The Sentencing Act 2002: Monitoring the First Year

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March 2004

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INTRODUCTION

1. The Sentencing Act 2002, together with the Parole Act 2002, came into force on 30 June 2002. The two acts represented a comprehensive reform of the laws relating to sentencing and parole as contained in the Criminal Justice Act 1985 ("**the CJA**"). This report considers the impact that the Sentencing Act 2002 ("**the Act**") has had on sentencing practice during the 12 months since it came into force, in terms of the key changes that were made to sentencing policy.

2. The report draws on an extensive review of judgments delivered by the courts at all levels and an analysis of statistics on a before and after basis. We have presented the last 5 years' statistics, as it is often the case that announced policy changes start to have an impact prior to coming into force. The report also provides a general snap shot of sentencing statistics in the year following the Act's coming into force.

3. The key policies introduced by the Act are discussed under three broad headings:

   (a) Sentencing Purposes and Principles;

   (b) Sentencing for Murder and High Risk Offenders; and

   (c) Range of Sentences.

4. We note from the outset that in the case of some reforms, a year is a very short time to demonstrate any clear trends or changes. There are a variety of reasons for this including the fact there are a number of cases being dealt with on a transitional basis, which, in effect, are being dealt with under the old legislation.

5. Over the course of the first year of operation a number of issues have been identified where the original drafting could be improved to better reflect the legislation's policy intent. The amendments necessary to "tidy up" these issues were introduced in the Parole (Extended Supervision) and Sentencing Amendment Bill. We refer to the amendments in the body of our report where relevant.

SUMMARY

6. There are indications that the legislation is generally working as intended and having a demonstrated impact on some of the key policy areas, even in the first year of operation. We have also identified some issues where unintended and unforeseen consequences have resulted, particularly in relation to home detention and deferral of the start date of sentences of imprisonment. The unforeseen impacts were identified at an early stage and have been addressed by the amendments contained in the Parole (Extended Supervision) and Sentencing Amendment Bill.

7. The key findings of our review include:

   (a) **Minimum terms of imprisonment:** Despite some difficulties with the drafting of the sections allowing the imposition of minimum terms, they have been imposed in cases of serious offending where the culpability of the offender has been high and aggravating factors have been present. The types of offending in which minimum terms have been imposed have also gone beyond the old "serious violent offence" category, with serious

drug offending and burglary offences attracting such terms in some instances. Concerns about the drafting of section 86 have been addressed in the Parole (Extended Supervision) and Sentencing Amendment Bill.

(b) **Sentencing for murder:** The new regime for murder appears to be working well. The law has been able to address the individual circumstances of the offences and offenders in the sentencing process. The longest ever minimum periods of imprisonment for a life sentence for murder have been imposed this year in recognition of the very serious aggravating factors in those cases, and the high culpability of the offenders. We have also seen the first determinate sentence for murder imposed, with 18 months imprisonment imposed on a 77 year old man convicted of murdering his ill wife.

(c) **Preventive detention:** The new preventive detention regime is having some impact with a sentence of preventive detention imposed for aggravated robbery, an offence for which it was not available prior to the Act. Minimum periods of imprisonment, which now have to be set in every case, have been shorter under the Act than they were under the CJA.

(d) **Reparation:** Reparation sentences were imposed in 8.6% of convicted charges in 2002/2003. This was greater than the total percentage of reparation sentences and part payment of fine orders imposed in each of the four previous years. The use of reparation in combination with other sentences has also increased. Twelve percent of charges where reparation was imposed in 2002/03 also had a sentence of imprisonment. This is a greater proportion than previous years (6% – 8%). The largest reparation sentence imposed was for $377,518.

(e) **Fines:** The increased use of fines in appropriate cases was one of the objectives of the Act. The statistics do not show an overall increase in the use of fines during the first year. Explanations for this are that the Act placed a greater emphasis on reparation than fines, and removed the part payment of fines to victims. Consequently, where a fine would previously have been imposed with part payment to go to the victim, instead reparation would be imposed alone. This would tend to artificially lower the use of fines. Also, an offender's ability to pay remains a key determinant in whether a fine is imposed for offences that have other penalties available. It is likely that offenders who would not have had a fine imposed on that basis would continue to have no fine imposed.

(f) **Home detention:** The courts have interpreted section 97 of the Act (leave to apply for home detention) as creating a strong presumption that leave must be granted. The proportion of eligible cases in which leave has been granted has increased from 33.7% to 46.3%. This was not intended and amendments have been introduced to address this situation.

(g) **Deferral of sentences:** The power to defer the start date of sentences of imprisonment has been used far more than under the CJA. In part this may be because of the statutory example in section 100 allowing deferral if there are special circumstances "such as retention of employment". Again, amendments have been introduced to address this unintended outcome.

SENTENCING PURPOSES AND PRINCIPLES

8. One of the objectives of the Act was to increase the transparency and consistency of sentencing decisions and provide more guidance in sentencing legislation about matching the type and severity of sentences to the seriousness of the offending and the culpability of the offender.

9. When people talk of the Act providing more guidance about matching sentences to offenders and their offending, the focus generally falls on the purposes of sentencing (section 7), the principles of sentencing (section 8) and the aggravating and mitigating factors to be taken into account when determining an appropriate sentence (section 9). However, that is not the only guidance provided by the Act. The Act provides guidance about when discharge, reparation, fines, community-based sentences or imprisonment should be used in individual cases. With imprisonment, further guidance is provided in terms of the length of imprisonment, minimum periods of imprisonment, and the use of the sentences of preventive detention and life imprisonment. The provision of this multi-layered guidance in the Act is intended to promote greater consistency and transparency in the decision- making process.

Consistency

10. Whether sentencing has become more "consistent" over the course of a year is difficult to measure. The need to have consistency in sentencing (that is, like cases should be treated alike) is a well-recognised principle of natural justice. However, as the Court of Appeal noted in *R v Lawson* [1982] 2 NZLR 219 at 223, "[s]entencing is not an exact science and the circumstances of one offender can rarely be closely compared with those of another". In sentencing offenders, the courts are not concerned with fine distinctions, rather "at achieving reasonable uniformity and avoiding substantial and unjustified disparity".

11. The Act assists sentencing judges and the appeal court in that exercise by providing purposes, principles and sentencing guidance against which to assess a particular decision and provide a basis for comparison between cases.

12. A perusal of sentencing notes from cases decided during the report period demonstrates that, for the most part, sentence type and quantum have been decided on consideration of the particular circumstances of the case, set against a background of precedent from similar cases, and bearing in mind any legislative or policy changes. In arriving at starting points for sentencing purposes, judges frequently cited sentences in analogous cases and, where relevant, referred to judgements of the Court of Appeal setting tariffs for certain types of offending.

13. From the starting point, aggravating and mitigating factors were taken into consideration to arrive at a sentence applicable to the offending in the particular case. Sentences were sometimes appealed on the ground that the sentence was 'manifestly unjust'. In deciding whether to allow such an appeal the court would consider whether the sentencing judge was 'plainly wrong' in arriving at the sentence. In some cases minor adjustments were made to sentences where they considered the sentence was inconsistent with analogous cases.

Transparency

14. Increasing the transparency of sentencing was another aim of the Act. Of the cases that were reviewed, it was generally possible to identify the purposes, principles, aggravating/

mitigating factors, and other considerations that were taken into account by the court when determining the appropriate sentence. In particular, the courts are routinely referring to the specific statutory purposes and principles and factors set out in ss 7, 8 and 9 of the Act. While these are largely a restatement of previous case law, their codification has clearly encouraged courts to make more systematic reference to them.

Requirement to give reasons

15. A specific provision providing for greater transparency is the requirement to give reasons in section 31 of the Act. It provides that a court is required to give reasons in open court for the imposition of a sentence or any other means of dealing with an offender, and for making an order under Part 2 (monetary penalties, community-based sentences, imprisonment, discharge and miscellaneous orders). The reasons may be given with whatever particularity is appropriate to the particular case (s31(2)).

16. Failure to give sufficient reasons for sentencing decisions has been the reason for a small number of appeals. The main area where the issue has been considered is in the context of leave to apply for home detention. A number of recent High Court decisions have ruled that failure to specify consideration of the factors in s97(3) at an appropriate level of particularity would result in an appellate court considering the matter afresh. In particular in *Jensen v The Police* (Auckland, 2/5/2003, A39/03) the court warned that:

> to observe the law and avoid the otherwise inevitable step of an appeal Court having to consider the matter afresh on appeal it is necessary for the judge who sentences an offender to a term of two years imprisonment or less and declines to grant leave to apply for home detention to show that he or she has taken into account all the factors prescribed by s97(3) of the Act by giving reasons at a level of particularity appropriate to the case.

17. An example of failure to give sufficient reasons in a different context is *R v Boyd* (24/6/2003, CA89/03). In that case the sentencing Judge imposed a term of 5 years imprisonment, with a minimum term of imprisonment of 2 ½ years, on a charge of aggravated robbery. The Court of Appeal considered the imposition of a minimum non-parole period afresh because the judge had not given sufficient reasons for imposing it. On further consideration, the court did not consider a minimum term of imprisonment was warranted in the circumstances.

Worst and serious cases

18. Section 8(c) of the Act states that in sentencing or otherwise dealing with an offender, the court is required to impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed. The court is required to impose a penalty near the maximum if the offending is near to the most serious of cases (s8(d)). The court retains a discretion not to impose such a sentence if the circumstances relating to the offender make it inappropriate. Subsections 8(c) and (d) codified the existing common law approach.

19. On the whole, Judges have been consistent in the application of maximum, or near maximum, terms in the types of violent, sexual or drug-related offending that attract the highest penalties. In such cases they have given clear reasons why they have, or have not, imposed the maximum sentence available. Examples of cases in which such sentences have been imposed include *R v Fairburn* (HC, Christchurch, 18/2/2003) where the sentencing judge handed down a term of 15 years for, among other things, kidnapping and "knee capping" the victim, stating: "it goes without saying that your [sic] have gone "off the rails" quite spectacularly." In

addition to imposing high sentences in cases where obvious aggravating factors, such as violence and premeditation, have been present, Judges have also imposed severe penalties for those considered to be "in charge" of serious offences.

20. Judges have been more reluctant to impose penalties at or near the maximum for property offences, unless the offender was a high level recidivist. In *R v Orchard* (24/10/03, Court of Appeal, CA123/03) the offender, who pleaded guilty in the District Court to over 600 charges involving dishonesty, appealed against his sentence of 7 ½ years imprisonment with a non-parole period of 5 years. The offender also had a long history of previous similar offending.

21. The District Court considered that s8(d) was relevant and used a starting point of 9 years (10 years was the maximum available), but reduced that by 18 months to recognise the pleas of guilty. The Court of Appeal, however, considered that while the starting point could have been higher, not enough credit was given for the guilty pleas. They consequently reduced the sentence to 6 years 9 months with a minimum period of 4 years 6 months.

22. In *R v Edwards* (HC, Auckland, 9/3/2003), the defendant was found guilty of managing two businesses at different times while being an undischarged bankrupt (maximum 2 years imprisonment), and using a document to defraud investors of almost $500,000 (maximum 7 years imprisonment). He had a history of similar offending, had been blatantly dishonest, and had taken advantage of people who could not afford the consequences of his fraud. Apart from his ill health there were no mitigating factors. He received a 5 ½ year sentence.

23. In the case of both s8(c) and s8(d) the court has a discretion not to impose a sentence at or near the maximum where the circumstances of the offender make it inappropriate. For example, in *R v Hovell* (HC, Gisborne, 26/11/2002, S11-02) the defendant was found guilty of 41 counts of indecent assault on a boy under 16 and 33 counts of inducing an indecent act on a boy. Both types of charge were punishable by a maximum of 10 years imprisonment. The sentencing Judge considered that the offending was an example of the most serious of its kind because of the abuse of trust involved and persistence of the offending over time. The Judge consequently arrived at a starting point of 9 ½ to 10 years. However, after taking into account various mitigating factors the final sentence was 6 years imprisonment. In order of importance, the mitigating factors were: a guilty plea and detailed confession, the offender's steps towards rehabilitation, an offer to make financial amends by selling all the livestock on his farm, his age (68) and health, and his previous good record.

24. A second example is *R v Mouat* (HC, Gisborne, 2/5/2003) where a 15 year old male broke into an elderly lady's house and attempted to rape her, then robbed her. The sentencing judge condemned the youth's conduct: "The prolonged savagery and cruelty of your attack defies rational belief. You beat an old lady senseless in what she believed was the sanctity of her own home…You consigned her last two years to what must have been a living nightmare". The judge concluded that such offending required a starting point of 10 years, which was the maximum available for attempted sexual violation. However, he lowered this to 8 years to reflect the guilty plea, age of the offender at the time, remorse, and previous good record, although he also imposed a minimum non-parole period of 5 years and 2 months (the maximum available).

25. Because the decision as to whether certain offending warrants the maximum penalty involves a reasonable degree of subjective assessment on the part of the sentencing judge, there have been cases where terms of imprisonment close to the maximum have been lowered on appeal. In *Watene v The Police* (HC, Whangarei, 26/5/2003), the defendant was found guilty of

inflicting grievous bodily harm with intent to injure after he beat his young son and threw him against a wall. The sentencing judge took a starting point of 7 years (the maximum available) and deducted 1 year for the defendant's guilty plea and remorse. On appeal, the High Court quashed the term and substituted one of 4 years and 6 months on the grounds that, although the offending was serious, the Courts had been faced with instances of child abuse spanning longer periods of time and involving the use of weapons.

Restorative justice

26. The Act refers to restorative justice processes in a number of provisions. The Act provides that the court must take into account the outcome of restorative justice processes and the Act allows the court to adjourn proceedings for restorative justice processes to be completed.

Restorative justice conferences

27. Our review of case law shows there have been some cases in which restorative justice processes have been considered during sentencing. There have been several cases in which the offender has requested a conference, but the victim has declined to take part. The offenders' desire to have a conference was viewed as indicative of remorse, but little weight was attached to it as a mitigating factor.

28. In *Glenie v The Police*, the offender appealed against a sentence of 6 months imprisonment imposed for charges of using a document for pecuniary advantage and theft as a servant. A restorative justice conference had been held, but the victim was not satisfied with the outcome. The appeal was on the grounds that the judge should not have imposed a custodial sentence in the circumstances. The High Court, in dismissing the appeal, noted that the judge had taken the restorative justice conference into account as required, but had not been satisfied that a non-custodial sentence would be sufficient given the poor outcome of the conference.

29. In *R v Ali* the defendant was sentenced to 2 years' imprisonment and granted leave to apply for home detention for an aggravated robbery. There were several mitigating factors in that case including a successful restorative justice conference. In referring to the conference the judge noted that:

> it is significant that a degree of understanding on your part took place as to the impact of your offending and that the complainant was prepared to acknowledge your problems and shake your hand at the end and wish you well.

