant is unlikely to accept the indication if this is the case, but the legislation is clear that this option remains open. Unsurprisingly, there are few examples.⁴⁵

Secondly, a defendant who received a sentence indication but was later sentenced to a different sentence without being given the opportunity to vacate his or her plea may appeal against either the conviction or the sentence imposed. While the failure to allow the defendant this opportunity is a clear error, the role of the court on appeal is somewhat less clear. In particular, the rule in s 252 of the CPA that the appellate court may impose a more severe sentence without allowing the defendant to vacate his or her plea does not directly apply.

Thirdly, a sentence indication may be unduly favourable to a defendant, in which case the Solicitor-General may appeal in the usual way. In such cases, the legislation is clear that the Court is not required to allow the defendant to vacate his or her plea, and may impose a more severe sentence, although the Court may allow a defendant to vacate his or her plea if it is in the interests of justice.

Of these three categories, the latter two are the most common and create the greater difficulty for the Court. Each raises unique challenges, and must be considered separately.

A. Departing from the Indication

When the Sentencing Court departs from an earlier indication, either because a different judge is sentencing, or because there has been a relevant change in circumstances since the indication was given, the Court is required to allow the defendant to vacate his or her plea. When this does not occur, the sentencing court commits a clear error.

This is relevant, because an appeal against sentence has been traditionally regarded an appeal against an exercise of judicial discretion. As a result, a sentence appeal is

⁴³ Section 252.

⁴⁴Section 252.

⁴⁵*Helsby-Knight v R* [2015] NZCA 315 appears exceptional in this regard.

only to be granted when the sentencing court has committed some error of principle or where the decision itself is plainly wrong.⁴⁶ An appellate court is not able to simply impose its own view in substitution of that of the lower court.⁴⁷

Section 250(2) of the CPA specifies that a sentence appeal must only be allowed if (a) there has been an error in the sentence imposed on conviction; and (b) a different sentence should be imposed. It is a conjunctive test and, in addition to being required to find an error in the lower court's decision, an appellate court must be satisfied that the sentence is wrong before it can interfere.

In a practical sense, it would be rare for a judge to find that a sentencing court made an error yet nonetheless imposed the correct sentence. A sentence imposed on wrong principle will be in error, even if it is within the available range. In this case, an appellate court is entitled to substitute its own view, even if the original sentence is defensible.⁴⁸ Similarly, a sentence which is outside the acceptable range is in error, whether some independent error of principle can be identified or not. However, in the case of a sentence imposed contrary to an earlier sentence indication, the case is not so clear. The sentencing court would clearly be in error in imposing a divergent sentence, but this does not mean that the sentence imposed is "wrong" – indeed, the appellate court may well consider that the sentence imposed is actually the correct sentence.⁴⁹

Applying the language of s 250, the appellate court should only depart from the sentence actually imposed if it is satisfied that not only was it imposed in error, but that it is also the wrong sentence. As such, the failure to impose the indicated sentence does not provide clear justification for imposing a different sentence. In particular, it does not mean that the appellate court should simply revert to the sentence which was indicated.

A number of such cases have already appeared before the courts. Because of the nature of the District Court and its workload, the vast majority of these cases have related to District Courts where there is a much higher chance (a) that a sentencing will take place before a different judge to the judge who gave a sentence indication; and (b) that the fact that a sentence indication has been given will be lost between the relevant hearings. As such, many of these appeals have been heard by the High Court.

⁴⁶ *Vae v Police* [2013] NZHC 2664 at [28].

⁴⁷ *R v Shipton* [2007] 2 NZLR 218 (CA) at [138].

⁴⁸ *R v Finau* (2003) 20 CRNZ 333 (CA) at 337; *M v Police* HC Auckland CRI-2004-404-440, 10 December 2004; however, in *Ripia v R* [2011] NZCA 101 at [15], the Court of Appeal has emphasised that in general it is the end sentence which will be of relevance on appeal.

⁴⁹ See for example *Wilson v R* [2015] NZHC 298 at [37].

The High Court has not been entirely consistent in its approach to these cases, however. In several cases the High Court has imposed a sentence in keeping with the original indication, although acknowledging that it was not required to do so.⁵⁰ By contrast, in *Wilson v R*, Wylie J dismissed an appeal where a District Court Judge imposed a sentence of imprisonment following a sentence indication of community detention, but where no address was available. While accepting that the Judge erred in failing to allow Mr Wilson to vacate his plea, his Honour noted that Mr Wilson had not indicated on appeal that he wished to vacate his plea.⁵¹ His Honour went on to observe:⁵²

[37] If I am to allow the appeal, I must also be satisfied that a different sentence should have been imposed. I must consider afresh what sentence was appropriate.

