Sentence Indication
A Report on the Pilot Scheme

Sentencing Advisory Council
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Glossary

AIC	Australian Institute of Criminology
Case conference	First hearing in the County Court once a defendant is committed for trial on an indictable offence. If the defendant does not enter a plea of guilty at this stage, a trial date is set. Under the *Criminal Procedure Act 2009* (Vic) this hearing will be known as the first directions hearing.
Committal hearing	Final hearing in the Magistrates' Court for indictable offences. Magistrate considers the prosecution case to determine whether the evidence is of sufficient weight to support a conviction for an indictable offence.
Committal mention hearing	Hearing in the Magistrates' Court for indictable offences following the filing hearing. At this hearing, the court can hear and determine applications for leave to cross-examine witnesses and set a committal date. If the defendant pleads guilty at this stage, the court will set a date for a plea hearing in the County or Supreme Court.
DPP	Director of Public Prosecutions
Door of court	Used to describe a stage in criminal proceedings. It is the last possible moment for a defendant to enter a plea of guilty prior to the beginning of a trial, literally at the 'door of the court'.
Directions hearing	Pre-trial hearing in the County or Supreme Court usually held to determine whether or not the parties are ready to proceed to trial.
Filing hearing	First court hearing in the Magistrates' Court for an indictable matter. At this hearing, dates are set for the service of the brief of evidence and the committal mention hearing.
Immediate custodial sentence	A sentence that includes any immediate custody such as imprisonment, a partially suspended sentence, a combined custody and treatment order or a youth justice centre order.
LIV	Law Institute of Victoria
Non–immediate custodial sentence	Any sentence that does not include immediate custody, including a wholly suspended sentence, an intensive correction order or a community-based order.
OPP	Office of Public Prosecutions
Pilot sentence indication scheme	Sentence indication scheme operating in the Victorian County and Supreme Courts between 1 July 2008 and 1 July 2010.

Practice Note	Document issued by the head of a jurisdiction (such as the Chief Judge of the County Court) that provides guidance for practitioners about administrative processes operating within the court.
Presentment	The document filed with the court containing a statement of the charges against the defendant, the date on which they were allegedly committed and the names of witnesses for the prosecution. The presentment must be signed by a Crown Prosecutor before filing. Under the *Criminal Procedure Act 2009* (Vic) the presentment is known as the indictment (effective from January 2010).
SARC	Scrutiny of Acts and Regulations Committee
Statement of Compatibility	A statement of compatibility must be produced to accompany all legislation introduced into parliament. It refers to the compatibility to the proposed legislation with the Charter of Human Rights and Responsibilities.
Sunset clause	A provision included in regulations or legislation that repeals either all or part of the instrument after a specified date, unless further legislative action is taken to extend its operation. The sunset clause for the pilot sentence indication scheme comes into operation on 1 July 2010.
VLA	Victoria Legal Aid

Chapter 1
Introduction

Background

1.1 In August 2005, the Attorney-General, the Hon. Rob Hulls, MP, asked the Council to advise the Government on whether Victoria should introduce a sentence indication scheme. The Council was asked to consider the advantages and disadvantages of a sentence indication scheme, having particular regard to its likely impact on the courts, victims of crime and the general Victorian community.

1.2 In September 2007, the Council released its Final Report, *Sentence Indication and Specified Sentence Discounts*,[1] in response to the reference. Among other proposals, the Council recommended that a pilot sentence indication scheme should be introduced for indictable offences.

1.3 In March 2008, the *Criminal Procedure Legislation Amendment Act 2008* (Vic) was passed, creating a pilot sentence indication scheme broadly consistent with the Council's recommendations to commence on 1 July 2008. Due to concerns raised when this legislation was debated in the Legislative Council, the Act includes a sunset clause. Unless the parliament legislates to continue the sentence indication scheme it will lapse on 1 July 2010.

1.4 The Attorney-General asked the Council to monitor the pilot sentence indication scheme in order to assist the government and parliament in determining whether the scheme should be retained beyond the date of the sunset clause.

1 Sentencing Advisory Council, *Sentence Indication and Specified Sentence Discounts: Final Report* (2007).

Terms of Reference

1.5 The terms of reference require the Council:

> to monitor, report and make recommendations in relation to the operation of the sentence indication scheme in the County and Supreme Courts.

1.6 The Council was asked to monitor and report on the impact of the sentence indication scheme on:

a. case flow (including the proportion of pleas of guilty in all matters determined and the stage in proceedings at which those pleas of guilty are entered);

b. sentencing outcomes;

c. the key people involved, namely victims and the defendant; and

d. the resources and operation of the key participating agencies.

1.7 The Council was specifically requested to consult with victims of crime and the community on their experience with, and views concerning, the operation of the key participating agencies.

1.8 The Council was asked to make recommendations concerning whether the operation of the scheme should be extended and if so, whether any changes should be made to improve the operation of the scheme.

1.9 The Council was requested to provide its report by 31 December 2009.[2]

The introduction of the sentence indication scheme

The problem of delay

1.10 Most criminal proceedings are ultimately resolved by a guilty plea. In the period June 2007 to July 2008, 77.0% of adjudicated indictable matters were finalised by a plea of guilty.[3] The resolution of proceedings as a plea of guilty rather than a contested hearing and the timing of the plea can significantly affect the length and cost of criminal proceedings. A plea of guilty can be entered at a number of stages. Figure 1 shows the stages in an indictable matter. The earliest point at which a plea of guilty may be entered is at the committal mention.

1.11 The earlier the guilty plea is identified, the greater the benefits to both the participants in that particular case and the justice system more generally. An early guilty plea has a particularly significant impact on the cost and efficiency of criminal proceedings. It spares counsel and witnesses the cost and time involved in preparing the case and frees up the time and resources of the courts for other matters.[4]

1.12 While entering a plea of guilty after the case has been listed and prepared for trial can reduce the length and cost of that case, demands will have already been placed on the time and resources of the participants and the courts. These pleas are shown post-case conference in Figure 2 and amount to 20.2% of all cases resolved by guilty plea in the higher courts between July 2004 and June 2009.

2 Letter from the Attorney-General, the Hon. Rob Hulls, MP, to Professor Arie Freiberg, 7 July 2008.

3 County Court of Victoria, *Annual Report 2007–08* (2008) 15.

4 Office of Public Prosecutions (Victoria), *Annual Report 2007–8* (2008) 43.

Figure 1: Hearing types for an indictable offence that proceeds to trial in the County Court[5]

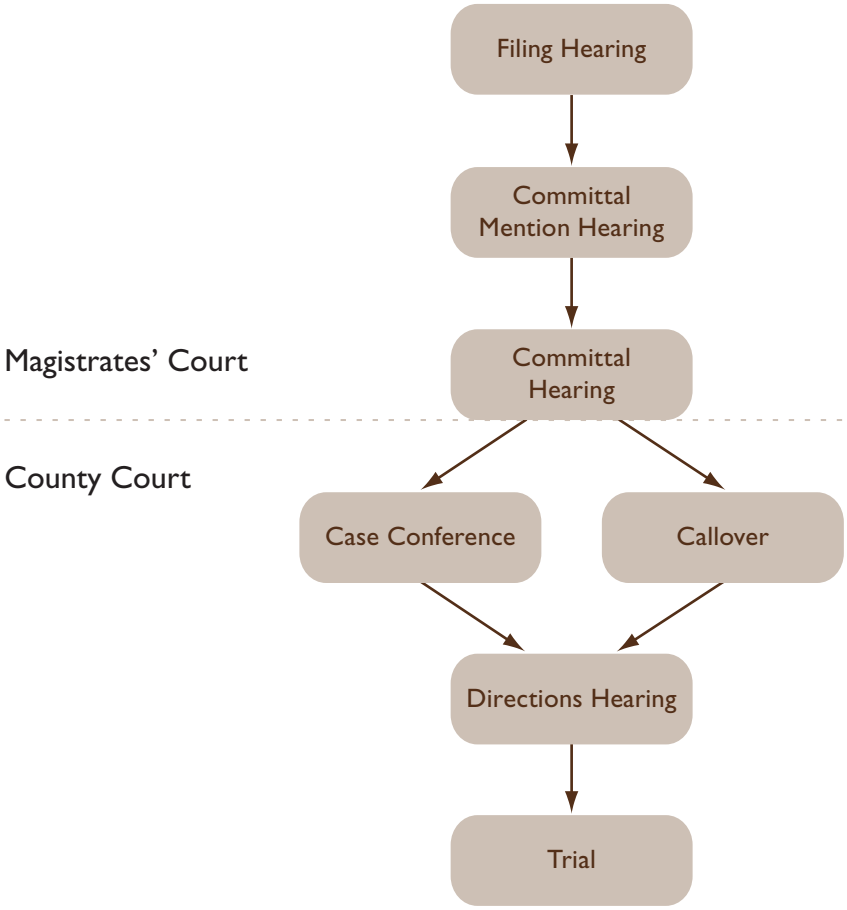
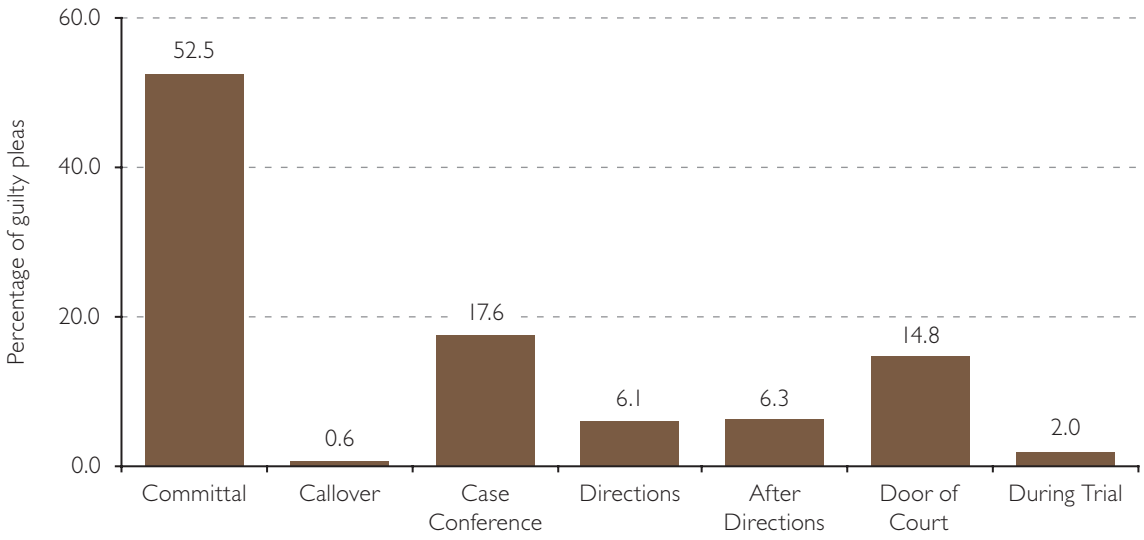


Figure 2: Percentage of guilty pleas by stage of plea, 2004–05 to 2008–09



5 This diagram refers to criminal procedure prior to the *Criminal Procedure Act 2009* (Vic). Under that legislation, which came into force on 1 January 2010, all pre-trial hearings in the higher court are referred to as directions hearings. See County Court of Victoria, *County Court Criminal Procedure Practice Note* (2010) <http://www.countycourt.vic.gov.au/CA2570A600220F82/Lookup/Practice_Notes/$file/PNCR_2-2010_County%20Court%20Criminal%20Procedure.pdf> at 13 January 2010.

1.13 During the period July 2004 to June 2009, 14.8% of matters were finalised by way of guilty pleas resolved at the 'door of the court' (at the beginning of the trial—see Figure 2). A plea entered at this stage may still reduce the length and cost of a single case, but it 'wreaks havoc with Court listings, wasting the time and expense of witnesses and the resources of the prosecution and defence'.[6] Late pleas complicate the management of criminal proceedings and can result in over-listing (in anticipation of some cases resolving), which can cause some cases to not proceed on the appointed day. Late pleas could also have a negative impact on the victim as he or she would be expecting to be called to give evidence right up until the beginning of the trial.

1.14 A 2007 report by the Australian Institute of Criminology (AIC) found that late guilty pleas were 'the single most common reason that criminal trials do not proceed on the day of listing'.[7] The Institute interviewed more than 60 stakeholders from 42 Australian criminal justice agencies and reported:

> It was the unanimous opinion of all respondents to this review that late guilty pleas remain of most concern to criminal trial procedure in Australia, both in the higher and lower courts.[8]

1.15 While late guilty pleas were a prime cause of delay, the AIC found that the measures most useful in targeting delay did not necessarily target guilty pleas directly. The AIC found general agreement among the legal community on the need for 'front ending', in other words, measures to encourage participants in the proceedings to discuss the case fully and openly at an early stage. The AIC identified a need for improved communication between the police, prosecution, defence and the court, between defence counsel and the defendant and with victims and witnesses generally.[9]

1.16 Having a mechanism for identifying and streaming cases in which the defendant is likely to plead guilty allows the courts to finalise these cases expeditiously, thus reducing the burden that avoidable contested hearings place on the resources of the justice system.[10] Such measures have the potential to deliver real savings to the criminal justice system.[11]

1.17 There is a risk that a focus on increasing the speed and efficiency of criminal proceedings might detract from efforts to preserve procedural fairness. However, achieving justice in criminal proceedings is inextricably linked with achieving efficiency. Justice delayed in some circumstances may mean that justice is denied. One criminal barrister consulted by the Council commented on the significant financial burden of privately defended cases on defendants in the higher courts, something which is exacerbated where the matter is unnecessarily prolonged. If the defendant must pay a barrister to prepare for and appear in a trial and the matter is not heard on the day it is listed and it is then relisted in the future, the defendant will need to pay for the preparation of the trial a second time.[12] Delay affects not only the cost and efficiency of criminal proceedings, but also their fairness.

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6 Pegasus Task Force, *Reducing delays in criminal cases* (1992) 32.

7 Jason Payne, *Criminal Trial Delays in Australia: Trial Listing Outcomes*, Research and Public Policy Series No. 74 (2007) 20, 24.

8 Ibid 24.

9 Ibid 20.

10 Australian Institute of Judicial Administration (AIJA), *Complex Criminal Trials* (1992); Standing Committee of Attorneys-General (SCAG), Working Group on Criminal Procedure, *Report* (1999); SCAG, *Deliberative Forum on Criminal Procedure*, Report (2000).

11 It should be noted, however, that these measures alone would have limited impact on the cost or length of criminal proceedings. In order to achieve lasting improvements to the efficiency of criminal proceedings, concerted action is required to address each of the various drivers that contribute to delay. For further consideration of this issue, see Don Weatherburn and Joanne Baker, *Managing Trial Court Delay: An Analysis of Trial Case Processing in the NSW District Criminal Court* (2000) 41. On the importance of addressing the root causes of delay, see David Field, 'Plead Guilty Early and Convincingly to Avoid Disappointment' (2002) 14 *Bond Law Review* 251, 254.

12 Meeting with the Criminal Bar Association (11 November 2009).

1.18 The Victorian Charter of Human Rights and Responsibilities includes in its minimum guarantees for people charged with criminal offences the right to be tried without unreasonable delay.[13]

1.19 This right recognises that when proceedings are not finalised within a reasonable time, their sheer length can impose a burden over and above the burden arising from the crime and/or the sentence. A lengthy period between charging the suspect and the hearing of the charges may result in:

- a less 'just' outcome, if the evidence (material exhibits or witnesses' recollections) becomes contaminated, lost or confused with the passage of time;
- the defendant being remanded in custody or released on bail for longer than would otherwise be regarded as appropriate in the circumstances; and/or
- the victim remaining 'in limbo', unable to move on from the offence and its impact.

1.20 The benefits of easing congestion in the court are not merely practical. It is in the public interest to expedite the resolution of criminal proceedings.[14] The efficient management of criminal proceedings 'encourages the clear-up rate for crime, and so vindicates public confidence in the processes established to protect the community and uphold its laws'.[15]

1.21 In recent years, concerns about the increasing cost and length of criminal proceedings have sparked a number of reviews of the criminal justice system.[16] In Victoria, the Attorney-General's *Justice Statement 1*, released in 2004, foreshadowed a review of criminal law and procedure. Important objectives were to modernise and streamline criminal procedure, to increase the efficiency of the administration of justice and to address the problem of delay in the criminal justice system.[17]

1.22 One reform identified in *Justice Statement 1* as having the potential to increase efficiency and decrease delay was sentence indication. It was suggested that 'a sentence indication procedure will assist the defendant to weigh up his or her options and should lead to earlier resolution of matters'.[18]

13 *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(c).

14 *Cameron v The Queen* (2002) 209 CLR 339 [66–67] (Kirby J).

15 Ibid.

16 See for example, Payne (2007) above n 7; Weatherburn and Baker (2000) above n 11.

17 Department of Justice (Victoria), *New Directions for the Victorian Justice System 2004–2014: Attorney-General's Justice Statement* (27 May 2004).

18 Ibid 29.

The Council's review: 2005–07

1.23 Based on the objectives set out in *Justice Statement 1*, the Attorney-General asked the Council in 2005 to advise the Government on whether Victoria should introduce a sentence indication scheme. The Council was asked to consider the advantages and disadvantages of a sentence indication scheme, having particular regard to its likely impact on the courts, victims of crime and the general Victorian community. In examining the merits and potential of such a scheme, the Council considered what role, if any, a specified sentence discount might play.

1.24 As part of its reference, the Council conducted extensive consultations on the merits of sentence indication, including holding meetings with legal practitioners, courts, victims and offenders, as well as focus groups with members of the wider community.

1.25 In September 2007, the Council released its Final Report, *Sentence Indication and Specified Sentence Discounts*.[19] The report discussed the value of the guilty plea in the criminal justice system and the mechanisms by which defendants could be encouraged to enter a guilty plea at the earliest possible stage in criminal proceedings.

1.26 The Council considered in detail whether sentence indication was a form of 'bargained justice', which suggests an agreement concluded in a way that falls below the standards of transparency, fairness or propriety required of the criminal justice system. The Council ultimately decided, taking into account the views and issues raised in consultations, that it was possible to devise a sentence indication scheme that could fairly and openly provide defendants with information that would assist them in making the decision to plead guilty at an early stage in the proceedings. This includes ensuring that the practitioners involved in the early stages of the process are sufficiently experienced to identify the cases with potential for resolution.[20]

1.27 The Council was conscious that such a scheme, particularly operating in conjunction with clearly articulated sentence discounts, should facilitate, rather than coerce, a defendant's plea decision and should not involve placing 'expediency before principle' in the administration of justice.[21]

1.28 The Council found strong support for formalising the previously ad hoc scheme of sentence indication that had been operating in the Magistrates' Court. Accordingly, the Council recommended that the *Magistrates' Court Act 1989* (Vic) be amended to provide magistrates with explicit statutory authority to give a sentence indication.[22]

1.29 In relation to the higher courts, the key issue confronting the Council was whether the simple, informal and flexible process that had been used in the Magistrates' Court could be adapted to meet the quite different needs of criminal practice and procedure in the County and Supreme Courts.

1.30 The Council recommended the introduction of a pilot sentence indication scheme in which the sentence indication given by the courts was limited to whether or not the defendant would receive an immediate custodial sentence if he or she pleaded guilty at that stage in the proceedings.[23] The Council recommended giving statutory underpinning to such a scheme in the County Court, with provision for the Chief Judge to give directions as required to establish the scheme's administrative framework.[24]

19 Sentencing Advisory Council (2007), above n 1.

20 Meeting with Victoria Legal Aid (27 October 2009).

21 Paul Byrne, 'Sentence Indication Hearings in New South Wales' (1995) 19 *Criminal Law Journal* 209 , 211, 213.

22 Sentencing Advisory Council (2007) above n 1, 83–90.

23 Ibid 116, 119.

24 Ibid 114.

The sentence indication scheme

1.31 In March 2008, the *Crimes (Criminal Trials) Act 1999* (Vic) was amended by the *Criminal Procedure Legislation Amendment Act 2008* (Vic) to provide for a pilot sentence indication scheme, broadly consistent with the recommendations made in the Council's report. This legislation was replaced by the *Criminal Procedure Act 2009* (Vic), which came into force on 1 January 2010. The relevant sections are replicated in the new legislation.[25]

1.32 When the legislation creating the sentence indication scheme was debated in parliament, there were concerns that the scheme may negatively impact on the criminal justice system. The following potential negative consequences were raised:

- inappropriately lenient sentences;
- the prioritisation of expediency over fairness;
- undue influence on the defendant to plead guilty; and
- not providing sufficient scope for the victim's views to be taken into account at sentencing.[26]

1.33 In order to determine whether or not such consequences would eventuate, a two-year sunset clause was added to the legislation, which means that the pilot scheme will expire on 1 July 2010 unless legislation is enacted to ensure its continuation. When the Bill was passed, the Attorney-General referred to the Council's role in monitoring the scheme and considering whether or not the issues raised would come to pass:

> The house amendment provides a two-year sunset clause for the sentence indication scheme in the County and Supreme courts. During this time the Sentencing Advisory Council will not only monitor the scheme by collecting and analysing data but may also make recommendations concerning the operation of the scheme.[27]

1.34 The provisions relating to a pilot sentence indication scheme in the County and Supreme Courts came into force on 1 July 2008.[28]

1.35 Section 23A of the *Crimes (Criminal Trials) Act 1999* (Vic) empowers a court to indicate whether it would or would not be likely to impose an immediate custodial sentence if the defendant pleaded guilty.[29] An application for a sentence indication can only be made by the defence with the consent of the prosecution. The court retains discretion as to whether to give a sentence indication. Once an indication is given, the defendant can either plead guilty and be sentenced consistent with the indication or proceed to trial.[30]

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25 *Criminal Procedure Act 2009* (Vic) pt 5.6.

26 Victoria, *Parliamentary Debates*, Legislative Assembly, 6 December 2007, 4348 (Peter Ryan); Victoria, *Parliamentary Debates*, Legislative Assembly, 6 December 2007, 4350, (Nick Wakeling); Victoria, *Parliamentary Debates*, Legislative Council, 7 February 2008, 125 (Gordon Rich-Phillips); Victoria, *Parliamentary Debates*, Legislative Council, 7 February 2008, 129 (Sue Pennicuik).

27 Victoria, *Parliamentary Debates*, Legislative Assembly, 13 March 2008, 835 (Rob Hulls, Attorney-General).

28 *Crimes (Criminal Trials) Act 1999* (Vic) s 23A. The *Crimes (Criminal Trials) Act 1999* was repealed when the *Criminal Procedure Act 2009* (Vic) came into force. While the pilot sentence indication scheme operated under the former, statutory references are also included for the latter, under which the scheme will continue to operate.

29 *Crimes (Criminal Trials) Act 1999* (Vic) s 23A(1); *Criminal Procedure Act 2009* (Vic) s 207.

30 See Chapter 2 for further detail as to the operation of the sentence indication scheme.

Reducing delay

1.36 As explained by the Attorney-General, 'sentence indications … are designed to place defendants who may ultimately plead guilty in a better position to make this decision early in the proceedings'.[31] A sentence indication can only be obtained once a defendant has been committed for trial in the County Court. As the first hearing in the County Court is the case conference, sentence indication is really only targeted at defendants who are pleading guilty post-case conference (see Figure 1, page 3). Therefore, while sentence indication is a useful tool to assist in the resolution of late resolving cases, it cannot move late pleas much earlier than the case conference.[32]

1.37 In many of the cases that could be resolved by a sentence indication, the parties will have already been through a committal hearing in the Magistrates' Court, which may have involved the complainant giving evidence (see Figure 1, page 3).

1.38 Other mechanisms have been introduced to attempt to have matters settled at committal mention, based on an awareness that the earlier the parties are able to fully discuss the relevant issues and the earlier the information is provided to the defence, the greater the likelihood that the case will be resolved as early as possible in the process.

Early Resolution Advocacy Unit

1.39 The creation of the Early Resolution Advocacy Unit at the Office of Public Prosecutions was also designed to reduce delay in the resolution of criminal proceedings. The unit is made up of five experienced solicitor advocates. Cases identified as having the potential for early resolution are referred to these solicitor advocates for assessment and negotiation with the defence. According to the OPP, the unit:

> adopts a proactive, specialised approach to resolving matters at an early stage. It aims to reduce the time spent by the courts in hearing contested matters, while still securing pleas of guilty to appropriate offences and ensuring that offenders receive adequate sentences.[33]

Changes to committal hearings

1.40 In 2006, the Government introduced a number of reforms to the operation of committals in Victoria. Changes were made to the committal rules and forms to promote early discussions, and committal case conferences[34] were created in order to 'make the criminal justice system more efficient by improving committal proceedings'.[35] While these conferences had previously been available on a voluntary basis, the new legislation empowered the court to direct parties to attend.[36]

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31 Victoria, *Parliamentary Debates*, Legislative Assembly, 22 November 2007, 4099 (Rob Hulls, Attorney-General).

32 Prior to the *Criminal Procedure Act 2009* (Vic), a defendant who had been committed for trial in the County Court could have his or her case listed for case conference or callover, with the majority of cases listed for case conference. Under the 2009 legislation, the first hearing in the County Court is the first directions hearing. See County Court of Victoria (2010) above n 5.

33 Office of Public Prosecutions (2008) above n 4, 43.

34 *Courts Legislation (Jurisdiction) Act 2006* (Vic) s 28. These are preferably held on the same day as the committal mention.

35 Office of the Attorney-General, 'New Laws to Improve Committal Proceedings' (Media Release, 7 June 2006) 1.

36 Ibid.

Abolition of reserve pleas

1.41 The *Criminal Procedure Legislation Amendment Act 2008* (Vic) abolished reserve pleas. Prior to this legislation, at the close of a committal hearing the defendant could choose to reserve his or her plea until arraignment.[37] At present, the defendant is required to enter a plea of guilty or not guilty on being committed to stand trial in the County or Supreme Courts. As explained by the Parliamentary Secretary for Justice, Brian Tee:

> Ideally this will make the court system more efficient. It will allow for better direction when a case is being referred … [t]he government has sought to try to encourage the defendant to institute a plea earlier, and that is in essence what abolishing the reserve plea does.[38]

Sentence discounts

1.42 In its review of sentence indication, the Council also considered whether specified sentence discounts should be introduced in Victoria. After considering the relevant issues, the Council concluded that, at that stage, it was preferable for Victorian courts to retain the discretion to determine whether a defendant should receive a reduction in sentence for pleading guilty and, if so, how this reduction should be applied on a case-by-case basis.

1.43 However, the Council was also of the view that there was some value in making this aspect of the sentencing process transparent and reviewable. In consultations, the Council found that many defendants who had pleaded guilty thought that their sentence had not been reduced because of the guilty plea. One defendant commented that 'the judge said that he had taken into account the guilty plea, but you don't really know how'.[39] The Council found widespread support for articulating the effect of the guilty plea at sentence in order to increase transparency as to its value. This in turn may assist defendants in making the decision to plead guilty earlier in the process.[40] Based on the Council's recommendation, section 6AAA was inserted into the *Sentencing Act 1991* (Vic), which requires the court to indicate what sentence would have been imposed but for the plea of guilty.[41]

Streamlining criminal procedure

1.44 The new *Criminal Procedure Act 2009* (Vic) came into force on 1 January 2010. One of the purposes of the Act is 'to clarify, simplify and consolidate the laws relating to criminal procedure in the Magistrates' Court, County Court and Supreme Court'.[42] In the Second Reading Speech, the Attorney-General announced that this legislation is intended to reduce delays in the criminal justice system by creating:

> a more clearly defined pre-trial regime for making decisions prior to the commencement of the trial … Clearer processes and powers will assist the courts in managing cases more effectively and better indicate to practitioners the types of matters that can and should be determined before a trial commences. The bill provides simple, flexible and effective case management powers and procedures.[43]

37 This is when the defendant is formally asked to enter a plea at the beginning of a trial. See Richard Fox, *Victorian Criminal Procedure* (2005) 247–49.