Offers and agreements to make amends

30. Section 10(1) of the Act provides that the court must take into account any offer, agreement, response or measure to make amends by or on behalf of the offender. This builds on section 12 of the CJA, as amended in 1993.

31. Section 10(2), however, goes on to state that in deciding whether, or to what extent, a matter in s10(1) should be taken into account, the court must take into account whether or not it was genuine and capable of fulfilment, and whether it was accepted by the victim as expiating or mitigating the wrong. In *R v Hovell* (HC, Gisborne, 26/1//2003, S11-02) the court observed that "it is the offer and acceptance of reparation and what it symbolises which is important" and in *R v Zhang* (DC, Hamilton, 28/10/2003, T024449) the court stated that "[t]he correct approach is simply to say; recognise the benefit of reparation; recognise the motivation for it,

and make an appropriate allowance". It should however be noted that the court may still impose a sentence if, despite any offer, agreement, response, measure or action outlined in s10(1), it still considers a sentence appropriate.

32. This provision has been the subject of a number of high profile cases during the first year of the Act's operation. Opposition parties and the media have labelled it "cheque book justice", with allegations of voluntary payments to victims being used to buy time off prison sentences. There appears to have been a failure to appreciate the importance of section 10(2) of the Act, which specifically refers to whether and to what extent the offer should be taken into account and the victim's response to that offer. A review of the judgments shows that the judges are acutely aware of this problem of perception and have addressed it in their sentencing notes.

33. An example of where the offender or their family have offered voluntary financial reparation to victims includes *The Police v Walker* (DC, New Plymouth, 8/11/2002). The defendant's family repaid the $60,000 she had stolen from her employer. While taking the reparation into account, the judge noted that it did not negate the criminality involved in the offending and sentenced her to 5 months imprisonment with leave to apply for home detention.

34. In *Zhao v The Police* (HC, Hamilton, 6/6/2003, AP32-03) the defendant was travelling at excessive speed before he lost control of his car and crashed into a stationary vehicle, killing a child and seriously injuring her father (the McCarten case). The trial judge sentenced Zhao to 2 years imprisonment, with leave to apply for home detention, and disqualified him from driving for 5 years. He also ordered him to pay $16,100 in reparation and recorded his family's offer to pay $40,000 to the dead child's kindergarten.

35. On appeal the court reduced the sentence of imprisonment to 12 months, because in part it considered that the trial judge had not made sufficient allowance for the reparation which had been ordered ($16,100) and the offer of amends which had been made and apparently accepted ($40,000). The judgment however specifically stated that:

> …offenders and their families should not have any grounds to believe that they may be able to effectively buy themselves out of prison by making an offer of reparation under s10.

36. This case also raised a number of issues about the advice and information offered to victims about reparation, offers of amends and the role of victims in the sentencing process. These issues were raised in a comprehensive report prepared by the victim's mother's family, which has been considered separately.

37. The genuineness of an offer of voluntary reparation is an important consideration when determining whether and to what extent the offer should be taken into account in terms of s10(2). In *Haque v The Police* (HC, Christchurch, 25/9/2002, AP97/02) the appellant appealed against a sentence of 12 months imprisonment on 5 charges of false pretences, on grounds including that his offer of reparation had not been taken into account. The court concluded that it could not be said that the sentencing judge had been plainly wrong, taking into account all the circumstances including the fact that his offers of reparation were hollow as he had no means to pay.

38. Likewise, in *R v Singh* (13/3/2003, CA336/02) the Court of Appeal held that it was not satisfied that the trial judge had been wrong to give little, if any, weight to the appellant's offer to pay reparation. The offender still had around $10,000 in reparation outstanding on another matter. The court shared the trial Judge's view that if the appellant "were to have

produced a receipt… for at least the outstanding amount of reparation, the provisions of s10(1)(a) would assume more prominence".

Other restorative justice initiatives

39. The court-referred restorative justice pilot began in September 2001 in 4 courts (Waitakere, Auckland, Hamilton and Dunedin). To date approximately 1100 cases have been referred to allow the possibility of a restorative justice conference to be investigated and 400 conferences have been completed. The outcome evaluation of the pilot is due at the end of 2004, and a comparative analysis of reoffending rates for offenders who participated in the pilot and those who did not is due in mid 2005.

40. The Ministry is also continuing to work on a policy framework to facilitate the development of restorative justice processes. This includes the development of restorative justice processes in the court, clarification of agencies' roles and responsibilities, and guidance for Government and government agencies in considering funding proposals for new initiatives.

Aggravating and mitigating factors

41. Section 9 of the Act contains a non-exhaustive list of 10 aggravating and 7 mitigating factors that the court must take into account when sentencing an offender. These factors are in essence a codification of aggravating and mitigating factors found in case law. No weight is prescribed to any factor, and in practice the weight attributed to each factor depends on the purposes of sentencing that the Judge wishes to emphasise by the sentence imposed.

42. Diminished intellectual capacity or understanding is listed as a mitigating factor. However section 9(3) specifically provides that if the diminished capacity or understanding is the result of the voluntary consumption of alcohol or drugs, then it must not to be taken into account. While this reflects sentencing practice and legislation prior to the Act, it is important that this position is clearly articulated in the provision listing aggravating and mitigating factors. This factor was most commonly considered when offending took place following the consumption of alcohol, however this factor is also coming into play with the recent publicity given to offending involving methamphetamine use.

43. Our review of case law shows that judges' sentencing notes during the report period were generally quite detailed in regard to aggravating and mitigating factors they were taking into account. This was true, both in terms of stating the factors relied on in setting the sentence, and also in comparing the factors present in similar cases. This makes the judgments more transparent and provides a good basis for future analysis and consideration on appeal.

44. The approach taken depends on the judge's approach to the sentencing exercise guided by precedent. In some cases the aggravating factors are seen as determining the starting point, with deductions made from that figure for any mitigating circumstances. In other cases judges use the "standard" or starting point for a "normal" case and make additions for aggravating factors and deductions for mitigating factors to arrive at the final sentence. Whatever the approach, the judgments we have considered generally set out in some detail what they consider are the aggravating and mitigating factors in the facts before them.

45. We comment below in more detail on two of the aggravating factors, "home invasion" and "hate crimes".

"Home invasion"

46. The Act repealed the provisions of the Crimes (Home Invasion) Amendment Act 1999 which had increased the maximum penalty for a range of offences where the Court was satisfied that the offence involved 'home invasion' as defined. In its place the Act, as part of its overall approach, provides that unlawful entry or presence in a dwelling place is an aggravating factor (section 9(1)(b)). Also, in the case of murder, if the offence involves unlawful entry to a dwelling place a minimum period of imprisonment of 17 years or more must be imposed unless the Court is satisfied that it would be manifestly unjust. This starting point is significantly more than the 13 years provided for under the previous legislation.

47. Section 9(1)(b) has been mentioned in a number of cases since the Act came into force. A recent example is *R v Watson* (CA 224/03) in which the Court of Appeal considered a sentence imposed for aggravated burglary (maximum penalty 14 years). The sentencing judge had used a starting point of 10 years and imposed a sentence of 6 years taking into account the offender's guilty plea. In determining the starting point the judge specifically referred to section 9(1)(b) and "home invasion", stating that:

> Now the law provides that home invasion is one of a number of aggravating circumstances. In point of fact so far as home invasion is concerned I really do not think that the law has changed very much at all. Home invasion has always been an aggravating factor and that is one of the reasons why specific mention of it in the Criminal Justice Act before June of last year was removed.

48. The appeal against sentence was on the ground that it was manifestly excessive. Defence counsel submitted that because of the repeal of the home invasion laws and its listing as an aggravating factor home invasion should not be used to increase the relevant starting point. On that basis, he submitted the starting point should be 7 years. In responding to this submission the court noted that while aggravated burglary inherently involves an intrusion into premises:

> Where that intrusion is into a private dwelling house, that is an aggravating factor. It was so regarded by the courts prior to the enactment of the home invasion legislation and is now expressly listed as an aggravating factor in the Sentencing Act 2002.
>
> […]
>
> As we have already noted the sentencing Judge was alive to the requirements of s9(1)(b) of the Sentencing Act 2002 in determining a sentence that included the element of home invasion as an aggravating factor.

49. The appeal was dismissed. This case illustrates that where home invasion is part of the offending it is being recognised and taken into account at all stages of the sentencing process.

"Hate crimes"

50. Parliament also included the aggravating factor of "hate crimes" in the list of aggravating factors the Court must consider (section 9(1)(h)). This factor codifies what had previously been noted as an aggravating factor in cases with respect to the race or sex of victims.

51. There has been one significant case in the first year of the Act's operation where s9(1)(h) has been relied upon. In *R v Moon* (CA366/02, 27 February 2003) the sentencing Judge indicated that the offending involved "racial overtones". The defendant in that case had sprayed the letters "KKK" and other graffiti on the victim's apartment door. When

confronted by the victim and told to remove the graffiti the defendant sprayed paint at the victim's face.

52. Although the Court of Appeal reduced the sentence imposed at first instance because the starting point of eight years was "manifestly excessive", the Court did confirm that the sentencing Judge had correctly determined the relevant aggravating factors, including the "racial overtones", and that there were no mitigating factors. As there has only been one case to date which has referred to the "hate crime" factor, no definite conclusions can be drawn regarding the courts' approach to its use during sentencing.

SENTENCING FOR MURDER AND HIGH RISK OFFENDERS

53. Changes to how murder and high-risk offenders are dealt with were a significant part of the reforms. The old "serious violent offence" and "home invasion" provisions were repealed and replaced with a new regime for both murder and other offences that focuses on the individual circumstances of the offending and the offender in setting the appropriate sentence.

54. The intention was to introduce a more flexible approach that was able to respond to the variety of factors that can arise in an individual case, and provide the sentencing court with the necessary tools to deal with offenders appropriately on the circumstances that were presented before them, rather than having to rely on rigid and arbitrary distinctions.

55. The main areas of reform were a:

    (a) New sentencing regime for murder;

    (b) New approach to preventive detention; and

    (c) Wider availability of minimum terms of imprisonment.

Sentences for murder

56. The Act provides that life imprisonment is now the maximum penalty for murder rather than the mandatory penalty, however, a strong presumption in favour of its use remains (section 102). Finite penalties are only available for murder if a life sentence would be "manifestly unjust". Such sentences were intended to apply in exceptional cases such as mercy killings, failed suicide pacts and situations involving battered defendants, where life imprisonment would be "manifestly unjust" on the facts.

57. If a life sentence is imposed the minimum term of imprisonment is 10 years. However, this may be increased if the circumstances are considered to be sufficiently serious (section 103). The Act also introduced a minimum non-parole period of 17 years for murders committed where certain aggravating factors are present (section 104). This more flexible approach recognises that circumstances in murder cases can and do vary markedly, which can impact on the culpability of an offender.

58. This change to the structure of murder penalties has resulted in a significant change to the range of sentences imposed for murder in 2002/2003. In 2002/03 the range was a determinate sentence of 18 months to life imprisonment with a minimum non-parole period of 30 years, the longest ever in New Zealand history.

59. In summary, between 1 July 2002 and 30 June 2003, 26 offenders were convicted of murder. Half of the sentences imposed were life imprisonment with a non-parole period of more than 10 years, whereas in the previous year just over a third (35%) of life sentences had a non-parole period exceeding 10 years. Table 1 sets out all the sentences imposed for murder over the last 5 years.

Table 1: Sentences imposed on offenders convicted of murder

Sentence imposed	1 July 1998 – 30 June 1999		1 July 1999 – 30 June 2000		1 July 2000 – 30 June 2001		1 July 2001 – 30 June 2002		1 July 2002 – 30 June 2003	
	No.	%	No.	%	No.	%	No.	%	No.	%
Determinate imprisonment[1]	-	-	-	-	-	-	-	-	1	3.8
Life with 10 year min	22	100.0	21	75.0	15	75.0	17	65.4	12	46.2
Life with >10-15 year min	0	0.0	5	17.9	4	20.0	7	26.9	8	30.8
Life with >15-20 year min	0	0.0	2	7.1	1	5.0	2	7.7	3	11.5
Life with >20 year min.	0	0.0	0	0.0	0	0.0	0	0.0	2	7.7
Total	22	100.0	28	100.0	20	100.0	26	100.0	26	100.0

Notes:
1. A dash (-) in this and subsequent tables indicates that the sentence type was not legislated for in that particular time period.

Finite sentences for murder

60. During the Act's first year of operation, only one finite sentence for murder was imposed. A second was imposed, however it was overturned on appeal and a life sentence was substituted. Despite the limited number of determinate sentences imposed, counsel have submitted that it would be "manifestly unjust" to impose a life sentence on their client in a number of cases. In addressing such submissions, either at first instance or on appeal, the courts have provided some indication as to when finite sentences might be appropriate.

61. The key element of the test is that a life sentence would be "manifestly unjust". This term is not defined in the Act, however the Courts have held that it is a high threshold. In *R v O'Brien* (HC, New Plymouth, 21/2/2003, T06/02) the court commented that:

> "Unjust" can only mean that in the context of a particular murder and a particular offender, the normal sentence of life imprisonment runs counter to both a Judge's perception of a lawfully just result and also offends against the community's innate sense of justice. "Manifestly" means that injustice must be patently clear or obvious."

62. The matters that the courts have identified as affecting the exercise of the s102 discretion were summarised in *R v Rawiri & ors* [2003] 3 NZLR 794:

> The assessment of manifest injustice falls to be undertaken against the register of sentencing purposes and principles identified in the Sentencing Act 2002 and in particular in the light of ss7, 8, and 9. It is a conclusion likely to be reached in exceptional cases only, as the legislative history of s102 suggests was the expectation. Thus, on introducing the Sentencing and Parole Reform Bill, the Minister of Justice (at 594 NZPD 10910) referred to its retention of "a strong presumption" in favour of life imprisonment for murder":
>
> > However, in a small under of cases, such as those involving mercy killing, or where there is evidence of prolonged and severe abuse, a mandatory life sentence is not appropriate. Under this legislation, the court will be able to consider a lesser sentence.
>
> While youth is a factor to be taken into account in sentencing, it is part only of a wider public interest (*R v Fatu* [1989] 3 NZLR 419, 431; *R v Mahoni* (1988) 15 CRNZ 428, 436). Where the offending is grave, the scope to take account of youth may be greatly circumscribed. …

63. What amounts to 'manifestly unjust' turns on the particular facts of the case, however as stated by the Court of Appeal, it is a conclusion likely to be reached only in exceptional cases.

This is consistent with the policy underlying the provision, in that it is to allow a response appropriate to the individual circumstances of the offence and the offender to be imposed.