After a review of the sentence, the Judge determined that the sentence under appeal was within the available range and dismissed the appeal.

To similar effect, in *Te Namu v Police*, Courtney J allowed an appeal against a sentence which included community work, where a different judge had given an indication of a sentence not including community work, but had not allowed Mr Te Namu an opportunity to vacate his plea. In those circumstances, her Honour imposed a wholly new sentence, by increasing the term of the community detention sentence while removing the order for community work. Such a sentence was in keeping with the sentence indication, which did not address quantum, but represented a change from the sentence actually imposed.⁵³

The unifying feature in both *Wilson* and *Te Namu* appears to be that the indicated sentence proved unworkable. In *Wilson*, the indicated sentence of community detention was practically impossible. In *Te Namu*, a sentence of community detention alone, at the quantum imposed, would be insufficient under the circumstances. As such, in both cases, a different sentence was required. Conversely, in the cases where the sentence was quashed and replaced with that which had been indicated, the High Court was satisfied that the indicated sentence was within the acceptable range.

These cases can be harmonised by drawing an analogy to the standard which is commonly applied in Solicitor-General's appeals. In these cases, appellate courts will interfere with a sentence to the minimum degree necessary to bring it within the

⁵⁰ *Te Tau v Police* [2015] NZHC 1716 at [13]; *Appuhamilage v Police* [2015] NZHC 2355.

⁵¹ Compare *Sipa v R*, above n 16, where the Supreme Court refused leave on the basis that the appellants had no interest in vacating their pleas.

⁵² *Wilson v R*, above n 49, at [37].

⁵³ *Te Namu v Police* [2013] NZHC 3443 at [10].

acceptable range.⁵⁴ As a result, the defendant can expect to receive the least severe sentence which is acceptable in the circumstances.

Similarly, these cases show that where the sentence indication is in the acceptable range, the High Court has developed a practice of reinstating the sentence which had been indicated. Conversely, where this sentence is unacceptable or impossible, the Court will adjust that sentence to impose an acceptable sentence, but where possible, will do so by altering the indicated sentence to the minimum degree necessary – mirroring the approach adopted in Solicitor-General’s appeals.

B. Vacating Pleas on Appeal

This approach, however, is secondary to the Court’s preferred approach in such cases, which is to allow the defendant to vacate his or her plea. This effectively restores the defendant to the position he or she would have been in, had the District Court correctly applied s 115 of the CPA, thus reinforcing the express scheme of the legislation.

While this policy effectively undoes the error in the lower court, it is not clear whether this was the result intended by the legislation. Indeed, the CPA does not make any express provision for how breaches of s 115 should be resolved. While s 252 of the CPA provides that an appellate court is not required to allow a defendant to withdraw his or her plea when imposing a more severe sentence – this only appears to apply when the Court is considering a sentence appeal – particularly a Solicitor-General’s appeal. The situation is different when a defendant chooses to appeal against his or her conviction.

The standard on a conviction appeal is significantly different from that which applies to sentence appeals. Under s 232(2)(c) of the CPA, the appellate court must allow the appeal if a “miscarriage of justice” has occurred. Subsection (4) further defines a “miscarriage of justice” as something that causes “a real risk that the outcome of the trial was affected”.

This language draws on earlier cases discussing the meaning of a “miscarriage of justice”. In those cases, the courts held that a “real risk of an affected outcome exists when there is a reasonable possibility that a not guilty (or more favourable) verdict might have been delivered if nothing had gone wrong.”⁵⁵ This standard means that “an appellant does not have to establish a miscarriage in the sense that

⁵⁴ *R v Donaldson* (1997) 14 CRNZ 537 (CA) at 548-550.

⁵⁵ *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 (SC) at [110] per Tipping J.

the verdict actually is unsafe” but that there is a real possibility the verdict would be unsafe.⁵⁶

Translated to the context of sentence indications, this standard could be reduced to a question of whether there is a real possibility that the defendant would not have pleaded guilty to the particular charge had it not been for the sentence indication. This may mean that the defendant would have sought an acquittal, or it may mean that the defendant would have sought to be convicted on a lesser charge. In some cases, it may not even be that the defendant would have been convicted of a lesser charge, but may have been able to disprove an aggravating fact that is contained in the summary – in short, the sentence indication may have led to the defendant accepting a state of affairs that was less favourable that could have resulted from a defended hearing.⁵⁷

This is broadly consistent to the approach which applies when a defendant appeals against his or her conviction following a guilty plea, although such cases are held to a high standard. This was confirmed by the Court of Appeal in *R v Le Page* where the Court observed:⁵⁸

It is only in exceptional circumstances that an appeal against conviction will be entertained following entry of a plea of guilty. An appellant must show that a miscarriage of justice will result if his conviction is not overturned. Where the appellant fully appreciated the merits of his position, and made an informed decision to plead guilty, the conviction cannot be impugned. These principles find expression in numerous decisions of this Court, of which *R v Stretch*⁵⁹ and *R v Ripia*⁶⁰ are examples.