38 Victoria, *Parliamentary Debates*, Legislative Council, 26 February 2008, 495 (Brian Tee, Parliamentary Secretary for Justice).

39 Sentencing Advisory Council (2007) above n 1, 37 (note 118).

40 Ibid 51–4.

41 *Sentencing Act 1991* (Vic) s 6AAA. This is limited to cases in which the sentence imposed is a term of imprisonment or a fine.

42 *Criminal Procedure Act 2009* (Vic) s 1(a).

43 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 December 2008, 4985 (Rob Hulls, Attorney-General).

The Council's monitoring process: 2008–09

Scope of this report

1.45 This report focuses on the operation of the sentence indication pilot scheme from 1 July 2008 to 30 June 2009. It is a monitoring report, not an evaluation of the scheme as a whole.

1.46 In the course of its consultations, the Council has been made aware of a number of issues relating to the operation of the scheme that may require some changes. However, the very small number of cases to date precludes any firm recommendations being made. The Council is of the view that the scheme should be continued but that it needs more time to become accepted by the legal community as a viable option within criminal procedure. At a later date, further changes may be required to make the scheme more effective.

Consultation

1.47 As the Terms of Reference specifically sought the views and experiences of those who have been involved in sentence indication cases, the Council generally confined its discussions to those who have been involved in the scheme.

1.48 In the course of this reference, the Council has spoken to:

- two County Court judges;
- a Supreme Court judge;
- defence barristers and solicitors who had been involved in sentence indication hearings;
- prosecution solicitors at the Office of Public Prosecutions (OPP) who had been involved in sentence indication hearings;
- the Law Institute of Victoria;
- Victoria Legal Aid;
- the Criminal Bar Association;
- the Victorian Director of Public Prosecutions;
- the Victorian Chief Crown Prosecutor;
- the Deputy Director of the Commonwealth DPP in Victoria;
- the Policy and Advice Directorate of the OPP; and
- victim support workers at the OPP.[44]

Data

1.49 Data on cases in which defendants requested a sentence indication were obtained from the Office of Public Prosecutions, and case listing data were supplied by the County Court of Victoria.

1.50 Basic statistical analysis of this data focussed on the treatment of the defendant's sentence indication request by the OPP and the judge, as well as the sentence indication given, the plea entered by the defendant and the final sentence imposed. Offence information was also obtained from this source. Sentence and offence information supplied by the OPP was validated using sentencing data from conviction returns maintained by the Courts Statistical Services Unit.

44 See Appendix 1 for a full list of consultations conducted as part of this reference.

1.51 Data on all higher courts cases were also examined. Data obtained from the County Court of Victoria were used to examine the stage and rate of guilty pleas for all cases resolved in the higher courts. Data supplied by the Courts Statistical Services Unit were used to analyse the percentage of cases sentenced in the higher courts that received an immediate custodial sentence.

Limitations of the monitoring exercise

1.52 The data in the Council's report cover the period 1 July 2008 to 30 June 2009. The Council's reporting date is 31 December 2009, which means that the reviewed period of operation is very limited due to the time required for data analysis and the preparation of this report as well as the Council's own timelines for deliberation. The time period means that there will be sentence indications under the pilot scheme that are not covered by this report.

1.53 The statistical data in this report in relation to sentence indication applications/hearings are largely based on material provided to the Council by the Office of Public Prosecutions. This collection method relies on the integrity of the data provided in sentence reviews to the Director of Public Prosecutions and information entered in the OPP internal database, which must be double-checked by the Policy and Advice Directorate of the OPP.[45] The Council is confident that the Policy and Advice Directorate has made every effort to provide the best information available, but it is possible that some relevant cases have not been identified. The Policy and Advice Directorate advised the Council that there were some early difficulties, but the process has improved.[46]

1.54 In order to confirm this data, the Council requested information from the County Court about matters that have been listed for separate sentence indication hearings, as opposed to where the indication was given at another hearing type, such as a case conference. The County Court only had the capacity to record cases in which matters were listed for a separate sentence indication hearing.[47] The Council also referred to sentencing remarks in cases in which these were available.

1.55 The Terms of Reference requested that the Council consider the impact of sentence indication on defendants and victims who were involved in sentence indication hearings, but it has been limited in its ability to consult with these groups.

1.56 The Council met with solicitors and workers at the Witness Assistance Service (WAS) of the Office of Public Prosecutions to gain some insight into their contact with victims in the relevant matters. The Council also developed a survey to be sent to victims involved in the process. WAS identified that it had contact with victims in a small number of those matters in which a sentence indication was sought and advised the Council that it would be inappropriate to send these surveys out to the victims in these matters because most victims indicated that they wanted to leave the court process behind and not revisit a difficult period in their lives.[48] The Council was very conscious not to inadvertently contribute to the revictimisation of people who have already been through the criminal justice system.

1.57 In relation to defendants, the Council sought the views of defence barristers and solicitors who had been involved in sentence indication cases about how their clients responded to the scheme and whether they were satisfied with the process.

45 Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009).

46 Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009).

47 There were 22 sentence indication hearings listed as separate hearings in the County Court.

48 Meeting with Witness Assistance Service at the Office of Public Prosecutions (29 October 2009).

Chapter 2
The pilot sentence indication scheme

The sentence indication process

2.1 The legislation creating the higher courts sentence indication scheme provides a broad framework for its operation (see Figure 3, page 14). It is not prescriptive in relation to the process to be followed and as such allows the court and legal practitioners involved a level of flexibility within the scheme.

2.2 Initially, this led to some confusion about how the scheme would operate. There were also some issues that the OPP had to grapple with in the early stages, particularly how it would respond to requests for indications and the basis on which consent would be withheld.[49] However, some participants reported that the scheme has settled down now that it has been in operation for 12 months and the parties have a better idea of what is expected of them.[50]

Sentence indication in practice

Applications for sentence indication

2.3 The defendant may apply for a sentence indication at any time after the filing of the presentment. Such an application can only be made with the consent of the prosecution.[51]

2.4 In the period July 2008 to June 2009, 31 applications were made for a sentence indication in the higher courts for state criminal matters.[52]

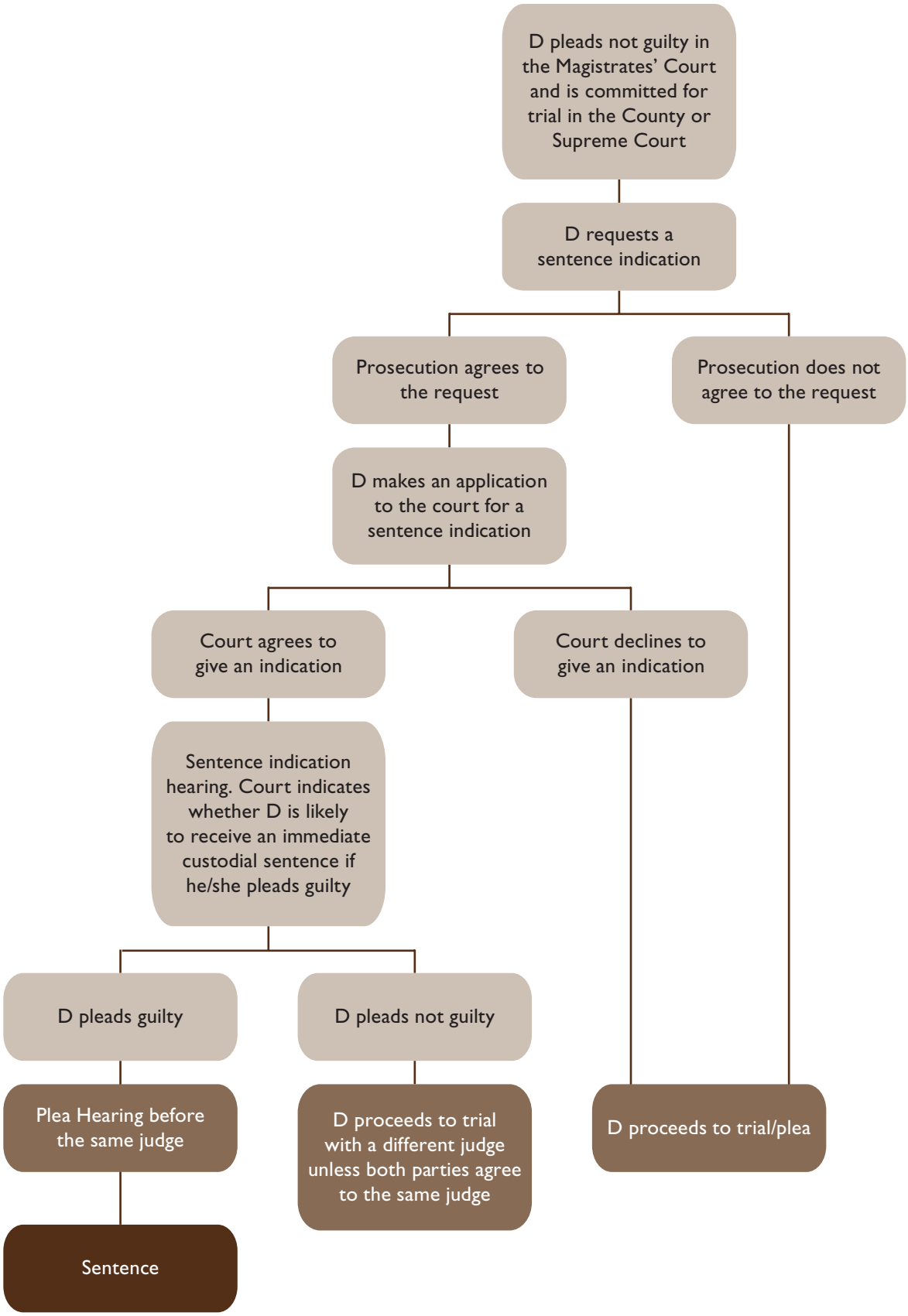
49 Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009).

50 Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009).

51 *Crimes (Criminal Trials) Act 1999* (Vic) s 23A(3); *Criminal Procedure Act 2009* (Vic) s 208(2).

52 There was one Commonwealth matter—see [2.17]–[2.19].

Figure 3: The Sentence Indication Process as set out in section 23A of the *Crimes (Criminal Trials) Act 1999* (Vic)



2.5 Of the 31 applications, 27 were consented to by the prosecution. Of the four cases in which the prosecution did not consent, two were sexual offences, one was a charge of reckless conduct endangering life and one was an affray. According to the OPP, consistent with its internal policy, prosecution consent was withheld on the basis that there was insufficient material before the court to determine whether the defendant would be likely to receive an immediate custodial sentence if he or she pleaded guilty,[53] such as in Case Study 1.

Case Study 1

The defendant requested a sentence indication on a number of sex offences. The OPP kept the victim informed throughout the plea negotiation process and informed the victim of the request for a sentence indication. The different steps were explained to the victim and the sentence indication was explained as a step that could lead to a resolution. The victim did not want to give evidence at the trial, so resolution by a plea of guilty was highly desirable.

The Crown did not consent to the application for a sentence indication because there was insufficient information for the judge to make an indication. This included the fact that a psychiatric report about the defendant was not available at the time of the application for an indication. As a result, there was no sentence indication hearing in this case. The matter ultimately resolved as a plea of guilty on the eve of the trial (on the Friday before it was due to start).

Sentence indication hearings

2.6 Sentence indication is available in the County and Supreme Courts. Of the 27 cases in which the prosecution consented to an application, the overwhelming majority of sentence indication hearings (25 cases) took place in the County Court.

2.7 In its 2007 report, the Council did not recommend that sentence indication should be available in the Supreme Court. This was based on the type of offences dealt with in the Supreme Court and a view that the Supreme Court did not have the same issues with delay as were apparent in the County Court.[54] However, parliament ultimately included the Supreme Court in the pilot sentence indication scheme.

2.8 In discussions with the Council, Justice Coghlan of the Supreme Court commented that while he supported continuing the sentence indication scheme in the Supreme Court, it was never going to have a huge impact on it as, except in the rarest of circumstances, immediate custodial sentences are imposed for offences heard in that jurisdiction.

2.9 This view is supported by statistical data on sentencing trends in the Supreme Court. A significant majority of defendants sentenced in that jurisdiction between July 2004 and June 2009 received an immediate custodial sentence (87.5%).

53 Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009).

54 Sentencing Advisory Council (2007) above n 1, 98–9.

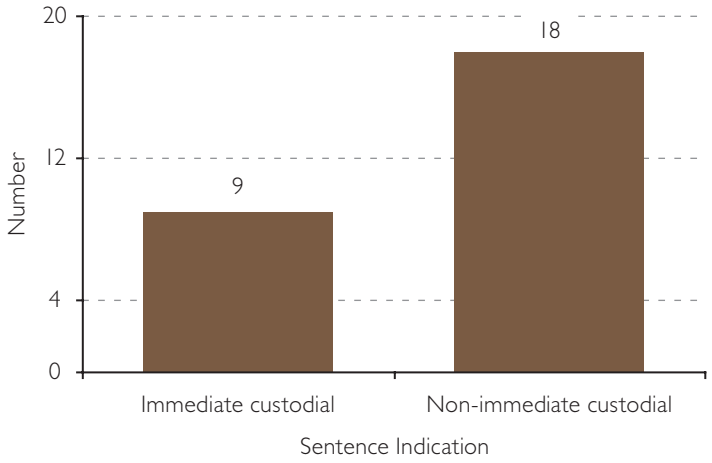
2.10 Upon an application for a sentence indication, the court may indicate whether it would be likely to impose a custodial sentence if the defendant enters a plea of guilty at that stage in the proceedings. The court may also decline to give a sentence indication, and this decision is not subject to review.[55] There was only one case in the review period in which the court declined to give a sentence indication, described in Case Study 2. There was also a case in which the court would not give an indication until further information could be provided by the defence, described in Case Study 3.

2.11 The majority of sentence indications given were that an immediate custodial sentence was not likely to be imposed if the defendant pleaded guilty. This is represented in Figure 4 as 'Non-immediate custodial', where 18 defendants were given an indication that they would be unlikely to receive an immediate custodial sentence if they were to plead guilty at that stage in the proceedings.

2.12 If the court provides a sentence indication and the defendant pleads guilty at the first available opportunity thereafter, the plea hearing can proceed before the same judge. The court is bound by the indication given when imposing sentence insofar as the judge cannot impose a sentence that is more severe than the indication given. Therefore, if the indication was that the court would be likely to impose a non-custodial sentence if the defendant pleaded guilty, the judge cannot sentence the defendant to an immediate custodial sentence. However, if the indication was that the court would be likely to impose an immediate custodial sentence, it is still open to the judge, after the plea hearing, to impose a sentence that does not require immediate custody.[56] This is illustrated in Case Study 4.

2.13 If, after a sentence indication, the defendant does not plead guilty at the first available opportunity, the trial must be listed before a different judge, unless both the prosecution and the defence agree to have the matter heard by the judge who gave the indication.[57] In four cases during the review period, the defendant did not accept the indication given. These were all before listing judges and the matters were returned to the general list to be heard by a different trial judge.

Figure 4: Sentence indications given by type of indication, 2008–09



55 *Crimes (Criminal Trials) Act 1999* (Vic) s 23A(5), (9); *Criminal Procedure Act 2009* (Vic) s 208(4), s 209(4). This does not affect the ability of the prosecution or the defence to appeal against the sentence ultimately imposed.

56 *Crimes (Criminal Trials) Act 1999* (Vic) s 23A(6); *Criminal Procedure Act 2009* (Vic) s 209(1).

57 *Crimes (Criminal Trials) Act 1999* (Vic) s 23A(7); *Criminal Procedure Act 2009* (Vic) s 209(2).

Case Study 2

The defendant requested a sentence indication before a listing judge on a charge of recklessly causing serious injury. The Crown consented to the application but the judge refused to give a sentence indication due to the nature of the offence. The matter was returned to the list and was listed for trial before a different judge. A subsequent sentence indication was sought before the trial judge and this was consented to by the Crown.

The circumstances of the offence were such that it was difficult to determine the cause of the victim's injuries, as both the offender and the victim had fallen through a mirror during a struggle. There were also several mitigating circumstances: absence of a prior criminal history, the youthfulness of the offender, his gainful employment, the fact that he was undertaking tertiary education and his very good prospects of rehabilitation. The Crown submitted that a term of imprisonment was warranted but it was a matter for the Court as to how this should be served. The judge indicated that an immediate custodial sentence would not be likely to be imposed. The defendant pleaded guilty at the next available opportunity.

Case Study 3

The defendant was committed for trial on charges of sexual penetration with a child aged under 16. The victim had consented 'in fact' to the sexual penetration. The defendant had no prior convictions and had some difficulties with cognitive functioning.

The defendant requested a sentence indication. The Crown consented to the application and submitted that a non–immediate custodial sentence was within range. The judge was initially reluctant to give an indication based on the material before the court and requested some further information about the psychiatric/psychological condition of the defendant. The matter was adjourned for a short period of time to allow defence counsel to contact the defendant's treating psychiatrist, who was able to provide some further information to the court. The judge was satisfied by this and indicated that a non–immediate custodial sentence would be likely to be imposed if the defendant pleaded guilty. The defendant entered a plea of guilty at the next available opportunity.

Case Study 4

The defendant applied for a sentence indication with the consent of the Crown on a charge of intentionally causing injury. After a sentence indication hearing, the judge indicated that all sentencing options were open. The judge said that she was not prepared to indicate a non–immediate custodial sentence at the sentence indication hearing stage but that this might change after the plea. The defendant pleaded guilty.

At the plea, the Crown submitted that a term of imprisonment was warranted and that at least part of it should be immediately servable. A difficulty acknowledged by the Crown was that there had been considerable delay in the matter. A victim impact statement was tendered at the plea. In imposing sentence, the judge noted that by pleading guilty the defendant had saved the witnesses the ordeal of giving evidence and the community the time and expense of a trial. The judge also noted that the offender 'entered [his] plea subsequent to a sentence indication hearing and in the face of being indicated that all sentencing options were open'.

In sentencing, the judge took into account the defendant's good prospects for rehabilitation, that the offender had undertaken to give evidence against co-accused in the matter, the guilty plea and contrition displayed by the defendant, the impact of the offence on the victim, the defendant's psychological issues, the delay in the filing of charges, the defendant's prior convictions and the need for general and specific deterrence. The defendant was sentenced to a suspended sentence.

Offence types

2.14 Sentence indication was used for varied offence types. In its 2007 report, the Council originally suggested that sentence indication may not be appropriate for sex offence cases and that it may be more useful in drug and/or fraud matters.[58] As Figure 5 shows, one sentence indication was given in a sex offence case (sexual penetration with a child aged between 10 and 16). There were also two other sexual offence cases in which the Crown did not consent to an application for sentence indication.

2.15 The offences shown in Figure 5 are the principal proven offences for which defendants were sentenced in cases in which a sentence indication was given. Charges of some offences are excluded as some defendants had more than one charge in their case.

2.16 A defendant may request a sentence indication for a charge that is not on the presentment.[59] In a number of cases, the matter resolved on the basis of charges that were not the same as the original charges against the defendant. This practice is not limited to cases in which there are sentence indication hearings. Some people consulted by the Council referred to the practice of charge negotiation by the parties in the majority of cases dealt with by the criminal justice system.[60] Case Study 5 is an example of a matter that resolved for a lesser charge.

Commonwealth offences

2.17 The pilot sentence indication scheme can also be used to assist the resolution of the Commonwealth matters. The *Judiciary Act 1903* (Cth) provides for the exercise of federal jurisdiction by state courts, allowing federal offences to be tried in state courts.[61] There are also specific provisions applying state criminal procedural laws to federal prosecutions, which allow sentence indication under the *Crimes (Criminal Trials) Act 1999* (Vic) to be utilised in Commonwealth matters.[62]

2.18 There was one Commonwealth case in which the defendant requested a sentence indication hearing during the review period.[63] The charges in that matter related to breaches of the defendant's duty as a company director.

2.19 In that case, the Office of the Commonwealth Director of Public Prosecutions did not consent to an indication hearing because it was of the view that the case warranted an immediate custodial sentence. The Commonwealth Deputy Director of Public Prosecutions in Victoria suggested that in a case in which the prosecution does not concede a suspended sentence and one is then imposed, the prosecution may want to appeal the sentence given.[64]

58 Sentencing Advisory Council (2007) above n 1, 125–8.

59 *Crimes (Criminal Trials) Act 1999* (Vic) s 23A(4); *Criminal Procedure Act 2009* (Vic) s 208(3).

60 Meetings with solicitors from the Office of Public Prosecutions (7 July 2009; 9 July 2009); Meeting with defence practitioner 7 (7 October 2009); Meeting with Justice Coglhan (23 October 2009).

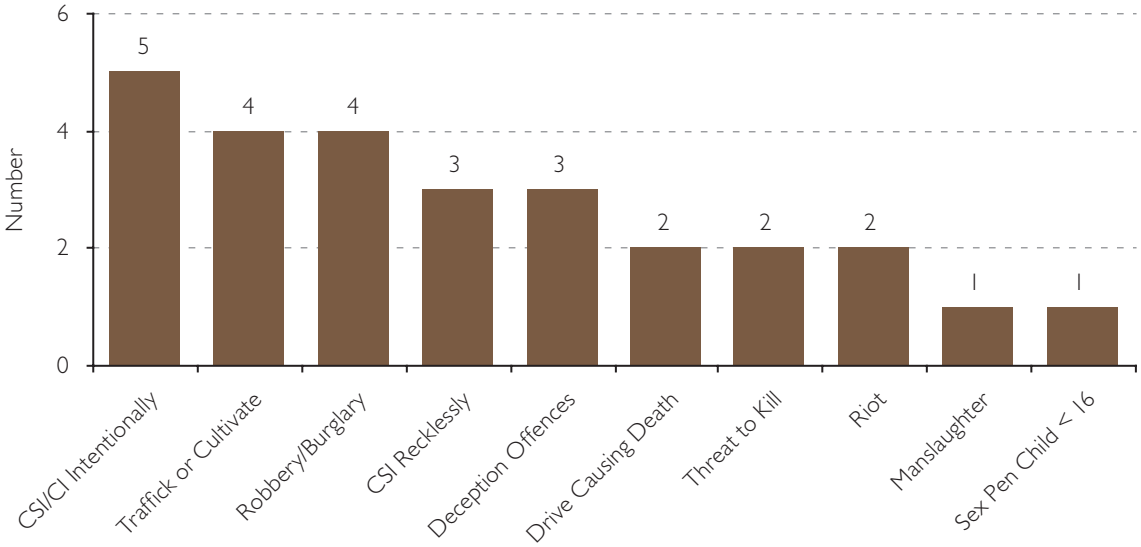
61 Specific provision is made under section 68(2) of the *Judiciary Act 1903* (Cth) for the exercise of federal criminal jurisdiction by state and territory courts.

62 *Judiciary Act 1903* (Cth) s 68(1), 79. For further discussion of federal offences dealt with by state courts, see Australian Law Reform Commission, *Same Time, Same Crime: Sentencing of Federal Offenders*, Report 103 (2006) [1.58]–[1.61].

63 The Council was advised that there was a more recent matter outside the reference period in which the defence requested a sentence indication. Meeting with Commonwealth Director of Public Prosecutions in Victoria (5 November 2009).

64 Meeting with Commonwealth Director of Public Prosecutions in Victoria (5 November 2009).

Figure 5: Offence type in cases in which there was a sentence indication hearing, 2008–09



Case Study 5

The defendant was charged with attempted murder. At the committal, the defendant entered a plea of guilty to a charge of recklessly causing serious injury and reserved his plea to the attempted murder charge. The defendant was committed for trial to the Supreme Court on the attempted murder charge and the matter was listed for trial. The defendant requested a sentence indication for the offence of intentionally causing serious injury. The Crown consented to the application and the matter was adjourned for a sentence indication hearing before another judge of the Supreme Court.

At the hearing, defence counsel submitted that the defendant was anxious to have the matter resolved, to accept responsibility for his conduct and to avoid the victim having to give evidence at trial. The time and expense saved by avoiding a trial was also highlighted. In submissions, defence counsel referred to the defendant's guilty plea to recklessly cause serious injury, which was entered at the earliest opportunity, and the defendant's good character and employment history. Defence counsel submitted that the combination of these factors constituted exceptional circumstances that justified a non–immediate custodial sentence.

The Crown indicated that it would accept a plea of guilty to the charge of intentionally cause serious injury but submitted that an immediate custodial sentence was required. It was also stressed that the Crown's consent to a sentence indication hearing should in no way be interpreted as agreement with the submission by the defence. The Crown submitted that there were aggravating factors that increased the gravity of the offence, making a suspended sentence inappropriate in the circumstances.

The judge had before him a statement from the victim, the record of interview, a psychiatric report, a defence report from a general practitioner and various psychologists' reports. The Crown also tendered a doctor's report detailing the injury sustained by the victim.

The judge would not indicate that he would impose an entirely non-custodial sentence if the accused pleaded guilty to intentionally cause serious injury.

The matter was listed for trial but ultimately resolved as a plea of guilty to intentionally causing serious injury. The defendant received an immediate custodial sentence.

Chapter 3
Impact of the sentence indication scheme

Introduction

3.1 The predominant concern underlying the reforms that introduced the sentence indication scheme was the increasing length of criminal proceedings in the higher courts.[65] The sentence indication pilot scheme was identified as a potential way of increasing efficiency and decreasing delay in the flow of cases in the higher courts, leading to the earlier resolution of matters.[66]

3.2 The Bill to enact the sentence indication pilot scheme was subject to extensive consideration and debate in the Legislative Council of the Victorian Parliament. Concerns were expressed about the scheme's potential to have significant negative effects. In particular, there was a concern that the scheme would operate in a manner that could place undue pressure on a defendant to plead guilty and adversely affect the rights of victims in sentence indication cases. Another concern raised was that the scheme may result in the imposition of lower sentences for cases that had been through the sentence indication process than would otherwise have been imposed.[67]

3.3 In the request to monitor the operation of the scheme, the Council was specifically asked to examine these issues so that, if necessary, they could be addressed should the scheme continue beyond the sunset clause. The terms of reference require the Council to monitor and report on the impact of sentence indication on the following factors:

a. case flow, including the proportion of pleas of guilty for all matters determined and the stage in proceedings at which those pleas of guilty are entered;
b. sentencing outcomes;
c. the key people involved, namely victims and the defendant; and
d. the resources and operation of the key participating agencies.

65 See [1.10]–[1.23].

66 Department of Justice (Victoria) (2004) above n 17, 29.

67 Victoria, *Parliamentary Debates*, Legislative Assembly, 6 December 2007, 4348 (Peter Ryan); Victoria, *Parliamentary Debates*, Legislative Assembly, 6 December 2007, 4350 (Nick Wakeling); Victoria, *Parliamentary Debates*, Legislative Council, 7 February 2008, 125 (Gordon Rich-Phillips); Victoria, *Parliamentary Debates*, Legislative Council, 7 February 2008, 129 (Sue Pennicuik).