Imposition of finite sentences for murder

64. The presumption in favour of life imprisonment was displaced in *R v Law* (HC, Hamilton, 29/8/2003, T021094). The offender was a 77 year old man who killed his 73 year old wife who was suffering from dementia as a result of Alzheimer's disease. The offender told the police that he and his wife had years ago made a pact that if either got Alzheimer's they would "do each other in". He hit her over the head with a mallet and suffocated her, before trying to take his own life.

65. The trial Judge sentenced the defendant to 18 months imprisonment with leave to apply for home detention. In arriving at the sentence the Judge took into account the total circumstances of the offending, including the fact that his wife had Alzheimer's and that he was emotionally exhausted and stressed from caring for her. The judge noted that the defendant accepted responsibility for his wife's death, contacted the police, and pleaded guilty to the charge of murder. The defendant was also in poor health, was of good character, and posed no future risk of offending. However, despite all of the mitigating factors, the Judge felt that a period of imprisonment was required to recognise the high value which the Courts and community attached to human life.

66. A finite sentence was also imposed at first instance in *R v Mayes* (CA, 16/10/03, CA26/03). The defendant stabbed his "on again, off again" partner during a dispute after she had come to his home and drunk alcohol with him. At the time he was on bail on a charge of assault against the victim, which included conditions that he not consume alcohol or associate with her. He had a mental disability as the result of a previous head trauma, which the sentencing Judge held reduced his ability to control himself, and consequently his culpability.

67. Weighing the defendant's lower culpability against his offending and future risk to the community, the sentencing Judge held that a sentence of 12 years imprisonment with a minimum term of imprisonment of 8 years was appropriate. The Court of Appeal on appeal by the Solicitor-General, quashed the sentence and substituted one of life imprisonment. The Court reasoned that while there was room for humane appreciation of the offender's head injury, it also had to be remembered that he was influenced by alcohol at the time, which was in breach of his bail conditions. Furthermore, the Court did not share the sentencing Judge's inclination to read down the future risk of a violent reaction to stressors or perceived provocation so as to displace the need for possible recall for the rest of his life.

68. The courts, while not imposing determinate sentences, have also considered the effect of mental disorders on the presumption of life imprisonment on several other occasions. In *R v O'Brien* (16/10/2003, CA107/03) the Court of Appeal held that in the context of a criminally motivated and brutal attack on a vulnerable victim, a mild intellectual impairment, even when coupled with youth, was not sufficient to displace the presumption. However, the Court noted that:

> There may be cases where the circumstances of a murder may not be so warranting denunciation and the mental or intellectual impairment of the offender may be so mitigating of moral culpability that, absent issues of further risk to public safety, it would be manifestly unjust to impose a sentence of life imprisonment.

69. The risk to public safety identified by the Court in *O'Brien* was considered in *R v Mikaele* (HC, Auckland, 30/8/2002, T013638). The defendant was found guilty of killing a 78 year-old male acquaintance during a dispute. The sentencing Judge accepted that the defendant's mental disorder, which had been caused by a prior head injury, could be a factor that qualified as rebutting the s102 presumption. However, he sentenced the defendant to life imprisonment on the ground that the result was not manifestly unjust because of the ongoing danger he posed to society.

70. Counsel have also submitted that the youth of their clients was a factor that would make a life sentence "manifestly unjust". The Courts have held that youth of itself is not sufficient to displace the presumption of life in cases where ss21 and 22 of the Crimes Act do not apply (children under 10 or 10-14 but unaware that the offence is wrong or contrary to law). The Court of Appeal noted in *R v O'Brien* that "[y]outh is not necessarily immune from wickedness".

71. Also, in *R v Rawiri & ors* the offender's youth, remorse, reparation of $2000 from her family, and the fact that she had been a victim of offending prior to her own offending, were upheld on appeal as insufficient to justify departing from the presumption of life imprisonment. Likewise, her co-offender's sentence of life was upheld on the ground that his youth (15 at the time of offending) was insufficient to justify departing from the presumption.

72. The courts have noted that the threshold is a high one before the presumption of life imprisonment may be displaced. The examples indicate that while a flexible approach is being taken, the fact that an offender may suffer from a mental impairment or is youthful is not itself sufficient to justify a departure from the presumption of life imprisonment. Issues of the risk to public safety posed by the offender are also being considered in determining whether a finite sentence is appropriate or not.

Minimum periods of imprisonment if life imprisonment imposed – section 103 of the Act

73. Where a life sentence for murder is imposed, the starting point is a minimum period of imprisonment of 10 years. The court may increase that period if it is satisfied that the circumstances of the case are "sufficiently serious" (s103). Section 103 is subject to s104 which provides that if one of the aggravating factors listed in s104 is present, the court must impose a minimum period of at least 17 years unless it is satisfied that it would be manifestly unjust to do so.

74. The purpose of minimum periods of imprisonment has been identified by the courts as "to achieve greater punishment, denunciation and deterrence than would be achieved under the normal period of ten years". The courts have identified the main consideration in imposing minimum periods as culpability, which is increased by factors such as unusual callousness, extreme violence and multiple or vulnerable victims. The Court of Appeal in *R v Bell* (7/8/2003, CA80/03), citing *R v Howse*, said that in determining the quantum of a minimum period "the primary comparison is between the individual case and datum of ten years. Comparisons with other cases are secondary, albeit necessary and important as a check, and for parity reasons". In *Howse* the Court of Appeal noted that strictly arithmetical comparisons between cases were not particularly helpful, but that they provided a framework which was difficult to obtain from any other source.

75. While the approach to imposing minimum periods of imprisonment appears to be settled, there has been some concern expressed by the courts about the drafting and language used in

section 103, in particular the "sufficient serious" criterion and the "out of the ordinary range of offending of the particular kind" test. This issue has been addressed by the Parole (Extended Supervision) and Sentencing Amendment Bill.

76. Cases where minimum periods have been imposed under s103 have often involved a number of serious aggravating factors, which have displaced the effect of any mitigating factors. In *R v Lyon* (HC, Dunedin, 18/10/2002, T022887) the sentencing Judge imposed a minimum period of 15 years because the murder had been premeditated and accompanied by rape. It had occurred in the victim's home (although it was accepted that she had invited him in) and had been motivated by the need to dominate and violate. In addition the offender had taken calculated steps to avoid detection, including setting the body on fire. These aggravating factors were sufficient to justify a minimum period even though the offender was only 18 at the time, had no previous convictions, gave himself up and pleaded guilty, and expressed a willingness to receive help.

77. There have also been several cases where a single serious aggravating factor has been held to justify a minimum period. In *R v Thompson* (HC, Palmerston North, 9/9/2002) the defendant was sentenced to a minimum non-parole period of 12 years on the ground that there were two victims. Similarly, in *R v Murray* (HC, Nelson, 10/2/2003, S2/03) a 12 year minimum period was imposed because of the brutal and horrific nature of the wounds inflicted by the offender.

78. Two of the most serious murder cases dealt with during 2002/03, *R v Howse* (the murder of Olympia Jetson and Saliel Aplin) and *R v Bell* (the RSA Murders), would have come under section 104 however the offences in question were committed before the Act came into force. Despite the fact that section 104 did not apply minimum periods of imprisonment of 25 and 30 years respectively (reduced from 28 and 33 on appeal) were still imposed because of the serious aggravating factors in those cases.

Minimum periods of imprisonment if life imprisonment imposed – section 104 of the Act

79. Section 104 sets out a list of situations where a minimum period of 17 years must be imposed under s103.

80. The Court of Appeal considered the approach to s104 in *R v Parrish* (12 December 2003, CA 295/03). The offender was found guilty of murdering his estranged wife, and sentenced to life imprisonment with a 13 year non-parole period. The sentencing Judge found that while s104 of the Act did apply, a 17 year minimum period would be manifestly unjust on the basis of the offender's age (67) and ill health (prostrate cancer) and imposed a minimum period of 13 years. The offender appealed against sentence arguing that the minimum period imposed was manifestly unjust.

81. The Court of Appeal held that there is a strong presumption, where s104 applies, that the minimum period to be served is to be not less that 17 years unless that would result in manifest injustice. The Court went on to emphasise the strength of the presumption stating:

> Section 104 is, however, couched only in mandatory terms, with the result that if, on proven or accepted facts, one of the circumstances prescribed therein is present, the imposition of a minimum period of 17 years imprisonment or more is mandatory. The Court is then expressly directed to impose such a minimum period, pursuant to s103, unless satisfied it would be manifestly unjust to do so.

> A determination of manifest injustice requires an assessment of an offender's personal circumstances alongside the circumstances of the offending and in light of the sentencing purposes and principles. The sentencer must be able to reach a clear view of demonstrable injustice, because this is what the description "manifestly" requires. Therefore, once one or more of the prescribed circumstances in s104 has been identified, it is only in exceptional circumstances that the starting point of 17 years can be departed from.

82. The Court also referred to cases in which it had considered "manifest injustice" as it appears in s102, noting that the term carries the same meaning in both sections. Consequently, mitigating factors such as age, whilst a relevant factor, will not displace the minimum term in s104 where the offending is grave.

83. In applying this approach to the offender, the Court of Appeal concluded that:

> There were in fact no circumstances of the offending that could have justified a departure from the mandatory minimum term in s104. The mitigating factors identified of old age, poor health and previous good record had no real or direct bearing on the appellant's offending: rather, his premeditated act was vindictive and motivated by jealousy.

84. The Court then, in dismissing the appeal, stated:

> Indeed we can only describe the minimum period of 13 years as a merciful sentence, fixed having regard to the age and state of health of the appellant. A minimum period of 17 years would not have been disturbed.

85. This finding is significant, and means that in cases involving home invasion and the other listed circumstances the starting point will be 17 years unless there are exceptional circumstances. This is a substantial increase over the 13 year starting point under the previous "home invasion" legislation, but at the same time it does provide for individual cases with strong mitigating factors through the "manifest injustice" test.

86. Section 104 also applied in *R v Luff* (HC, Palmerston North, 18/9/2002, S4/02) because the offender fatally shot an unarmed police officer (s104(f)). He also wounded another police officer and held his former girlfriend and her family hostage in their house. He refused to let Police assist the male officer who had been shot, even though there was a possibility he was still alive. Prior to the incident the defendant's firearms licence had been revoked and he was on bail for other offending. He also showed no remorse at the time of offending. Luff was sentenced to life imprisonment with a 17-year minimum non-parole period even though there were mitigating factors such as his age (17) and early guilty plea.

87. In *R v Smith* (HC, Dunedin, 15/5/2003, S03/1402), section 104 was held to apply but a minimum period less than 17 years was imposed because the court determined that it would be manifestly unjust to do so in the circumstances. In that case, a taxi driver drove a woman, whom he had had as a passenger on previous occasions, into the country. In the course of an altercation he assaulted, then killed her in what may have been a sexually motivated attack.

88. The sentencing Judge held that section 104 applied for three reasons. First, taxi drivers have an obligation of responsibility and trust towards their passengers (s104(i)). In addition, in this case the court was also entitled to infer that the murder was to avoid detection for the assault (s104(a)), and that the murder was committed in the course of kidnapping (s104(d)). However, the Judge held that, because the defendant had pleaded guilty, which was uncommon in murder cases, it would be manifestly unjust to apply the s104 presumption. The judge also reasoned that it "would also mean that there is little likelihood of people in

[such] circumstances pleading guilty and one must acknowledge the benefits of that". This can be compared with *Luff* where a guilty plea, in addition to other mitigating factors was held to be insufficient to make the application of s104 manifestly unjust, and the more recent Court of Appeal decision in *Parrish*.

Preventive detention

89. The purpose of the sentence of preventive detention is to "protect the community from those who pose a significant and ongoing risk to the safety of its members", which is spelt out in section 87 of the Act. The Act extended the sentence of preventive detention so that it was available for a wider range of offences and offenders. The key changes were:

- Expansion of the list of "qualifying sexual or violent offences";
- Removal of the requirement that an offender had to have a previous conviction for a qualifying offence;
- Reduction of the minimum eligibility age from 21 years to 18 years; and
- Minimum non-parole period of not less than 5 years must be imposed in every case (as opposed to 10 years under the CJA).

90. The matters that the court must take into account when considering whether to impose a sentence of preventive detention, set out in s87(4) of the Act, have been acknowledged as being "substantially a codification in different words of the matters traversed" in the judgment of *R v Leitch* [1998] 1 NZLR 420 (*R v C*, CA, CA249/02, 17/10/2002). The matters are:

(a) Any pattern of serious offending disclosed by the offender's history;

(b) The seriousness of the harm to the community caused by the offending;

(c) Information indicating a tendency to commit serious offences in the future;

(d) The absence of, or failure of, efforts by the offender to address the causes of the offending; and

(e) The principle that a lengthy determinate sentence is preferable if this provides adequate protection for society.

91. Given the small number of cases that result in a sentence of preventive detention it is difficult to consider the impact of all the changes to preventive detention and whether they are working as intended. The lowering of the age from 21 to 18 years can not be assessed fully at this time. In 2002/03 none of the 14 offenders sentenced to preventive detention was under 21, nor were any cases found in which preventive detention was considered for an offender under the age of 21 years. The youngest person sentenced to preventive detention in 2002/03 was aged 28, with the average age of all people sentenced to preventive detention in 2002/03 being 40 years.

Imposition of preventive detention

92. Table 2 shows that 14 people were sentenced to preventive detention in 2002/03 – a similar number to the average number of such sentences imposed in each of the four previous years (13). Most preventive detention sentences are imposed for sexual violation offences.

Table 2: Most serious offence resulting in preventive detention

Type of offence	1 July 1998 – 30 June 1999		1 July 1999 – 30 June 2000		1 July 2000 – 30 June 2001		1 July 2001 – 30 June 2002		1 July 2002 – 30 June 2003	
	No.	%	No.	%	No.	%	No.	%	No.	%
Rape	7	46.7	6	33.3	2	33.3	4	30.8	5	35.7
Unlawful sexual connection	7	46.7	9	50.0	1	16.7	6	46.2	5	35.7
Attempted sexual violation	0	0.0	1	5.6	0	0.0	2	15.4	1	7.1
Indecent assault	0	0.0	2	11.1	1	16.7	1	7.7	1	7.1
Other sexual[1]	0	0.0	0	0.0	2	33.3	0	0.0	1	7.1
Aggravated robbery	0	0.0	0	0.0	0	0.0	0	0.0	1	7.1
Grievous assault	1	6.7	0	0.0	0	0.0	0	0.0	0	0.0
Total	15	100.0	18	100.0	6	100.0	13	100.0	14	100.0

Notes:
1. Sexual intercourse with a girl aged under 16 years or inducing an indecent act with a boy aged under 16 years.