In that case the Court identified three broad categories where a miscarriage of justice would occur. The first such circumstance is where the appellant pleaded by accident or did not understand the charge to which he or she pleaded. In these cases, the Court held that the plea was “vitiating by genuine misunderstanding or mistake”.⁶¹ There is a clear analogy to cases where the defendant pleads guilty based on a mistaken sentence indication. The second is where the defendant pleads guilty but on the basis of facts which could not in law justify a conviction for the charge.⁶² In most cases, such cases will also fall under the first ground. Thirdly, the defendant may vacate his or her plea where “the plea was induced by a ruling which

⁵⁶ At [110].

⁵⁷ Compare, for example *R v Smail*, above n 3; *Solicitor-General v Morunga* [2015] NZHC 1954, both discussed in more detail below.

⁵⁸ *R v Le Page* [2005] 2 NZLR 845 (CA) at [16].

⁵⁹ *R v Stretch* [1982] 1 NZLR (CA).

⁶⁰ *R v Ripia* [1985] 1 NZLR 122 (CA).

⁶¹ *R v Le Page*, above n 58, at [17].

⁶² At [18].

embodied a wrong decision on a question of law.”⁶³ Again, the analogy to an erroneous sentence indication is a simple one. Similarly, in *Merrilees v R* the Court of Appeal held that a plea which was induced by deficient legal advice could also provide a basis for a conviction appeal.⁶⁴ In that case, the Court also observed:⁶⁵

[35] It is often the case that an offender pleads guilty reluctantly, but nevertheless does so, for various reasons. They may include the securing of advantages through withdrawal of other counts in an indictment, discounts on sentencing, or because a defence is seen to be futile. Later regret over the entering of a guilty plea is not the test as to whether that plea can be impugned. If a plea of guilty is made freely, after careful and proper advice from experienced counsel, where an offender knows what he or she is doing and of the likely consequences, and of the legal significance of the facts alleged by the Crown, later retraction will only be permitted in very rare circumstances.

Again, this standard would appear to justify an approach that a defendant may withdraw his or her plea following a sentence indication provided there is a basis for concluding that absent the plea, the defendant may have obtained a more favourable result. This does not mean, necessarily, that the defendant must be able to prove a more favourable sentence would have been given. It will be sufficient if the defendant has waived an argument that would have led to a different and more favourable outcome in terms of the charge or the facts which are found.

It is noteworthy that this requires a different approach to that adopted by the Supreme Court in *Sipa v R*.⁶⁶ In that case, the Court refused to consider an appeal unless the appellants were intending to defend the charges at trial. With respect, this binary analysis fails to reflect the multifaceted negotiations that take place in case review. While a defendant may accept that his or her conduct fulfils the elements of a charge, the presence or absence of particular aggravating features is a point of some significance. The fact that a defendant does not intend to change his or her plea, does not mean that no injustice has been suffered as a result of the mistaken indication.

While this approach is justified both in terms of the language of the section and by comparison with the approach which applies to conviction appeals following guilty pleas generally, the courts have applied a more generous standard to date in appeals which fall under this category. In each of the cases outlined above, the Court was willing to vacate the defendant’s plea, and only imposed a sentence when the defendant indicated that he or she did not wish to take that step. It appears that

⁶³ At [19].

⁶⁴ *Merrilees v R* [2009] NZCA 59 at [34].

⁶⁵ At [35].

⁶⁶ *Sipa v R*, above n 16.

the Court is willing to treat any breach of a sentence indication as a miscarriage of justice – although it is not immediately clear that this should be the case. However, these cases could equally be justified on the basis that in electing not to vacate their pleas, the appellants in each case confirmed that they did not consider a more favourable outcome would have been achieved by defending the charge. Alternatively, it may simply be that they do not wish to risk losing the guilty plea discount which they have received. Whether this is the case will become clearer as the courts continue to consider and determine similar appeals.