Impact on case flow

3.4 The Council examined the impact of the sentence indication scheme on case flow by assessing a number of indicators. These included:

- the proportion of sentence indication cases that resolved by way of a guilty plea;
- the impact of the sentence indication on plea behaviour;
- the timing of the plea entered in sentence indication cases; and
- the time saved by avoiding a trial in sentence indication cases.

3.5 The Council has analysed data on the 27 sentence indications that occurred during the pilot period from 1 July 2008 to 30 June 2009. To provide context, the Council has also analysed data on the total number of guilty pleas in higher court cases during the same period according to the stage at which guilty pleas were entered.

Pool of cases targeted by sentence indication

3.6 There were 31 applications for a sentence indication in the review period (1 July 2008 to 30 June 2009). In 27 of these cases, the application was consented to by the Crown and an indication was given by the court.

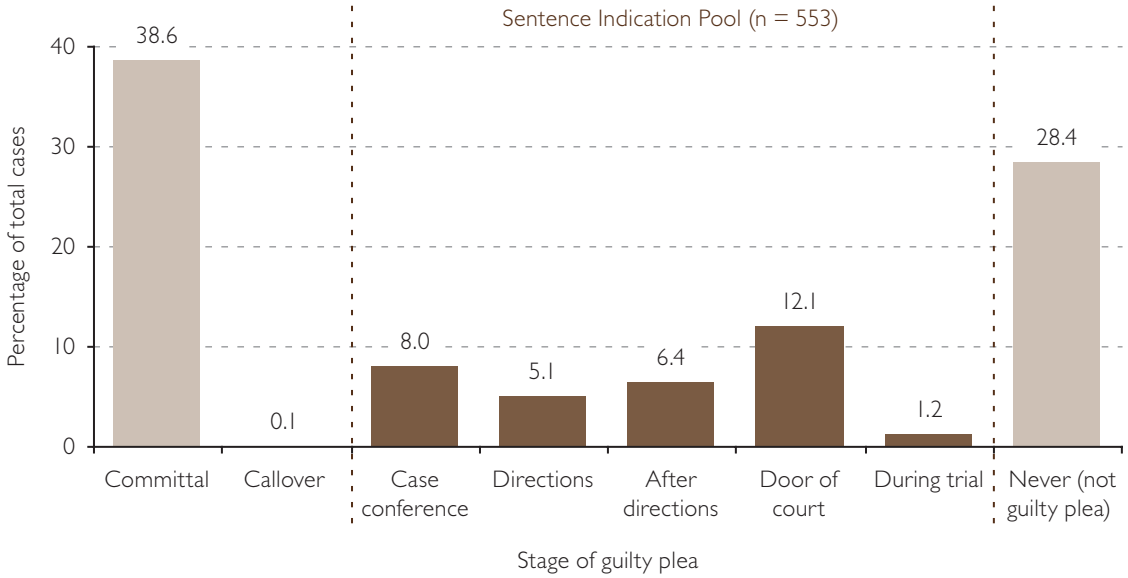
3.7 The number of sentence indication cases appears to be small, especially considering it represents about 1.0% of the 2,231 cases resolved in the County Court in the same period. However, it is important to understand that not all County Court cases are in the 'pool' of cases that could potentially be targeted by the pilot sentence indication scheme.

3.8 The pool of potential sentence indication cases excludes cases that are resolved by a guilty plea at the committal stage as well as cases in which the defendant maintained a not guilty plea throughout the case, leading to a trial. The aim of the sentence indication scheme was not to encourage *more* guilty pleas, but to encourage defendants who have not entered a guilty plea at the committal stage but who ultimately will plead guilty, to enter their guilty plea sooner *after committal* than they would without a prior indication of the sentence.

3.9 Figure 6 shows the proportion of cases in the higher courts by the stage at which the guilty plea was entered. A substantial proportion (38.6%) was resolved by a guilty plea at the committal stage, while a further 28.4% of cases did not resolve by a guilty plea at any stage. Thus, after guilty pleas at committal and pleas of not guilty are excluded, the pool of potential sentence indication cases comprised 32.8% of all County Court criminal cases, totalling 553 cases. Of this pool of potential cases, the number of sentence indication cases heard comprises 5.0%. In this context, the number of sentence indication cases represented a more substantial proportion than the 1.0% initially represented, though this is still small.

3.10 It should also be noted that the pool of potential sentence indication cases is reduced even further by the nature of the offences within a case as well as the likelihood of an immediate custodial sentence being perceived by the defendant. If the likelihood of an immediate custodial sentence is perceived to be extremely high (such as in a murder case) or extremely low (such as in a relatively minor theft case), it is unlikely that the defendant would request a sentence indication. Sentence indication is most useful for borderline cases in which it is uncertain whether an immediate custodial sentence will be imposed. The actual number of potential cases is difficult to determine, as it requires information about defendants' perceptions. Nevertheless, it is reasonable to assume that the 5.0% 'uptake' of the scheme is itself a minimum estimate of the impact on relevant cases.

Figure 6: Proportion of cases by plea type and stage at which a guilty plea was entered, County Court, 2008–09



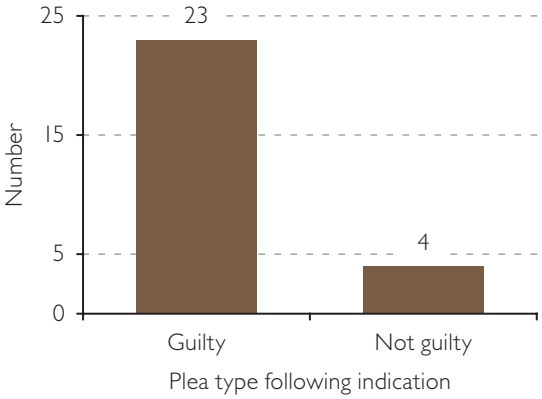
3.11 Therefore, when assessing the impact that the scheme has had on case flow, it is important to note the small number of sentence indication cases thus far and the relatively limited impact that this could have had on the system overall. The small number of sentence indication cases has also limited the Council's ability to assess the impact that sentence indications have had on case flow during the pilot period. However, the fact that sentence indication was used in only 5.0% of potential cases also suggests that there is a capacity for the sentence indication scheme to have a more significant impact, if the number of sentence indications is increased and the scheme is continued beyond the sunset clause.

Proportion of guilty pleas

3.12 The sentence indication scheme intends to provide a defendant with information about the likely sentence he or she will face at an earlier stage in order to assist his or her decision to plead guilty.

3.13 The Council analysed the sentence indication cases according to the plea entered after the indication was given by the court. Figure 7 shows that in 23 (85.2%) of the 27 cases in which a sentence indication was given, a plea of guilty was entered by the defendant after the indication. This high rate of guilty pleas is a positive indicator that sentence indication has the potential to facilitate the resolution of cases that might otherwise have been resolved at a later stage or proceeded to trial had it not been for the sentence indication.

Figure 7: Plea type for cases in which a sentence indication was given, 2008–09



3.14 With respect to the four cases in which the defendant pleaded not guilty after the sentence indication was given, two defendants were ultimately convicted at trial and two defendants later pleaded guilty before a different judge.

3.15 With respect to the four cases in which the application for a sentence indication was not consented to by the Crown, two defendants later pleaded guilty and two defendants pleaded not guilty and the matters went to trial. One matter resulted in a conviction at trial and the other matter resulted in an acquittal.

3.16 Looking at the overall contribution to the system, the 23 cases that resolved by way of a guilty plea after a sentence indication comprised 4.2% of the 'pool' of 553 cases that could possibly have been assisted by sentence indication (see further [3.9]).

3.17 Therefore, while there has been some impact in terms of increased resolution of cases, the contribution that this would have made on case flow has been limited due to the low numbers of cases.

3.18 However, the high proportion of guilty pleas following indications strongly suggests that the scheme has the potential to facilitate the resolution of an increased number of cases, should the scheme continue. The high rate of guilty pleas after a sentence indication demonstrates that the sentence indication scheme has the capacity to increase the proportion of guilty pleas in matters that have not resolved after the first hearing in the higher courts.

3.19 Most of the OPP solicitors consulted with said that it would be difficult to say whether their cases would have resolved without the indication. However, feedback from the majority of defence practitioners consulted with suggested that in their cases the matter would have proceeded to trial had there been no sentence indication,[68] or at a minimum the sentence indication assisted to resolve the matter.[69] For example, one defence practitioner said:

> [my client] could have had a case and if the indication was that he was going to get locked up, it would have been worth running the trial. By having the indication of a non-immediate custodial [sentence] you had the certainty he would not go in so it would resolve. It was a good resolution.[70]

3.20 Another defence practitioner reported that, as the client's main concern was whether or not he would get a sentence of immediate imprisonment if he pleaded guilty, 'in the absence of the sentence indication he probably would have gone to trial'.[71] Another practitioner said that '[w]ithout the indication the [defendant] would have run the trial'.[72] The importance of the sentence indication in assisting resolution was also emphasised by another defence practitioner:

> It is difficult to say whether the defendant would have pleaded guilty anyway. However, having some certainty of outcome really helped, because the defendant was in fear of going to jail.[73]

3.21 In another case, it was reported that initially there had been an agreement reached between the defence and the Crown as to a resolution but this then broke down. In this case, the sentence indication facilitated a guilty plea after the judge indicated that the defendant would be unlikely to receive an immediate custodial sentence if he pleaded guilty.[74] One practitioner remarked that it was difficult to say whether the defendant would have pleaded guilty anyway but that if it had not resolved it would have been a three- to four-month trial.[75] The time saved by avoiding a trial in sentence indication cases is discussed further at [3.46]–[3.54].

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68 Meeting with defence practitioner 4 (3 September 2009); Meeting with defence practitioner 6 (5 October 2009); Telephone conversation with defence practitioner 8 (28 October 2009).

69 Meeting with defence practitioner 2 (21 August 2009); Meeting with defence practitioner 3 (21 August 2009).

70 Telephone conversation with defence practitioner 8 (28 October 2009).

71 Meeting with defence practitioner 4 (3 September 2009).

72 Meeting with defence practitioner 6 (5 October 2009).

73 Meeting with defence practitioner 3 (21 August 2009).

74 Meeting with defence practitioner 1 (19 August 2009).

75 Meeting with defence practitioner 3 (21 August 2009).

Impact of indication on plea behaviour

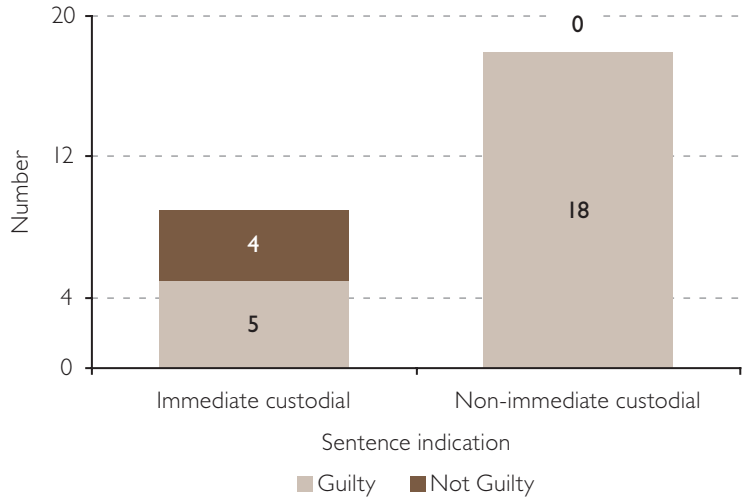
3.22 To assess the effectiveness of a sentence indication in facilitating the earlier resolution of cases, the Council examined the impact of the indication on the defendant's plea for each case in which a sentence indication was given.

3.23 As discussed, sentence indications were effective in facilitating a resolution in the majority of cases. Of the 27 cases in which a sentence indication was given during the pilot period, 23 cases (85.2%) resulted in a guilty plea. A plea of not guilty was entered in the remaining four cases, and of these two were ultimately resolved by guilty pleas.

3.24 Analysis of the type of indication given by the judge and the plea entered indicates that sentence indications were extremely effective at resolving cases in which the sentence indicated was a non–immediate custodial sentence. Figure 8 shows the plea type according to the sentence indication given and indicates that all 18 cases in which a non–immediate custodial sentence was indicated resulted in the defendant entering a guilty plea.

3.25 Therefore, the indication that a defendant is likely to receive a non–immediate custodial sentence has a significantly positive effect on the resolution of cases. This supports the feedback from defence practitioners that the question of whether or not a defendant is going to jail is a crucial one in many cases and is often a key factor which can delay the resolution of cases.

Figure 8: Sentence indication given and plea type for cases in which the crown consented to an indication, 2008–09



3.26 Almost all defence practitioners stressed that the question of whether or not a defendant is likely to go to jail if he or she pleads guilty can be very significant in the minds of defendants.[76] Many practitioners indicated that, in their experience, the 'fear of going to jail'[77] can lead to defendants delaying a plea of guilty if there is a risk that they may be required to serve an immediate custodial sentence. For example, one defence practitioner said the following about the impact that this can have on the timing of the resolution of cases:

> In terms of early resolution, people will always want to put off going to jail, even if it is a question between going now and in six months. This is why many matters do not resolve until close to the trial as the defendant will also put it off and counsel are briefed very late in the process … It's human nature, the most fundamental thing that people want to know is if they are going to jail. That is the single most important consideration, especially in the County Court.[78]

3.27 In one case examined by the Council, the indication was requested by the defence five days before a trial was due to commence as the defendant was 'terrified of going to jail'.[79] The Crown consented to the indication and a non–immediate custodial sentence was indicated, after which the defendant pleaded guilty immediately. In this case, the non–immediate custodial sentence was described as the 'safety net' that the defendant needed to make a decision to plead guilty to the offence.

3.28 Victoria Legal Aid, on the other hand, argued that contrary to the perception that defendants always want to delay cases, this is not the case and that the majority of defendants want to have matters resolved early.[80]

3.29 Figure 8 also shows that there were nine cases in which an immediate custodial sentence was indicated. In five of these cases, the defendant entered a plea of guilty after the indication was given, and in four cases the defendant pleaded not guilty.

3.30 Therefore, while custodial indications had less impact in facilitating resolution by resulting in a guilty plea, such sentence indications did assist to resolve five cases. An indication is binding on a judge in that if a non–immediate custodial sentence has been indicated, the judge cannot then impose an immediate custodial sentence.[81] However, if the sentence indicated is for an immediate custodial sentence, it is still open to the judge, after the plea hearing, to impose a sentence that does not require immediate custody, such as a suspended sentence.[82]

3.31 Defence practitioners who were involved in some of these cases reported that even though the indication was for an immediate custodial sentence, the indication was given in a way that suggested that a non–immediate custodial sentence was still an option that might be open after the judge had heard the full plea. For example, the judge's ultimate sentence may be influenced by the evidence tendered at the plea as to the mitigating circumstances of the defendant, the views and impact of the victim in the matter or the Crown's submissions as to the range of an appropriate sentence. This is illustrated in Case Study 6.

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76 Meeting with defence practitioner 1 (19 August 2009); Meeting with defence practitioner 3 (21 August 2009); Meeting with defence practitioner 6 (5 October 2009); Meeting with defence practitioner 7 (7 October 2009); Telephone conversation with defence practitioner 8 (28 October 2009).

77 Meeting with defence practitioner 3 (21 August 2009).

78 Telephone conversation with defence practitioner 8 (28 October 2009).

79 Meeting with defence practitioner 6 (5 October 2009).

80 Meeting with Victoria Legal Aid (27 October 2009).

81 *Crimes (Criminal Trials) Act 1999* (Vic) s 23A(6); *Criminal Procedure Act 2009* (Vic) s 209(1).

82 *Crimes (Criminal Trials) Act 1999* (Vic) s 23A(6); *Criminal Procedure Act 2009* (Vic) s 209(1). See discussion at [4.45]–[4.79] in relation to whether the scope of the sentence indication scheme should be expanded to include more specific indications, such as the sentencing range open to the court.

3.32 In all four cases in which the defendant pleaded not guilty, the sentence indicated was for an immediate custodial sentence. However, two of these cases ultimately resolved as a guilty plea. In one case, a plea of guilty was not entered immediately after an immediate custodial sentence was indicated and the matter went back to the general list. This case resolved almost immediately after this occurred. The defendant pleaded guilty and was sentenced by a judge different to the one who gave the indication. Although the indication in this case did not directly result in a plea of guilty, the defence practitioner in this case reported that the indication did assist in the ultimate resolution of the matter.

3.33 This analysis illustrates the significant impact that an indication of a non–immediate custodial sentence can have on resolving cases earlier than they would have otherwise resolved. It provides further support for the continuation of the scheme as an effective tool to assist in the resolution of cases at an earlier stage. This also suggests that the provision of such information and certainty of outcome for defendants have the potential to assist in the earlier resolution of cases.[83]

Case Study 6

The defendant requested a sentence indication on a charge of intentionally causing serious injury. The defendant's main concern was whether or not he would get a term of imprisonment if he pleaded guilty. The Crown consented to the application and at the sentence indication hearing, the judge indicated that the court would be likely to impose an immediate custodial sentence should the defendant plead guilty or be found guilty at trial. However, the indication was framed in a manner that suggested the possibility that a non–immediate custodial sentence was open.

The defendant pleaded guilty at the next available opportunity. At the plea hearing, the judge was informed that the victim did not want the accused to go to jail but wanted him to understand that what he had done was wrong. The judge acknowledged this in sentencing the defendant. Evidence was also tendered at the plea that the offending was out of character for the defendant. The defendant had no prior criminal history, was a contributing member of the community, had maintained constant employment, had a loving and supportive family and a relationship with his wife and had expressed remorse immediately after the incident. The offence had occurred while the defendant was celebrating the birth of his second child, and a psychological report tendered at the plea provided that his actions were fuelled by his heightened emotion at becoming a father again, a lack of sleep upon being present during the birth and intoxication at the time of the offence. The defendant was ultimately sentenced to a non–immediate custodial sentence, namely a suspended term of imprisonment.

83 This is discussed further under 'Impact on defendants' at [3.160]–[3.199].

Timing of guilty plea

3.34 By encouraging defendants who would ultimately plead guilty to enter their plea at an earlier stage than they might otherwise have done, sentence indication aims to decrease the delay in the flow of cases in the higher courts and free up court time and resources to deal with other matters.

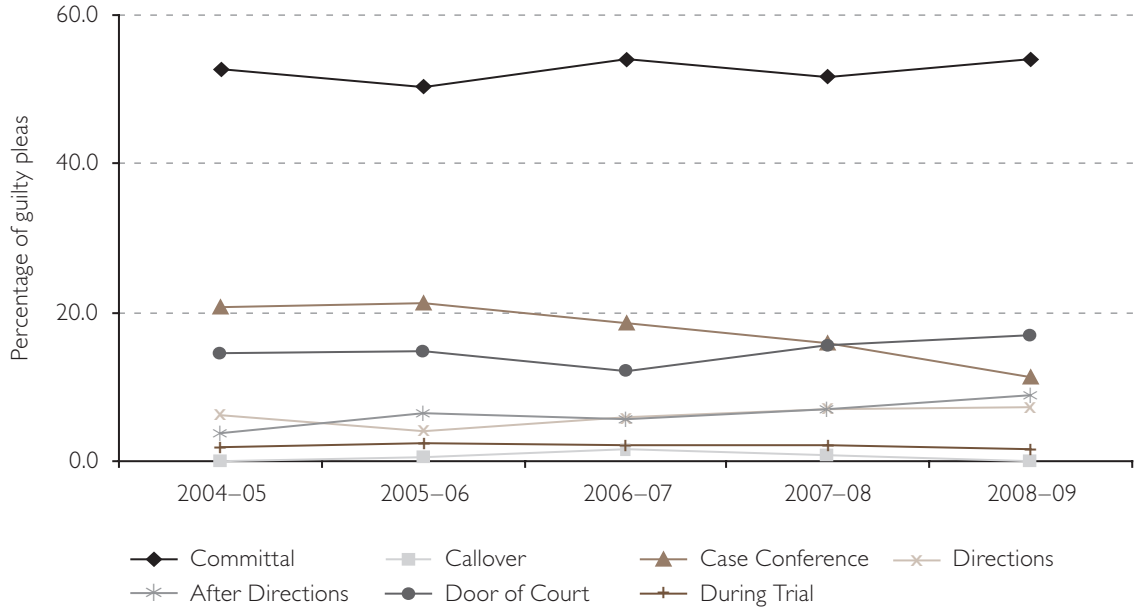
3.35 As shown in Figure 6 (page 23), the majority of all cases in 2008–09 in the higher courts resolved by way of guilty plea (71.6%). In 2008–09, only 28.4% of cases were not resolved by guilty plea and were disposed of at trial by the acquittal or conviction of the defendant.

3.36 Further, of those cases that did resolve by a plea of guilty, 65.4% in 2008–09 had already resolved by the time of the first hearing in the higher courts at case conference. While the fact that a high proportion of cases resolved at this early stage is encouraging, this still left 553 cases that were listed for trial but then ultimately resolved at a later stage in the process. The late resolution of these matters can have a costly impact on the system in terms of the wasted time and resources spent preparing the matters for trial, and the delay in resolving other matters that do go to trial. Therefore, if the resolution of these 553 matters can be expedited, this will have a positive impact by saving resources and court time, enabling the system to dispose of other cases more efficiently. A purpose of the sentence indication scheme was to assist this by moving guilty pleas to an earlier stage in proceedings, from the stages of 'during trial', 'door of court', 'after directions' and 'directions' to 'case conference'.

3.37 Analysis of the stage of resolution of cases in the higher courts that resolve by way of a guilty plea from 2004–05 to 2008–09 indicates a trend in the later resolution of such cases. Figure 9 shows that, while the percentages of cases that resolved at committal has stayed relatively stable (on or above 50%), the cases that have not resolved at committal are resolving at later stages in the process.

3.38 Figure 9 suggests that instead of resolving at case conference, case resolution is being delayed to the later stages in the process, such as directions hearings (one month before trial) and the door of the court (immediately before trial is due to commence). The percentage of cases that resolved by a guilty plea at case conference has decreased by nearly half, from 20.7% in 2004–05 to 11.2% in 2008–09. This is combined with an overall increase in the percentage of cases that resolved

Figure 9: Percentage of guilty pleas by stage of plea and financial year, 2004–05 to 2008–09



at a directions hearing from 4.1% in 2005–06 to 7.1% in 2008–09 and an overall increase in the percentage of cases that resolved at the door of court from 12.2% in 2005–06 to 16.9% in 2008–09.

3.39 Sentence indications can assist in the earlier resolution of cases by providing defendants with information and certainty that can help with their decision as to whether to enter a plea of guilty at the next available opportunity after the sentence indication. If this occurs, depending on the stage at which the sentence indication is sought, the resolution of cases will occur at an earlier stage. This could occur either at case conference before the matter is listed for trial or soon after case conference, well before the stages of directions hearing, door of court and during trial.

3.40 While the Council has not been able to access reliable data on the timing of the request for the indication in the 27 sentence indication cases during the pilot period, feedback from defence practitioners indicates that sentence indications were sought and given at various stages in the process.

3.41 In some cases, the matter was raised at the case conference or before a listing judge[84] prior to the matter being listed for trial. In other cases, the request for an indication was sought after case conference when the matter had been listed for trial in an effort to resolve the matter and avoid the trial proceeding.[85]

3.42 However, data on the immediacy of the timing of guilty pleas with respect to the indication show that in many cases the plea was entered immediately or at the first available opportunity after the indication was given.

3.43 In 10 of the 23 cases in which a guilty plea was entered after the indication was given, the plea was entered immediately or at the next available opportunity after the indication. In the remaining 11 cases, information about the timing of the plea with respect to sentence was not available.

3.44 Case Study 7 illustrates how quickly sentence indication can facilitate the resolution of cases in which there is no direct victim and no need to adjourn the matter to allow additional material to be prepared for the plea, such as victim impact statements or psychological reports.

3.45 Although the small number of cases in the pilot period limits the effect that sentence indications have had on case flow through the earlier timing of pleas, in many of the cases in the pilot period, the sentence indication resulted in an immediate resolution of the case by the defendant entering a plea of guilty immediately after the indication or at the next available opportunity. This illustrates the potential that sentence indication has if it is to be continued and if the number of cases increases. Therefore, the earlier in the process the request for a sentence indication is made, the earlier the case is likely to resolve.

Case Study 7

The defendant on a charge of cultivate a commercial quantity of cannabis requested a sentence indication before a listing judge. As this was a drug matter, there was no need for the plea to be adjourned to enable a victim impact statement to be prepared. The Crown consented to the application and the judge indicated that a non–immediate custodial sentence would be likely to be imposed. The defendant pleaded guilty on the same day as the indication was given and a plea hearing and sentence also followed on the same day. The defendant was sentenced to a non–immediate custodial sentence. He had no prior convictions and had a lesser role in the offending compared with his co-accused. There were also parity considerations as the defendant's co-accused had already been given a suspended sentence.

84 Meeting with defence practitioner 2 (21 August 2009).

85 Meeting with defence practitioner 3 (21 August 2009); Meeting with defence practitioner 6 (5 October 2009).

Time saved by avoiding a trial

3.46 Many defence practitioners suggested in consultations that in their cases, the matter would have proceeded to trial if there were no sentence indication mechanism.[86] It is difficult to predict whether every matter in which there was a sentence indication would have proceeded to trial without the sentence indication and to estimate the period of time saved in each case. However, feedback from defence practitioners indicates that there were significant savings of time in cases in which a sentence indication facilitated a resolution and avoided the need for a trial. For example, in one case a defence practitioner reported:

> The case would have been a three to four month trial if it had not resolved so this was a saving of cost and time for the court, but also the emotional cost to the parties if it had been a lengthy trial.[87]

3.47 This case involved two defendants and had already gone through a lengthy committal. The indication was requested following case conference at a further directions hearing after the matter had been listed for trial. It was reported that the indication was given quite quickly on the material. The defendant then entered a plea of guilty at the next available opportunity and a plea hearing followed.

3.48 In another case in which a sentence indication resolved the matter, both time and resources were saved by the avoidance of a trial. The trial was listed for 5 to 7 days but it was estimated that it could have run for up to 6 to 8 days as it involved complex legal issues around identification and self-defence. Further, the trial would have required significant resources as there were several witnesses, and one of the complainants and a witness were overseas, requiring a video link to give evidence. Interpreters were also required.[88] The practitioner commented on the fact that time was also saved by avoiding an appeal in this case:

> There was a significant risk that if he pleaded he would go to jail and I wanted to avoid him pleading and then being unhappy with the result and the time and resources that would then be necessary for a possible appeal.[89]

3.49 Although most of the OPP solicitors consulted with said that it would be difficult to say whether their cases would have resolved without the indication, one solicitor described how using the sentence indication process in a drug matter involving multiple defendants had assisted in significantly reducing the duration of the case:

> My trial was listed for three months. These guys were not settling because they were the ones that were looking at jail. I mean they didn't get jail. Some of the others settled as well thinking 'Well, I'm kind of in their category and they didn't get jail'. So I think it's pretty effective at reducing time. We only ended up with two defendants that are still going to trial out of 20 or 30. So that's a pretty good result.[90]

3.50 Some defence practitioners reported that the process seemed cumbersome, particularly when compared with the way in which sentence indications operated in the Magistrates' Court.[91] For example one defence practitioner said the following:

> The process of getting the indication and hearing the plea of guilty took three hearings, which seemed unnecessarily dragged out. There was the hearing at which the request for an indication was made, the indication hearing itself and then a further plea date. The plea could have been heard on the same day as the judge had already heard the bulk of the material.[92]

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86 Meeting with defence practitioner 1 (19 August 2009); Meeting with defence practitioner 3 (21 August 2009); Meeting with defence practitioner 5 (3 September 2009); Meeting with defence practitioner 6 (5 October 2009); Telephone conversation with defence practitioner 8 (28 October 2009).