93. Thirteen of the fourteen individuals sentenced to preventive detention during 2002/03 were convicted of offences that would have been captured under the 'specified offence' definition in the CJA. In *R v Carroll* (HC Christchurch, T 5/03, 10/4/2003), the offender was sentenced to preventive detention for aggravated robbery, an offence for which preventive detention could not be imposed prior to the Act. The offender was convicted of burglary, aggravated robbery, detaining, threatening to kill or cause grievous bodily harm, car conversion and criminal damage. He was sentenced to preventive detention with a minimum non-parole period of 7½ years on the basis of his previous offending record and the risk to the public. The Court of Appeal subsequently confirmed the sentence of preventive detention, but reduced the minimum period of imprisonment to 6½ years.

94. In determining whether to impose preventive detention, the court is required to take into account the 5 matters specified in s87(4). Fro example, in *R v Cumming* (HC, Christchurch, T25/02, 18/12/2002) where the offender was convicted of rape, unlawful sexual connection, attempted sexual violation and other offences which are not specified offences. The offender had previous convictions for dishonesty, violence (assaults and threatening to kill) and driving-related offences. The court noted that it accepted "that you do not have a pattern of serious offending. This is the first occasion of convictions for really serious offending" (see s87(4)(a)). However it imposed preventive detention with a 7½ year minimum non-parole period because of the seriousness of the harm caused by his offending (s87(4)(b)), and information tending to indicate a tendency to commit serious offences (s87(4)(c)).

95. In *R v Ryder* (HC, Christchurch, T20/03, 13/3/2003) the court referred to the offender's prior offending, which appeared to show a pattern of serious offending against children, in sentencing the offender to preventive detention.

96. The offender had convictions between 1985 and 1995 for assault, threatening to kill, kidnapping, assault with a weapon and assault with intent to commit sexual violation where most of the victims involved "young boys". The court also referred to the sentencing notes of Heron J who when sentencing the offender in 1995 to 9 years for assault with the intent to commit sexual violation said that he had no power to impose a sentence of preventive detention but, had there been such a power, he would have contemplated that sentence.

97. Under s87(4)(e) the court must take into account the principle that a lengthy determinate sentence is preferable if this provides adequate protection for society. This point was considered in *R v Bailey* (CA 102/03, 22/7/2003). The High Court imposed preventive detention with a minimum period of imprisonment of 5 years for indecent assault of a boy aged between 12 and 16. The Court of Appeal quashed the sentence, ruling that:

> the nature of the offending of this appellant cannot be characterised as trivial. But neither is it high on the scale of seriousness…while offensive, embarrassing and even frightening to victims, the pattern of offending over this ten year period has not been violent or of an increasing seriousness. It reflects apparent sexual gratification, when disinhibited by alcohol, from low level offending from which he seems to be and was readily deterred. Offending at that level does not warrant the indeterminate sentence of preventive detention without first there having been a lengthy finite sentence as, in effect, a final warning and chance to address underlying problems.

98. On that basis, while the need for a prior qualifying offence has been removed evidence on the other matters in section 87(4) of the Act (listed above) needs to be present in order to support the imposition of preventive detention and balanced against the principle that a lengthy determinant sentence is preferable if appropriate.

Length of minimum period of imprisonment for preventive detention

99. The minimum period of imprisonment for preventive detention was reduced from a minimum of 10 years to 5 years. The purpose of this reduction was to provide greater flexibility to deal with the expanded range of cases and circumstances in which preventive detention can be applied. The 5-year period is only the starting point, and the court must give consideration to the period of imprisonment that is required in each individual case.

100. The Court of Appeal considered the determination of minimum periods for preventive detention in *R v C* (CA249/02, 17/10/2002). The approach to determining the appropriate minimum term was set out as follows:

> Section 89(2) therefore involves the Court in a two step inquiry. First, the Court must assess what minimum period properly reflects the gravity of the offending on the basis just mentioned. Second, the Court must consider whether that period is adequate for public protection purposes. It must be remembered that at this point a decision has already been made to sentence the offender to preventive detention. It has therefore already been established that the offender qualifies for such a sentence and it is appropriate to impose it because of the significant and ongoing risk the offender poses to the safety of the community. What is at issue at the stage now under discussion is whether the minimum period necessary to punish, denounce and deter, after bearing in mind all matters relevant to that inquiry, is enough for the purposes of public protection. If it is not enough, the period fixed at the first step must be increased to the level which is considered necessary for the purpose of public protection.

101. Table 3 shows that the length of minimum non-parole periods imposed by the courts changed significantly after the enactment of the Act. Twelve of the 14 preventive detention sentences imposed in 2002/03 had non-parole periods of under 10 years. The longest non-parole period imposed in the year after the new Act was 11 years. As with other changes to address serious

offending, the use of the guidance depends on appropriate cases coming before the courts, and we would note that in mid-July 2003 a preventive detention sentence with a minimum period of 25 years was imposed.

Table 3: Minimum periods of imprisonment for sentences of preventive detention

Minimum period imposed	1 July 1998 – 30 June 1999		1 July 1999 – 30 June 2000		1 July 2000 – 30 June 2001		1 July 2001 – 30 June 2002		1 July 2002 – 30 June 2003	
	No.	%	No.	%	No.	%	No.	%	No.	%
5 years	-	-	-	-	-	-	-	-	4	28.6
>5 to <10 years	-	-	-	-	-	-	-	-	8	57.1
10 years	14	93.3	17	94.4	5	83.3	13	100.0	1	7.1
>10-15 years	0	0.0	1	5.6	0	0.0	0	0.0	1	7.1
>15-20 years	0	0.0	0	0.0	1	16.7	0	0.0	0	0.0
>20 years	1	6.7	0	0.0	0	0.0	0	0.0	0	0.0
Total	15	100.0	18	100.0	6	100.0	13	100.0	14	100.0

102. The courts have noted that the fact that the minimum period now starts at 5 years is not a matter that will make the court more receptive to the imposition of preventive detention. Before the question of the minimum period arises the decision must first be made to impose preventive detention. The length of the minimum period is not a matter relevant to whether an offender qualifies for the sentence (see *R v Thompson* (HC, Auckland, T020435, 25/7/2002)). The courts have also highlighted in some cases that an offender will not necessarily be released at the end of the minimum period. The New Zealand Parole Board, applying the tests under the Parole Act 2002, will determine whether an offender is released.

Minimum periods of imprisonment for determinate sentences

103. Where a court imposes a sentence of imprisonment of more than 2 years, section 86 of the Act provides that the court may impose a minimum period of imprisonment on an offender if the offending in question is sufficiently serious.

104. The purpose of this provision is to provide the courts with the power to impose minimum periods of imprisonment in those cases where the one-third parole eligibility date is considered inadequate. It was expected that a court might consider one third inadequate for a number of reasons including the seriousness of the offending, an offender's culpability, or the risk the offender poses to the community where there was evidence at sentencing that showed parole eligibility at one-third would not be entertained.

105. The benefits of imposing minimum periods were to provide a flexible means of addressing serious cases and introduce an element of certainty in terms of when the first parole hearing would be held in cases of serious offending. This would avoid the need to hold unnecessary hearings, which has an impact on the Board and all those that participate in its proceedings, in particular the victims of crime and their families.

106. Under the CJA, courts were able to impose minimum periods of imprisonment on offenders convicted of a serious violent offence. Those offenders were not eligible for parole and had a final release date of two-thirds of their sentence. The minimum period imposed by the court could extend that release date to up to 3 months before the sentence expiry date.

107. Offenders sentenced to imprisonment for all other offences were eligible for parole at one third and final release at two thirds. There was no power to impose a minimum period of imprisonment on those offenders no matter how serious the individual circumstances of their offending might have been.

Interpretation of section 86 of the Sentencing Act

108. The first cases involving section 86 did not appear to pose too much difficulty, with courts finding that particular cases were "sufficiently serious" on the facts to justify imposing non-parole periods in excess of one-third of the sentence. However, mention was made about the difficulties involved in the interpretation of the "sufficiently serious" criterion and the "out of the ordinary range of offending of the particular kind" test in section 86 of the Act.

109. The Court of Appeal set out its approach to section 86 of the Act in *R v Brown* [2002] 3 NZLR 670. In *Brown* the Court of Appeal held that the "out of the ordinary range of offending" test in section 86(3) is not intended to be an exhaustive definition of the "sufficiently serious" criterion for imposing a minimum period of imprisonment. The Court in *Brown* also held that minimum period orders were designed for cases of such seriousness that release after one-third of the sentence imposed would represent insufficient denunciation, punishment and deterrence. This approach is consistent with the intention underlying section 86 of the Act.

110. The Court in *R v M & D* confirmed and reinforced the approach in *Brown*. The Court is concerned with whether the sufficiently serious criterion is fulfilled and in terms of *Brown*, with the adequacy of the punishment, deterrence, and denunciation inherent in a one-third period. The Court also noted that section 86 of the Act is intended to apply to all cases involving determinate sentences longer than 2 years, and that the focus is on "increased culpability in the individual case by reference to the presence of aggravating circumstances".

111. While this approach is consistent with the intention underlying section 86, the Court of Appeal has held in successive cases that the "safety of the community" is not relevant to the determination of minimum periods of imprisonment, and overturned minimum periods imposed on that ground. This is not consistent with the policy underlying section 86.

112. The Court of Appeal in *R v M & D* also made a plea to Parliament to revisit the wording of section 86, in particular raising concerns about the term "ordinary range of offending of the particular kind".

113. The Parole (Extended Supervision) and Sentencing Amendment Bill addresses these issues by removing the language identified as problematic by the Court of Appeal and replacing it with a test that reflects the Court of Appeal's approach in *R v Brown*. The bill also clarifies that "safety of the community" is relevant to the imposition of minimum periods.

114. A final point of interpretation to note is that section 86 does not require an application by the Crown or any special procedure to be applied when considering a minimum period of imprisonment. Judges are able to take the initiative and impose minimum periods in cases they consider appropriate. Judges have, in some cases, considered whether the minimum one-third is appropriate as part of their sentencing decision without any application by the Crown. This is consistent with the logic of the Court of Appeal's approach in *Brown*. The Court of Appeal has noted that if a minimum period of imprisonment is being considered, or might be appropriate, the parties should be notified, and given the opportunity to make submissions to

the court on that point. This is in order to comply with the right to natural justice recognised in section 27 of the New Zealand Bill of Rights Act 1990.

Imposition of minimum periods of imprisonment

115. Our review of the case law shows that a number of cases involving serious aggravating factors have attracted minimum periods of imprisonment in excess of the statutory one-third. The approach set out in *R v Brown* and developed in subsequent cases has been applied in a variety of cases.

116. Table 4 shows that approximately 139 people had minimum periods of imprisonment imposed in conjunction with a determinate sentence of imprisonment. This represents 11% of all determinate prison sentences of more than two years that were imposed. Sexual violation, grievous assault and aggravated robbery offences together accounted for just over two-thirds of the prison sentences for which minimum periods were imposed for determinate sentences. Recording of minimum periods of imprisonment in the available data was poor, hence the number of such cases could only be approximated.

Table 4: Approximate number of minimum periods of imprisonment imposed for determinate prison sentences between 1 July 2002 and 30 June 2003, by type of offence

Offence	Minimum term as a proportion of the total imposed sentence					
	40-49%	**50%**	**51-59%**	**60-66%**	**67%**	Total
Manslaughter	1	2	1	1	1	6
Attempted murder	3	0	2	0	1	6
Kidnap / abduct	0	0	2	0	2	4
Rape	0	10	9	7	7	33
Unlawful sexual connection	3	6	2	2	2	15
Aggravated robbery	0	5	1	4	6	16
Grievous assault	2	5	7	5	12	31
Other violence[1]	1	4	0	1	3	9
Property offence[2]	1	2	0	2	3	8
Deal in non-cannabis drugs	2	4	2	1	0	9
Other	0	1	1	0	0	2
Total	13	39	27	23	37	139

Notes:
1. Includes attempted sexual violation, indecent assault, and aggravated burglary.
2. Includes burglary, theft, fraud, arson, and wilful damage.

117. Most (91%) of the non-parole periods imposed required the offender to serve at least half the imposed sentence before becoming eligible for parole, including 43% that required the offender to serve between 60% and 67% of the imposed sentence.

118. Table 5 shows that minimum periods of imprisonment were imposed on a wide range of sentence lengths, ranging from a person with a two year five month sentence for an Arms Act offence having to serve half the sentence before being eligible for parole, to a person with a 17 year sentence for rape having to serve 10 years (the longest possible minimum period) before being eligible for parole.

Table 5: Approximate number of minimum periods of imprisonment imposed for determinate prison sentences between 1 July 2002 and 30 June 2003, by length of imposed sentence

Length imposed	Minimum term as a proportion of the total imposed sentence					
	40-49%	**50%**	**51-59%**	**60-66%**	**67%**	Total
>2 – 4 years	2	7	1	2	8	20
>4 – 6 years	5	15	3	3	8	34
>6 – 8 years	1	6	9	4	3	23
>8 – 10 years	3	4	7	8	9	31
>10 – 12 years	2	6	4	4	6	22
>12 – 14 years	0	1	1	1	1	4
>14 – 16 years	0	0	1	1	2	4
>16 – 18 years	0	0	1	0	0	1
Total	13	39	27	23	37	139

119. The types of offences for which minimum periods of imprisonment have been imposed have not been limited to the former "serious violent offences", but have included property and drug offences. Minimum periods imposed in cases involving sexual offences and violence reflect the expectation that such orders would be used in cases of lengthy determinate sentences where there would be a growing differential between the nominal sentence and parole eligibility at one-third.

120. Of interest is the use of minimum periods in cases involving offences other than serious sexual or violent offences. Two representative examples are:

    (a) *R v Wan Sang Chan* –The offender was convicted of trafficking a large quantity of class A drugs. The judge considered that the case was very serious and imposed a sentence of 8 years imprisonment (14 years maximum). He then imposed a minimum period of 4 ½ years to reflect the serious nature of the offending and the impact that such offending has on the people of New Zealand.

    (b) *R v Goile* – The offender was sentenced to 3 years imprisonment for a variety of driving offences. The offender had a number of similar previous convictions. Based on that and the fact that the offending was committed while disqualified from driving, the judge imposed a minium period of two-thirds of the sentence.

121. Under the CJA it was not possible to impose minimum periods of imprisonment on offenders except for serious violent offences. The new regime is more flexible than the CJA in that serious offences of any type can be considered on an individual basis and a sentence developed to suit the circumstances of the offence and offender.