C. Solicitor-General's Appeals

The situation is somewhat different when an appeal is brought by the prosecutor on the basis that a sentence is outside the acceptable range. In such cases, the legislation is clear that the appellate court is not required to allow the defendant to vacate his or her plea – unless the court considers that it is in the interests of justice to grant leave for the plea to be withdrawn.⁶⁷

Such appeals must also contest with the principles set out in *R v Donaldson* for prosecutorial appeals, namely that:⁶⁸

- a. considerations which justify an increase in sentence must be more compelling than those which might justify a reduction;
- b. even if the Court determines that the sentence is manifestly inadequate or based upon a wrong principle, it will still be reluctant to interfere if this would cause injustice to the offender; and
- c. in particular, the court will be more disinclined to interfere where a community-based sentence has been imposed and conditions which were ordered have been complied with.

In that case the Court set out the dangers of a prosecutorial appeal in significant detail, referring to the unique harshness of imposing an increased sentence on a defendant who would otherwise consider his or her sentence to be settled. In particular, the impact of imposing a custodial sentence, in place of a community based one, was recognised by the court as being particularly crushing.⁶⁹ The Court then went on to remark:⁷⁰

... At times, certainly, any deficiency or discrepancy in the sentence under appeal may be met by the Court indicating what the appropriate term of imprisonment would have been but nevertheless declining to reverse a non-custodial sentence. We would consider such a course appropriate where the minimum custodial term which would otherwise be substituted would be 2 years' imprisonment or less ...

⁶⁷ Criminal Procedure Act 2011, s 252.

⁶⁸ *R v Donaldson*, above n 54, at 548-550.

⁶⁹ At 550.

⁷⁰ At 550.

In short, a court considering increasing a sentence on appeal must only alter the sentence to the minimum degree necessary. It must have due regard to the impact of an increased sentence and in some cases should do nothing, even where a clear error has occurred. There is no indication that these principles have been displaced by the advent of the CPA.

These principles are of equal application in cases where the defendant has pleaded guilty following a sentence indication. In such cases, the defendant's relief at receiving a particular sentence is measurable by his or her willingness to plead guilty. Where the sentence is later increased, the impact may be severe.

The potential solution to this challenge is to allow the defendant to vacate his or her plea. This avoids, in part, the crushing effect of a substituted sentence and allows the defendant to consider whether to accept the new sentence or whether to revert to the defended hearing path. However, the legislation is clear that this is not applicable in all cases where a more severe sentence is to be imposed, but only in cases where the interests of justice require it. This solution may not be perfect either, as the defendant would still be forced to decide whether to waive the guilty plea discount which would have been included in the sentence.

Given the comments of the Court of Appeal in *Donaldson*, it seems that this should be a relatively low threshold. Certainly, the impact of an increased sentence in such appeals is significant and it is not difficult to envision a case where the interests of justice would require that an opportunity be given to the defendant to vacate his or her plea. However, given the clear legislative intent to limit this outcome – in keeping with the overall purpose of the legislation being to promote efficiency in the criminal process – the court's discretion must nonetheless be somewhat constrained.

Relatively few cases have arisen under this section and there has been little judicial analysis on when the defendant should be entitled to vacate his or her plea on appeal. In some cases, it appears to simply be granted automatically.⁷¹ However, the decision of Brewer J in *Solicitor-General v Morunga* is instructive.⁷² In that case his Honour made express reference to the submission by Mr Morunga's counsel that, had the sentence indication not been given, Mr Morunga had an arguable defence which would have resulted in a reduced charge. While noting that it would have been "a roll of the forensic dice against long odds", Brewer J accepted that this was

⁷¹ For example, *Police v Filippo*, above n 8, at [85].

⁷² *Solicitor-General v Morunga*, above n 57.

nonetheless relevant in assessing (a) whether the sentence should be increased; and (b) whether the defendant should be permitted to vacate his plea.⁷³

This is broadly consistent with the approach proposed above – that a defendant should be entitled to withdraw his or her plea when it can be shown that the defendant, in accepting the sentence indication, forwent an opportunity to obtain a better outcome by defending the proceeding. Where the defendant by pleading has simply accepted the inevitable, there is little injustice to preventing them from obtaining the windfall of an overly favourable sentence indication. Conversely, where the acceptance of the indication represents a compromise on the part of the defendant, he or she should not lose the benefit of that compromise without an opportunity to revisit it. In such cases, the defendant should be able to vacate his or her plea.

There is a practical limit, however, on the benefit which the defendant can obtain by vacating his or her plea. This is because by the time a case is determined on appeal, the practical protection of the mandatory suppression under ss 63 and 65 of the CPA may well have been lost.