87 Meeting with defence practitioner 3 (21 August 2009).

88 Meeting with defence practitioner 6 (5 October 2009).

89 Meeting with defence practitioner 6 (5 October 2009).

90 Meetings with solicitors from the Office of Public Prosecutions (7 July 2009; 9 July 2009).

91 Telephone conversation with defence practitioner 8 (28 October 2009).

92 Meeting with defence practitioner 4 (3 September 2009).

3.51 In this case, the defendant pleaded guilty at the next available opportunity after the sentence indication was made. The plea was heard 15 days after the indication hearing and the sentence was imposed seven days after that. Therefore, although the addition of the sentence indication hearing resulted in a further step in the process, the matter was resolved and disposed of within one month of the request for the indication.

3.52 Data from the County Court on the number of cases in which there was a sentence indication hearing indicate that in 22 of the 27 cases, there was an additional step in the process via an adjournment and listing for a sentence indication hearing. Therefore, in the remaining five cases, presumably the sentence indication hearing would have proceeded immediately before the judge on the same day as the request for a sentence indication.

3.53 While in the majority of cases the sentence indication resulted in the addition of an extra step to the process due to the need for a sentence indication hearing, the process was still considered to be quicker and to have saved more time than if the matter had gone to trial. For example, one defence practitioner said:

> The process does add some delays to what is already a lengthy process, particularly if you compare it to what happens at [a] contest mention (in the Magistrates' Court). It is longer than if the matter goes to plea but [it] saves time compared to a trial. [Sentence indication] help[ed] to resolve the matter in this case.[93]

3.54 Another defence practitioner reported that although the sentence indication added an additional hearing, overall court time was saved compared to the time that the case would otherwise have taken if it had proceeded by way of a plea or trial. At the sentence indication hearing, information on mitigating circumstances was tendered in outline form and submissions were made on the sentence indication. It was reported that this took less court time than would have been required for a normal plea. After the judge indicated that a non–immediate custodial sentence would be likely to be imposed, the defendant immediately indicated that he accepted the indication and would plead guilty. The matter was then adjourned to a plea hearing one month later. The plea also took less court time than a full plea hearing as the majority of the material had already been presented to the judge at the sentence indication hearing. Therefore, at the plea, the practitioner was able to go over the same material, formally tender documents referred to at the sentence indication hearing and make a few additional submissions in mitigation.

Concluding comments

3.55 Overall, the sentence indications between July 2008 and June 2009 have had a minimal effect on case flow. Thus far, applications for sentence indications under the scheme have been successful in targeting 5.0% of the pool of potential cases.

3.56 The indication that a defendant will be unlikely to receive an immediate custodial sentence was highly correlated with case resolution. This confirms that giving defendants the information and certainty that they will not go to jail does assist in the earlier resolution of cases that would otherwise have resolved at a later date. Further, the immediacy of the plea after the indication in many cases suggests that if sentence indication is raised at an early stage in proceedings, it is able to bring the resolution of cases forward to that early stage immediately after the indication is given.

3.57 The high correlation between non–immediate custodial sentences and guilty pleas indicates the further potential of sentence indication to assist in the resolution of cases. As numbers increase under the continued operation of the scheme, there will be a more significant impact on case flow, with the resolution of more cases at an earlier stage in proceedings and increased time and cost savings brought about by avoiding a trial.

93 Meeting with defence practitioner 2 (21 August 2009).

Impact on sentencing outcomes

3.58 One of the concerns raised by the Legislative Council during the debates on the Bill enacting the pilot sentence indication scheme was the potential impact that sentence indication may have on sentencing outcomes. There was a concern that using sentence indication to resolve matters where the court is overloaded had the potential to result in a judge indicating a sentence that is lower than the sentence which might otherwise be imposed. This led to a concern regarding:

> the capacity for [sentence indication] to be used to clear the courts and in doing so provide lighter sentences than would otherwise prevail.[94]

3.59 This concern arose in part because of the experience of the New South Wales pilot sentence indication scheme.[95] Under that scheme, a number of cases in which defendants were sentenced after pleading guilty on receipt of a sentence indication were appealed by the prosecution on the basis that the sentences imposed were manifestly inadequate.[96] After a spate of successful Crown appeals, the Chief Justice commented that the 'extraordinary leniency' being shown by judges sentencing post-indication was bringing the scheme into 'disrepute'.[97]

3.60 The New South Wales Court of Appeal's concerns about the imposition of unduly lenient sentences were borne out by the findings of evaluations of the scheme. The New South Wales Judicial Commission's review compared the sentences imposed on all defendants sentenced under the pilot scheme with sentences imposed on a sample of offenders arraigned but dealt with outside the sentence indication process. Disparity was found between sentences imposed on those who pleaded guilty after a sentence indication hearing, those who pleaded guilty at committal and those who entered a guilty plea at any other stage of proceedings.[98] The final evaluation conducted by the New South Wales Bureau of Crime Statistics and Research, which compared sentencing outcomes generally before and after the introduction of sentence indication, found that 'those pleading guilty after receiving a sentence indication are dealt with as leniently as those pleading guilty at committal, if not more so'.[99]

3.61 As part of its monitoring of the impact of the pilot scheme on case flow, the Council was also asked to assess and report on whether the sentence indication scheme had affected sentencing outcomes.

3.62 There were insufficient cases in the Victorian pilot scheme to allow for statistical analysis similar to that undertaken for the New South Wales scheme. Therefore, it cannot be determined whether there were disparities between the sentences imposed in sentence indication cases and ranges in general sentencing practices.

3.63 The Council has therefore assessed the impact of the scheme on sentencing outcomes in three different ways.

3.64 First, the Council examined the changes between the types of sentences indicated and the sentences ultimately imposed for sentence indication cases overall, including sentences indicated and imposed by offence type.

3.65 Second, the Council compared the type of sentence imposed in sentence indication cases in specific offence categories with the types of sentences imposed in the same offence categories in non–sentence indication cases for similar periods. This limits the assessment of sentence outcomes to

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94 Victoria, *Parliamentary Debates*, Legislative Council, 7 February 2008, 125 (Mr Rich-Phillips).

95 See Donna Spears, Patriza Poletti and Ian MacKinnell, *Sentence Indication Hearings Pilot Scheme* (1994); Don Weatherburn, Elizabeth Matka and Bronwyn Lind, *Sentence Indication Scheme Evaluation* (1995).

96 Byrne (1995) above n 21, 218.

97 *R v Hollis* (Unreported, New South Wales Court of Criminal Appeal, Hunt CJ, 3 March 1995) 7.

98 Spears, Poletti and MacKinnell (1994) above n 95, 40 (Table 8).

99 Weatherburn, Matka and Lind (1995) above n 95, 21.

a comparison of the sentencing outcome in each case and the statistical analysis of sentence types for the same offence. This is distinct from an examination of the appropriateness of the particular sentences indicated compared to ranges in general sentencing practices.

3.66 Third, the Council discussed the impact that a plea of guilty in sentence indication cases may have had on the sentences ultimately imposed, as a result of the discount on sentence to which a defendant is entitled upon pleading guilty.

Comparison of sentence indication and sentence imposed

3.67 Of the 27 sentence indications given in the pilot period, in 18 cases the indication was that a non–immediate custodial sentence would be likely to be imposed, and in six cases it was indicated that an immediate custodial sentence would be likely to be imposed.

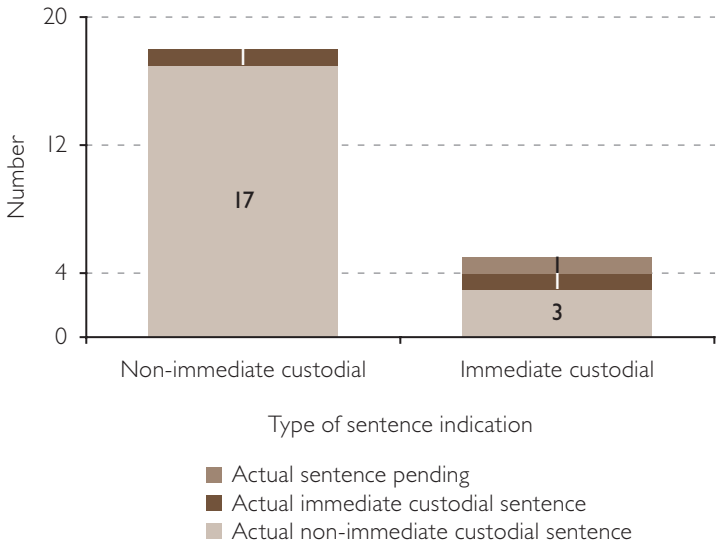
3.68 Figure 10 shows the number of defendants who pleaded guilty following a sentence indication, according to the indicated sentence and actual sentence imposed. There were 23 defendants who pleaded guilty after a sentence indication. The graph shows that the consistency between indicated and actual sentences varied according to the indication that was given.

3.69 For non–immediate custodial indications, there was consistency between actual and indicated sentences. Of the 18 cases in which a non–immediate custodial sentence was indicated, all defendants effectively received a non–immediate custodial sentence. One case in Figure 10 suggests that an immediate custodial sentence was given despite the non–immediate custodial indication, but the defendant was in custody when he pleaded guilty. The sentence imposed was a partially suspended sentence, for which the period of imprisonment imposed did not exceed the time already served by the defendant. Therefore, the effective sentence imposed was a suspended sentence.

3.70 In contrast, of the five defendants who pleaded guilty following an immediate custodial indication, three had their final sentence 'reduced' to a non–immediate custodial sentence, while one had not been sentenced by the court.

3.71 This illustrates that when the indication is for a custodial sentence, the indication does not predetermine the sentence that may be imposed. Rather, the material tendered at the full plea can have an effect on the sentence ultimately imposed as it is open to the judge to impose a less severe sentence than the one indicated.

Figure 10: Number of defendants who pleaded guilty following a sentence indication by the type of indication given and the type of sentence finally imposed, 2008–09



3.72 The remaining defendant who received an immediate custodial indication received a custodial sentence. This is illustrated in Case Study 8.

Case Study 8

The defendant sought an indication on a charge of recklessly causing serious injury. The Crown consented to the request and the judge indicated that an immediate custodial sentence would be likely to be imposed. The defendant pleaded guilty at the next available opportunity. At the plea hearing, a victim impact statement was tendered.

The Crown submitted that an immediately servable sentence was within range. The defendant had significant prior convictions and was sentenced to an immediately servable period of imprisonment.

Sentence indicated and imposed by offence type

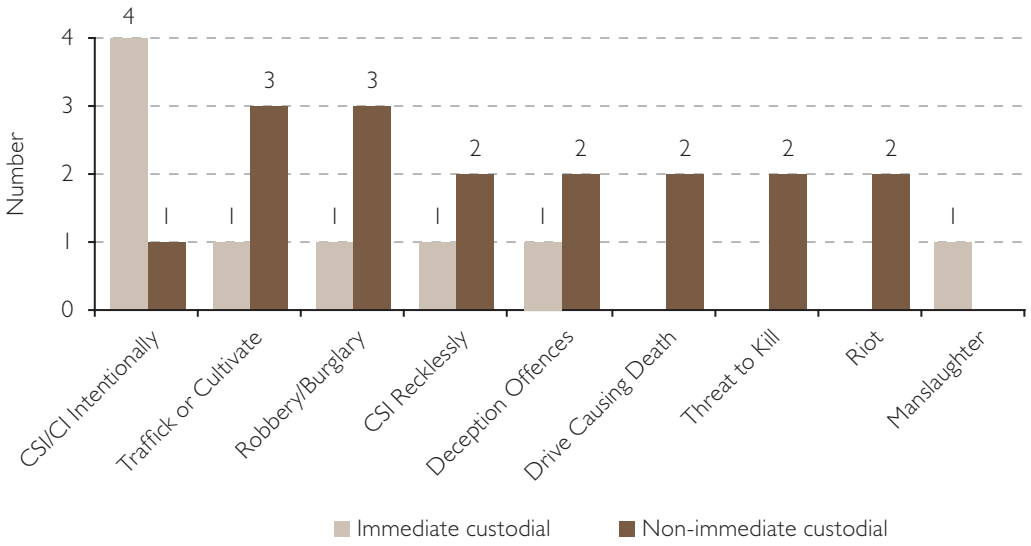
3.73 Figure 11 shows the sentence indication by offence type that was given in the 27 cases in which the Crown consented to the request for an indication.

3.74 The most commonly occurring offence category for which a sentence indication was given was injury offences, including intentionally causing serious injury, intentionally causing injury and recklessly causing serious injury. With respect to the five intentionally causing injury cases in which an indication was given, in four cases the indication was for an immediate custodial sentence, and in one case the sentence indicated was a non–immediate custodial sentence. With respect to the three recklessly causing serious injury cases, in two cases the indication was for a non–immediate custodial sentence, and in one case the sentence indicated was a non–immediate custodial sentence.

3.75 Immediate custodial sentences were indicated in four other cases in which the principal proven offence was traffick or cultivate drugs, robbery/burglary, deception and manslaughter (Supreme Court).

3.76 Non–immediate custodial sentences were indicated in three traffick or cultivate drugs and three robbery/burglary offence cases. Such sentences were also indicated in two cases involving deception

Figure 11: Sentence indication by offence type in cases in which the Crown consented to the application for a sentence indication, 2008–09



offences, two dangerous driving causing death cases, two riot cases and two make threat to kill cases. In one case in which a non–immediate custodial sentence was indicated, the principal proven offence was sexual penetration with a child between the age of 10 and 16 years.

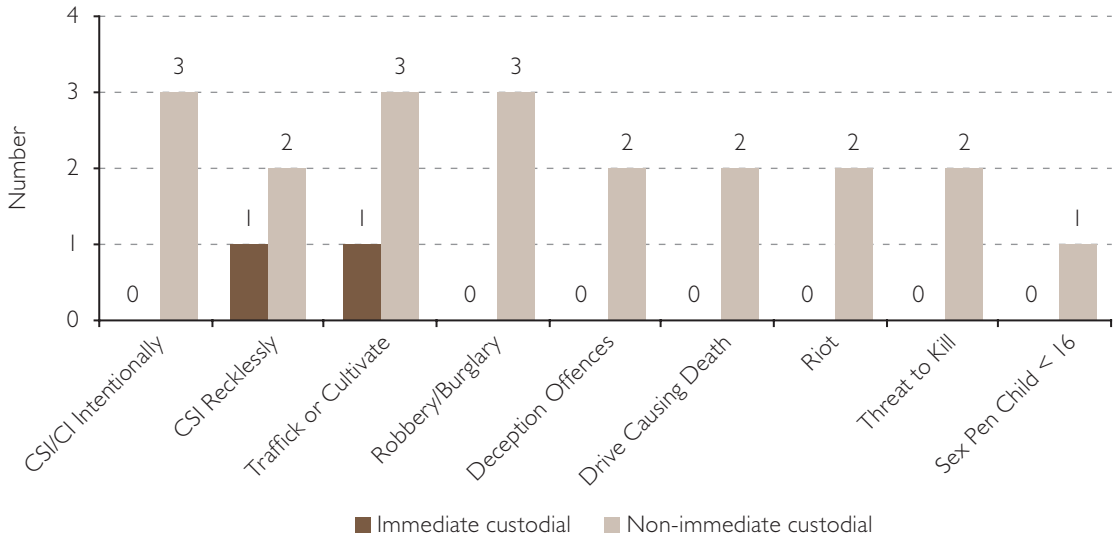
3.77 Almost all offences for which sentence indications were given can be categorised as serious enough to warrant a term of imprisonment. Therefore, the question of whether the defendant was likely to be sentenced to an immediate custodial sentence if he or she pleaded guilty was a crucial one in each case in which a sentence indication was requested. Feedback from defence practitioners indicates that in each of their cases, the request for the indication was made because the cases were 'borderline' or could have 'gone either way' in terms of whether or not the defendant was facing an immediately servable sentence of imprisonment.[100]

3.78 In giving the indication in each case, the judge would have had certain information before him or her, including the Crown's submission as to the appropriate sentencing range in the circumstances of the case, the impact of the offence on victims, submissions from the defence as to the circumstances of the offence and defendant and any mitigating factors. This is evident from the case study examples, which illustrate the information that indications were given on in particular cases.

3.79 For example, in Case Study 9 (page 46), which involves an offence of dangerous driving causing death, there was evidence before the judge that the victim did not want the defendant to go to jail. In many of the cases, the Crown submission on sentence was that a non–immediate custodial sentence would be an appropriate sentence within the range for the particular offences in each case.

3.80 Figure 12 shows the sentences ultimately imposed by offence type in those cases in which the defendant pleaded guilty after the indication. The majority of these were non–immediate custodial sentences. Of the 23 cases in which the defendant pleaded guilty after receiving a sentence indication, in one case the defendant had yet to be sentenced. Of the 22 remaining cases, a non–immediate custodial sentence was imposed in 20 cases (91.0%). Of the 20 non–immediate custodial sentences imposed, the most common type of sentence imposed was a wholly suspended sentence (18 cases), followed by a community-based order (one case) and a fine (one case).

Figure 12: Type of sentence imposed by offence type for cases in which a sentence indication was consented to and the defendant pleaded guilty, 2008–09



100 Meeting with defence practitioner 1 (19 August 2009); Meeting with defence practitioner 2 (21 August 2009); Meeting with defence practitioner 3 (21 August 2009); Meeting with defence practitioner 4 (3 September 2009); Meeting with defence practitioner 6 (5 October 2009); Meeting with defence practitioner 7 (7 October 2009).

3.81 In two cases, for the offences of recklessly causing serious injury and traffick/cultivate cannabis, the sentence imposed was an immediate custodial sentence. However, as discussed at [3.69], although in one of these cases the sentence imposed was partially suspended, its effect was that the defendant was not required to immediately serve time in custody in addition to the time already served when he pleaded guilty.

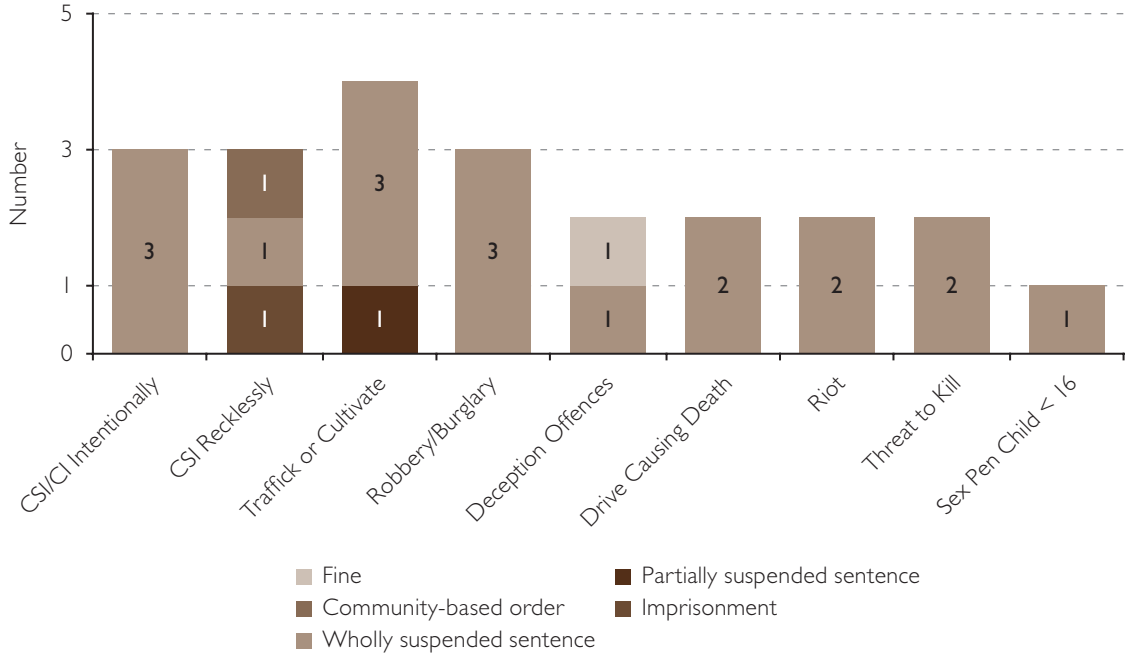
3.82 A comparison of the types of sentences indicated (shown in Figure 11) with the sentences ultimately imposed (shown in Figure 12), demonstrates that in the two intentionally cause serious injury/cause injury cases in which an immediate custodial sentence was indicated, the sentence imposed was less severe than the sentence indicated. In both cases, the sentence was reduced to a non–immediate custodial sentence after the judge had heard the plea on sentence.

3.83 For example, in one of these cases (Case Study 6, page 27) there was significant evidence tendered at the plea which mitigated the circumstances of the offence, and the defendant and the judge were informed that the victim did not want the defendant to go to jail but to understand that what he had done was wrong.

3.84 Figure 13 shows the particular sentences ultimately imposed by offence type. It indicates that a fine was imposed in a case involving a deception offence as the principal proven offence. The community-based order was imposed in a case in which the most serious principal proven offence was recklessly causing serious injury. The partially suspended sentence was imposed in a case in which the most serious principal proven offence was traffick cannabis.

3.85 In all other cases in which non–immediate custodial sentences were imposed, the sentence imposed was a wholly suspended sentence. This includes cases involving the following offences: intentionally causing injury or serious injury, recklessly causing serious injury, traffick or cultivate cannabis, robbery/burglary, deception, driving causing death, making threat to kill and sexual penetration with a child aged between 10 and 16 years.

Figure 13: Sentence imposed by offence type for cases in which a sentence indication was approved and the defendant pleaded guilty, 2008–09



Comparison of sentence type with sentencing statistics

3.86 A number of factors limit the conclusions that can be drawn from comparing sentences given in sentence indication cases with 'general' sentencing statistics for the same offences.

3.87 First, it involves the comparison of sentences imposed in a small number of sentence indication cases with general statistics on the sentences imposed in a large number of non–sentence indication cases. Such a comparison does not account for the particular circumstances in each sentencing case and the weight that was given to the factors that a sentencing judge takes into account in imposing sentence in the exercise of his or her discretion. These include, for example, the gravity and circumstances of the offence, the impact of the offence on any victim and the circumstances of the offender. Sentence indications may also be more likely to be sought in 'borderline' cases, which could involve less serious examples of a serious offence.

3.88 The limits of the use that sentencing statistics can have are discussed in recent decisions by the Victorian Court of Appeal.[101] In *R v Tran*,[102] the Court indicated that while Sentencing Snapshots are a 'tool' that can be used to 'partially reflect "current sentencing practice"', it was important to consider each case 'on its own facts'.[103] Reference was also made to earlier comments by the Court in the case of *DPP v Maynard*,[104] where the view was expressed that:

> care … must be taken when making comparisons between individual cases and in using statistics. Statistics do no more than establish minimum and maximum sentences and the average and median sentences imposed over a particular, and necessarily arbitrary period … the statistics … provide guidance in only a limited way to the sentence that should have been imposed in this case. By themselves, statistics do not establish a sentencing practice.[105]

3.89 It should be borne in mind that for the purposes of this comparison, the statistics are not being used as an indicator of sentencing practice or what appropriate sentences might be in particular cases according to the category of offences. Rather, the statistics are used as a statistical indicator of the types of sentences that were imposed for the same offences in the same period as non–sentence indication cases. This is compared to the sentence type for sentence indication cases in order to ascertain whether such a sentence was an 'option' open for sentencing for that offence.

3.90 The Council selected the following offences due to their relative prevalence in the sentence indication cases:

- Dangerous driving causing death;
- Recklessly causing serious injury; and
- Intentionally causing injury.

3.91 The offence of sexual penetration with a child aged between 10 and 16 years was also selected for comparison due to concerns that had been raised in relation to the use of sentence indication in cases involving sexual offences.

3.92 The Council compared the type of sentence imposed in sentence indication cases in which one of the above offences was the principal proven offence in the pilot period (from 1 July 2008 to 30 June 2009) with the type of sentence imposed in cases with the same principal proven offence in the same period.

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101 *R v Tran* [2009] VSCA 252 (Unreported, Maxwell P and Coghlan AJA, 12 October 2009); *DPP v Maynard* [2009] VSCA 129 (Unreported, Ashley, Redlich and Kellam JJA, 11 June 2009).

102 [2009] VSCA 252 (Unreported, Maxwell P and Coghlan AJA, 12 October 2009) [24]–[25].

103 *R v Tran* [2009] VSCA 252 (Unreported, Maxwell P and Coghlan AJA, 12 October 2009) [24]–[25].

104 [2009] VSCA 129 (Unreported, Ashley, Redlich and Kellam JJA, 11 June 2009).

105 *DPP v Maynard* [2009] VSCA 129 (Unreported, Ashley, Redlich and Kellam JJA, 11 June 2009) [35].

3.93 In two of the cases in which a defendant was sentenced after accepting a sentence indication, the principal proven offence was dangerous driving causing death. In each case, the sentence imposed was a wholly suspended sentence of imprisonment. In the same period, there were 20 non–sentence indication cases in which dangerous driving causing death was the principal proven offence. In those cases, a wholly suspended sentence was the most common sentence type and was imposed in 55.0% of cases. A partially suspended sentence was imposed in 20.0% of cases. Imprisonment was also imposed in 20.0% of cases. In 5.0% of cases, the sentence imposed was an intensive corrections order. Therefore, a wholly suspended sentence for this offence is, statistically speaking, a sentencing option that could have been imposed had the case not gone through the sentence indication process.

3.94 In three of the cases in which the defendant pleaded guilty and was sentenced after a sentence indication from 1 July 2008 to 30 June 2009 the principal proven offence was recklessly causing serious injury. In these three cases, the following three sentences were imposed: imprisonment, a wholly suspended sentence and a community-based order. In the same period, there were 113 non–sentence indication cases sentenced in the higher courts in which the same offence was the principal proven offence. In those cases, the most common sentence was a wholly suspended sentence, imposed in 40.7% of cases. This was followed by sentences of imprisonment (39.8%), partially suspended sentences (11.5%) and community-based orders (4.4%). Therefore, the sentences imposed in the sentence indication cases were not statistically outside the sentencing options that were 'open' for the same offence.

3.95 In two cases that resolved by way of a sentence indication from 1 July 2008 to 30 June 2009 the principal proven offence was intentionally causing injury. In both of these cases, a wholly suspended sentence of imprisonment was imposed. In the same period, the principal proven offence was intentionally causing injury in 68 non–sentence indication cases sentenced. The most common sentence imposed was a wholly suspended sentence, comprising 27.9% of all cases sentenced. In 23.5% of cases, the sentence imposed was imprisonment and in 17.6% of cases, a community-based order was imposed. Partially suspended sentences were imposed in 10.3% of cases and fines were imposed in 10.3% of cases, followed by detention in a youth training centre (4.4%). Adjourned undertakings were imposed in 2.9% of cases and intensive corrections orders were also imposed in 2.9% of cases. Therefore, the imposition of wholly suspended sentences for such sentence indication cases is not inconsistent with statistics on the type of sentence imposed in non–sentence indication cases for the same offence in the same period.