122. In some cases courts have struggled with the issue of whether a minimum period should be imposed on the facts of an individual case. This does not indicate any concerns about the legislation but rather the difficulty inherent in the sentencing process. Where an order is not made judges, have indicated that the NZ Parole Board will not release an offender on their parole eligibility date if they pose an undue risk to the community, and that the NZ Parole Board's assessment is made on information available at that time.

Transitional Issues

123. In *R v B* (CA 398/02, 7/4/2003, Court of Appeal) following conviction for rape, the offender was sentenced to 9 years imprisonment with a minimum period of 5 years. The offender appealed against sentence. On appeal the court held that:

> [11] Counsel at the hearing in this Court were agreed that there was no power to impose a minimum sentence in respect of offences committed in the early 1980's when that power did not exist. They accordingly agreed that the appeal should be allowed to that extent.
>
> [12] We, too, agree. The minimum sentence is a penalty. To impose it would be in breach of the principle prohibiting retrospective application of criminal penalties to the detriment of the offender; see s6 of the Sentencing Act and s25(g) of the Bill of Rights and for the earlier period s43B of the Criminal Justice Act 1954 as enacted in 1980.

124. The minimum period was set aside on the basis that there was no jurisdiction to impose it. This will continue to be the situation for offending that took place prior to 1993 in cases of sexual offending and other serious violent offences, consistent with well-founded criminal law principle, as endorsed by the Court of Appeal. In response to this situation the Solicitor General has advised Crown Solicitors not to seek minimum orders in cases where the offending occurred prior to 1993 (see *R v Ga & Anor* (T4/02, 12/3/2003, High Court, New Plymouth).

125. This situation is not unusual, and it has been the case with every change to the criminal and sentencing laws. A common example is the increase in rape penalties from 14 to 20 years' imprisonment in 1993. Offending that was committed prior to the increase coming into force (September 1993) is subject to the 14 year maximum.

RANGE OF SENTENCES

126. The range of sentences and orders available to the courts was also changed by the Act. Suspended sentences of imprisonment and corrective training were abolished, and the number of community-based sentences was rationalised from four to two. Guidance was also provided on the appropriate use of each sentence type in legislation. Table 6 shows the number of each type of sentence imposed by the courts in the last five years.

Table 6: Total number of convicted cases resulting in each type of sentence

Most serious sentence imposed	**1 July 1998 – 30 June 1999**		**1 July 1999 – 30 June 2000**		**1 July 2000 – 30 June 2001**		**1 July 2001 – 30 June 2002**		**1 July 2002 – 30 June 2003**	
	No.	%	No.	%	No.	%	No.	%	No.	%
Custodial[1]	8238	8.1	8004	8.4	7942	8.3	7749	8.3	8054	8.4
Community work	-	-	-	-	-	-	-	-	24740	25.8
Periodic detention[2]	21578	21.2	19040	19.9	18515	19.2	17914	19.1	3	0.0
Community service	8727	8.6	7491	7.8	7084	7.4	6298	6.7	-	-
Subtotal – work-related[3]	*30305*	*29.8*	*26531*	*27.7*	*25599*	*26.6*	*24212*	*25.9*	*24743*	*25.8*
Community programme	362	0.4	224	0.2	213	0.2	160	0.2	-	-
Supervision	4985	4.9	4166	4.4	3787	3.9	2924	3.1	1971	2.1
Monetary[4]	48137	47.3	46664	48.7	47689	49.6	47866	51.1	49604	51.7
Other[5]	4695	4.6	4604	4.8	4929	5.1	4569	4.9	5167	5.4
Conviction & discharge	4963	4.9	5547	5.8	6033	6.3	6138	6.6	6368	6.6
Total	101685	100.0	95740	100.0	96192	100.0	93618	100.0	95907	100.0

Notes:

1. The number of custodial sentences shown in this table is greater than the number of new receptions to prison. Some offenders will have already been serving a prison sentence, so the offenders existing 'aggregate' prison sentence will be adjusted to incorporate the new sentence. Also, some offenders who are granted leave to apply for home detention have the sentence start date deferred and do not end up spending any time in a penal institution before being released to home detention. In addition, some people sentenced to terms of prison have already spent significant periods on custodial remand, so have in effect already served the required amount of the imposed sentence.
2. The three periodic detention sentences imposed after 1 July 2002 were the result of rehearings or appeals that were successful.
3. Subtotal of community work and the two sentences it replaced - periodic detention, and community service.
4. Mostly fines, but also includes reparation sentences and a small number of cases where a compensation order was made when the person was convicted and discharged.
5. To come up for sentence if called upon, driving disqualification, suspended prison sentences, and orders under section 118 of the CJA for treatment of the offender in a psychiatric hospital.

127. The use of imprisonment in 2002/03 was the same as in the four previous years, with 8% of all convicted cases resulting in a custodial sentence. This was not unexpected because none of the changes was intended to increase the use of imprisonment as a sanction.

128. The new sentence of community work replaced the sentences of periodic detention and community service. The number and proportion of all convicted cases resulting in community work in 2002/03 were similar to the total number and proportion of cases that resulted in either periodic detention or community service in the previous year. Over the five year period under examination, there was a slight decrease in the use of "work-related" community sentences - from 30% of cases in 1998/99 to 26% of cases in 2002/03.

129. The number and proportion of cases resulting in supervision decreased significantly after the commencement of the Act, although this was a continuation of a decreasing trend across the five year period under examination. Between 1998/99 and 2002/03, both the number and proportion of cases resulting in supervision as the most serious sentence more than halved.

130. Monetary penalties accounted for 52% of the sentences imposed in 2002/03 – a marginally higher figure than in previous years.

Discharge

131. Sections 106 to 108 of the Act deal with discharge of offenders. These sections largely reflect the equivalent provisions of the CJA. While the discretion to discharge was previously unfettered by the CJA, the guidance now provided by section 107 of the Act is essentially the same as the criteria applied by the courts before the Act came into force, and no change in judicial approach was expected. It had been intended to provide even greater guidance in the bill, however, submissions to the select committee indicated that spelling out the factors that had been considered in case law may inadvertently introduce a class bias into the discharge regime, in particular by references to employment situation and reputation.

132. A review of the case law relating to discharge indicates that courts are continuing to take an approach similar to that prior to the Act. The statistics show that there has been no change in the numbers of cases in which discharge without conviction and conviction and discharge have been ordered.

133. However, there are two significant differences between sections 106 and 108 and their predecessors in relation to how cases are disposed of when a discharge is ordered. First, the court may now award compensation (the equivalent of the sentence of reparation). In contrast, the CJA only allowed the court to make an order for restitution of property. Second there is greater flexibility for the court to make orders it would have been required to make had the offender been convicted.

134. Reparation is a sentence and consequently is only available if the offender is convicted and sentenced. In other words, use of discharge provisions under the CJA precluded the victim's interest in reparation for the crime committed from being recognised. This amendment consequently is an important and significant change with respect to victims' rights.

Discharge without conviction

135. Table 7 shows that 3% of cases prosecuted in 2002/03 resulted in the person being discharged without conviction. This is the same proportion as in the 3 previous years.

Table 7: Outcome of all prosecuted cases finalised in the District or High Court[1]

Outcome	1 July 1998 – 30 June 1999		1 July 1999 – 30 June 2000		1 July 2000 – 30 June 2001		1 July 2001 – 30 June 2002		1 July 2002 – 30 June 2003	
	No.	%	No.	%	No.	%	No.	%	No.	%
Convicted	101685	77.4	95740	75.3	96162	75.2	93618	75.3	95907	74.0
Discharge without conviction[2]	3024	2.3	3524	2.8	3723	2.9	3462	2.8	3723	2.9
Not proved[3]	26653	20.3	27706	21.8	27881	21.8	27196	21.9	29779	23.0
Other[4]	88	0.1	127	0.1	120	0.1	132	0.1	171	0.1
Total	131450	100.0	127097	100.0	127916	100.0	124408	100.0	129580	100.0

Notes:

1. Only the most "serious" outcome for each case is shown in this table. For example, say a defendant had two charges being dealt with in a case - one of which resulted in conviction and the other was withdrawn. This case would be included in the table as a convicted case as conviction is a more serious outcome than a withdrawal.
2. Discharge without conviction under section 19 of the CJA, or section 106 of the Act.
3. Cases that were withdrawn, dismissed, discharged, struck out, not proceeded with, or acquitted.
4. Includes cases where there was a stay of proceedings, and cases where the person was found to be under disability or was acquitted on account of insanity and an order was made under section 115 of the CJA.

136. When discharging an offender under section 106, the court can now make an order for the restitution of any property and an order for compensation. Table 8 shows that 9% of cases that were discharged without conviction in 2002/03 included an order for compensation or restitution of property. In the four previous years, the court made an order for the restitution of property for between 4% and 6% of cases.

Table 8: Whether an order for compensation or restitution of property was made for cases resulting in discharge without conviction

Compensation or restitution order made?	1 July 1998 – 30 June 1999		1 July 1999 – 30 June 2000		1 July 2000 – 30 June 2001		1 July 2001 – 30 June 2002		1 July 2002 – 30 June 2003	
	No.	%	No.	%	No.	%	No.	%	No.	%
Yes	150	5.0	158	4.5	221	5.9	136	3.9	320	8.6
No	2874	95.0	3366	95.5	3502	94.1	3326	96.1	3403	91.4
Total	3024	100.0	3524	100.0	3723	100.0	3462	100.0	3723	100.0

Conviction and discharge

137. Section 108 of the Act allows the court to convict and discharge an offender ie. convict the offender, but not impose any sentence. Earlier, Table 6 showed that for 7% of the cases resulting in conviction in 2002/03, the offender was convicted and discharged. This is the same proportion as in the previous year, but a slightly greater figure than in years prior to 2001/02.

138. Table 9 shows that very few (less than 1%) of the conviction and discharge cases in any of the five years included an order for restitution of property or compensation.

Table 9: Whether an order for compensation or restitution of property was made for cases resulting in conviction and discharge

Compensation or restitution order made?	1 July 1998 – 30 June 1999		1 July 1999 – 30 June 2000		1 July 2000 – 30 June 2001		1 July 2001 – 30 June 2002		1 July 2002 – 30 June 2003	
	No.	%	No.	%	No.	%	No.	%	No.	%
Yes	34	0.7	37	0.7	39	0.6	33	0.5	46	0.7
No	4963	99.3	5547	99.3	6033	99.4	6138	99.5	6368	99.3
Total	4997	100.0	5584	100.0	6072	100.0	6171	100.0	6414	100.0

Reparation

139. Reparation is given paramount importance in the Act as a sentence in itself, or as part of a wider sentence. The Act strengthened the provision for reparation by:

    (a) creating a presumption in favour of reparation where the victim suffers loss or damage or emotional harm (Section 12);

    (b) extending reparation to cover compensation for loss or damage *consequential* upon physical or emotional harm (Section 32).

140. The importance of reparation is also reflected in other sections of the Act, such as s14(2) which requires that a sentence of reparation is to be imposed over a fine if the offender does not have means to pay both, and s35(2) which provides that any money received from an offender sentenced to a fine and reparation must go towards satisfying the reparation component first.

141. The Act also removed the ability to order that some, or all, of a fine to be awarded to the victim of physical or emotional harm. It is reasonable to assume that a sentence of reparation would now be imposed in circumstances where such an order would previously have been made (see statistical analysis below).

When an order of reparation is appropriate

142. Section 12 requires a Court to impose a sentence of reparation unless it would result in "undue hardship" to the offender or any other "special circumstances" would make it inappropriate. By far the most common form of "undue hardship" recognised by the Courts is insufficient means to make reparation. As with other monetary penalties, the appropriateness of an order of reparation depends on the offender's ability to pay. Judges have frequently acknowledged that "you cannot get blood out of a stone". In many cases during the report period, reparation was not ordered because the offender did not have the means to pay it. In *R v Vaka* (HC, Auckland, T021669, 28/5/2003) the fact that the offender had no assets, had been remanded in custody and was about to commence a lengthy prison sentence led the Judge to rule that there was no capacity to make reparation. Similarly, in *Mills v The Police* (HC, Wellington, 28/5/2003), where the appellant had been convicted and sentenced on various charges of fraud, France J refused to increase the reparation component of the sentence, which had the possibility of reducing the term of imprisonment, because the appellant's ability to pay more was "optimistic rather than real".

143. The Act requires that an individual's financial capacity be established in order to determine whether reparation is appropriate. If the Court is unsure about the financial capacity of the

offender, the value of loss or the harm sustained by the victim, it can order a reparation report be prepared under s33.

144. In *R v Quayle* (Court of Appeal, CA39/03, 3/7/2003) one of the grounds of appeal was that an order of reparation of $3600 should not have been granted in the circumstances, as no reparation report was before the Court when it sentenced the appellant. The Court of Appeal acknowledged that a reparation report was not a mandatory pre-requisite in ordering reparation. However, the Court went on to note that "it is unwise for a Judge, in our view, to order reparation without such a report where there is evidence which suggests that the offender may not have the means to make payment". The sentencing judge had remitted $575 in fines when imposing the sentence of reparation, which the Court of Appeal considered was "no doubt on the basis of lack of capacity to pay". The Court considered there was an inconsistency between the remission of fines and the order of reparation, and quashed the reparation order.

145. A clear inability to pay reparation is not the only factor that has been held to constitute "undue hardship". In *Leng v New Zealand Customs Service* (HC, Auckland, A.4/03, 4/3/2003) the appellant was convicted of evading the customs revenue owed on a $27,000 sapphire and diamond ring. The ring was forfeited and the Court held that requiring the appellant to pay reparation in the amount of duty owed on the item in addition to forfeiture would result in "undue hardship" and quashed the reparation order.

146. Judges have also been mindful of the effect that an arrangement for reparation can have on the victims. In *R v Thompson* (HC, Christchurch, 15/3/2003, T65/02) the sentencing Judge ordered the defendant to pay a lump sum of $25,000 (plus the cost of airfares to New Zealand for one complainant) on multiple charges of indecent assault against 3 female complainants, who were children at the time of offending. The Judge, in deciding on the lump sum approach, noted (at paragraph 28):

> There was one suggestion that you should make reparation by way of fortnightly payments. That would completely defeat any cathartic element of this process and would require continued reminders of this offending for the complainants.

Statistical analysis of reparation

147. Analysis of trends in the Courts' use of reparation is complicated somewhat by extended availability of reparation under the Act. Under the Act the availability of reparation includes circumstances where, prior to the Act, the court may have imposed a fine and ordered that all or part of the fine be paid to the victim as compensation for physical or emotional harm suffered through the offence. To get around this problem, Tables 15 and 16 respectively show the number and percentage of charges that resulted in reparation or part payment of the fine to the victim in each year, as well as a total of such charges.

148. Table 10 shows that the total number of reparation sentences in 2002/03 was greater than the total number of reparation sentences and part payment of fine orders imposed in each of the four previous years.