The CPA makes it clear that requesting a sentence indication should not prejudice a defendant if he or she elects to defend the proceeding. The fact that an indication was requested cannot be admitted as evidence, and must not be published until the defendant is sentenced. However, if the defendant ultimately withdraws his or her plea following a sentence appeal, there is no guarantee that the details of the indication will not have been published in the interim.

This risk is exemplified in the recent case of *Police v Filippo*.⁷⁴ In that case, Mr Filippo, a successful young rugby player, was granted a discharge without conviction following an incident where he assaulted several people. Following a public outcry about the case, the Solicitor-General appealed, successfully, against the decision. However, Mr Filippo had pleaded guilty following a sentence indication which had indicated that a discharge without conviction would be granted.

The Court, recognising that Mr Filippo had pleaded in reliance on the indication gave him the opportunity to vacate his plea.⁷⁵ However, in practical terms this appears to have been an empty opportunity – the publicity surrounding the case and, in particular, the fact that he had pleaded guilty would have made it very difficult for him to receive a fair trial. Perhaps unsurprisingly, he elected not to vacate the plea and was sentenced by the High Court.

⁷³ At [36].

⁷⁴ *Police v Filippo*, above n 8.

⁷⁵ At [85].

This consequence is potentially unavoidable, but demonstrates a clear tension between the suppression provisions and the appeal provisions in the CPA. While it is not realistic, or indeed appropriate, to have permanent suppression in relation to sentence indications, the protections granted by suppression may well be lost when a case is challenged on appeal. As such, this is a factor which appellate courts should take into account when determining whether it is in the interests of justice to allow the defendant to vacate his or her plea or, whether the circumstances are such that the only just outcome is to allow the defendant to enjoy the benefit of a generous sentence indication and the associated discount for guilty plea but, pursuant to *Donaldson*, to make a declaration that the sentence itself is outside the acceptable range.

D. Open Justice

In addition to the tension between the suppression and appeal provisions under the CPA, the suppression provisions also have the potential to undermine access to the Court's sentencing jurisprudence.

Consistently, regulations for the giving of sentence indications have required that they be given in open court and in the presence of the defendant.⁷⁶ In this regard, the provisions for sentence indications mirror those which apply to sentencing generally, and for the same reasons.

The CPA confirms a principle which was already widely observed in the Courts prior to the passage of that law and confers on the defendant an absolute right to be present at sentencing.⁷⁷ Unlike the trial phase, where the defendant by his or her actions may waive the right to be present, a defendant charged with an imprisonable offence has an absolute right to be present.

The reasons for this are several. On the one hand the defendant has a right to participate in the sentencing process, and the defendant's personal circumstances mean that direct involvement is highly important.⁷⁸ However, beyond this, a defendant must also hear why he or she is being sentenced and how the sentence corresponds to his conduct.⁷⁹ This is a matter of fairness, but also a matter of instruction, where the defendant's own conduct is examined for his or her benefit.

⁷⁶ District Court Bench Book, above n 5; *R v Goodyear*, above n 9, at [75]; Criminal Procedure Act 2011, s 61.

⁷⁷ Criminal Procedure Act 2011, s 118.

⁷⁸ *R v van Yzendoorn* [2002] 3 NZLR 758 (CA); *R v Tukaokao* HC Rotorua T010266, 31 May 2001; *R v Smail*, above n 3.

⁷⁹ *R v D* [2003] 1 NZLR 43 (CA) at [60].

However, sentencing does not only speak to the defendant who is being sentenced. Rather, in sentencing, a judge addresses a range of audiences, each with a vested interest in the process.

In addition to the defendant, the judge addresses the appellate courts that may later consider the sentence. The reasons for the sentence and the component parts of the sentence allow a supervisory court to properly consider whether the sentence is an appropriate one.⁸⁰

Another audience of the sentencing court is the victims of the offending. While acknowledging that no crime can be undone by the courts, the sentencing judge must demonstrate to the victims that their hurt has been properly recognised and vindicated in the courts.⁸¹

Thirdly, and relatedly, the sentencing court also addresses the public – both those who are in the courtroom and those who will later hear of its decision through the news media and other means.⁸² To this group, the court's task is to demonstrate the fairness of the courts, their reliability and justice. This is closely linked to the principle of open justice.⁸³ As observed by the Court of Appeal in *Lewis v Wilson & Horton Ltd*, the failure to give reasons for a decision would often render it "unintelligible" to those present.⁸⁴

In addition to these well recognised groups, one further audience deserves attention – the legal profession. It is on judges and lawyers that the responsibility falls to ensure that sentencing is both consistent and fair.⁸⁵ Therefore, it is judges and lawyers who must be able not only to understand the reasons for a sentence but also to adapt them and apply them to future cases. This requires more than a general explanation of the factors which go into a sentence, which are often obvious to those initiated in the sentencing process but which require a detailed and comparative approach that places a particular sentence in the wider context of offending generally.