3.96 Dangerous driving causing death, recklessly causing serious injury and intentionally causing injury are not classified as 'serious offences' for the purpose of section 3 of the *Sentencing Act 1991* (Vic). Therefore, in sentencing offenders to imprisonment for these offences, a court would have been permitted to make an order suspending the whole or a part of the sentence, if it was 'satisfied that it is desirable to do so in the circumstances'.[106]

3.97 Figure 14 shows the sentences imposed according to whether the sentence was an immediate custodial sentence or non–immediate custodial sentence for non–sentence indication cases in which dangerous driving causing death, recklessly causing serious injury or intentionally causing injury was the principal proven offence. In each offence category, non–immediate custodial sentences were imposed in almost half or more cases. Therefore, the imposition of a non–immediate custodial sentence in sentence indication cases in the same offence categories was not inconsistent with the broad type of sentences imposed in non–sentence indication cases.

3.98 The offence of sexual penetration with a child aged between 10 and 16 years is classed as a 'serious offence' under section 3. In relation to this offence, a sentencing judge would be required to find exceptional circumstances before making an order suspending any sentence of imprisonment imposed.[107] Therefore, in imposing a wholly or partially suspended sentence for such an offence, a

106 *Sentencing Act 1991* (Vic) s 27(1).

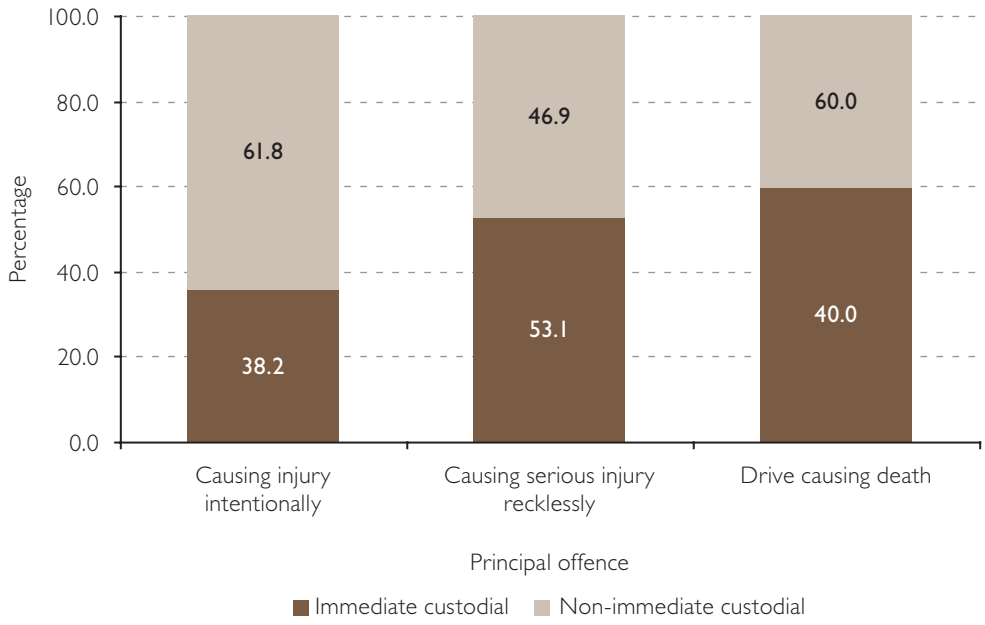
107 *Sentencing Act 1991* (Vic) s 27(2B).

sentencing judge would be required to be satisfied that such an order would be appropriate because of the existence of 'exceptional circumstances' and it is 'in the interests of justice'.[108]

3.99 In one sentence indication case from 1 June 2008 to 31 July 2009 the principal proven offence was sexual penetration with a child aged between 10 and 16 years. A wholly suspended sentence was imposed in that case. In sentencing the defendant, the judge considered that a wholly suspended sentence satisfied the criteria in section 3 and that there were exceptional circumstances 'on a basis of a combination of factors', including the defendant's limited social cognitive capacity and borderline intellectual functioning.[109]

3.100 Data on the sentences imposed for the offence of sexual penetration with a child aged between 10 and 16 years in non–sentence indication cases from 1 June 2008 to 31 July 2009 were not available. The Council has used data from 2006–07 to 2007–08 to examine the types of sentences imposed in cases in which sexual penetration with a child aged between 10 and 16 years was the principal proven offence. Sentencing practices for sexual penetration with a child aged between 10 and 16 years are markedly different from those for other sexual offences where the overwhelming majority of sentences imposed are imprisonment.[110] In the period from 2006–07 to 2007–08, the most common sentence imposed was imprisonment, comprising 51.8% of cases. However, in 18.1% of cases, the sentence imposed was a wholly suspended sentence. This was followed by 15.6% of cases in which a partially suspended sentence was imposed.[111] Therefore, statistically speaking, the wholly suspended sentence imposed in the sentence indication case is a sentence type frequently imposed in non–sentence indication cases.

Figure 14: Percentage of non–sentence indication cases by total effective sentence and selected principal offence, 2008–09



108 *Sentencing Act 1991* (Vic) s 27(2B).

109 This comment is taken from Victorian County Court sentencing remarks for this case dated 12 December 2008. The Council has not cited the case to protect the identity of the parties involved.

110 Such offences include rape, sexual penetration with a child aged under 10 years and sexual penetration with a child aged 10–16 years under the care, supervision or authority of the defendant. The circumstances for the offence of sexual penetration with a child aged between 10 and 16 years can vary widely, depending on the age difference between the victim and the offender and whether the victim consented 'in fact' to the penetration. See Sentencing Advisory Council, *Maximum Penalties for Sexual Penetration with a Child under 16 Report* (2009) [5.67]–[5.71].

111 Sentencing Advisory Council, *Sentencing for Sexual Penetration Offences Statistical Report* (2009) 12.

3.101 This analysis has shown that for each of the four offence types, the sentences imposed in the sentence indication cases were not outside the type of sentences imposed in non-indication cases for the same offences. Without reference to the individual circumstances of each case, care must be taken in drawing conclusions from these statistics as to the ranges within sentencing practices. It has not been possible to ascertain whether the sentences imposed in the sentence indication cases were 'appropriate' having regard to sentencing practices. However, this analysis does not suggest that the sentence indication scheme has resulted in sentences that are inconsistent with sentencing statistics for particular offence types.

3.102 Further, none of the cases in which a defendant was sentenced after accepting a sentence indication has been appealed by the Crown. This would suggest that the prosecution was not of the view that the sentences imposed in these cases were manifestly inadequate.

Would there have been a different sentence without the indication?

3.103 Most of the OPP solicitors consulted with said that it would be difficult to say whether there would have been a different sentence imposed if there had not been an indication given. Similarly, defence practitioners were not able to say whether the indication had affected the sentence actually imposed, except insofar as the indication assisted the matter to resolve. None of the stakeholders consulted with reported that the sentence indication had resulted in inappropriate sentencing outcomes or that the process had had an adverse impact on the sentence imposed.

3.104 In cases in which the defendant pleaded guilty, as in all cases in which a defendant pleads guilty, the sentence imposed would have been less than the sentence that may have been imposed had the offender pleaded not guilty and been convicted at trial.

3.105 This is a result of the discount that all defendants are entitled to receive for pleading guilty to a matter. As in any other case, a discount in sentence recognises the utility of a guilty plea in saving the resources and time required for a trial and the need for witnesses to give evidence. A plea of guilty can also be a mitigating factor in sentencing, as a sign of remorse.[112]

3.106 Legislation enacted in Victoria in 2008 now requires that if a court imposes a 'less severe' sentence because an offender has pleaded guilty to an offence, that court must state the sentence that would have been imposed but for the guilty plea.[113] A mechanism allowing courts to state the effect of the guilty plea on the sentence was recommended by the Council in its *Sentence Indication and Specified Sentencing Discounts Final Report*.[114] In making its recommendation, the Council also expressed the view that the court should be required to, rather than be merely permitted to, disclose the reduction in sentence provided for a guilty plea.[115] The Council also recommended that provision be made for courts to state the effect of a guilty plea on the indication by declaring whether a more severe sentence would have been indicated but for a plea of guilty being entered at that stage of proceedings.[116]

3.107 The requirement for the court to state the effect of a plea of guilty on sentence was introduced into section 6(AAA) of the *Sentencing Act 1991* (Vic) by section 3 of the *Criminal Procedure Legislation Amendment Act 2008* (Vic). While the provision does not require the court to quantify the discount received for the plea of guilty, it does require the court to state the sentence the defendant would have received but for the guilty plea.

112 Sentencing Advisory Council (2007) above n 1, 43–7.

113 *Sentencing Act 1991* (Vic) s 6 (AAA)(1).

114 Sentencing Advisory Council (2007) above n 1, 55 (Recommendation 1).

115 Ibid 54.

116 Ibid 121 (Recommendation 8).

3.108 The interaction between sentence indications and the giving of, and specifying, a discount for a guilty plea was examined in the New South Wales Judicial Commission's review of the New South Wales sentence indication scheme. In that review, some disparity was found between sentences imposed for those who pleaded guilty after a sentence indication hearing, those who pleaded guilty at committal and those who entered a guilty plea at any other stage of proceedings.[117] The final evaluation conducted by the New South Wales Bureau of Crime Statistics and Research also found that 'those pleading guilty after receiving a sentence indication are dealt with as leniently as those pleading guilty at committal, if not more so'.[118]

3.109 Therefore, under the New South Wales scheme, it was apparent that in some cases defendants were receiving a larger discount for pleading guilty after a sentence indication compared to the discount other defendants received for pleading guilty at an earlier stage in proceedings.

3.110 Due to the small number of cases under the Victorian scheme, the Council has not been able to do a similar statistical comparison of the discounts received in sentence indication cases with non–sentence indication cases according to the timing of the guilty plea at a particular stage in proceedings. Further, section 6(AAA) of the *Sentencing Act 1991* (Vic) does not apply to the giving of a sentence indication, but only to the imposition of sentence once the defendant has pleaded guilty. Therefore, it has not been possible to compare the stated effects of guilty pleas in sentence indication cases with the stated effects of guilty pleas on sentences in non–sentence indication cases.

3.111 In the 23 cases that resolved under the sentence indication process and resulted in a plea of guilty after the indication was given, the defendant would have been entitled to, and received, a reduction in sentence in recognition of his or her guilty plea.[119] In each of the cases, in accordance with the requirement under section 6(AAA) of the *Sentencing Act 1991* (Vic), the judge, in imposing sentence, stated what the sentence would have been had the defendant not pleaded guilty.

3.112 Therefore, in these cases, it is expected that the sentencing outcome in each case would have been different had the defendant not pleaded guilty and proceeded to trial. If the defendant had been convicted at trial, he or she would have been sentenced without any entitlement to the discount. If the defendant had been acquitted, he or she would not be sentenced at all.

3.113 The sentencing outcome would have also been different if the defendant had pleaded not guilty immediately after the sentence indication but then pleaded guilty at some later stage, for example on the morning of, or during, the trial. In such cases, although the defendant would have been entitled to a discount for the plea of guilty, it would be expected that the discount would have been less compared with the discount the defendant might have received had he or she pleaded guilty at a much earlier stage, for example before committal or at case conference.

3.114 Therefore, although there was no specific reference to the discount received in each case, defendants who pleaded guilty after a sentence indication would have received a discount in their sentence as a result of their guilty plea. While the sentence indication cannot be said to have had a direct impact on the reduction of sentences, its facilitation of the resolution of cases resulted in a guilty plea being entered in 23 cases. Thus, it indirectly resulted in discounted sentences being imposed in these 23 cases (although the discount cannot be quantified). Further, the sentence indication may have also affected the amount of the discount by encouraging the defendant to plead guilty at an earlier stage than he or she may have otherwise, thus entitling the defendant to a higher discount than if he or she had pleaded guilty at a much later stage in proceedings.

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117 Spears, Poletti and MacKinnell (1994) above n 95, 40 (Table 8).

118 Weatherburn, Matka and Lind (1995) above n 95, 21. See further [3.59]–[3.60].

119 The court is required to take into account the stage in proceedings at which the defendant indicated a willingness to plead guilty. See *Sentencing Act 1991* (Vic) s 5(2)(e). This is because the earlier the guilty plea is entered, the greater its potential value to the system.

Concluding comments

3.115 The small number of sentence indication cases in the review period has limited the impact of the scheme on overall sentencing outcomes in higher court cases. The comparisons between sentences indicated and sentences imposed in those cases in which the sentence indication resulted in a plea of guilty indicate that there was overall consistency between the sentence indicated and the sentence ultimately imposed. However, it is also evident that an indication for an immediate custodial sentence does not bind the sentencing judge in the ultimate sentence he or she imposes. There were cases in which further evidence tendered at the plea resulted in the imposition of a less severe sentence. In each case, as in all cases in which a defendant pleads guilty, the defendant would have also been entitled to, and received, a discount for pleading guilty, thus resulting in a different or shorter sentence than the one that would have been imposed had the defendant been convicted at trial.

3.116 The small number of sentence indication cases indicates that the concerns about the scheme being used to 'clear the courts' have not been borne out under the pilot scheme. The Council has not been able to assess whether or not there were disparities between the sentences imposed in sentence indication cases and general sentencing practices. However, the types of sentences imposed for particular offences in sentence indication cases were 'statistically consistent' with sentence types imposed for non–sentence indication cases in the same period. Thus, the Council does not consider there to be any evidence that sentence indication has adversely affected sentencing outcomes in the cases under the pilot scheme.

Impact on victims

Concerns regarding the role of victims in sentence indication

3.117 The Criminal Procedure Legislation Amendment Bill that introduced the sentence indication scheme in the County and Supreme Courts was subject to extensive consideration and debate by the Legislative Council. One of the issues raised was the impact that sentence indications may have on victims' rights in the criminal process.[120]

3.118 Section 6 of the *Victims' Charter Act 2006* (Vic) places an obligation on the OPP[121] to take account of the needs of victims. The OPP is also obliged to keep the victim informed of proceedings and to give victims of crime the opportunity to make a victim impact statement.[122] There are also various provisions in the *Public Prosecutions Act 1994* (Vic), which place obligations on the Director of Public Prosecutions and all OPP staff to consider the needs of victims.[123] Further, under the *Sentencing Act 1991* (Vic), in sentencing an offender a court must have regard to the impact of the offence on any victim of the offence, any personal circumstances of any victim of the offence and any injury, loss or damage resulting directly from the offence.[124]

3.119 One of the concerns raised during the Parliamentary debate on the proposed sentence indication scheme related to the role that victims and victim impact statements would have in sentence indication cases.

3.120 It was suggested that if a court gives a sentence indication and then is bound not to impose a more severe sentence in the event that the defendant pleads guilty, information that comes out later in proceedings, such as victim impact statements, will not be able to be taken into account in sentencing.[125]

3.121 In criminal matters, the OPP's practice in relation to victim impact statements is to wait until a defendant has either pleaded guilty or been convicted of an offence before requesting the informant to ask the victim if he or she would like to make a victim impact statement. Once the OPP receives a copy of any victim impact statements, it must provide a copy to the defence. This practice is due to the provisions in the *Sentencing Act 1991* (Vic) in relation to victim impact statements. Section 95(A) of the Act provides that '[i]f a court finds a person guilty of an offence, a victim may make a victim impact statement to the court for the purpose of assisting the court in determining sentence'. This practice ensures that any information contained in a victim impact statement that may be relevant to the issues at trial cannot be used against a victim if he or she is required to give evidence in the matter.[126] Therefore, the OPP will wait until the matter has been resolved before any victim impact statements are prepared, in compliance with the legislative provisions. It is also considered undesirable for possible cross-examination of a victim to occur if a victim impact statement is prepared before the defendant is found guilty by the court.[127]

120 Letter from the Attorney-General, the Hon. Rob Hulls, MP, to Professor Arie Freiberg, 7 July 2008.

121 The legislation refers to the 'prosecuting agency'. The OPP is the prosecuting agency for all indictable offences dealt with in Victoria.

122 *Victims' Charter Act 2006* (Vic) s 11, 13.

123 *Public Prosecutions Act 1994* (Vic) s 24, 36, 38, 4.

124 *Sentencing Act 1991* (Vic) s 2(daa), (da), (db).

125 Victoria, *Parliamentary Debates*, Legislative Council, 7 February 2008, 125 (Mr Rich-Phillips).

126 See *R v Lewis-Hamilton* (Unreported, Supreme Court of Victoria, Winneke P, Hayne and Charles JJA, 8 April 1997).

127 Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009).

3.122 The defendant has not pleaded guilty or been convicted when a request for a sentence indication is made. Therefore, under the current practice, the OPP will not have any victim impact statements when the request is made. The victim impact statements will only be requested after the offender has pleaded guilty following the sentence indication. Therefore in most cases there will not be a victim impact statement before the court at the time a sentence indication is made. The concern raised was that due to this practice, the sentence indication process may undermine the victim's right to make a victim impact statement. Another issue raised was the extent to which the process may result in the OPP's lack of consultation with the victim in criminal proceedings.

3.123 These issues were considered extensively by the Scrutiny of Acts and Regulations Committee ('SARC') and the Legislation Committee, both before and after the Second Reading of the Bill in the Legislative Council. In considering the effect that the provisions may have on victims' rights, SARC noted that, 'sentence indication hearings may occur at an early stage and that victims may therefore not be as involved as they are in regular sentencing hearings'. However, its view was that the provisions did not modify existing protections for victims' rights under the *Public Prosecutions Act 1994* (Vic) and the *Victims' Charter Act 2006* (Vic).[128]

3.124 The Legislative Committee also considered these issues. It noted that the obligation for a court to consider the impact of an offence on a victim extended to the discretion not to make a sentence indication if it did not consider that there was sufficient information before the court to ensure it could take this into account as required under the Act. The Committee discussed the safeguards already in place under the *Sentencing Act 1991* (Vic), *Public Prosecutions Act 1994* (Vic) and the *Victims' Charter Act 2006* (Vic), which:

> [p]lace a positive duty on the courts to consider victims, place a proactive duty on the prosecution to consider the views of victims [and] provide a very comprehensive opportunity for victims to put their views and impose an obligation on the court to take those views into account.[129]

3.125 This is also consistent with the Council's view of the safeguards provided by the *Public Prosecutions Act 1994* (Vic) and the *Victims' Charter Act 2006* (Vic) in its report recommending a pilot sentence indication scheme:

> The combined effect of these provisions is to create a statutory obligation on the prosecution to confer with the victim and a corresponding right of the victims to be consulted as part of the process.[130]

3.126 A further safeguard recommended by the Council and adopted in the legislation enacting the pilot scheme is the requirement of the prosecution to consent to a request by the defence for a sentence indication.[131] This requirement ensures that in appropriate cases the OPP can consider the attitude of the victim in its decision to consent to the indication.[132] It also ensures that if there is information about the impact of the offence on any victim, which ought to be before the court at the time of the request for a sentence indication but is not because of the lack of a victim impact statement, the OPP may decline to consent to the request for an indication.

3.127 As discussed above at [1.57], there were barriers to consulting directly with the victims of the offences in the 27 sentence indication cases. To assess the impact of the scheme on victims, the Council consulted with solicitors from the OPP, who were involved with and had liaised with victims in sentence indication cases, the DPP, Witness Assistance Service workers at the OPP, some of whom had worked with victims in cases in which there had been a sentence indication, and members of the judiciary.

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128 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest No. 2 of 2008* (2008), 9.

129 Legislative Council Legislation Committee, Parliament of Victoria, Criminal Procedure Legislation Amendment Bill, 26 February 2008 (Mr Tee) 10.

130 Sentencing Advisory Council (2007) above n 1, 120.

131 Ibid.

132 Ibid 119.

Right to be kept informed and consulted

3.128 In addition to the OPP's obligations under the *Public Prosecutions Act 1994* (Vic) and the *Victims' Charter Act 2006* (Vic) to take account of the needs of victims and keep victims informed of proceedings, internal OPP policy also requires that where possible victims should be kept informed of, and given the opportunity to express their views at various stages of, the criminal process.[133]

3.129 These obligations apply in all criminal cases, including those in which a sentence indication is requested. While there is not an express requirement under the current scheme for the OPP to consult with victims as part of its decision to consent to a sentence indication, its policy to consult with and keep victims informed of the proceedings applies to the sentence indication process. Therefore, in the same way that a solicitor should consult with and keep a victim informed of the possible resolution of a matter, a solicitor, where possible, should inform a victim if a request for a sentence indication is made and seek his or her views on this request.

3.130 The Policy and Advice Directorate of the OPP reported that no issues had arisen in relation to consultation with victims specific to sentence indication cases during the pilot period. A function of the Policy and Advice Directorate of the OPP is to deal with complaints from victims that may arise in relation to the level of consultation or provision of information in particular cases. The Policy and Advice Directorate informed the Council that there had not been any such complaints made to the OPP in relation to sentence indication in general or in relation to the process in specific sentence indication cases in the pilot period.[134] The Policy and Advice Directorate also noted that the OPP was currently addressing a number of issues in relation to the role and rights of victims in criminal proceedings, arising from the recent review undertaken by the Victims Support Agency (VSA) on the implications of the *Victims' Charter Act 2006* (Vic). However, the OPP commented that these are broader issues that apply in all cases and are not specific to sentence indication.

3.131 OPP solicitors involved in sentence indication cases suggested that where the OPP had been able to contact the victim, the victim was kept informed and consulted as part of the sentence indication process and had been given the opportunity to make a victim impact statement after the matter had resolved.[135]

3.132 In one case described in consultation, the victim was kept informed throughout the plea negotiation process, including the request for a sentence indication. The process was explained to her by the solicitor in charge of the case, who formed the view that the victim was satisfied with what was happening. It was explained to her that the request for a sentence indication was not a plea offer as yet: 'This isn't necessarily a resolution; this is a step that could lead to that. But not necessarily'.[136]

3.133 The victim in that case did not want to give evidence. She had the process explained to her, and the sentence indication gave her some hope that the matter would resolve. However, '[s]he knew not to get her hopes up too high'.[137]

3.134 One solicitor described a dangerous driving causing death case in which sentence indication was used. The sentence indication was requested at the case conference, and the family of the victim was present in court, so the solicitor was able to speak to them about the sentence indication at the time. He noted that this would not always be possible because victims generally do not attend administrative hearings.[138]

133 Office of Public Prosecutions, *Victims and Witnesses: Policy* 7 (2008).

134 Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009).

135 Meetings with solicitors from the Office of Public Prosecutions (7 July 2009; 9 July 2009).

136 Meetings with solicitors from the Office of Public Prosecutions (7 July 2009; 9 July 2009).

137 Meetings with solicitors from the Office of Public Prosecutions (7 July 2009; 9 July 2009).

138 Meetings with solicitors from the Office of Public Prosecutions (7 July 2009; 9 July 2009).

3.135 Case Study 9 provides another example of the process of consultation with a victim's family in a dangerous driving causing death case in which there was a sentence indication.

Case Study 9

The defendant was charged with dangerous driving causing death. The offence occurred as a result of momentary inattention by the defendant. The defendant asked for a sentence indication, which was consented to by the Crown. In making its decision to consent to the application, the Crown consulted with the victim's family, who were not opposed to a sentence indication being given by the judge. The family had also been advised that one possible outcome was that the accused would not receive an immediate sentence of imprisonment.

At the sentence indication hearing, defence counsel conceded that a sentence of imprisonment was required but submitted that it should be fully suspended. The Crown conceded that a fully suspended sentence was within the range of the sentences which were properly open. The judge indicated that a non–immediate custodial sentence was likely.

Following the indication, the defendant pleaded guilty. The plea was heard five days after the indication hearing. The main concerns of the victim's family had been for the process to be over quickly and for the accused not to go to jail. These views were communicated to the judge in victim impact statements tendered at the plea hearing. Evidence was also tendered by the defence about the defendant's circumstances, including that he had no prior convictions, was a hard working member of the community, had pleaded guilty and showed genuine remorse for the offence.

Two days after the plea, the offender was sentenced to a non–immediate custodial sentence, namely a wholly suspended sentence of imprisonment. The sentencing outcome was consistent with the views of the victim's family. However, the family reported to the solicitor that the addition of the sentence indication hearing had made the process feel drawn out. Although the family had been consulted in relation to the request for the sentence indication, there appeared to have been some confusion about the process and why there was a need for a sentence indication hearing prior to the plea hearing.

3.136 The possible challenge of ensuring that victims understand the sentence indication process where applicable was raised by the OPP. An OPP solicitor suggested that in some cases there might be difficulty in explaining the legal process involved in a sentence indication. One solicitor said that she had spoken to the victim about the possibility of the trial resolving and the basis on which it might resolve, but she did not specifically refer to sentence indication as part of the plea negotiation.[139]

3.137 The Council's consultation with workers from the WAS in the OPP also indicated that if a legal process such as sentence indication is explained to, and understood by, victims at the time of a witness conference, it may not be something that is as important as other aspects at this stage of the process. Although the experience of victims will differ in every case, it was reported that in many cases, at that stage of the process 'the key thing is that the case will be resolved and [they] can move on'.[140] Justice Coghlan commented that for some victims, the most important aspect of the process can be the resolution of the case and not having to give evidence, over the individual steps in the process or the outcome.[141]

3.138 It was reported by OPP solicitors that in some cases the victims were not very interested in the outcome of the case. In a case of affray, the solicitor in charge of the file said that the victims 'didn't particularly care' about the sentence indication 'and that had been their attitude throughout'.[142] There were also examples of cases in which victims could not be contacted, despite efforts to do so, and therefore it would not have been possible for the solicitor to seek their views on whether or not to consent to a sentence indication.

3.139 Seven of the cases in which there was a sentence indication were for offences that did not directly involve a particular victim. Four such cases were offences of traffick or cultivate a drug and two were riot offences. Therefore, there would have been no requirement by the OPP to inform or consult with victims in making the decision to consent to the request for a sentence indication.

3.140 An OPP solicitor described one such case in which the defence had requested an indication very close to the trial date. The matter was the last in a multi-headed drug matter dating back to 2004 where all other co-defendants had pleaded guilty:

> It was a drug case so I didn't have victims to consider. We were saying [the sentence should be an] immediate custodial [sentence]. Defence were hoping to hear something more favourable … the judge indicated that a custodial sentence would be appropriate. Ultimately it resolved into a plea of guilty and ultimately the sentence was suspended.[143]

139 Meetings with solicitors from the Office of Public Prosecutions (7 July 2009; 9 July 2009).

140 Meeting with Witness Assistance Service, Office of Public Prosecutions (29 October 2009).

141 Meeting with Justice Coghlan, Supreme Court of Victoria (23 October 2009).

142 Meetings with solicitors from the Office of Public Prosecutions (7 July 2009; 9 July 2009).

143 Meetings with solicitors from the Office of Public Prosecutions (7 July 2009; 9 July 2009).

Making a victim impact statement

3.141 The *Sentencing Act 1991* (Vic) and the *Victims' Charter Act 2006* (Vic) state that all victims may make a victim impact statement to inform the court of the impact that the offence has had on them.[144] Under the *Sentencing Act 1991* (Vic), in sentencing an offender a court must have regard to the impact of the offence on any victim of the offence, any personal circumstances of any victim of the offence and any injury, loss or damage resulting directly from the offence.[145]

3.142 Flowing on from these provisions, the concern raised in relation to sentence indications was that at the time of giving a sentence indication the court may not be provided with information about the impact of the offence on a victim, as this would usually be contained in a victim impact statement. This is because it is not desirable for a victim impact statement to be prepared and provided to the court and defence before the matter has resolved.[146]

3.143 The Policy and Advice Directorate of the OPP confirmed that this practice is adopted to comply with the requirement in section 95(A) of the *Sentencing Act 1991* (Vic) that victim impact statements should not be prepared before a defendant has pleaded guilty or been found guilty of an offence.[147] This also avoids the undesirable consequence of a victim being cross-examined on the contents of victim impact statements if he or she is required to give evidence at a trial.[148]

3.144 The importance of providing information at the time of the sentence indication hearing about the impact of the offence on the victim was emphasised by many stakeholders.[149] In addition, the important part that victim impact statements play in the criminal justice system and in the healing process for victims was also emphasised:[150]

> [Y]ou can see that it means a lot to victims to be able to read [the statement] out … [victim impact statements] serve a huge purpose.[151]

3.145 However, the fact that a victim impact statement is not before the court at the time a sentence indication is requested does not necessarily mean that the court cannot be informed of, and take into account the impact of, the offence on the victim when giving a sentence indication. Nor does this mean that a victim will not be entitled to make a victim impact statement to be taken into account by the judge in sentencing once the defendant has pleaded guilty (although the court would be bound by the indication if it was for a non–immediate custodial sentence).