Table 10: Number of charges resulting in reparation or part payment of a fine to the victim, by type of offence

Offence type	Compensation type	1/7/1998 to 30/6/1999	1/7/1999 to 30/6/2000	1/7/2000 to 30/6/2001	1/7/2001 to 30/6/2002	1/7/2002 to 30/6/2003
Violent	Reparation	565	487	555	543	1382
	Part fine to victim[1]	893	919	1088	959	32
	Total Rep + PFV[2]	1411	1361	1573	1437	1414
Other against persons	Reparation	42	39	53	45	121
	Part fine to victim	46	44	49	37	8
	Total Rep + PFV	87	83	100	81	129
Property	Reparation	11245	9841	10597	10111	11225
	Part fine to victim	81	97	156	149	3
	Total Rep + PFV	11310	9907	10716	10212	11226
Drug	Reparation	16	8	14	19	73
	Part fine to victim	0	0	0	2	0
	Total Rep + PFV	16	8	14	21	73
Against justice	Reparation	46	43	42	43	74
	Part fine to victim	18	14	19	31	1
	Total Rep + PFV	63	57	61	74	75
Against good order	Reparation	114	129	112	126	201
	Part fine to victim	38	74	89	86	4
	Total Rep + PFV	152	199	198	207	205
Traffic	Reparation	927	776	836	846	1452
	Part fine to victim	385	453	452	473	17
	Total Rep + PFV	1269	1199	1241	1275	1469
Miscellaneous	Reparation	298	278	171	162	270
	Part fine to victim	196	239	168	196	103
	Total Rep + PFV	477	505	326	348	372
Total	Reparation	13253	11601	12380	11895	14798
	Part fine to victim	1657	1840	2021	1933	168
	Total Rep + PFV	14785	13319	14229	13655	14963

Notes:

1. It is not clear why the part payment of fines orders were made in 2002/03, as there is no legislative provision for this.
2. May not total the sum of reparation and part fines to victims, as some charges resulted in both types of compensation.

149. Table 11 shows that just under 9% of convicted charges in 2002/03 resulted in reparation (or in a small number of cases part payment of fines to the victims) – a marginally higher percentage than in the four previous years.

Table 11: Percentage of all convicted charges resulting in reparation or part payment of a fine to the victim, by type of offence

Offence type	Compensation type	1/7/1998 to 30/6/1999	1/7/1999 to 30/6/2000	1/7/2000 to 30/6/2001	1/7/2001 to 30/6/2002	1/7/2002 to 30/6/2003
Violent	Reparation	3.6	3.3	3.7	3.8	9.4
	Part fine to victim	5.6	6.3	7.2	6.7	0.2
	Total Rep + PFV[1]	8.9	9.3	10.4	10.1	9.6
Other against persons	Reparation	1.1	1.1	1.4	1.2	3.0
	Part fine to victim	1.2	1.2	1.3	1.0	0.2
	Total Rep + PFV	2.2	2.3	2.7	2.2	3.1
Property	Reparation	21.0	19.7	20.9	21.5	23.2
	Part fine to victim	0.2	0.2	0.3	0.3	0.0
	Total Rep + PFV	21.2	19.8	21.1	21.7	23.2
Drug	Reparation	0.1	0.1	0.1	0.2	0.6
	Part fine to victim	0.0	0.0	0.0	0.0	0.0
	Total Rep + PFV	0.1	0.1	0.1	0.2	0.6
Against justice	Reparation	0.3	0.3	0.3	0.3	0.5
	Part fine to victim	0.1	0.1	0.1	0.2	0.0
	Total Rep + PFV	0.4	0.4	0.4	0.5	0.5
Against good order	Reparation	1.0	1.1	0.9	1.0	1.5
	Part fine to victim	0.3	0.7	0.7	0.7	0.0
	Total Rep + PFV	1.4	1.8	1.6	1.7	1.5
Traffic	Reparation	1.5	1.4	1.5	1.5	2.7
	Part fine to victim	0.6	0.8	0.8	0.9	0.0
	Total Rep + PFV	2.0	2.1	2.2	2.3	2.7
Miscellaneous	Reparation	3.0	3.5	2.0	1.7	2.2
	Part fine to victim	2.0	3.0	2.0	2.0	0.8
	Total Rep + PFV	4.8	6.4	3.8	3.6	3.1
Total	Reparation	7.1	6.7	7.1	7.0	8.5
	Part fine to victim	0.9	1.1	1.2	1.1	0.1
	Total Rep + PFV	7.9	7.7	8.1	8.1	8.6

Notes:

1. May not total the sum of reparation and part fines to victims, as some charges resulted in both types of compensation.

150. Just under 10% of violent offences in 2002/03 resulted in reparation (or part payment of fines) – a similar figure to the previous few years.

151. Property offences are the most likely offence type to result in reparation. In 2002/03, 23% of all property charges resulted in reparation compared to 20% to 22% of such charges in previous years.

152. Table 12 shows that reparation is not usually imposed as the only sentence. In only one-fifth (21%) of charges where reparation was imposed in 2002/03 was it the only sentence imposed. This is a lower proportion than in the four previous years when 25% to 26% of charges resulted in reparation or a part payment of fine to victim order as the only penalty.

Table 12: Other sentences imposed with reparation sentences and part payment of fine to victim orders

Other sentence	1 July 1998 – 30 June 1999		1 July 1999 – 30 June 2000		1 July 2000 – 30 June 2001		1 July 2001 – 30 June 2002		1 July 2002 – 30 June 2003	
	No.	%	No.	%	No.	%	No.	%	No.	%
Custodial	844	5.7	897	6.7	1043	7.3	1152	8.4	1842	12.3
Community work	-	-	-	-	-	-	-	-	5963	39.9
Periodic detention	4312	29.2	3602	27.0	4066	28.6	3952	28.9	-	-
Community service	1606	10.9	1438	10.8	1291	9.1	1185	8.7	-	-
Subtotal – work-related	*5918*	*40.0*	*5040*	*37.8*	*5357*	*37.6*	*5137*	*37.6*	*5963*	*39.9*
Community programme	132	0.9	55	0.4	105	0.7	92	0.7	-	-
Supervision	1430	9.7	1044	7.8	1023	7.2	751	5.5	594	4.0
Monetary	1883	12.7	1896	14.2	1983	13.9	1996	14.6	2540	17.0
Other	875	5.9	932	7.0	966	6.8	1012	7.4	901	6.0
No other sentence	3703	25.0	3455	25.9	3752	26.4	3515	25.7	3123	20.9
Total	14785	100.0	13319	100.0	14229	100.0	13655	100.0	14963	100.0

153. Twelve percent of charges where reparation was imposed in 2002/03 also had a sentence of imprisonment imposed. This is a greater proportion than in previous years (6% to 8% of charges), and may indicate that the greater emphasis placed on reparation is having some impact.

154. Work-related community sentences are the most common sentences imposed with reparation, with 40% of charges resulting in reparation in 2002/03 having community work imposed in tandem. In the four previous years, 38% to 40% of charges resulting in reparation or part payment of fine orders had either periodic detention or community service imposed at the same time. This would appear to be logical given the greater ability of an offender in the community to pay reparation than one in custody.

155. When the court ordered that part or full payment of the fine should be made to the victim, the proportion or amount of the total imposed fine ordered to be paid to the victim was not recorded in the data on the Law Enforcement System. Therefore, statistics on the total amount of "financial compensation" ordered between 1998/99 and 2002/03 cannot be produced.

156. Table 13 shows the amounts of reparation imposed during this time period. Caution should be exercised when interpreting this information, as the much greater number and total amount of reparation sentences imposed in 2002/03 is an artefact of the missing fine-related information in earlier years.

157. Over $16 million dollars of reparation was imposed in 2002/03, with the median sentence imposed being just under $300. Four percent of reparation sentences imposed in 2002/03 were for amounts exceeding $5,000. The largest such sentence was $377,518.

Table 13: Amounts of reparation imposed[1]

Amount imposed	1 July 1998 – 30 June 1999		1 July 1999 – 30 June 2000		1 July 2000 – 30 June 2001		1 July 2001 – 30 June 2002		1 July 2002 – 30 June 2003	
	No.	%	No.	%	No.	%	No.	%	No.	%
<=$100	4140	31.2	3648	31.4	3673	29.7	3447	29.0	3933	26.6
>$100 to $250	2772	20.9	2410	20.8	2670	21.6	2462	20.7	3172	21.4
> $250 to $500	2270	17.1	1985	17.1	2216	17.9	2077	17.5	2803	18.9
>$500 to $1,000	1759	13.3	1470	12.7	1597	12.9	1558	13.1	1962	13.3
>$1,000 to $5,000	1902	14.4	1694	14.6	1827	14.8	1890	15.9	2356	15.9
>$5,000	410	3.1	394	3.4	397	3.2	461	3.9	572	3.9
Total	13253	100.0	11601	100.0	12380	100.0	11895	100.0	14798	100.0
Median amount	$238		$240		$250		$258		$291	
Total amount	$12,674,931		$11,736,140		$12,752,478		$13,455,043		$16,235,503	

Notes:
1. This table only includes reparation sentences, as the amount of fines ordered to be paid to victims is not recorded in the data.

158. A final note is that, in several cases where offers to make amends were put forward by the defendant, the sentencing judge made an order for the payment of that reparation, presumably to add to the enforceability of the offer. An example of this practice is *R v Cromie* (DC, Christchurch, 21/2/2003, T013412) where the sentencing judge made an order for $377,518 reparation, the whole of which had been offered by the offender and her father.

Fines

159. One of the objectives of the Act was to increase the use of fines and reparation in appropriate cases. On that basis, it is important to consider the use of fines and reparation together when analysing the statistics for each sentence.

160. The Act created a presumption in favour of fines where the purposes and principles of sentencing make such a sentence appropriate. There is a two-stage test in the Act to determine whether a fine is an appropriate sentence. First, consideration is given to whether a fine would achieve the purposes and principles of sentencing. Second, consideration is given to the offender's ability to pay.

161. An important restriction on the use of fines occurs when the court considers that both a fine and reparation are appropriate in the circumstances. If the offender only has the means to pay one and not both, then the court is directed to impose a sentence of reparation and not a fine. This is to ensure that the interests of the victim are given a high priority in the sentencing process.

Statistical analysis of the use of fines

162. Table 14 shows that 33% of convicted charges resulted in a fine in 2002/03 – a marginally lower figure than in 2001/02, but a slightly greater figure than in the three years prior to 2001/02. Miscellaneous offences, traffic offences and offences against good order continue to be the offence categories most likely to result in a fine. This is not surprising given that much greater proportions of these offences are non-imprisonable offences and have a fine as the maximum penalty.

Table 14: Number and percentage of convicted charges resulting in a fine, by type of offence

Offence type	1 July 1998 – 30 June 1999		1 July 1999 – 30 June 2000		1 July 2000 – 30 June 2001		1 July 2001 – 30 June 2002		1 July 2002 – 30 June 2003	
	No.	%	No.	%	No.	%	No.	%	No.	%
Violent	2528	16.0	2427	16.5	2701	17.9	2563	18.0	2174	14.8
Other against persons	842	21.6	861	24.2	984	26.3	876	24.1	1000	24.4
Property	4514	8.4	4779	9.6	4746	9.4	4780	10.1	4477	9.2
Drug	4979	35.0	4773	34.8	4708	35.8	4076	34.9	4087	32.3
Against justice	1047	6.6	1132	7.5	1168	7.6	1684	11.2	1186	8.1
Against good order	4139	38.0	4899	43.3	5315	43.6	5603	45.9	6311	46.0
Traffic	31526	50.5	30630	53.6	31125	55.0	30811	55.8	29531	55.1
Miscellaneous	6104	61.2	4699	59.8	5163	60.5	6231	63.8	8443	69.5
Total	55679	29.8	54200	31.3	55910	31.9	56624	33.5	57209	32.9

163. The presumption in favour of fines did not lead to an increase in their use in 2002/03. However, as noted in the discussion on reparation, the incorporation of circumstances where previously the court could order full or part payment of a fine to a victim into the reparation provisions artificially lowered the number of fines imposed in 2002/03. Another factor that may explain why the use of fines did not increase is that "ability to pay" continues to be an important factor in judicial consideration as to whether a fine is appropriate in the circumstances.

164. Our review of case law about the use of fines was limited by the fact that cases in which fines are imposed usually do not have detailed reasons or sentencing notes recorded on file. However the information available indicates that courts when considering fines did not impose them where the offender did not have the ability to pay. It was generally noted that the offender had no means with which to service a fine, in particular that the offender was unemployed.

165. A survey of District Court Judges in September 2001 (Searle 2003) on their views on court imposed fines found that some judges indicated that they thought the Act would make little difference to what in fact is already current practice because they are already imposing a fine whenever possible. Other judges interviewed were reluctant to see fines used more widely – mainly due to many offenders' inability to pay a fine. The survey found that half of the judges interviewed said they would impose an alternative sentence in more than half the cases because the offender could not afford to pay the fine they would usually impose.

166. Our review of case law and the survey of judges in September 2001 both appear to be consistent with the two step approach to fines, in that consideration is given to whether a fine might be appropriate and then whether the offender has the ability to pay. Where there is no ability to pay or reparation takes priority, an alternative to a fine is selected. This in part could explain no increase in the use of fines.

167. Table 15 shows that $24.3 million dollars in fines were imposed by the courts in 2002/03 - a slightly lower figure than the previous year, but a greater amount than in the three earlier years. As noted above, the incorporation of the part payment of fines provisions into the reparation sentence artificially lowered the number of fines imposed in 2002/2003. The

median fine imposed in the last four years has been $300. Eighty percent of fines imposed in 2002/03 were for amounts of $500 or less. The largest fine imposed in 2002/03 was $55,000.

Table 15: Amounts of fines imposed

Amount imposed	1 July 1998 – 30 June 1999		1 July 1999 – 30 June 2000		1 July 2000 – 30 June 2001		1 July 2001 – 30 June 2002		1 July 2002 – 30 June 2003	
	No.	%	No.	%	No.	%	No.	%	No.	%
<=$100	8559	15.4	6336	11.7	6417	11.5	5778	10.2	6911	12.1
>$100 to $250	19253	34.6	17950	33.1	18089	32.4	17732	31.3	18038	31.5
> $250 to $500	16326	29.3	18458	34.1	19235	34.4	20613	36.4	20549	35.9
>$500 to $1,000	9919	17.8	9767	18.0	10441	18.7	10685	18.9	10279	18.0
>$1,000 to $5,000	1445	2.6	1571	2.9	1604	2.9	1694	3.0	1261	2.2
>$5,000	177	0.3	118	0.2	124	0.2	122	0.2	171	0.3
Total	55679	100.0	54200	100.0	55910	100.0	56624	100.0	57209	100.0
Median amount	$270		$300		$300		$300		$300	
Total amount	$23,690,233		$23,141,686		$23,886,394		$25,010,385		$24,346,145	

Community-based sentences

168. The Act reformed community-based sentences by replacing the sentences of supervision, community programme, community service and periodic detention with two more clearly defined sentences of supervision and community work.