The sentence indication provisions under the CPA attempt to preserve these interests by requiring a sentence indication to be given in the same manner as a

⁸⁰ *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [80]-[81].

⁸¹ See, for example, *R v Elliot* HC Hamilton CRI-2011-219-182, 17 November 2011 at [1] and [3]; *R v Mika* [2013] NZHC 2357 at [29].

⁸² *R v Husband* (2000) 18 CRNZ 229 at [33].

⁸³ *Lewis v Wilson & Horton Ltd*, above n 80, at [76]; *R v Liddell* [1995] 1 NZLR 538 (CA) at 546.

⁸⁴ *Lewis v Wilson & Horton Ltd*, above n 80, at [77].

⁸⁵ See generally: Geoff Hall "Reducing Disparity by Judicial Self Regulation" (1991) 14 NZULR 208; Mallet, above n 11; *Practice note: Sentencing in the High and District Courts* HCPN 2014/1 at [7]-[8].

sentence. However, this can be compromised by the suppression rules which automatically apply to sentence indications.

Under ss 63 and 65 of the CPA, sentence indications are automatically suppressed. They cannot be disclosed in subsequent proceedings and it is unlawful to publish them until they are accepted. Even when they are accepted, they are not automatically published, with publishers generally cautious about publishing suppressed material even after the suppression has expired.⁸⁶

Often, when an offender is sentenced pursuant to a sentence indication, the Court does not repeat the reasons for the sentence. While not a universal rule, in some cases such sentencing decisions are brief, simply making reference to the earlier indication and imposing a final sentence. As a result, in some cases, no public record of the reasons for the decision exists.

The consequence of this is that while those present in court are able to assess the correctness of a particular sentence indication, the public and the profession are, in some cases, effectively excluded from it. Even the media do not typically provide details of the sentence indication when the final sentence is imposed, significantly undermining their role as the public's eyes and ears in the courtroom.

For the profession, the lack of access to the sentence indications is yet more crucial. Inability to access these decisions means that they cannot form part of counsel's submissions in future cases. They are effectively removed from the data which courts will have regard in sentencing in the future. Given the increasing popularity of sentence indication, this creates a clear risk that crucial precedents will be missed, or worse, misinterpreted as a result of the partial information contained in the brief sentencing decisions that are released.

The solution to this problem is a simple one – ensuring that sentence indications are published in full. This can be achieved by a simple change of policy amongst publishers, or even more easily by sentencing judges who can either repeat their indications at sentencing⁸⁷ or annex them to sentencing judgments that are given.

⁸⁶ This appears to stem from the official policy of Judicial Decisions Online (JDO), which specifically states that JDO does not publish decisions subject to suppression, including those subject to time-limited suppression (which includes many pre-trial decisions and bail decisions, as well as Sentence Indications). Whether other publishers are relying on the availability of decisions from JDO or simply applying a similar policy is difficult to assess. However, the effect of it is that sentence indications, as is the case with bail decisions, are generally not available online: *Judicial Decision Online* <www.forms.justice.govt.nz/>.

⁸⁷ Many Judges appear to have adopted this practice: *R v Maywald* [2015] NZHC 2264; *R v Dickson* [2015] NZHC 2448; *R v Sisley* [2014] NZHC 396. However, the practice is not uniform: *R v Esterhuizen* [2013] NZHC 716.

In this way the lacuna in public access to this crucial part of the sentencing process can be repaired.

V. SENTENCE INDICATIONS: DANGEROUS INCENTIVES

The most frequent objection that has been raised to the sentence indication scheme is that it bears strong similarities to plea bargaining⁸⁸ and, as with plea bargaining, it encourages innocent defendants to plead guilty.⁸⁹

Sentence indications differ from plea-bargaining in several key respects. Crucially, the judge is independent of the prosecutor, and there is no negotiation based on mutual exchanges. However, the fact remains that the defendant is given the ability to choose between a fixed sentence in return for their plea and the risk that they will face an inevitably greater sentence, having lost the plea discount, if they are convicted at trial. Some view this as placing undue pressure on defendants to plead guilty. In particular, some commentators have expressed concern about the effect of a judge explaining to a defendant that a guilty plea discount would be available if he or she pleaded guilty immediately.⁹⁰

In response to these concerns, others have observed that it is artificial to treat defendants as being unaware of the practice of giving guilty plea discounts and of the likely sentence which they may receive.⁹¹ These are all matters which defence counsel will advise on and so some argue that the impact of judicial indications is likely to have little impact other than to provide clarity around the precise level of penalties.