144 *Sentencing Act 1991* (Vic) s 95A; *Victims' Charter Act 2006* (Vic) s 13. See also Office of Public Prosecutions, *Policy 7* (2008) above n 133.

145 *Sentencing Act 1991* (Vic) s 2 (daa), (da), (db).

146 See discussion at [3.119]–[3.121].

147 *Sentencing Act 1991* (Vic) s 95.

148 Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009). See *R v Lewis-Hamilton* (Unreported, Supreme Court of Victoria, Winneke P, Hayne and Charles JJA, 8 April 1997). In this case there was a victim impact statement available before the defendant had been convicted, which had been not been disclosed to defence. This resulted in the defendant's conviction being overturned.

149 Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009); Meeting with Director of Public Prosecutions (Victoria) (27 October 2009); Meeting with Justice Coghlan, Supreme Court of Victoria (23 October 2009).

150 For consideration of the role of Victim Impact Statements, see Victim Support Agency (Department of Justice, Victoria), *A Victim's Voice: Victim Impact Statements in Victoria* (2009) 4–7 <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Victims/Are+You+a+Victim/JUSTICE+-+A+Victims+Voice+Victim+Impact+Statements+in+Victoria+%28PDF%29> at 8 December 2009.

151 Meeting with County Court judge 1 (13 October 2009).

3.146 The OPP policy on sentence indications states the way in which the views of a victim have a role in the sentence indication process. The policy states that if a sentence indication hearing proceeds, the Prosecutor should make submissions at a sentence indication hearing as to the impact of the offending on the victim/s.[152] It was reported by the OPP that such information could be collected by the police informant from victims orally and this can be asserted from the bar table by the Crown as part of submissions to the judge on the sentence indication.[153] This method was viewed by many other stakeholders consulted as an appropriate way of ensuring that the judge was informed of the impact of an offence on the victim at the sentence indication stage.[154]

3.147 One solicitor from the OPP explained the way that the Office of Public Prosecutions deals with victim impact at a sentence indication hearing:

> We have a policy … that … we're not to get victim impact statements before the sentence indication … So you're supposed to contact the victim and get some sort of statement from them, whether it be verbal or written, in relation to how it's affected them, so the judge has some idea.[155]

3.148 It was reported by an OPP solicitor that ordinarily there is information in the brief of evidence that can be put before the judge at a sentence indication hearing to inform him or her of the impact the offence has had on the victim. In that solicitor's particular case, '[w]e had statements outlining the injuries suffered and the rehab[ilitation] of the victims … [as] part of the brief anyway'.[156]

3.149 One solicitor expressed concern about whether there would be sufficient time to get a victim impact statement if a sentence indication was given and the defendant chose to plead guilty straight away. In her words, '[y]ou'd want to be able to tell the court, "No, we need extra time"'.[157] This situation arose in one of the cases in which an indication was given. The case was adjourned in order to give the Crown time to obtain victim impact statements. One of the solicitors we spoke to said that, '[o]ften judges will let you adjourn it for further plea and sentence so that there's time in the meantime for the Crown to get a victim impact statement'.[158]

3.150 A County Court judge consulted by the Council indicated that it was her common practice to request a victim impact statement as part of the information provided to her on the request for a sentence indication. However, if this was not available or the OPP did not wish to provide one, this did not mean that the impact of the offence on the victim is excluded from consideration in the sentencing process, as impact is often relevant for the offence summary itself. Other material requested includes an agreed summary of facts for the purpose of the sentence indication only, prior convictions and appearances and a dot-point outline of the matters the defence says it is capable of proving upon a plea.[159]

152 Office of Public Prosecutions, *Crown's Role on Plea and Sentence: Policy 9* (2008) [9.6.4].

153 Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009).

154 Meeting with defence practitioner 3 (21 August 2009); Meeting with Justice Coghlan, Supreme Court of Victoria (23 October 2009); Meeting with defence practitioner 6 (5 October 2009).

155 Meetings with solicitors from the Office of Public Prosecutions (7 July 2009; 9 July 2009).

156 Meetings with solicitors from the Office of Public Prosecutions (7 July 2009; 9 July 2009).

157 Meetings with solicitors from the Office of Public Prosecutions (7 July 2009; 9 July 2009).

158 Meetings with solicitors from the Office of Public Prosecutions (7 July 2009; 9 July 2009).

159 Meeting with County Court judge 2 (20 October 2009).

3.151 Another County Court judge expressed the view that if the Crown asks the judge to take into account the impact of the offence on the victim in giving a sentence indication, it should provide a victim impact statement to the court at the sentence indication hearing. Alternatively, it was suggested that a 'truncated' version of the statement, with inadmissible material removed, could be tendered to the court.[160] Justice Coghlan also suggested that the legislation could be amended to allow provision of a victim impact statement to the court if a defendant requests a sentence indication.[161]

3.152 The current practice of informally providing information on victim impact requires the presentation of information as evidence from the bar table rather than as information contained in a sworn victim impact statement. It was acknowledged that there can be problems if such information is given orally by the Crown because it is hearsay. There can also be problems if the victim later contradicts or challenges what was said.[162] However, these were not thought to outweigh the problems that can arise once the information is put in writing before a conviction, such as, in particular, the exposure of the victim to the risk of cross-examination on the contents of his or her victim impact statement. The DPP also noted that the more requirements that are put into the process, the more onerous the process would become, and the sentence indication could run the risk of turning into a 'pre-plea plea hearing', which will increase costs and delays.[163]

3.153 Other stakeholders also noted the problems that can arise if there is inadmissible material contained in victim impact statements. This may be put before the court at a sentence indication or plea hearing and, by agreement with both parties, may be disregarded by the judge in considering the impact of an offence on a victim.[164] Members of the judiciary consulted also referred to the lack of knowledge surrounding what should and should not be included in a victim impact statement and commented that victims should be given more assistance in drafting victim impact statements to ensure that their statements do not contain inadmissible material.[165] However, it was noted that this was not the responsibility of the OPP, which is 'no more than the conduit' for the provision of a victim impact statement to the court.[166]

3.154 Therefore, the OPP Policy and Advice Directorate did not support the preparation and provision of victim impact statements at the sentence indication stage of the process. It stressed that the 'key issue is [that] we don't want a victim impact statement at that stage in the process … the 'victim impact statement should be kept to a stage in the process after the plea'.[167] The Director of Public Prosecutions, as a general rule, would be opposed to a requirement to produce any written document relating to victim impact at the time of the sentence indication.[168]

160 Meeting with County Court judge 1 (13 October 2009); Meeting with Justice Coghlan, Supreme Court of Victoria (23 October 2009).

161 Meeting with Justice Coghlan, Supreme Court of Victoria (23 October 2009).

162 Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009); Meeting with Director of Public Prosecutions (Victoria) (27 October 2009).

163 Meeting with Director of Public Prosecutions (Victoria) (27 October 2009).

164 Meeting with County Court judge 1 (13 October 2009); Meeting with Justice Coghlan, Supreme Court of Victoria (23 October 2009).

165 Meeting with Justice Coghlan, Supreme Court of Victoria (23 October 2009). This issue was also discussed by the Victim Support Agency in its recent report evaluating the effectiveness of victim impact statements. To address this issue, the Victims Support Agency report has recommended that the Department of Justice establish a 'Victim Impact Statement Working Group' to 'develop information about the role and purpose of VISs, how to prepare a VIS, and the court and VIS process generally': Victim Support Agency (2009) above n 150, 6–7.

166 Meeting with Justice Coghlan, Supreme Court of Victoria (23 October 2009).

167 Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009).

168 Meeting with Director of Public Prosecutions (Victoria) (27 October 2009).

3.155 Thus, requiring a victim impact statement to be provided at the time of the sentence indication hearing and before the plea could raise significant difficulties. To date, the practice of the Crown providing information about the impact on the victim orally to the court as part of its submissions at the sentence indication hearing appears to have been effective in ensuring that such information is conveyed to the court.

3.156 Further, the requirement that the OPP consent to the request for a sentence indication also helps to ensure that sentence indications are not given in cases in which the OPP is of the view that, in the absence of a victim impact statement, there is insufficient information on victim impact before the judge for him or her to make a sentence indication. As discussed at [4.25]–[4.26], the test for the Crown in agreeing to a request for an indication is the sufficiency of the material before the judge for him or her to make an indication. This includes whether there is sufficient material on the impact of the offence on the victim. If sufficient information cannot be provided orally to the court and the Crown is of the view that the court should not make an indication without a victim impact statement, the Crown can refuse to consent to the application.

3.157 The Policy and Advice Directorate suggested that a different mechanism could be added to the sentence indication legislation to ensure that the judge has the relevant information on the impact of the offence on the victim at the sentence indication stage. For example, a section could be inserted into the legislation specifically providing for the OPP to make submissions at the sentence indication hearing on the impact of the offence on the victim and the victim's views on the matter. This would:

> ensure that the judge has the relevant information on the impact of [the] offence on the victim while still preserving the victim impact process. This would also avoid inadmissible material which is often in victim impact statements being before the judge who is doing the sentence indication. It is not appropriate for the judge to be exposed to such information.[169]

3.158 It is unclear whether such a provision is necessary given the current practice under the scheme. However, to legitimise this as the accepted method of providing victim impact information to the court at the sentence indication stage, it may be useful to include such a provision in the relevant Practice Note.

Overall impact on victims

3.159 Overall, the pilot scheme has had a minimal impact on victims, due to the limited number of cases in which sentence indication was used. Although the small number of cases limited the extent to which the Council could draw conclusions, there was no evidence of adverse effects on victims. While there is currently no provision specifying the method of providing information about victim impact as part of the scheme, information about the impact of an offence on the victim can be provided to the court at a sentence indication hearing. Further, the prosecution veto acts as a safeguard by ensuring that the courts do not give indications where there is insufficient material about the victim before the court to determine whether the defendant would be likely to receive an immediate custodial sentence.

169 Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009).

Impact on defendants

3.160 The objective of the sentence indication scheme, as originally conceived by the Council, was to encourage defendants who ultimately plead guilty in the higher courts to enter this plea at an earlier stage in the proceedings.

3.161 This was reflected in the Second Reading Speech for the *Criminal Procedure Legislation Amendment Act 2008* (Vic). In introducing the legislation, the Attorney-General, the Hon. Rob Hulls, MP, said that sentence indication was for 'defendants whose primary concern is the possibility of … an immediately servable sentence of imprisonment, an indication … may remove the impediments that are causing them to defer their plea decision'.[170]

3.162 However, when the Scrutiny of Acts and Regulations Committee (SARC) considered the legislation, it raised concerns about the sentence indication scheme potentially being incompatible with the rights of defendants under the Victorian Charter of Human Rights and Responsibilities. The rights that SARC considered were particularly engaged by the sentence indication scheme were:

- the right against self-incrimination; and
- the right to a fair hearing.

3.163 The Council has sought to gauge the impact of the scheme on defendants by consulting with defence barristers and solicitors. All defence practitioners with whom the Council spoke have expressed the view that the ability to obtain a sentence indication from the court had a positive impact on their clients by providing them with further information that could inform their decision as to whether to plead guilty.

The right against self-incrimination

3.164 The *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) sets out minimum guarantees in criminal proceedings.[171] One of these guarantees is that a person charged with a criminal offence must not be compelled to testify against him- or herself or to confess guilt.[172] SARC was concerned that sentence indication may be 'incompatible' with this right.[173] This concern was also raised by the Legislation Committee of the Legislative Council.[174]

3.165 The particular issue raised by SARC was that the combined effect of the sentence indication scheme and the discount for a guilty plea might increase the pressure on defendants to plead guilty. This is because, if the defendant pleads guilty at the first available opportunity after receiving a sentence indication, the sentence imposed cannot be more severe than the sentence indicated. It was suggested by the Committee that, 'this procedure may place such defendants under heightened pressure to plead guilty, especially if the sentence indicated is a generous one'.[175]

3.166 In considering the scope of the right against self-incrimination, the Council met with the Human Rights Law Resource Centre. Its view was that the standard of 'compulsion' in the right not to be compelled to testify or confess guilt was high and it is unlikely that any influence that might flow

170 Victoria, *Parliamentary Debates*, Legislative Assembly, 22 November 2007, 4100 (Rob Hulls, Attorney-General).

171 *Victorian Charter of Human Rights and Responsibilities 2006 Act* (Vic) s 25 (2).

172 *Victorian Charter of Human Rights and Responsibilities 2006 Act* (Vic) s 25(2)(k).

173 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest No. 16 of 2007* (2007) 8.

174 Legislative Council Legislation Committee, Parliament of Victoria, Criminal Procedure Legislation Amendment Bill, 26 February 2008, 18–20.

175 Scrutiny of Acts and Regulations Committee (2007) above n 173, 8.

from a sentence indication scheme could amount to 'compulsion'.[176] However, it recommended a number of additional safeguards that could assist in countering any concerns about the potential of the scheme to limit the rights of defendants (see further [3.193]–[3.194]).

3.167 In a submission to the Council, the Law Institute of Victoria (LIV) also noted the importance of having adequate safeguards in place in the scheme to ensure fairness and to avoid defendants being coerced into pleading guilty in order to save court time and resources:

> We note that the interests of justice are served only where appropriate safeguards are in place to prevent defendants being persuaded unfairly to plead guilty, particularly in cases where the matter may not be able to proceed for some considerable time because of a lack of court resources.[177]

3.168 The LIV submitted that the following safeguards must be in place in order to avoid coercion and ensure procedural fairness:

> The court must adjourn a matter to give an unrepresented defendant the opportunity to seek legal representation before determining an application for a sentence indication.
>
> That the court should advise the accused that a sentence indication does not limit his or her right to require the prosecution to prove its case beyond reasonable doubt.
>
> That the prosecution should not be able to request a sentence indication.[178]

3.169 The Council notes that there have been no unrepresented defendants in sentence indication cases and that the scheme in the County and Supreme Courts only allows a request for a sentence indication to be made by a defendant. The role of the court in ensuring the defendant is aware of his or her rights under the sentence indication process was also emphasised in consultation with the Human Rights Law Resource Centre. This is discussed under 'Right to a Fair Hearing' at [3.194].

3.170 None of the defence practitioners consulted by the Council considered that the sentence indication process in their cases had placed undue pressure on the defendant to plead guilty or that the sentence indication had constituted an improper inducement for the defendant to plead guilty.[179]

3.171 Although it was recognised that the sentence indication could act as an incentive to plead guilty (particularly if it is a non–immediate custodial sentence), this did not mean that the incentive was improper or infringed the rights of a defendant against self-incrimination. One defence practitioner commented:

> It is an inducement but it is not an improper one as it is still their decision to make—it is a 'reasonable inducement' … At least in a sentence indication they have the capacity to make the decision and without it they can still plead guilty or not guilty.[180]

3.172 Another defence practitioner said the following:

> More generally, there is a lot of pressure within the system for defendants to plead guilty. The question is whether or not it is improper pressure. One of the difficult things about being a defence lawyer is that you can advise your client, but ultimately the decision whether or not to plead guilty has to be their decision.[181]

176 Meeting with the Human Rights Legal Resource Centre (4 November 2009).

177 Submission 1 (Law Institute of Victoria).

178 Submission 1 (Law Institute of Victoria).

179 Meeting with defence practitioner 1 (19 August 2009); Meeting with defence practitioner 2 (21 August 2009); Meeting with defence practitioner 3 (21 August 2009); Meeting with defence practitioner 4 (3 September 2009); Meeting with defence practitioner 6 (5 October 2009); Meeting with defence practitioner 7 (7 October 2009).

180 Meeting with defence practitioner 6 (5 October 2009).

181 Meeting with defence practitioner 3 (21 August 2009).

3.173 Further, some features of the scheme were identified by defence practitioners as militating against the concern that the scheme could unduly pressure defendants to plea guilty. These include:

- That it was the defendant (not the prosecutor) who had the right to make the request to the Crown and, if consented to, the court for a sentence indication.[182]
- That the sentence indication could in some cases relieve the pressure on a defendant and place him or her in a better position to make a decision to plead guilty as it provided him or her with information about the likely outcome.[183]
- That the defendant is not compelled to accept the indication and it is the defendant's decision as to whether or not he or she would accept the indication, thus the right to proceed to trial is retained.[184]
- That defence practitioners in representing a defendant should not advise him or her to ask for an indication unless they had instructions from the defendant to plead guilty.[185]

3.174 A number of defence practitioners identified the empowering effect that sentence indication can have on defendants:

> The scheme is really useful from the defendant's point of view as generally defendants are quite powerless in the criminal justice system and this gives them a bit of control.[186]

> The fact that it is the defence who can apply for it helps to combat this issue as they are the ones who can decide whether to do it or not.[187]

> There was no improper pressure, giving more information can actually relieve the pressure on an accused … there is some value in the defendant hearing the potential sentence from the judge.[188]

3.175 The positive impact on defendants of providing information and certainty as to sentence outcome was a common theme that emerged in consultation. Many defence practitioners pointed to the benefits of defendants hearing the judge indicate the sentence that will be likely to be imposed if the defendant pleads guilty in cases in which the defendant is likely to plead guilty but is delaying the guilty plea due to uncertainty about, or fear of, the sentencing outcome.[189] A significant, positive impact of the sentence indication identified by defence practitioners in each case was that it had given their clients certainty as to the sentencing outcome, and this had assisted to resolve the matter.[190] One defence practitioner remarked that he would use sentence indication again to gain certainty for clients.[191]

3.176 Some defence practitioners suggested that, although in most cases experienced practitioners will be able to advise their clients with some certainty of the likely outcome, there was a benefit to defendants being able to hear the likely outcome from the sentencing judge. For example, one defence practitioner said:

> Even though barristers may have a good idea of whether or not their client will go to jail [in the County Court] it makes a difference to the defendant to hear the judge say absolutely that they are not facing a term of imprisonment. The accused was terrified of going to jail … To be able to hear it from the judge—'if you plead guilty you won't go in'—especially where it is a real borderline case like this one, was the 'safety net' that the accused needed … That was what happened in this case and it was a really good outcome.[192]

182 Submission 1 (Law Institute of Victoria); Telephone conversation with defence practitioner 8 (28 October 2009); Meeting with defence practitioner 3 (21 August 2009); Meeting with Justice Coghlan, Supreme Court of Victoria (23 October 2009).

183 Meeting with defence practitioner 2 (21 August 2009).

184 Meeting with defence practitioner 6 (5 October 2009).

185 Meeting with Justice Coghlan, Supreme Court of Victoria (23 October 2009).

186 Meeting with defence practitioner 3 (21 August 2009).

187 Meeting with defence practitioner 6 (5 October 2009).

188 Meeting with defence practitioner 2 (21 August 2009).

189 Meeting with defence practitioner 1 (19 August 2009); Meeting with defence practitioner 2 (21 August 2009); Meeting with defence practitioner 3 (21 August 2009); Meeting with defence practitioner 4 (3 September 2009); Telephone conversation with defence practitioner 5 (5 October 2009); Meeting with defence practitioner 6 (5 October 2009).

190 Meeting with defence practitioner 2 (21 August 2009); Meeting with defence practitioner 6 (5 October 2009); Meeting with Criminal Bar Association (11 November 2009).

191 Meeting with defence practitioner 2 (21 August 2009).

192 Meeting with defence practitioner 6 (5 October 2009).

3.177 This was also noted by Justice Coghlan:

> Experienced practitioners have a good sense about where a case sits in the sentencing range. However, there is a benefit in a client hearing it from the court … From the defence point of view there is not much to be lost in asking.[193]

3.178 Another defence practitioner reported that the defendant being able to hear this from the judge was particularly useful in 'borderline' cases:

> Often barristers will know if a defendant will go to jail or not, but it is good to have the judge give an indication, particularly in borderline cases. It was useful in [this] particular case because while it was an objectively serious offence and the co-accused had received a substantial jail term, the defendant had good material to put before the court in mitigation.[194]

3.179 One defence practitioner suggested that, although the sentence indication scheme did not provide defendants with any information above and beyond what an experienced criminal practitioner would be able to tell them about the likelihood of an immediate custodial sentence in the particular case, there were still benefits in clients hearing the indication directly from the judge:

> While defence practitioners can advise their clients as to what they are likely to get, it provides some level of certainty to hear it from the judge … [a]ccused people want certainty as to what their sentence might be before they plead guilty.[195]

3.180 Case Study 10 illustrates how the sentence indication assisted in providing certainty of outcome and facilitated the earlier resolution of a case, which otherwise may not have been resolved until later in the proceedings.

Case Study 10

The defendant had been committed to the County Court for trial and sought a sentence indication on aggravated burglary, intentionally causing serious injury and criminal damage. The Crown consented to the application, and the judge indicated that a non–immediate custodial sentence would be likely to be imposed.

The defendant had three co-accused in the matter who had pleaded guilty. The co-accused had been sentenced by the same judge who gave the sentence indication in the defendant's matter. Therefore, for parity reasons, it was likely that the defendant would also receive a suspended sentence if he pleaded guilty. However, although there were mitigating circumstances in the defendant's case, including that he had an intellectual disability and was a young offender, he also had a significant history of drug and alcohol abuse and many prior convictions. The sentence indication was requested in order to give the defendant certainty through an assurance that he would not go to jail, thereby assisting in the resolution of the matter. Without the indication, it was likely that the matter would have gone to trial.

At the plea hearing, the Crown conceded that a suspended sentence was within the range of an appropriate sentence. In sentencing the defendant, the judge took into account the impact of the offences on all three victims. The judge also took into account the defendant's plea of guilty, his remorse, his prospects of rehabilitation, the fact that he was a young offender and had an intellectual disability and his significant criminal history. The defendant was sentenced to a suspended sentence of imprisonment and a community-based order with the requirement that he comply with the terms and conditions of the Department of Human Services Justice Plan to which he was subject.

193 Meeting with Justice Coghlan, Supreme Court of Victoria (23 October 2009).

194 Meeting with defence practitioner 3 (21 August 2009).

195 Meeting with defence practitioner 7 (7 October 2009).

The right to a fair hearing

3.181 Another minimum guarantee under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) is the right to have the charge decided after a fair and public hearing. As SARC pointed out, the right to a fair hearing 'includes all aspects of the post-charge procedure, including sentencing and appeals'.[196] Section 25(4) of the Charter also provides that people convicted of criminal offences have 'the right to have the conviction … reviewed by a higher court in accordance with the law'.

3.182 SARC noted that the Statement of Compatibility on the legislation enacting the pilot sentence indication scheme refers to the possible conflict between the right to a fair hearing and the provision that the decision not to give a sentence indication is 'final and conclusive'.[197] The Statement of Compatibility concludes that:

> the decision to grant or not grant a sentence indication does not infringe this right because it in no way limits the information that may be presented to the court. If a decision not to grant an indication has been made, the hearing or trial proceeds as normal and the accused may produce any material that was available to them to produce before the indication was requested. The bill also provides that the application for, and determination of, a sentence indication are inadmissible in evidence against the accused.[198]

3.183 Despite this assurance, SARC observed that, 'an erroneous refusal to make a sentencing indication may deny defendants the benefits of transparency and a binding maximum sentence on a guilty plea'.[199] However, the refusal by a judge to give a sentence indication does not mean that a defendant is denied the opportunity to make a further request before a different judge. This occurred in one case under the pilot scheme, in which a judge refused to give an indication due to the nature of the offence. The matter was returned to the general list and a request for an indication was made before another judge. The Crown consented to the indication and the defendant pleaded guilty at the next available opportunity, thus resolving the case.[200]

3.184 SARC was also concerned that the sentence indication does not provide information about the type of sentence the defendant is likely to receive if he or she does not plead guilty (in particular whether it would be a more severe sentence). Therefore, defendants may be 'denied the benefit of a transparent understanding of the impact of a guilty plea on sentencing'.[201]

3.185 Another concern discussed by SARC was whether the provision that sentence indications are not binding on a differently constituted court may result in 'a person who pleads guilty following a sentencing indication receiving a higher penalty than the one indicated (e.g. if the court is reconstituted between the plea and the sentencing, or if the Crown successfully appeals against the sentence)'.[202]

3.186 SARC adverted to the possibility that the use of the sentence indication scheme may result in significant delays in cases in which the defendant rejects the sentence indication. As the matter must then be listed before a different judge unless both parties agree, it was suggested that this could lead to delays in listing a further trial for the defendant.

3.187 There were four cases in which the defendants rejected the sentence indication and pleaded not guilty. However, there was no suggestion that this had resulted in undue delays in the matters. In one sentence indication case in the Supreme Court, the defendant did not accept the indication given by the judge and the matter was relisted before a different judge. This did not cause any undue delay because the judge was specifically assigned to the sentence indication hearing to deal

196 Scrutiny of Acts and Regulations Committee (2007) above n 173, 8.

197 Ibid 9.

198 Victoria, *Parliamentary Debates*, Legislative Assembly, 22 November 2007, 4098 (Rob Hulls, Attorney-General) (Statement of Compatibility).

199 Scrutiny of Acts and Regulations Committee (2007) above n 173, 9.

200 Meeting with defence practitioner 7 (7 October 2009).

201 Scrutiny of Acts and Regulations Committee (2007) above n 173, 9.

202 Ibid 9–10.

with the sentence indication and, if relevant, the subsequent plea. The matter was returned to the trial list and assigned to a different judge without any significant delay.[203] In another case, the indication was rejected by the defendant and the matter was returned to the general list, almost immediately after which the matter resolved.[204]

3.188 It was also reported in one case in which the defendant requested and accepted an indication that the defendant was later permitted to withdraw the plea and the matter was listed for trial. Therefore, although there had been a sentence indication, the defendant's right to a fair hearing was preserved:

> The defendant asked for an indication, which was consented to. He then pleaded, and was arraigned, and then changed his mind, and there was a change of plea application hearing, and that was granted, and the matter was relisted for trial.[205]

3.189 While there is the potential for sentence indication to delay matters through extra hearings and the relisting of matters, this should be balanced against the fact that, without the sentence indication scheme, some of these matters may not have resolved until the door of the court. Therefore, sentence indication may involve short-term delay in order to prevent significant long-term delay while awaiting trial.