169. The two new sentences are intended to target particular groups of offenders for specific purposes. The two sentences are also clearly distinguished from each other in terms of their sentencing purposes and the requirements placed on offenders. Community work is a reparative sentence aimed at compensating the community. It incorporates elements of community service and periodic detention. Supervision is a rehabilitative sentence for those offenders who are at risk of reoffending, and for whom supervision and monitoring would be likely to reduce that risk. This clear distinction was intended to lead to greater consistency and more appropriate use of community-based sentences.

Community work

170. As shown in Table 16, the number and proportion of all convicted cases resulting in community work in 2002/03 were similar to the total number and proportion of cases that resulted in either periodic detention or community service in the previous year. Over the 5-year period under examination, there was a slight decrease in the use of 'work-related' community sentences - from 30% of cases in 1998/99 to 26% of cases in 2002/03.

Table 16: Number and percentage of convicted cases resulting in periodic detention, community service or community work, by type of offence

Offence type	1 July 1998 – 30 June 1999		1 July 1999 – 30 June 2000		1 July 2000 – 30 June 2001		1 July 2001 – 30 June 2002		1 July 2002 – 30 June 2003	
	No.	%	No.	%	No.	%	No.	%	No.	%
Violent	3285	31.3	3165	32.1	3231	32.1	2981	31.7	3151	33.3
Other against persons	403	24.8	310	21.6	287	18.2	307	20.9	350	20.7
Property	8433	43.2	7870	42.3	7680	40.9	7410	41.4	7800	43.2
Drug	2459	33.8	2113	30.9	1934	29.2	1642	28.5	1762	29.4
Against justice	2939	48.4	2947	48.2	3029	48.4	2986	44.9	2669	44.0
Against good order	871	13.2	764	10.7	827	10.8	701	9.1	886	10.0
Traffic	11611	25.6	9131	21.5	8400	20.0	7932	19.2	7760	19.3
Miscellaneous	344	7.2	261	7.7	240	7.7	285	8.5	365	6.5
Total	30345	29.8	26561	27.7	25628	26.6	24244	25.9	24743	25.8

Notes:
1. Table includes cases where a work-related community sentence was the primary sentence imposed, or the secondary sentence imposed in conjunction with a custodial sentence (before 1 July 2002).

171. Violent offences and property offences were the only offence types for which the use of community work in 2002/03 was the same or greater than the use of periodic detention or community service in all previous years in the decade. In both numerical and percentage terms, the largest decrease in the use of work-related community sentences over the five year period under examination occurred for traffic cases.

172. Table 17 shows that the sentences imposed at the same time as work-related community sentences did not change significantly after the enactment of the Act. Half the community work sentences imposed in 2002/03 had no other penalty imposed at the same time. This proportion was similar to the figures in earlier years for periodic detention and community service.

Table 17: Other sentences imposed with periodic detention, community service or community work

Other sentence	1 July 1998 – 30 June 1999		1 July 1999 – 30 June 2000		1 July 2000 – 30 June 2001		1 July 2001 – 30 June 2002		1 July 2002 – 30 June 2003	
	No.	%	No.	%	No.	%	No.	%	No.	%
Custodial	40	0.1	30	0.1	29	0.1	23	0.1	-	-
Supervision	3316	10.9	3128	11.8	2920	11.4	2348	9.7	2557	10.3
Reparation	2421	8.0	2253	8.5	2335	9.1	2344	9.7	2761	11.2
Fine	200	0.7	166	0.6	168	0.7	145	0.6	-	-
Suspended sentence	773	2.5	601	2.3	505	2.0	469	1.9	-	-
Driving disqualification	8725	28.8	7743	29.2	7187	28.0	6919	28.5	6738	27.2
No other sentence	14870	49.0	12640	47.6	12484	48.7	11996	49.5	12687	51.3
Total	30345	100.0	26561	100.0	25628	100.0	24244	100.0	24743	100.0

173. Ten percent of community work sentences in 2002/03 were imposed concurrently with a supervision sentence. In the four earlier years, 10% to 12% of periodic detention sentences had supervision imposed concurrently.

174. In 1998/99, 8% of work-related community sentences were imposed concurrently with reparation, but by 2002/03 the proportion had increased to 11.2% of cases. The greater emphasis on reparation in the Act may be one factor contributing to this change.

175. As shown in Table 18, the average length of community work sentences imposed in 2002/03 was 127 hours. More than half the community work sentences imposed in 2002/03 were for a duration of 100 hours or less, and a further 35% were more than 100 and up to 200 hours in length. Only 2% of community work sentences were 300 hours or longer in length.

Table 18: Number and percentage of sentences of periodic detention, community service or community work[1] imposed of various lengths and average sentence length

Length imposed[2]	1 July 1998 – 30 June 1999		1 July 1999 – 30 June 2000		1 July 2000 – 30 June 2001		1 July 2001 – 30 June 2002		1 July 2002 – 30 June 2003	
	No.	%	No.	%	No.	%	No.	%	No.	%
= 50 hours	4358	14.4	3821	14.4	3727	14.5	3362	13.9	4788	19.4
>50 to 100 hours	10978	36.2	9574	36.0	9379	36.6	8449	34.8	8447	34.1
>100 to 150 hours	6011	19.8	5423	20.4	5030	19.6	4886	20.2	4424	17.9
>150 to 200 hours	7179	23.7	6417	24.2	6258	24.4	6159	25.4	4194	17.0
>200 to 250 hours	717	2.4	511	1.9	530	2.1	591	2.4	1373	5.5
>250 to 300 hours	1017	3.4	748	2.8	672	2.6	734	3.0	1039	4.2
>300 to 350 hours	60	0.2	50	0.2	21	0.1	40	0.2	239	1.0
>350 to 400 hours	25	0.1	17	0.1	11	0.0	23	0.1	239	1.0
Total	30345	100.0	26561	100.0	25628	100.0	24244	100.0	24743	100.0
Overall average	122 hours		121 hours		120 hours		123 hours		127 hours	

Notes:
1. Table includes cases where a work-related community sentence was the primary sentence imposed, or the secondary sentence imposed with a custodial sentence (before 1 July 2002).
2. Periodic detention was imposed by the courts in day, week or month units up to a maximum term of 12 months. For the purpose of this table, periodic detention sentence lengths were converted to sentences in hours based on the assumption that a periodic detention sentence of 12 months was equivalent to a community work sentence of 400 hours. That is, a conversion factor of 400/12 was applied to the number of months of periodic detention imposed. For example, a 9 month sentence of periodic detention was assumed to be equivalent to 300 hours [9*400/12] of community work.

Supervision

176. The guidance on the use of supervision provided in the Act was intended to ensure that it was imposed only in appropriate cases. That is, those cases where the supervision or monitoring provided under this sentence would have an impact on the rehabilitation of the offender in terms of reducing their risk of reoffending. A good example of the application of this guidance is *R v Waiba* (HC, Auckland, 8/8/2003). The offender was convicted of manslaughter where her son had drowned in the bath while she was talking on the telephone. The pre-sentence report recommended supervision, however the court declined to impose supervision because in that case the judge was:

> Not satisfied that there is a need for rehabilitation and reintegration which is a condition of my having jurisdiction to impose a sentence of supervision.

177. The court instead convicted and discharged the offender on the manslaughter charge, which it considered the more appropriate outcome on the facts of that case, and the circumstances of the offender.

178. It was also expected that this guidance would reduce the number of offenders sentenced to supervision. Table 19 shows that the number and proportion of cases resulting in supervision decreased significantly after the commencement of the Act, although this was a continuation of a decreasing trend across the five year period under examination. Between 1998/99 and 2002/03, both the number and proportion of cases resulting in supervision more than halved. All types of offence have shown a decrease in the use of supervision.

179. The use of supervision for violent offences decreased significantly between 2001/02 and 2002/03 from 23% of cases to 16% of cases. This follows a decreasing trend in earlier years from 30% of violent cases in 1998/99 to 23% of cases in 2001/02. Property offences showed the next largest decrease from 13% of cases in 1998/99 to 9% of cases in 2001/02, before decreasing further to 7% of cases in 2002/03.

180. The Act removed the ability for judges to impose a supervision sentence cumulative upon a sentence of imprisonment of 12 months or less. In place of this, the court can now impose release conditions on short-term prison sentences of 2 years or less. The removal of the ability to combine imprisonment and supervision accounted for about half of the decrease in the total use of supervision – a drop in the order of 1,000 sentences. Information is not currently available on how often the court is imposing release conditions on short-term prison sentences.

Table 19: Number and percentage of convicted cases resulting in supervision[1], by type of offence

Offence type	1 July 1998 – 30 June 1999		1 July 1999 – 30 June 2000		1 July 2000 – 30 June 2001		1 July 2001 – 30 June 2002		1 July 2002 – 30 June 2003	
	No.	%	No.	%	No.	%	No.	%	No.	%
Violent	3135	29.9	2789	28.3	2556	25.4	2131	22.6	1497	15.8
Other against persons	172	10.6	140	9.8	175	11.1	129	8.8	105	6.2
Property	2493	12.8	2232	12.0	2088	11.1	1584	8.8	1195	6.6
Drug	642	8.8	536	7.8	499	7.5	390	6.8	227	3.8
Against justice	537	8.8	509	8.3	420	6.7	361	5.4	309	5.1
Against good order	266	4.0	216	3.0	216	2.8	179	2.3	132	1.5
Traffic	2260	5.0	1957	4.6	1838	4.4	1479	3.6	1035	2.6
Miscellaneous	62	1.3	70	2.1	59	1.9	47	1.4	28	0.5
Total	9567	9.4	8449	8.8	7851	8.2	6300	6.7	4528	4.7

Notes:
1. Table includes cases where supervision was the primary sentence imposed, or the secondary sentence imposed with either custodial or periodic detention sentences (before 1 July 2002) or community work sentences (from 1 July 2002).

181. As shown in Table 02, over half (56%) of all supervision sentences imposed in 2002/03 were imposed concurrently with a community work sentence. Less than a third (31%) of the supervision sentences imposed in 2002/03 were imposed as the only sentence.

Table 20: Other sentences imposed with supervision

Other sentence	1 July 1998 – 30 June 1999		1 July 1999 – 30 June 2000		1 July 2000 – 30 June 2001		1 July 2001 – 30 June 2002		1 July 2002 – 30 June 2003	
	No.	%	No.	%	No.	%	No.	%	No.	%
Custodial	1266	13.2	1155	13.7	1144	14.6	1028	16.3	-	-
Community work	-	-	-	-	-	-	-	-	2557	56.5
Periodic detention	3313	34.6	3122	37.0	2919	37.2	2347	37.3	-	-
Community service[1]	3	0.0	6	0.1	1	0.0	1	0.0	-	-
Subtotal – work-related	*3316*	*34.7*	*3128*	*37.0*	*2920*	*37.2*	*2348*	*37.3*	*2557*	*56.5*
Monetary	880	9.2	721	8.5	634	8.1	509	8.1	327	7.2
Suspended sentence	497	5.2	484	5.7	402	5.1	327	5.2	-	-
Driving disqualification	567	5.9	575	6.8	530	6.8	376	6.0	250	5.5
No other sentence	3041	31.8	2386	28.2	2221	28.3	1712	27.2	1394	30.8
Total	9567	100.0	8449	100.0	7851	100.0	6300	100.0	4528	100.0

Notes:
1. It is not clear why a few cases resulted in both community service and supervision, as there was no legislative provision for this.

182. The Act did not change the length of time that supervision could be imposed for – this remains between 6 months and 2 years. Table 21 shows that the average supervision sentence imposed has remained relatively stable in length at 10 months over the five-year period under examination. Only 6% of supervision sentences imposed in 2002/03 were for periods in excess of 12 months.

Table 21: Number and percentage of sentences of supervision1 imposed of various lengths and average sentence length

Length imposed	1 July 1998 – 30 June 1999		1 July 1999 – 30 June 2000		1 July 2000 – 30 June 2001		1 July 2001 – 30 June 2002		1 July 2002 – 30 June 2003	
	No.	%	No.	%	No.	%	No.	%	No.	%
6 months	3200	33.4	2641	31.3	2328	29.7	1819	28.9	1079	23.8
>6 to 9 months	2897	30.3	2681	31.7	2619	33.4	2087	33.1	1692	37.4
>9 to 12 months	3051	31.9	2689	31.8	2529	32.2	2039	32.4	1476	32.6
>12 to 18 months	293	3.1	310	3.7	250	3.2	233	3.7	181	4.0
>18 to 24 months	126	1.3	128	1.5	125	1.6	122	1.9	100	2.2
Total	9567	100.0	8449	100.0	7851	100.0	6300	100.0	4528	100.0
Overall average	9.5 months		9.6 months		9.6 months		9.8 months		10.0 months	

Notes:
1. Table includes cases where supervision was the primary sentence imposed, or the secondary sentence imposed in conjunction with either custodial or periodic detention sentences (before 1 July 2002) or community work sentences (from 1 July 2002).

Imprisonment

183. A number of changes were made to the use of imprisonment in specific situations such as sentencing for murder, preventive detention and the treatment of the worst and most serious cases. The sentence of corrective training and the ability for the courts to suspend a prison sentence were also removed. However, no general change was intended to the use of

imprisonment. For the sake of completeness we set out below the statistics relating to the use of imprisonment during the Act's first year.

184. Table 22 shows there was little change in 2002/03 in the overall use of custodial sentences compared to the four previous years. In all five years under examination, 8% of convicted cases resulted in a custodial sentence.

Table 22: Number and percentage of convicted cases resulting in a custodial sentence, by type of offence

Offence type	1 July 1998 – 30 June 1999		1 July 1999 – 30 June 2000		1 July 2000 – 30 June 2001		1 July 2001 – 30 June 2002		1 July 2002 – 30 June 2003	
	No.	%	No.	%	No.	%	No.	%	No.	%
Violent	2174	20.7	2161	21.9	2179	21.7	2054	21.8	2205	23.3
Other against persons	110	6.8	96	6.7	106	6.7	110	7.5	124	7.3
Property	2476	12.7	2442	13.1	2462	13.1	2354	13.1	2515	13.9
Drug	628	8.6	701	10.2	704	10.6	728	12.6	850	14.2
Against justice	828	13.6	765	12.5	752	12.0	687	10.3	592	9.8
Against good order	143	2.2	113	1.6	127	1.7	141	1.8	141	1.6
Traffic	1811	4.0	1656	3.9	1554	3.7	1587	3.8	1525	3.8
Miscellaneous	68	1.4	70	2.1	58	1.9	88	2.6	102	1.8
Total	8238	8.1	8004	8.4	7942	8.3	7749	8.3	8054	8.4

185. Nearly one out of every four violent offenders convicted in 2002/03 was imprisoned. The proportion of violent offenders imprisoned in 2002/03 (just over 23%) was slightly greater than in the three previous years where nearly 22% of such cases were so sentenced. There was also a small increase in the proportion of property offenders imprisoned in 2002/03 compared with previous years (14% compared with 13%). The proportion of drug offenders imprisoned increased over the five-year period under examination from 9% in 1998/99 to 14% in 2002/03.