In fact, the role of counsel is significant in this area for several reasons. The majority of defendants who seek a sentence indication will be represented and will have counsel who can explain to them the significance of the indication and ensure that they do not misinterpret it as pressuring them to plead guilty. However, the risk remains that defendants will see the opportunity of a sentence that they can accept and take this rather than running the risk of being convicted at trial and being sentenced more harshly. Furthermore, where the sentence indicated is particularly lenient, defence counsel will generally identify this fact – potentially increasing the pressure on the accused to plead guilty.

On the other hand, courts and legislatures have developed systems that attempt to minimise the pressure placed on defendants. In particular, it is a common feature of

⁸⁸ *R v Reece* CA74/95, 22 May 1995 at 3-4; *R v Smail*, above n 3, at [39]; , "Criminal Pre-trial Processes: Justice Through Efficiency", above n 15, at [313].

⁸⁹ "Criminal Pre-trial Processes: Justice Through Efficiency", above n 15, at at [313].

⁹⁰ At [314]; *R v Turner*, above n 27, at 327.

⁹¹ "Criminal Pre-trial Processes: Justice Through Efficiency", above n 15, [315]-[316].

most sentence indication schemes that only the defendant may request an indication – this removes the sense that the defendant may misinterpret an uninvited sentence indication as a judge’s attempt to encourage a guilty plea. In particular, this was central to the Court of Appeal of England and Wales’ approach set out in *R v Goodyear*.⁹²

It is clear that these processes provide a degree of protection to defendants, and generally the appeals following sentence indications seem to confirm that defendants who plead guilty to a charge following a sentence indication do not later seek to claim innocence. However, there are shades of innocence and these appeals do show that sentence indications may encourage defendants to plead guilty to more serious crimes than they believe they have committed.

In both *R v Smail*⁹³ and *Solicitor-General v Morunga*,⁹⁴ the offenders pleaded guilty despite raising arguments which could have resulted in a reduced charge.

In the case of Mr Smail, he received a sentence indication that indicated he would receive either a determinate sentence, or a low-grade murder sentence. In reliance on that indication, he pleaded guilty to murder – waiving a possible defence of provocation.⁹⁵ On appeal, the Court of Appeal considered that he was guilty of aggravated murder and concluded that a sentence pursuant to s 104 of the Sentencing Act 2002 would have been the appropriate outcome but for the sentence indication.⁹⁶

Similarly, Mr Morunga pleaded guilty on the strength of an indication that he would receive three years’ imprisonment.⁹⁷ In entering his plea Mr Morunga waived a possible defence that would have reduced his charge to one of an accessory.⁹⁸ The Solicitor-General then appealed.

Both of these cases reveal the more pertinent risk of sentence indications. Innocent defendants are unlikely to plead guilty to a sentence indication. However, defendants may well be willing to plead guilty to a charge if the sentence they expect to receive is the same as that for the crime they believe they have actually committed. Similarly, a defendant is likely to take substantially less issue with a

⁹² *R v Goodyear*, above n 9, at [49].

⁹³ *R v Smail*, above n 3.

⁹⁴ *Solicitor-General v Morunga*, above n 57.

⁹⁵ *R v Smail*, above n 3, at [3], [21] and [28].

⁹⁶ As a result of the sentence indication, however, the Court of Appeal allowed Mr Smail to vacate his plea: at [5] and [9].

⁹⁷ He ultimately received an even more lenient sentence of 12 months’ home detention on the basis of factors disclosed by the pre-sentence report. Ultimately the High Court considered this sentence too low but in all the circumstances reverted to the indicated sentence of three years’ imprisonment.

⁹⁸ *Solicitor-General v Morunga*, above n 57, at [36].

summary of facts where the judge has already indicated that he or she will place no weight on a disputed fact.

The mischief of this is that on appeal, those issues may hold greater relevance. While a particular fact or a particular increment in a charge may not have attracted the concern of the court at first instance, on appeal these factors may lead to a more stringent sentence. However, if the defendant is unable to vacate his or her plea, then there will be no opportunity for the defendant to contest those factors. In this way, a sentence indication may potentially “short-cut” the s 24 process which applies to disputed facts.⁹⁹ Instead of contesting these issues, once the defendant is satisfied that they are irrelevant, he or she may plead guilty only to later discover the importance of these issues.