3.190 This view was taken by defence practitioners who were involved in sentence indications. They emphasised that, in their cases, the sentence indication had assisted in avoiding the longer-term delay that could have been caused had the matter proceeded to trial or resolved later in proceedings. While it was reported that, in some cases, the process had resulted in an additional hearing and some initial delay, this was preferable to the delay that may have been caused had the matter resolved at a later stage. For example, one defence practitioner said:

> There were no disadvantages to having been involved in the process. Although the process of resolution was delayed slightly (through the extra hearing), the delay gave the offender some time to prepare … material to the court on rehabilitation.[206]

3.191 SARC acknowledged that whether or not the sentence indication scheme infringed any of the minimum guarantees under the Charter may depend on how the scheme operates in practice. Thus far, the concerns identified by SARC do not appear to have eventuated in the cases identified by the Council.

3.192 However, in order to better protect defendants and counter any concerns about the indication scheme's potential to limit rights under the Charter, the Human Rights Law Resource Centre suggested that the scheme could include safeguards either in legislation or a Practice Note setting out:

- the basis on which the decision whether to make a sentence indication will be made;
- the requirement that the court must be satisfied that the defendant is aware that he or she has the right to silence and not to confess his or her guilt; and
- the requirement that the court must be satisfied that the defendant is aware that he or she has the right to apply for leave to appeal against sentence.

3.193 Although all of these rights currently exist at common law and under the Charter, the Human Rights Legal Resource Centre argued that linking them to the operation of the scheme would make the process clearer and more transparent. This would assist in addressing SARC's concerns, ensure that defence practitioners are aware of the process and assist defence practitioners in giving proper advice to their clients if judges are required to be satisfied that defendants are aware of their rights.[207] The Human Rights Legal Resource Centre also emphasised the need to balance the efficient and

203 Meeting with Justice Coghlan, Supreme Court of Victoria (23 October 2009).

204 Meeting with defence practitioner 2 (21 August 2009).

205 Meetings with solicitors from the Office of Public Prosecutions (7 July 2009; 9 July 2009).

206 Meeting with defence practitioner 2 (21 August 2009).

207 Meeting with defence practitioner 1 (19 August 2009); Meeting with defence practitioner 6 (5 October 2009).

effective management of the criminal justice system with the rights of an individual. It also suggested that the more codification of rights there was, the better the protection that would be afforded to individuals. Also, providing appropriate guidance may make the scheme more efficient, help to ensure that it is compliant with the Charter and make it more transparent.[208]

3.194 Overall, defence practitioners did not report any disadvantages for defendants from the process involved in the scheme. Defence practitioners consulted by the Council reported that while the process can be difficult to explain to some defendants, in general defendants understood the process[209] and were happy with the outcome.[210] For example, one practitioner said:

> He was very nervous about the whole process … I told him it was like a safety net: 'If you don't like the indication you can plead not guilty and continue to trial; If you do like it you can plead guilty and bring the matter to a conclusion'. After I explained it like this he was very happy to proceed. He was still a little uncertain as it happened relatively quickly, but just hearing that he had the option was good. He was happy with the outcome.[211]

3.195 Another practitioner said that even though the indication given had not been the outcome that the defendant had wanted and he did not accept the indication, the ultimate resolution of the matter was a good outcome and the indication had assisted to achieve that.[212]

Overall impact on defendants

3.196 Despite the concerns expressed when the scheme was introduced about its potential to adversely impact the rights of defendants, there is no evidence that these concerns have been borne out in the sentence indication cases under the pilot scheme.

3.197 Although the scheme provides an incentive for defendants to plead guilty at an earlier stage than they may have otherwise done, there was no suggestion that this was an improper incentive or that it had operated improperly to infringe defendants' rights against self-incrimination. On the contrary, defence practitioners who were involved in the scheme saw the process as empowering for defendants, providing further support for the positive impact that this process can have on some defendants who decide to plead guilty to an offence.

3.198 There is also no evidence that the scheme has operated in a way that has infringed defendants' rights to a fair hearing. In the cases within the pilot period, a judge's refusal to give a sentence indication did not impede a defendant's ability to make a second request before a different judge. In addition, a defendant's request for an indication did not impede that defendant's right to plead not guilty and proceed to a trial. The potential for short-term delay in the sentence indication process should be balanced against the significant long-term delay that may have occurred in these cases while waiting for a trial.

3.199 However, the codification of defendants' rights that currently exist at common law and under the Charter by linking them to the operation of the scheme may assist in making the process clearer and more transparent.

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208 Meeting with Human Rights Legal Resource Centre (4 November 2009).

209 Meeting with defence practitioner 2 (21 August 2009); Meeting with defence practitioner 3 (21 August 2009); Meeting with defence practitioner 6 (5 October 2009).

210 Meeting with defence practitioner 1 (19 August 2009); Meeting with defence practitioner 2 (21 August 2009); Meeting with defence practitioner 3 (21 August 2009); Meeting with defence practitioner 4 (3 September 2009); Meeting with defence practitioner 6 (5 October 2009).

211 Meeting with defence practitioner 6 (5 October 2009).

212 Meeting with defence practitioner 2 (21 August 2009).

Impact on resources and operation of key agencies

3.200 The Council was also asked to monitor and report on the impact of sentence indications under the pilot scheme on the resources and operation of key participating agencies. These include the County and Supreme Courts in which the pilot scheme operates, the Office of Public Prosecutions, defence practitioners who have been involved in the scheme and Victoria Legal Aid.

Impact on resources and operations

3.201 The key participating agencies advised the Council that the sentence indication scheme has had a minimal impact on their resources. There have only been 31 applications for a sentence indication under the scheme and it has required minimal resources to run.

3.202 The addition of an extra sentence indication hearing in cases has had a minor impact on the resources of the County and Supreme Courts, particularly when compared with the resources used by a late plea or trial. The County Court has also developed a Practice Note on the new *Criminal Procedure Act 2009* (Vic) which includes direction on the process for sentence indication under the Act.

3.203 Another effect of the scheme has been the small reduction in resources required by the County and Supreme Courts and Victoria Legal Aid due to the avoidance of trials. One defence practitioner also discussed the cost savings that can be achieved even when the sentence indication arises very late in the process:

> There are many cases which are funded by VLA and a barrister is briefed for trial which then resolve on the morning of the trial or very late—a lot of resources are spent on wasted trial fees. If sentence indication was used more often this would save these resources.[213]

3.204 Victoria Legal Aid confirmed that it provides the same funding for sentence indication hearings as for a plea.[214] Therefore, if a matter is resolved by way of a sentence indication, the cost to VLA is significantly less than if the matter is funded for a trial or resolves very late in proceedings after preparation for trial has already occurred.

3.205 One of the most significant impacts of the scheme has been on the resources and operation of the Office of Public Prosecutions in setting up and maintaining a system for the collection of data on sentence indications under the pilot scheme. The OPP reported that this had created significant work for the Policy and Advice Directorate. The system also relied on individual OPP solicitors recording the information. The OPP advised that while there had been some initial issues with the collection of data around solicitors' understanding of the requirement to record and provide information on applications for sentence indications and sentence indications themselves, the collection of data through this process has now improved.

3.206 The OPP stated that if the courts are required to collect data on sentence indications, this could assist in improving the quality of the data and reducing the cost to the OPP of data collection. However, the Council notes that this is likely to require the court to allocate some additional resources in order to ensure that such data is collected. This may also limit the data to only those cases in which a separate sentence indication hearing is listed and the data would not capture unsuccessful requests by defendants to the OPP for sentence indications (which occur on an informal basis out of court).

213 Meeting with defence practitioner 6 (5 October 2009).

214 Victoria Legal Aid, *Grant Handbook* <http://www.legalaid.vic.gov.au/handbook.htm> at 11 December 2009; Meeting with Victoria Legal Aid (27 October 2009).

3.207 Another implication was the time and resources taken by the OPP to develop and implement a policy on sentence indication during the first year of operation of the pilot scheme. This policy required changes in response to a number of issues that arose in the early stages of the pilot scheme, including the need to obtain instructions on a request for a sentence indication and to respond to indications that may be made in 'bad faith'.[215]

Impact on case load

3.208 Overall, the impact of the scheme on the case load of practitioners involved in sentence indications has been minimal. This is due to the small numbers of cases under the scheme.

3.209 The general view expressed in consultation by defence and prosecution lawyers involved in the scheme was that sentence indications required minimal, if any, extra work. The main difference was that some of the work in preparing a file had to be completed earlier in the process. Therefore, it did not require the preparation of any additional material or information, but rather involved the same material that would be required on a plea but merely brought the requirement to prepare that material forward to an earlier stage in the process.

3.210 Some defence practitioners told the Council that, in some of their cases in which a sentence indication was given, it is unlikely that the matter would have resolved without the indication. In those cases, the existence of the scheme meant that matters that would have been otherwise contested at trial resolved into pleas of guilty. As the average time taken by the court to dispose of a matter where a plea of guilty is entered is significantly less than that required where there is a contested trial, the sentence indication scheme has, at the very least, had an impact on the workload of the courts in relation to those particular cases.

3.211 This is supported by feedback from the OPP about the work involved in the preparation of a matter for trial compared with a sentence indication:

> The work involved in a sentence indication is nothing compared to a trial or a late plea on the morning of a trial. You save briefing barristers for trial, witnesses etc.[216]

3.212 One OPP solicitor suggested that the sentence indication request did not add to his workload because it happened on the day of the trial and was just part of the normal negotiation that occurs. This view was supported by another solicitor who agreed that there was a 'flurry of activity on the day', but otherwise it did not make much of a difference. Another solicitor said that because the request for an indication was rejected in her case, she did not need to spend much time on it aside from a brief discussion with a Crown Prosecutor.

3.213 Another OPP solicitor reported that the scheme had been 'effective and … useful' and thought that it only required minimal effort in getting the information together. It just meant 'you have to get things ready a little bit earlier'. It was also suggested by an OPP solicitor that while sentence indication meant that 'you're supposed to have filed the presentment earlier … that's not such a bad thing and it's not such an onerous thing because if it's a plea hearing it's generally a smaller presentment … than a trial presentment'.[217]

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215 The OPP policy on sentence indication hearings is contained in Office of Public Prosecutions, *Policy 9* (2008) above n 152, [9.6].

216 Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009).

217 Meetings with solicitors from the Office of Public Prosecutions (7 July 2009; 9 July 2009).

3.214 OPP solicitors also advised that they try to list sentence indication hearings before listing judges as opposed to trial judges so that they do not have to change judges if the indication is not accepted, although this is not always possible. Sentence indication can cause problems if a judge has been allocated to case-manage a large, multi-headed case and one of the defendants asks for a sentence indication. If the indication is not favourable to the defendant and he or she does not consent to having the same judge hear the trial, the judge's considerable time and effort preparing the case would be wasted.[218]

3.215 Defence practitioners reported that sentence indications had not required additional preparation as they had prepared them as though they were a plea, and thus there was minimal impact on their workload. Almost all practitioners mentioned the reduced impact on the resources and workload for themselves and for the courts brought about by the avoidance of a trial. One defence practitioner said:

> If you can resolve a matter prior to the briefing you save time spent on preparation of the brief, reading of depositions, reading and preparation time for barristers, preparation for getting psychological reports, etc.[219]

Reported knowledge of the scheme

3.216 Another issue to emerge during consultation on the impact of the scheme was that there may be a lack of knowledge of the scheme, which could explain why there were only a small number of cases in the pilot period.

3.217 It was evident that, in the early operation of the pilot scheme, there was uncertainty in some cases as to how the scheme should work. There was also initial uncertainty as to how VLA would fund sentence indication hearings or whether VLA would fund psychological reports for sentence indications before a plea had been entered.[220]

3.218 Some OPP solicitors suggested that some criminal barristers they worked with were not aware of the sentence indication pilot scheme. One solicitor said that he was:

> surprised that I haven't been asked for more of them because we get a lot of cases where it's borderline, where it could be custodial, immediate or just suspended.[221]

3.219 Another OPP solicitor suggested that defence practitioners should be provided with more practical training on how the process works in court:

> [W]hat I found is I was getting counsel emailing me and phoning me all the time and 'So how does this work again?' and 'What's the next step in the procedure?'.[222]

3.220 A County Court judge expressed the view that in general the cost of continuing legal education may be limiting access to education in processes such as sentence indication and that such education should be provided free of charge to private solicitors who may not be in a position to pay the fees that are currently charged.[223]

218 Meetings with solicitors from the Office of Public Prosecutions (7 July 2009; 9 July 2009).

219 Meeting with defence practitioner 6 (5 October 2009).

220 Meeting with defence practitioner 2 (21 August 2009).

221 Meetings with solicitors from the Office of Public Prosecutions (7 July 2009; 9 July 2009).

222 Meetings with solicitors from the Office of Public Prosecutions (7 July 2009; 9 July 2009).

223 Meeting with County Court judge 2 (20 October 2009).

3.221 However, stakeholders report that these initial process issues had resolved as the number of cases increased and judicial officers and practitioners became more familiar with the process. For example, the OPP adapted its policy to respond to issues as they arose,[224] and VLA has provided guidance on how a sentence indication is to be funded.[225]

3.222 For example, one OPP practitioner said that the OPP's policy had assisted in clearing up any confusion about the Crown's role in a sentence indication:

> There was some initial confusion as to what the Crown's policy was in relation to sentence indication. There was a misperception that the Crown would only consent if it was of the view that a non-immediate sentence of imprisonment would be appropriate under the circumstances. This confusion has been cleared up and now there is a clear policy on how to deal with sentence indication requests.[226]

3.223 Defence practitioners' views varied as to whether there was a general lack of knowledge of the scheme and whether further education and promotion of the scheme would assist in its being used in more cases. For example, one practitioner said:

> I was of the view that most people were aware of it. It should be one of the options that defence practitioners put to their clients. It might only be suited to borderline cases which may not come up that often.[227]

3.224 However, other practitioners suggested that many practitioners are not aware of the scheme and that there needs to be better advertising, particularly among solicitors.[228] The Criminal Bar Association suggested that, anecdotally, at the beginning of the scheme the level of knowledge and use of the scheme was high and that this had slowly deteriorated as the scheme had continued.[229]

3.225 The most common suggestion made by defence practitioners for increasing the level of awareness and use of the scheme was for greater judicial involvement in the scheme. It was suggested that judges could mention sentence indication as part of the checklist of matters discussed or as a 'standard practice' at the case conference or first hearing in the County Court. It was thought that this function was a way of reminding practitioners of the existence of the scheme and would 'turn practitioner's minds to it'.[230] For example, one practitioner said:

> The best way to increase the level of awareness is to require judges to mention it at every case conference … It should be asked as a standard question whether a sentence indication has been considered or is appropriate. This would plant the seed in people's minds … it should be raised as early as possible (e.g. at a case conference) [so] that this may enable it to be raised by the solicitor who has the relationship with the client rather than a recently briefed barrister. If your client then chooses to accept the sentence indication the solicitor can conduct the plea (possibly on the same day) without necessarily needing to involve a barrister at all.[231]

224 Meeting with Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009).

225 Meeting with Victoria Legal Aid (27 October 2009).

226 Meetings with solicitors from the Office of Public Prosecutions (7 July 2009; 9 July 2009).

227 Meeting with defence practitioner 3 (21 August 2009).

228 Meeting with defence practitioner 1 (19 August 2009); Meeting with defence practitioner 6 (5 October 2009).

229 Meeting with Criminal Bar Association (11 November 2009).

230 Meeting with defence practitioner 1 (19 August 2009); Meeting with defence practitioner 3 (21 August 2009); Meeting with defence practitioner 4 (3 September 2009); Meeting with defence practitioner 6 (5 October 2009).

231 Meeting with defence practitioner 6 (5 October 2009).

3.226 However, VLA questioned whether practitioners in attendance at listing hearings, such as case conference or directions hearings, would be senior enough to be able to make the decision to advise their client to request a sentence indication. Further, the late briefing of counsel who could provide such advice would impede this occurring at an earlier stage in the process.[232] However, if it becomes common practice for courts to raise sentence indication at this stage, it would arguably change the practice of sending to listing hearings practitioners who are not sufficiently experienced to provide this advice.

3.227 Another reason why practitioners thought there was a lack of knowledge of the scheme in the higher courts, compared with the Magistrates' Court, is that there is less opportunity for practitioners to observe other cases in the higher courts as cases are often listed individually:

> [I]n the summary jurisdiction you have the opportunity to observe other practitioners conducting their cases whilst waiting for your own case to be heard. This assists with 'spreading the word' in that a practitioner who observes such hearings may then try it on one of their own cases. However, in the County Court you generally get only one matter of any substance listed per court per day. There are generally no other practitioners in the room awaiting their case to be reached and so there will not be the same opportunities to observe a sentencing indication hearing conducted by another practitioner. This is another reason why it would be good to have it raised at case conferences as the Listing Court-rooms are always busy and therefore people will get more exposure to it.[233]

3.228 While it did appear that there was some initial uncertainty among practitioners about the sentence indication process, these issues appear to have been addressed as the pilot scheme continued and the process became more bedded down. While it is difficult to make conclusions about the impact of any deficiencies in knowledge of the scheme on its operation during the pilot period, any increases in knowledge will assist in encouraging the use of the scheme in appropriate cases.

3.229 The Practice Note developed by the County Court on the *Criminal Procedure Act 2009* (Vic) provides information on the steps to be followed under the sentence indication process. This will also assist in improving judicial and practitioners' knowledge of the scheme and provide guidance on its use. The Council's view on whether any changes should be made to the scheme in order to introduce a requirement for sentence indication to be raised by judges is discussed at [4.86]–[4.89].

232 Meeting with Victoria Legal Aid (27 October 2009).

233 Meeting with defence practitioner 6 (5 October 2009).

Chapter 4
Continuation of the pilot scheme

Should the pilot scheme be continued?

4.1 As discussed in the previous chapter, the impact of the sentence indication scheme has been minimal due to the small number of sentence indication cases before the courts. The Council has identified 32 cases in which there was an application for sentence indication in the one year that was studied.

4.2 However, the slow take-up rate of sentence indications is not necessarily due to deficiencies in the scheme, but may instead relate to a lack of knowledge about, or understanding of, the scheme. It was commented that the legal community in Victoria is conservative and it often takes time for change to occur.[234] One defence solicitor suggested that once the scheme starts working and there is more data, people will see the benefits and use the scheme more regularly.[235] A lack of knowledge may also mean that people are not using the scheme because of misconceptions about how it is supposed to work in practice.

4.3 There was also the view expressed that the low numbers could also indicate the effective use of other mechanisms in the system to encourage the early resolution of cases.

4.4 One prosecution solicitor described some of the early discussions between the parties:

> [A]t committal for example, defence often seek not just agreement prior to the committal proceeding on what charges we'll be proceeding with but they ask for sentencing concessions from us. And I wonder if they're relying on our concessions more than these sentence indication hearings. They seem to ask for non-custodial concessions a lot rather than asking the judge.[236]

234 Meeting with defence practitioner 1 (19 August 2009).

235 Meeting with defence practitioner 6 (5 October 2009).

236 Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009).

Potential to reduce delay

4.5 Despite the fact that sentence indication was used in a very small percentage of cases during the pilot scheme, all of the people consulted by the Council were of the view that the scheme should be extended because of its potential to resolve cases, particularly where the alternative is a long and costly trial.[237]

4.6 The same concerns about delay in the criminal justice system discussed when sentence indication was first considered by the Council were raised in consultations on the operation of the pilot scheme.[238] As Figure 9 (page 28) shows, late resolving pleas increased in the period between July 2005 and June 2009.

4.7 The Criminal Bar Association identified significant problems with delays in the higher courts in Victoria. Of particular concern was that the trial reserve list[239] has up to 20 cases in it on a Monday morning. There was a very strong view that something needs to be done to clear the lists because of the significant waste of resources in cases in which the parties are required to attend court ready to proceed only to be repeatedly turned away.[240]

4.8 When the Council recommended introducing a sentence indication scheme, it was careful to note that:

> while [this] proposal may resolve some of the concerns that cause defendants to defer entering a guilty plea, [it] should not be regarded as the prime strateg[y] for expediting criminal proceedings and tackling the problem of delay.[241]

4.9 Similarly, when the Attorney-General introduced the legislation creating the pilot sentence indication scheme into parliament, he suggested that it was only one of a wide range of initiatives under the Justice Statement designed to reduce delay:

> The Sentencing Advisory Council has also found that sentence indications could sometimes be helpful in resolving matters at an earlier stage in proceedings. Having an indication of a likely sentence can help some defendants to decide whether or not to plead guilty to an offence … [S]entence indications … complement this government's priority to reduce delays in the criminal justice system, and to reduce the stress and trauma experienced by victims of crime.[242]

4.10 Based on these comments, it is clear that sentence indication was never intended to be the 'silver bullet' that could, on its own, solve the seemingly intractable problem of delay. However, consistent with expectations when the scheme was introduced, people consulted by the Council were of the view that, in tandem with the numerous other initiatives implemented to bring forward late-resolving pleas, sentence indication could assist in decreasing the time taken for matters to be dealt with by the court without sacrificing fairness to the defendant. As one defence practitioner explained, 'I think [sentence indications] are a really good tool for resolving matters that should not proceed to contest, whilst at the same time keeping your client happy with the outcome'.[243]

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237 Meeting with defence practitioner 6 (3 September 2009).

238 Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009); Meeting with Victoria Legal Aid (27 October 2009); Meeting with Criminal Bar Association (11 November 2009).

239 The reserve list is a list of trials that have not been assigned a judge and are listed before a listing judge, usually at the beginning of the week.

240 Meeting with the Criminal Bar Association (11 November 2009).

241 Sentencing Advisory Council, *Sentence Indication and Specified Sentence Discounts: Final Report Summary and Recommendations* (2007) 6. The original quote referred to both sentence indication and the Council's recommendations in relation to the articulation of the reduction in sentence given for a plea of guilty.

242 Victoria, *Parliamentary Debates*, Legislative Assembly, 22 November 2007, 4100–02 (Rob Hulls, Attorney-General).

243 Meeting with defence practitioner 6 (5 October 2009).

4.11 Another defence barrister said, 'a sentence indication hearing in an appropriate case is likely to be advantageous in reducing delays within the County Court, thereby ultimately reducing the expense to the community of running trials, which in practical terms, need not be run'.[244] This view was supported by another defence practitioner consulted by the Council who said that he would use the sentence indication scheme again and that he believes it should be continued as there is a community benefit in resolving cases quickly.[245]

4.12 One County Court judge who was consulted acknowledged that matters resolved by sentence indication might have resolved anyway, which raises the question of whether there is any utility in an earlier resolution. However, in her Honour's opinion, anything that can bring the resolution of a case forward is useful for the victim, the accused and the justice system. She said that she liked to have as many tools as possible at her disposal in order to facilitate the early resolution of cases and sentence indication is another one of those tools.[246] Similarly, another County Court judge said that, in his view, there were a lot of trials that should resolve and sentence indication can help—it is a good tool for borderline cases.[247]

4.13 The ability of sentence indication to shift these 'borderline' cases was recognised by the Policy and Advice Directorate of the OPP. In its view, there were still a number of cases in which it could be used within the limited sphere for which it was intended. It suggested that the ideal would be for every case that ultimately resolves as a guilty plea and in which a non-custodial sentence is appropriate to resolve by way of a sentence indication, because the defendant will know that he or she is not going to jail.[248]

4.14 Most of the discussion of the sentence indication pilot scheme in this report relates to the operation of the scheme in the County Court. This is largely because there have been only two sentence indication hearings in the Supreme Court during the relevant time period.

4.15 However, Justice Coghlan, who conducted one of the sentence indication hearings in the Supreme Court, was of the view that the scheme should be continued in that jurisdiction. In his view, one of the biggest challenges for the criminal law is the early resolution of cases and anything that can contribute to that is worth having. Sentence indication is one of 'a whole panoply of things to remove trials'. While it did not resolve the case in which Justice Coghlan heard the sentence indication, he suggested that this did not mean the scheme did not have the potential to resolve other matters.[249]

244 Letter from defence practitioner to the Sentencing Advisory Council, 13 October 2009.

245 Meeting with defence practitioner 2 (21 August 2009).

246 Meeting with County Court judge 2 (13 October 2009).

247 Meeting with County Court judge 1 (20 October 2009).

248 Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009).

249 Meeting with Justice Coghlan, Supreme Court of Victoria (23 October 2009).

Support for continuing the pilot scheme

4.16 All of those consulted by the Council have supported continuing the pilot sentence indication scheme.[250] One barrister said he thought it was a good process and would use it again.[251] This was echoed by another barrister who said that he would put sentence indication as an option to his clients.[252]

4.17 The Office of Public Prosecutions said that sentence indication had worked well in a number of cases and supported the continuation of the scheme, particularly as the scheme was not especially onerous, but rather just another step in the process that can avoid a trial.[253]

4.18 The Director of Public Prosecutions agreed that the scheme should continue because of its potential to resolve matters. He observed that it is not causing any harm, although he questioned whether or not it was resolving cases that would result in a plea of guilty anyway. He was of the view that the majority of cases in which it has been used have been a success, and as there have been no downsides or risks, the scheme is worth continuing. The Director of Public Prosecutions suggested that, given the short period of time it has been operating and the small numbers, the scheme needs to continue for longer to enable a better understanding of its impact on the system.

4.19 The Law Institute of Victoria also supported the continuation of the pilot scheme beyond the current sunset date of July 2010. The LIV told the Council that members of its Criminal Law Committee advised that sentence indications form a valuable tool for the early resolution of cases in the Magistrates' Court, generating significant cost savings for all parties and freeing up limited court resources for matters that cannot be resolved as a plea of guilty. Accordingly, these members fully supported the ongoing use of sentence indication in the higher courts.[254]

4.20 Victoria Legal Aid were of the view that the sentence indication scheme should continue and that its real potential for resolving cases was through its interaction with sentence discounts. VLA suggested that certainty of outcome and consistency, in addition to a real indication of what the outcome would be if the defendant was found guilty at trial, would promote earlier resolution of cases.[255]

250 Meeting with defence practitioner 1 (19 August 2009); Meeting with defence practitioner 2 (21 August 2009); Meeting with defence practitioner 3 (21 August 2009); Meeting with defence practitioner 4 (3 September 2009); Meeting with defence practitioner 6 (5 October 2009); Meeting with defence practitioner 7 (7 October 2009); Meeting with County Court judge 1 (13 October 2009). Meeting with County Court judge 2 (20 October 2009); Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009); Meeting with Justice Coghlan, Supreme Court of Victoria (23 October 2009); Meeting with Director of Public Prosecutions (Victoria) (27 October 2009); Meeting with Victoria Legal Aid (27 October 2009); Meeting with the Commonwealth Deputy Director for Public Prosecutions (Victoria) (5 November 2009); Meeting with Criminal Bar Association (11 November 2009); Telephone conversation with defence practitioner 8 (28 October 2009); Submission 1 (Law Institute of Victoria).

251 Meeting with defence practitioner 1 (19 August 2009).

252 Meeting with defence practitioner 3 (21 August 2009).

253 Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009).

254 Submission 1 (Law Institute of Victoria).

255 Meeting with Victoria Legal Aid (27 October 2009).

Should the current scheme be changed?