186. In contrast, the proportion of convicted cases resulting in imprisonment for offences against justice decreased over the five-year period from 14% in 1998/99 to 10% in 2002/03.

187. Table 23 shows the lengths of custodial sentences imposed in the last five years. Custodial sentences imposed in 2002/03 were nearly two months longer, on average, than those imposed in 2001/02. No general increase in the length of prison sentences was intended by the Act. However, by addressing serious offending there has been an increase in the average length of prison sentences being imposed.

Table 23: Number of custodial sentences imposed of various lengths and average custodial sentence imposed[1]

Length imposed	1 July 1998 – 30 June 1999		1 July 1999 – 30 June 2000		1 July 2000 – 30 June 2001		1 July 2001 – 30 June 2002		1 July 2002 – 30 June 2003	
	No.	%	No.	%	No.	%	No.	%	No.	%
Corrective training	349	4.2	294	3.7	202	2.5	85	1.1	-	-
= 3 months[2]	2573	31.2	2120	26.5	1986	25.0	1959	25.3	1620	20.1
>3 to 6 months	1504	18.3	1637	20.5	1667	21.0	1714	22.1	1605	19.9
>6 to 12 months	1560	18.9	1591	19.9	1624	20.4	1646	21.2	1987	24.7
>1 to 2 years	1206	14.6	1224	15.3	1398	17.6	1249	16.1	1587	19.7
>2 to 3 years	434	5.3	482	6.0	442	5.6	482	6.2	558	6.9
>3 to 5 years	365	4.4	354	4.4	381	4.8	345	4.5	379	4.7
>5 to 7 years	127	1.5	133	1.7	101	1.3	117	1.5	130	1.6
>7 to 10 years	66	0.8	100	1.2	91	1.1	82	1.1	114	1.4
>10 years	17	0.2	23	0.3	25	0.3	31	0.4	36	0.4
Preventive detention	15	0.2	18	0.2	5	0.1	13	0.2	13	0.2
Life imprisonment	22	0.3	28	0.3	20	0.3	26	0.3	25	0.3
Total	8238	100.0	8004	100.0	7942	100.0	7749	100.0	8054	100.0
Overall average[3]	13.4 months		14.8 months		14.4 months		14.8 months		16.5 months	

Notes:

1. The figures in this table relate to the longest individual sentence imposed in a case, and do not take into account cumulative prison sentences. For cases involving multiple charges, it is often not clear from the data used for this report exactly which sentences are cumulative and which are concurrent, to allow the actual total length of sentence imposed to be calculated.
2. Excludes corrective training.
3. The average length of custodial sentences was calculated using all custodial sentences imposed, including indeterminate sentences. For the purpose of this table, the determinate equivalent of an indeterminate sentence was assumed to be 1.5 times the minimum non-parole period that was ordered to be served in conjunction with the indeterminate sentence. For example, the determinate equivalent of a sentence of life imprisonment with a minimum non-parole period of 17 years was assumed to be 17 * 1.5 = 25.5 years.

188. Both the number and proportion of prison sentences of six months or less in length (excluding corrective training) decreased in 2002/03 compared with previous years. Forty percent of all prison sentences imposed in 2002/03 were for six months or less, compared with 47% of sentences in the previous year. In contrast, there was a similar sized increase in 2002/03 in the proportion of prison sentences of more than six months and up to 24 months in length (from 37% of cases in 2001/02 to 44% of cases in 2002/03).

189. The number of very long determinate prison sentences (ie. for more than 10 years) has increased over the five year period under examination from 17 in 1998/99 to 36 in 2002/03.

Front-end home detention

190. Section 97 of the Act creates a presumption in favour of granting leave to apply for home detention to offenders sentenced to imprisonment of not more than two years unless the court is satisfied that it would be inappropriate to grant leave taking into account:

- the nature and seriousness of the offending;
- the circumstances and background of the offender;

- any relevant matters in the victim impact statement; and
- any other factors that the Court considers relevant.

191. Under the equivalent provision in the CJA (s21D), there was no such statutory presumption. However, the Court of Appeal in *R v Barton* [2000] 2 NZLR 459 had held that leave to apply under s21D "removed a barrier" to home detention, with the ultimate decision resting with the Parole Board. As such the Court's role was to "sift out those cases where it can clearly be said that home detention is not relevant". It is therefore arguable that a presumption in favour of the granting of leave was regarded as having existed under the previous legislation. Section 97 was intended to codify this interpretation of the previous legislation.

192. Despite the argument that s97 only codified the existing law, the High Court in a series of decisions on appeal has held that the inclusion of the statutory presumption is a significant change, and has narrowed the discretion available to the sentencing Judge. The current interpretation of s97 to mean that "in the normal course of events" leave to apply would be granted was not intended. This narrow interpretation of s97 appears to be contributing to more cases of leave to apply for home detention being granted. This increase was not intended nor expected when the legislation was enacted.

193. As Table 24 demonstrates, under the CJA, leave was granted in 31.6% of eligible cases in 2001. For the 6 months between January and June 2002 leave was granted in 33.7% of cases. However, under the Act leave was granted in 46.6% of cases in the period July 2002 to June 2003.

Table 24: Whether leave to apply for home detention was granted by the court for prison sentences of two years or less

Time period	Granted		Denied		Unknown[1]		Total	
	No.	%	No.	%	No.	%	No.	%
January to June 2001	1023	30.8	1879	56.6	417	12.6	3319	100.0
July to December 2001	1061	32.3	1826	55.6	398	12.1	3285	100.0
January to June 2002	1107	33.7	1793	54.6	382	11.6	3282	100.0
July to December 2002	1542	44.9	1535	44.7	359	10.4	3436	100.0
January to June 2003	1625	48.3	1377	40.9	362	10.8	3364	100.0

Note:

1. It is not clear why over 10% of cases did not have a court order recorded in the data, as the court must make an order either granting leave or declining leave. The proportion of cases where this information was not recorded in the data was greater before January 2001, so data before then has not been included in this table. It is likely that many of the cases where no court order was recorded in the data had leave to apply denied. However, another data source indicates that at least some of the cases where the court order information was not recorded had leave to apply granted.

194. In the period between July 2002 and March 2003 the percentage of applications to the NZ Parole Board for front end home detention that were declined remained relatively constant at the pre-Sentencing Act level of just over 40%. However, the increased incidence of granting leave by the courts under the stronger s97 presumption has, at least in part, meant an increase in the actual number of applicants that are denied home detention. In 2001 454 applicants were denied front-end home detention by the NZ Parole Board, whereas in the period 1 July 2002 to 31 March 2003 alone 623 male offenders were denied. This is problematic because the costs involved in hearing an application are incurred whether it succeeds or not.

Granting and denying leave to apply for front-end home detention

195. The view that there is a strong presumption in favour of granting leave has meant that the Courts have been reluctant to deny leave in many instances. Where leave may have been denied at first instance, it has subsequently been granted on appeal even where the court acknowledges that the prospect of home detention actually being granted is remote. For example in *Huata v The Police* (HC, Hamilton, 9/12/2002) the sentencing judge denied leave on a charge of possession of cannabis for supply, stating that to grant leave would send the wrong message as the offending had taken place at home with young siblings present. Leave was granted on appeal because, while the court considered it unlikely that the appellant would be granted home detention, the wide range of mitigating factors in the case meant the possibility could not be discounted.

196. However in other cases, leave has been denied with reference to the purposes for which the sentence was imposed. *Acton v The Police* (HC, Auckland, 16/7/2003) and *Garner v The Police* (HC, Wellington, 18/3/2003) involved charges relating to driving under the influence of alcohol, where the offenders each had multiple previous convictions for similar offences. The court considered that to grant leave would undermine the shock value of a sentence of imprisonment in those cases.

197. Likewise, in *Owen v The Police* (HC, Auckland, 1/6/2003, A 44/02), where the defendant was found guilty of being the owner of a dog that had attacked a child, the court held that leave should be denied as the case was near to the most serious of its kind and to grant leave would not serve the purposes of accountability, denunciation and deterrence. Other situations where leave has not been granted have involved danger to other people, particularly family. In *Chandra v The Police* (HC, Auckland, 6/3/2003, A03/03) the defendant was found guilty of two counts of male assaults female. The court upheld the sentencing judge's refusal to grant leave as there was a real risk that the appellant might revert to a pattern of physically abusing his wife.

198. The court has the primary role in determining whether wider sentencing considerations such as denunciation, deterrence, the safety of the community, the offender's background, and relevant matters in the victim impact statement make home detention inappropriate. This role has been reflected in some of the cases that were reviewed (see above for examples), however in many others this role does not appear to have been exercised. To address this, the Parole (Extended Supervision) and Sentencing Amendment Bill amends section 97 to emphasise that the court has this primary role.

Deferral of start date of sentences of imprisonment

199. Section 100 of the Act states that the court may defer the start date of a sentence of imprisonment for a period of up to 2 months:

    (a) on humanitarian grounds (s100(1)(a)); or

    (b) if the court has given leave for the offender to apply for home detention and it is satisfied that there are special reasons (such as retention of employment) why the sentence should not commence immediately (s100(1)(b)).

200. Some issues have arisen regarding the interpretation and use of this provision, in particular section 100(1)(b). Under the CJA the term "special reasons" was unqualified and taken as

meaning something out of the ordinary. The Act was not intended to change the policy or law regarding the discretion, and it was expected that deferral rates would continue at the pre-Sentencing Act level. This, however, has not been the case.

201. Table 25 shows the approximate number of prison sentences where leave to apply for home detention was granted by the court and the start date of the prison sentence was deferred. Information is not available on the use of deferred prison sentence start dates on humanitarian grounds. There has been a very large increase in deferrals since the commencement of the Act. The increase has mainly occurred at the maximum period of deferral – 2 months. In the year since the new Act commenced, most deferrals have been for the maximum period.

Table 25: Approximate number of sentences of imprisonment where leave to apply for home detention was granted and the prison sentence start date was deferred[1], by maximum length of deferral[2]

Length of deferral	January to June 2002		July to December 2002		January to June 2003	
	Number	Percent	Number	Percent	Number	Percent
<=7 days	2	4.0	3	1.2	3	1.6
8 to 14 days	7	14.0	5	2.0	3	1.6
15 to 21 days	5	10.0	4	1.6	5	2.7
22 to 28 days	20	40.0	7	2.9	2	1.1
29 to 35 days	16	32.0	15	6.1	3	1.6
36 to 42 days	-	-	8	3.3	5	2.7
43 to 49 days	-	-	5	2.0	6	3.2
50 to 56 days	-	-	12	4.9	10	5.3
57 to 62 days	-	-	185	75.8	150	80.2
Total	50	100.0	244	100.0	187	100.0

Notes:

1. The data do not specifically include an indicator of whether a sentence deferral was ordered by the court. The data were scanned for prison sentences where the sentencing date was different to the sentence commencement date of the prison sentence (excluding cumulative sentences). However, some incorrect data meant that the exact number of deferrals could not be determined. In addition, orders granting leave to apply for home detention are not fully recorded in the data. Data on sentence start date deferrals before 1 January 2002 was not readily available.
2. The length of deferral imposed by the court is the maximum length of time before the sentence commences. The actual length of time the person remains out of custody will usually be less than this because an offender will have a hearing before the New Zealand Parole Board as soon as it can be arranged. As soon as that hearing occurs, the period of deferral ends, regardless of the maximum period of deferral imposed by the court.

202. A possible reason for the rise in deferral rates is that the Act included "retention of employment" as an example of a "special reason". Retention of employment does not of itself seem out of the ordinary, so it seems that this example has diluted the requirement.

203. The Courts have considered this issue on a number of occasions since the Act came into force. There have been a number of inconsistent decisions and Judges have been split between those applying the original 'something out of the ordinary' test and those applying a lower threshold.

204. In *R v Crampton* (HC, Tauranga, 13/2/2003, S316-03) deferral was granted on humanitarian grounds relating to the fact that the offender was a single parent of 4 children. However, in

Grey v Police (HC, Christchurch, 12/9/2002, A99-02) the court declined a request for deferral in relation to care of the offender's child. The court did not consider that every woman with a preschool child should automatically be entitled to deferral. In that case the court did not consider there was convincing evidence that the child care arrangements in place could not continue for a further 5 weeks.

205. Rehabilitation efforts have featured strongly in some cases where deferral has been granted. In *Jensen v The Police* (HC, Auckland, 2/5/2003, A39/03), *Campbell v The Police* (HC, New Plymouth, 28/5/2003, AP8-02), *R v Waipouri* (HC, Whangarei, 24/10/2002, T020413) and *R v Stephenson* (HC, Christchurch, 20/8/2002, T10-02) deferral was granted to enable the continuation of rehabilitative efforts by the offender.

206. The question of whether deferral should be granted merely to enable an offender to prepare an application for home detention has also been considered. In *Police v Walker* (DC, New Plymouth, 8/11/2002) the sentencing judge, in reliance on an unnamed high court authority, granted deferral on the ground that it was inevitable that the offender was going to get home detention. However, in *R v Finn and Others* (HC, Hamilton, 13/3/2003, T021313, T021295, T0211352, HC) the court held that preparing an application for home detention was not a sufficiently "special reason" for the purposes of s100(1)(b).

Amendments to section 100 of the Act

207. The Parole (Extended Supervision) and Sentencing Amendment Bill amends s100(1)(b) to clarify that sentence start dates may only be deferred where leave to apply for home detention has been granted and there are exceptional circumstances. Other amendments being made to address issues with the operation of section 100 are:

    (a) Where a sentence is deferred there is currently no power to release an offender on bail. Amendments are made to address this situation by requiring the court to impose bail conditions on an offender whose sentence start date has been deferred;

    (b) Amendments to clarify that only one period of deferral of up to 2 months may be granted, and that deferral may not be granted if the offender has already commenced serving the sentence or is in custody serving another sentence; and

    (c) Where an offender has been granted leave to apply for home detention and has had their sentence start date deferred, the offender will be required to make an application for home detention within 2 weeks.