In both *Smail* and *Morunga*, the Court recognised these concerns and allowed the defendant to vacate his plea for precisely this reason. However, this risk nonetheless raises several issues for both courts and counsel to consider.

First, as outlined earlier in this article, this factor should guide the appellate court when considering whether it is in the interests of justice to allow the defendant to withdraw his or her plea. If the defendant has genuinely foregone an opportunity to achieve a different outcome, then the court should preserve this right if the indication is later altered.

Secondly, there is the evidential issue. Where a defendant is waiving a defence in pleading guilty following a sentence indication or is electing not to dispute a particular fact in the process, this needs to be clearly recorded in order to preserve that right in any future appeal. It may be useful for counsel and courts to cooperate in recording that these factors have been raised when a defendant is sentenced after a sentence indication. There is naturally a challenge in this for defence counsel who may not wish to actively draw the courts attention to what will no doubt be an aggravating factor. However, when the sentence is being imposed after the indication is accepted there should be little reason for concern. In any event, even if the indication is altered and the plea is vacated as a result, this should be preferred over the situation where the sentence is increased on appeal without an automatic right for the defendant to vacate his or her plea.

Thirdly, appellate courts should also consider whether there are other alternatives that avoid requiring the defendant to vacate his or her plea. On appeal, this option is typically presented as binary – the defendant may accept an increased sentence or may return to face trial. For a defendant already several months into a prison

⁹⁹ Sentencing Act 2002, s 24.

sentence, such a prospect may be naturally unappealing. However, if the appellate court were to directly engage with the issue and conduct a s 24 hearing to resolve disputed facts,¹⁰⁰ the defendant would have an opportunity to resolve this challenge without facing the prospect of a full trial.

Such an approach is also consistent with the s 24 procedure – where a court is expected to indicate the significance which it is likely to place on a particular disputed fact.¹⁰¹ A court considering a sentence appeal could indicate to counsel the likely import of the particular fact at issue and then Crown and defence would be able to consider whether a s 24 hearing could resolve the issue on appeal without the need to revert to the first instance court for a full defended hearing.

Such an approach would recognise the reality of the calculations which a defendant is likely to engage in when presented with a sentence indication and would prevent defendants from being surprised by aggravating factors which are inherent in their plea but do not form part of their acknowledgment. It also presents a way for the courts to preserve the benefit of a sentence indication and a guilty plea without either adopting a manifestly inadequate sentence or treating a defendant unfairly. Rather, it provides a high degree of transparency to a defendant while also allowing the appellate courts to properly supervise the sentencing decisions of lower courts.

VI. CONCLUSION

The sentence indication scheme that was included in the CPA builds on more than a decade of experimental practice in the District Court and also in the High Court. It is a robust scheme which seeks to balance the systemic advantages of encouraging early pleas against the rights of defendants to be able to elect to defend proceedings and to have a degree of transparency and predictability in the sentencing process. However, even this well-designed system is unable to cure the fact that these objectives are in constant tension and as such the system requires courts, and particularly appellate courts, to trade between these principles when dealing with sentence indications.

There is as yet little data on whether the sentence indication scheme has reduced the caseload in courts around the country¹⁰² but the predominant response from the profession and from District Court Judges is that it is a good system that works well.

¹⁰⁰ The hearing could be conducted pursuant to the power of an appellate court to receive fresh evidence under s 334 of the Criminal Procedure Act 2011.

¹⁰¹ Specifically, Sentencing Act 2002, s 24(2)(a).

¹⁰² Compare the analysis of the NSW trial scheme which concluded that there were little if any systemic advantages as a result of the scheme: Don Weatherburn, Elizabeth Matka and Bronwyn Lind *Sentence Indication Scheme Evaluation* (NSW Bureau of Crime Statistics & Research, Sydney, 1995).

However, those involved in the criminal justice system also clearly understand that it is a system that requires close supervision.

There remain a number of questions for appellate courts as how best to resolve the questions which the sentence indication scheme raises. This paper has attempted to propose solutions to some of these issues; however it will be for the courts to determine how best these questions are resolved. As with sentencing generally, the question for the court will remain how best to balance the rights of the defendant and the need to treat the defendant fairly with the importance of the broader principle of consistency in sentencing.¹⁰³

¹⁰³ Sarah Krasnostein and Arie Freiberg "Pursuing Consistency in an Individualist Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?" (2013) 76 *Law and Contemporary Problems* 265 at 265, cited by Mallet, above n 11, at 533.