4.21 The Criminal Bar Association supported the continuation of a 'properly formed' sentence indication scheme. However, it felt that the scheme was too restrictive in its current form and required some adjustments before its potential could be fully reached, specifically the removal of the requirement for prosecution consent and greater specificity in the indication given by the court.[256] Similarly, Victoria Legal Aid and the Law Institute of Victoria were of the view that the efficacy of the scheme was limited unless it was amended in that fashion.[257]

Requirement of prosecution consent

Background

4.22 Under the current scheme, the defence can only make an application to the court for a sentence indication with the consent of the prosecution.[258]

4.23 The requirement for consent was a feature of the model recommended by the Council in its 2007 report.[259] One of the main reasons for inclusion of this requirement was that the Council was of the view that unless both the prosecution and the defence were in agreement about the manner in which a case should be resolved, there would be little point in the defence asking for an indication. The requirement for consent was intended to encourage the parties to consider the relevant issues early in the process with a view to resolving the matter.[260]

4.24 The Council considered that the prosecution would not consent to an application if it was of the view that a sentence indication hearing would cause further hardship to the victim.[261] Implicit in this was the idea that the prosecution would not consent to a sentence indication if it was concerned that the absence of the victim impact statement at that point in the proceedings would mean that the court would have insufficient information on which to give such an indication.

State practice

4.25 As described by the Policy and Advice Directorate of the Office of Public Prosecutions, the Crown will only consent if:

1. The matter will settle on the charges for which the indication is requested.
2. There is sufficient material for an indication to be given.[262]

4.26 The Office of Public Prosecutions does not see the requirement of consent as a test for the Crown to make a judgement on the merit of the application for a sentence indication. Instead, the focus is on the sufficiency of the materials, which is reflected in its policy on sentence indications:

> The prosecution will consent to the giving of a sentence indication in circumstances where there is available to the court at that time all material necessary to enable the presiding judge to give a reasoned and considered indication. The prosecution's view as to the appropriate sentencing disposition is irrelevant to whether or not the Crown consents to the giving of an indication. The decision to consent to the giving of the indication is based solely on an assessment of the sufficiency of the materials available to enable the Judge to give a considered indication, whatever that indication might be.[263]

256 Meeting with Criminal Bar Association (11 November 2009).

257 Submission 1 (Law Institute of Victoria); Meeting with Victoria Legal Aid (27 October 2009).

258 *Crimes (Criminal Trials) Act 1999* (Vic) s 23A(3); *Criminal Procedure Act 2009* (Vic) s 208(2).

259 Sentencing Advisory Council (2007) above n 1, 119.

260 Ibid 116.

261 Ibid 117.

262 Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009).

263 Office of Public Prosecutions, *Policy 9* (2008) above n 152, [9.6.2]. The Policy is also available on the OPP's website.

4.27 However, other considerations are taken into account when consenting to a sentence indication hearing. OPP policy requires that advice must be sought from the Director of Public Prosecutions or the Chief Crown Prosecutor where a sentence indication is sought in a case in which:

- the defendant is currently serving another sentence; or
- the offences for which the sentence indication is sought breach a parole order; or
- the prosecutor in the matter has reason to suspect that the defendant is seeking a sentence indication for a reason that is not bona fide or that is improper (for example to seek a sentence indication in a case in which a custodial sentence is inevitable, as a strategic device in the trial of co-accused); or
- the listing of the trial of the defendant or that of the co-accused would be significantly affected if, in the event that a sentence indication were given, it is probable that the defendant would not plead guilty; or
- there are other complicating factors that make it appropriate to seek instructions from the Director of Public Prosecutions or Chief Crown Prosecutor.[264]

4.28 The requirement for consent has been criticised by some defence practitioners on the basis that it can impede the swift resolution of cases, which is contrary to the objectives of the sentence indication scheme.[265]

4.29 Some defence practitioners were concerned that the prosecution did not use the veto for the limited purpose it was intended.[266] It was suggested by one defence lawyer that the prosecution instead used the veto to gain a forensic advantage, as illustrated by Case Study 11.[267]

4.30 Another barrister described a situation in which the prosecution refused to consent to an indication with no good reason in his opinion. He was of the view that the Crown refused the indication because there was no agreement on the facts in relation to the particular charge, but that was incorrect.[268] There appeared to be some initial confusion among individual solicitors early on in the operation of the scheme about whether the Crown would consent if it did not concede that a sentence other than an immediate custodial sentence (such as a suspended sentence) was open in the circumstances.[269] However, the Policy and Advice section of the OPP advised that it had always been OPP policy that consent would be given if it was considered that there was sufficient material available for the court to make an informed indication.[270]

4.31 The Law Institute of Victoria was strongly of the view that 'an application to a judge should not be prevented by the whim of a particular prosecutor'.[271]

4.32 Other defence practitioners also took the view that there was no good reason for the prosecutor to act as the gatekeeper, although they did not suggest that the prosecution had used its veto power unreasonably.[272] These practitioners suggested that if the prosecution determined that there was insufficient material before the court on which an indication could be made, it could make such

264 Office of Public Prosecutions, *Policy 9* (2008) above n 152, [9.6.3].
265 Meeting with Criminal Bar Association (11 November 2009).
266 Telephone conversation with defence practitioner 5 (5 October 2009).
267 Telephone conversation with defence practitioner 5 (5 October 2009).
268 Meeting with defence practitioner 4 (3 September 2009).
269 Meetings with solicitors from the Office of Public Prosecutions (6 July 2009; 9 July 2009).
270 Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009).
271 Submission 1 (Law Institute of Victoria).
272 Meeting with defence practitioner 3 (21 August 2009).

a submission to the court.[273] Victoria Legal Aid also suggested that a lack of information is not sufficient reason for retaining the Crown veto, as the judge can always refuse to give an indication if he or she feels that it is not appropriate.[274]

4.33 It was acknowledged by some defence practitioners that the view of the prosecution was highly relevant to whether an indication should be given, but that this should not be the determinative factor in whether or not a defendant can make an application to the court.[275] As one defence lawyer argued, the Crown does not need to have veto power to protect victims. The Crown can still put the view to the court that it does not think the case is an appropriate vehicle for sentence indication if it considers that the court should have a victim impact statement to assist the decision.[276]

4.34 Although it is possible that removing the prosecution veto could result in wider use of sentence indications, current practice does not suggest that the prosecution is exercising its veto power unreasonably. The Crown veto has been exercised in four of the 31 sentence indication cases identified. The Director of Public Prosecutions suggested that the low number of refusals does not bear out the defence perspective that the Crown veto is being used for the wrong purpose.[277]

Case Study 11

The defendant was charged with the offence of riot and some offences of assault. A co-accused was also charged with riot.

In the defendant's case, the matter had gone through a lengthy committal but the defendant was keen to resolve the matter. The defendant had been discharged on the assault charges at the committal hearing on the basis that there was insufficient evidence to support the charges.

However, the defendant was directly presented on the assault charges in the County Court. Therefore, he was presented on two separate sets of charges in the County Court—on one presentment for riot and on another for the assault charges.

The defendant asked for a sentence indication on the riot charge only. However, the prosecution advised that it would only consent to the indication if it was in relation to both presentments.

Defence counsel for the defendant was initially dissatisfied with this as he was of the view that there was a good chance of his client being found not guilty of the assault charges. However, the defendant's defence barrister eventually did apply for a sentence indication on both presentments, and this was consented to by the prosecution.

At the sentence indication hearing, the Crown submitted that an immediate custodial sentence was appropriate. Defence counsel had prepared for the hearing as though it were a plea, and substantial material in mitigation was provided to the judge.

The defendant's counsel submitted that a plea of guilty to the assault charges would be significant in the judge's assessment of the defendant's remorse and prospects of rehabilitation as the charges were originally discharged at committal and the identification evidence on the charges would be unlikely to 'survive the rigours of a jury trial'.

The judge indicated that 'an immediate sentence of imprisonment is not likely to be imposed'. Consistent with the indication, the defendant pleaded guilty to all charges and received a non–immediate custodial sentence.

273 Meeting with defence practitioner 3 (21 August 2009); Submission 1 (Law Institute of Victoria).

274 Meeting with Victoria Legal Aid (27 October 2009).

275 Meeting with defence practitioner 6 (5 October 2009).

276 Meeting with defence practitioner 3 (21 August 2009).

277 Meeting with Director of Public Prosecutions (Victoria) (27 October 2009).

Commonwealth practice

4.35 The use of the prosecution veto has been slightly different in the one Commonwealth case in which there was an application for a sentence indication. As the Commonwealth DPP has not had to deal with more than one case in the monitoring period, it has not yet developed a policy as to the use of the veto. In the one case in which there was a sentence indication, prosecution consent was withheld because, in the view of the Commonwealth DPP in Victoria, it would not have been useful for the DPP to consent to the application for an indication unless it viewed a suspended sentence to be within range. In the relevant case, the prosecution did not think that a non–immediate custodial sentence was appropriate in the circumstances.

Possible consequences of removing the veto

4.36 The removal of the veto may have other practical consequences. Under the current legislation, a defendant may request a sentence indication for a charge that is not on the presentment.[278] For example, if the defendant is charged with armed robbery, he or she may request a sentence indication for the lesser charge of robbery. Under the current scheme, if the prosecution is prepared to accept a plea of guilty to robbery (because, for instance, the victim is not clear about whether or not the defendant was actually carrying a weapon), it will consent to the application. However, if the prosecution is not prepared to accept such a plea, it can refuse the application.

4.37 If the prosecution veto were removed, the defendant could request a sentence indication from the court without the prosecution agreeing that it would accept a plea of guilty to the lesser charge. For example, the defendant could request a sentence indication for a plea of guilty to robbery, even though the prosecution had not agreed to resolve the matter on this charge. If the court provided a sentence indication for the lesser charge, the prosecution would need to either accept a plea that it believed did not reflect the criminality of the behaviour involved or disregard the indication given by the court and proceed to trial.

4.38 The Director of Public Prosecutions suggested that removing the Crown veto could result in the court having some input into what charges a defendant is presented on in the higher courts. This should be the sole decision of the prosecution, as the prosecution has the burden of proving the charges beyond reasonable doubt.[279] In his view, the requirement for consent is a useful check against possible misuse of the process, whereby an application for a sentence indication is made for the purpose of 'forum-shopping'. This view was supported by the Office of Public Prosecutions.[280]

4.39 Victoria Legal Aid agreed that there may be a reasonable rationale for requiring the Crown to consent to an indication for charges that are not on the presentment, but not for charges on the presentment.[281]

4.40 Similarly, Justice Coghlan did not think that the requirement for prosecution consent was necessary, even for applications relating to a charge not on the presentment. The critical factor was that the prosecution has the opportunity to be heard on an application. This would include the need for the defence to give notice to the prosecution prior to the application, in order to allow the prosecution to prepare submissions.[282]

4.41 In contrast, one of the County Court judges consulted by the Council was of the view that removing the requirement for prosecution consent would be counter-productive. This is because there would be very little point in a judge giving an indication without agreement from the Crown that

278 *Crimes (Criminal Trials) Act 1999* (Vic) s 23A(4); *Criminal Procedure Act 2009* (Vic) s 208(3).

279 Meeting with Director of Public Prosecutions (Victoria) (27 October 2009).

280 Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009).

281 Meeting with Victoria Legal Aid (27 October 2009).

282 Meeting with Justice Coghlan, Supreme Court of Victoria (23 October 2009).

it would accept a plea on the charge for which an indication was requested. She did not support removing the veto as it may have unintended consequences.[283] One defence lawyer consulted by the Council suggested it was unlikely that he would make an application for a sentence indication on a charge that the prosecution had not agreed to accept.[284]

4.42 It is difficult to accurately assess the impact of the requirement for prosecution consent on the scheme and, in particular, to draw any conclusions about whether prosecution consent has hindered the more widespread use of sentence indication in the higher courts.

4.43 The Council's data would suggest that the requirement for prosecution consent has not been a stumbling block. However it may be that the low number of cases in which the prosecution withheld consent in the cases identified by the Council does not reflect the true number of cases in which applications were made and rejected. There may be cases that have not been captured by the Council's data, particularly in the early stages of the pilot period, when there was confusion about how the scheme was supposed to work.

4.44 Alternatively, it may be that some defence practitioners are under the impression that the prosecution will withhold consent as part of the adversarial process. They may not have specifically asked for an indication because they perceived it would be refused.

Expanding the scope of indications

4.45 At present, the pilot sentence indication scheme only permits the court to give an indication as to whether the defendant would receive an immediate term of imprisonment if he or she entered a plea of guilty.[285]

4.46 During consultations, some defence practitioners argued that the sentence indication scheme would be more useful in resolving cases if courts were empowered to give a more specific sentence indication.[286] They advocated introducing the following types of indications:

- an indication as to the range of imprisonment terms open if the court indicated that the defendant would be likely to receive an immediate custodial sentence; and
- an indication as to the type of sentence likely to be imposed in cases in which the court was not considering the imposition of an immediate custodial sentence.

4.47 The advantage of a more specific indication is that the defendant would have a greater degree of certainty on which to base the decision to plead guilty.[287]

Sentencing range

4.48 Broadening the scope of the sentence indication scheme to include an indication of sentencing ranges would mean that judges could give a numerical value to the length of the term of imprisonment likely to be imposed if the defendant pleaded guilty. This value would not be a specific number, but rather an indication as to the range of imprisonment terms under consideration, similar to submissions that the prosecution may currently make at sentence.[288]

283 Meeting with County Court judge 2 (20 October 2009).

284 Telephone conversation with defence practitioner 8 (28 October 2009).

285 *Crimes (Criminal Trials) Act 1999* (Vic).

286 Telephone conversation with defence practitioner 8 (28 October 2009); Meeting with defence practitioner 7 (7 October 2009); Meeting with Victoria Legal Aid (27 October 2009); Meeting with Criminal Bar Association (11 November 2009); Submission 1 (Law Institute of Victoria).

287 Submission 1 (Law Institute of Victoria).

288 Meeting with Criminal Bar Association (11 November 2009).

4.49 For example, if a defendant charged with armed robbery requests a sentence indication, the court would be able to indicate that the defendant would be likely to receive an immediate custodial sentence for that offence and that the term of imprisonment imposed would likely be between two and five years. This is similar in substance to the type of sentencing submission the prosecution is required to make in relevant cases after the Court of Appeal case of *MacNeil-Brown*.[289]

4.50 The Law Institute of Victoria was of the view that the Council should consider extending the scope of sentence indications in order to include ranges:

> That is, the court is able to give a range for the length of any term of imprisonment they would consider appropriate, as well as indicating whether imprisonment is or is not the only available sentencing option. This would give an accused who has served substantial pre-sentence detention, or one who is facing a significant term of imprisonment, a 'worst case scenario' to assist in the decision to plead guilty. Often an accused will know that their chances of success are slim, but they are prepared to take the chance of a trial because of the uncertainty of the sentence they would receive if they commit to a plea of guilty. A sentencing range (that could be further reduced at the actual plea by appropriate reports, references and submissions, but not increase) would remove this uncertainty.[290]

4.51 The view that specific sentence indications would be particularly useful for defendants remanded in custody awaiting trial was echoed by other defence practitioners consulted by the Council.[291]

4.52 An example given by a defence solicitor of a case in which this could be useful was that of a defendant who had been in custody for 20 months on remand. He did not want to go to trial but also did not want to plead guilty because he could not remember what had happened. The matter was booked for trial but ended up resolving by a contested plea (a plea at which the defendant accepts responsibility for the offences but there is a dispute between the parties on the facts and circumstances surrounding the offending). In the opinion of the solicitor, the matter could have been resolved by an uncontested plea—all the defendant needed to hear was that he would receive a sentence of somewhere between 18 months and two and a half years. He would then have pleaded guilty. He needed to know if he was facing that type of sentence or one much higher. If the judge had been able to give an indication as to length or range, this could have resolved the matter.[292]

4.53 As one defence barrister explained:

> In my experience, some accused persons—usually those with a lengthy criminal history and/or those who are remanded in custody at any event—would, in the appropriate case, be content to plead guilty if one burning question were to be resolved, namely, the likely length of time to be spent in custody rather than the fact of a custodial sentence.
>
> While I recognise that it may be undesirable at a sentence indication hearing to state with precision the length of a custodial sentence upon a plea of guilty, it is nevertheless the fact that some who are remanded in custody in any event, would compromise their position if a likely range was made explicit.[293]

4.54 Another defence solicitor was of the view that the current scope of the indications that the court is able to give limits the efficacy of the scheme in promoting early guilty pleas. As an example, this practitioner described the difficulty in advising defendants charged with trafficking a commercial quantity of drugs because of the wide range of sentences being imposed for these offences. In his view, it would make a difference to his clients if the courts were able to give an indication of the range being considered.[294]

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289 *R v MacNeil-Brown* (2008) 20 VR 677.

290 Submission 1 (Law Institute of Victoria).

291 Meeting with defence practitioner 6 (5 October 2009); Telephone conversation with defence practitioner 8 (28 October 2009).

292 Meeting with defence practitioner 6 (5 October 2009).

293 Letter from defence practitioner to the Sentencing Advisory Council, 13 October 2009.

294 Meeting with defence practitioner 7 (7 October 2009).

Sentence type

4.55 As an alternative to indicating sentencing ranges, the Law Institute of Victoria suggested that, where the court indicated that the defendant would receive a non–immediate custodial sentence, the scope of the scheme could be expanded to allow the court to indicate the type of sentence that would be within range.[295] For example, if the court was contemplating a sentence other than an immediate custodial one, the court could indicate that the defendant would be likely to receive a community-based order if he or she were to plead guilty.[296] This was also supported by two of the defence practitioners consulted by the Council.[297] One defence barrister suggested that specificity as to sentence type would be helpful in resolving cases involving young offenders, if the court could indicate whether an immediate custodial sentence would be served by way of detention in a Youth Justice Centre (see Case Study 12). This barrister suggested this case would have resolved immediately post–sentence indication if there was an indication that the sentence would not be served in an adult jail.[298]

Case Study 12

The defendant applied for a sentence indication at case conference on a number of robbery offences. The matter was adjourned to a sentence indication hearing. The defence barrister involved in this case considered that it was appropriate for sentence indication as it was a 'borderline' case as to whether the defendant was going to jail. The Crown consented to the application and the judge indicated that an immediate custodial sentence would be the likely sentence imposed.

The defendant did not plead guilty on the same day as the indication, so the matter was returned to the general list. However, very soon after this, the matter resolved and the defendant pleaded guilty before a different judge. At the plea hearing, the Crown originally submitted that the appropriate sentence was an immediate sentence of imprisonment. After hearing the plea in mitigation, including information from a psychological report, the Crown conceded that detention in a Youth Justice Centre would be within range. There were mitigating circumstances, including that the offender was young, he had made a number of admissions during an interview with police, he had few relevant prior convictions and he had good prospects of rehabilitation. The offender was ultimately sentenced to 22 months in a Youth Justice Centre.

295 Submission 1 (Law Institute of Victoria).

296 Telephone conversation with defence practitioner 8 (28 October 2009).

297 Meeting with defence practitioner 6 (5 October 2009); Telephone conversation with defence practitioner 8 (28 October 2009); Submission 1 (Law Institute of Victoria).

298 Meeting with defence practitioner 2 (21 August 2009).

Issues with greater specificity

4.56 The advantage of more specific indications is that they may lead to resolutions in a greater number of cases. However, the Council identified some problems with expanding the scope of the scheme in this way. Some who thought that greater specificity would be useful also acknowledged that there may be difficulties in making this work in practice.[299]

Lack of information

4.57 Two County Court judges consulted by the Council did not support extending the scope of the pilot scheme to include ranges. While one of the judges acknowledged that broadening the scope may assist in some cases, she was also of the view that a judge would not want to indicate the range of sentences open without having all of the relevant facts.[300] Similarly, another judge said that he would not want to give a range of imprisonment terms without hearing the full facts of the case, including detailed information about the defendant's background.[301]

4.58 Justice Coghlan was also of the view that it would be too difficult for judges to engage in such an exercise. He was concerned that in order to give a range, the judge would need to have virtually heard the plea in mitigation, which is not the intention of the scheme. The material provided at a sentence indication is only meant to foreshadow the issues that would be raised at a full plea hearing.

4.59 Justice Coghlan referred to the Sentencing Snapshots produced by the Council as an illustration of how difficult it would be for judges to indicate a sentencing range. In his view, it is relatively simple to indicate the mean sentence imposed for a particular offence, but the exercise is complicated by the circumstances of individual cases.[302]

4.60 The Director of Public Prosecutions agreed that providing a range may assist in resolving cases. However, he was also concerned that a judge would only be able to give such an indication after being presented with all of the information that would normally be presented on a plea, including the victim impact statement. The Director did not support allowing the court to give an indication of range for this reason.[303] Consistent with legislation, it is OPP policy at present to not obtain victim impact statements until a matter is resolved, either by a plea of guilty or a conviction at trial.[304]

4.61 This policy is reflective of the provision in the *Sentencing Act 1991* (Vic) for the use of victim impact statements: 'If the court finds a person guilty of an offence, a victim of the offence may make a victim impact statement to the court for the purpose of assisting the court in determining sentence'.[305] The Crown's main concern is that it would not be in a position at that point in the proceedings, prior to a plea hearing, to offer a sentencing range, due to a lack of information. The relevance of the victim impact statement in this regard is just one of the factors that lead to this conclusion.[306]

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299 Meeting with defence practitioner 2 (21 August 2009); Meeting with defence practitioner 3 (21 August 2009); Meeting with defence practitioner 4 (3 September 2009); Meeting with Director of Public Prosecutions (Victoria) (27 October 2009).

300 Meeting with County Court judge 2 (22 October 2009).

301 Meeting with County Court judge 1 (13 October 2009).

302 Meeting with Justice Coghlan, Supreme Court of Victoria (23 October 2009).

303 Meeting with Director of Public Prosecutions (Victoria) (27 October 2009).

304 Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009); Meeting with Director of Public Prosecutions (Victoria) (27 October 2009).

305 *Sentencing Act 1991* (Vic) s 95A(1).

306 Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009).

4.62 Victoria Legal Aid was of the view that having no victim impact statement does not particularly constrain the judge in his or her ability to give a sentence indication as to range, because this is balanced by the fact that there is information about the defendant that is not available to the court at a sentence indication hearing. At that stage in the proceedings, there may be practical difficulties in relation to obtaining psychiatric reports about the defendant. However, Victoria Legal Aid was of the view that even though this may be an issue in some cases, there should not be an overall bar on courts providing more specific indications. Representations could be made from the bar table foreshadowing what reports are expected to say about the defendant. In cases in which the court is of the view that there is insufficient information, it could decline to give an indication as to range, but this should not prevent the defendant from being able to make an application.[307]

4.63 Other defence barristers consulted by the Council did not think there was an issue with having no victim impact statement at this point in the proceedings, because judges are usually able to assess the general impact on a victim, which should be enough to give a range. The judge would then have the victim impact statement at the plea hearing prior to the imposition of the specific sentence in each case.[308]

4.64 In its 2007 report on *Sentence Indication and Specified Sentence Discounts*, the Council considered how broad the scope of the indication should be. The Council ultimately rejected anything more specific than an indication as to whether the court would be likely to impose an immediate custodial sentence. One of the main reasons for the limited scope was that this was considered the most the court could foreshadow without the benefit of all the material available at a plea hearing.

4.65 The Council was concerned that it would be too onerous to require the defence to provide sufficient material to the court for a more specific indication and for the prosecution to make submissions as to the appropriate range at an early stage in the proceedings.[309]

4.66 Some defence practitioners have suggested that the legal framework within which sentence indication operates has changed significantly, following the Court of Appeal case of *R v MacNeil-Brown*.[310]

4.67 In that case, the main issue was whether it is appropriate for a Crown prosecutor to make a submission to the sentencing judge about the 'range' of sentences open in a given case. The majority of the Court ruled that, in the interests of consistency in sentencing and in order to reduce the risk of appellable error, it is reasonable for a prosecutor to make a submission on sentencing range if:

- the sentencing court requests such assistance; or
- even though no such request has been made, the prosecutor perceives a significant risk that the court will fall into error regarding the applicable range unless such a submission is made.[311]

4.68 In the view of the majority, the sentencing 'range' means the limits within which reasonable minds can differ as to the appropriate sentence for a particular set of circumstances.[312] A submission by the Crown as to the applicable 'range' of sentences amounts to a submission of law and is not a mere expression of opinion. The submission must be:

> [b]ased on a clearly articulated view of the gravity of the offence, the relevant sentencing principles and practices, and relevant aggravating or mitigating factors. All of these matters should be referred to in the course of the submission, so that the court understands how the Crown contends that the relevant matters should be brought to bear.[313]

307 Meeting with Victoria Legal Aid (27 October 2009).

308 Meeting with defence practitioner 6 (5 October 2009).

309 Sentencing Advisory Council (2007) above n 1, 111, 117.

310 *R v MacNeil-Brown* (2008) 20 VR 677.

311 Ibid 1.

312 Ibid 5.

313 Ibid.

4.69 This suggests that a submission by the prosecution as to range should only be made with all the material relevant to sentence, which would not necessarily be available at a sentence indication hearing. This is the view taken by the Office of Public Prosecutions, which advised that prosecutors would not be comfortable with making submissions as to the appropriate range at a sentence indication hearing as there is insufficient information available.[314]

4.70 It may be that as legal practitioners become more accustomed to canvassing ranges at the plea hearing, following *MacNeil-Brown*, and the ranges for particular offending circumstances become more widely known and accepted, there will be a flow-on effect, making courts more receptive to the idea of giving an indication as to the range of sentences open.[315]

4.71 Two defence barristers suggested that the court could give a contingent sentence indication that could be changed on the basis of material received at the plea.[316] In part, the scheme already allows for this where a judge gives an indication that an immediate custodial sentence is likely to be imposed but ultimately imposes a non–immediate custodial sentence on hearing the full plea in mitigation. While this seems to have worked effectively in the relevant cases, allowing courts to indicate a non–immediate custodial sentence but then impose an immediate custodial sentence based on information put at the plea would cause significant unfairness to the defendant, who has entered a plea of guilty on the basis that he or she is facing a non-custodial sentence.

Possible negative consequences

4.72 A possible flow-on effect of extending the scheme to include ranges was suggested by the Director of Public Prosecutions. He considers that there is a danger that the sentence indication hearing could turn into a 'pre-plea' plea in order to provide the court with sufficient information for a range to be given. This would defeat the purpose of sentence indication, as the same material would be put before the court at two separate hearings—the sentence indication hearing and the plea hearing.[317]

4.73 Another consequence of allowing judges to give a range of imprisonment terms or refer to the type of sentence under consideration is that defendants may delay entering a plea of guilty in order to obtain more information about the sentence they are likely to receive.

4.74 One of the objectives of the sentence indication scheme was to encourage people who would be pleading guilty at some stage in the proceedings to enter that plea at the earliest possible opportunity. At present, 52.2% of guilty pleas are entered by the time the defendant is committed for trial (see Figure 2, page 3).

4.75 If the sentence indication scheme were extended to allow judges to give an indication of the range of imprisonment terms or the type of sentence being considered, some defendants who are currently pleading at the committal stage may delay entering their plea until after they are committed for trial. This would be counter-productive as it would bring more defendants into the trial stream in the County Court, thereby increasing, rather than relieving, pressure on the court.

4.76 The Director of Public Prosecutions also suggested that the extension of the scheme to ranges may also inappropriately raise the legitimate expectations of defendants, who would expect a particular length of sentence but then would not receive that sentence.[318]

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314 Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009).

315 Meeting with Justice Coghlan, Supreme Court of Victoria (23 October 2009).

316 Meeting with defence practitioner 1 (19 August 2009); Meeting with defence practitioner 2 (21 August 2009).

317 Meeting with Director of Public Prosecutions (Victoria) (27 October 2009). It should be noted that there were some defence practitioners who suggested that this was happening already, although others suggested that the material put at the sentence indication was only a summary of what would be submitted at the plea.

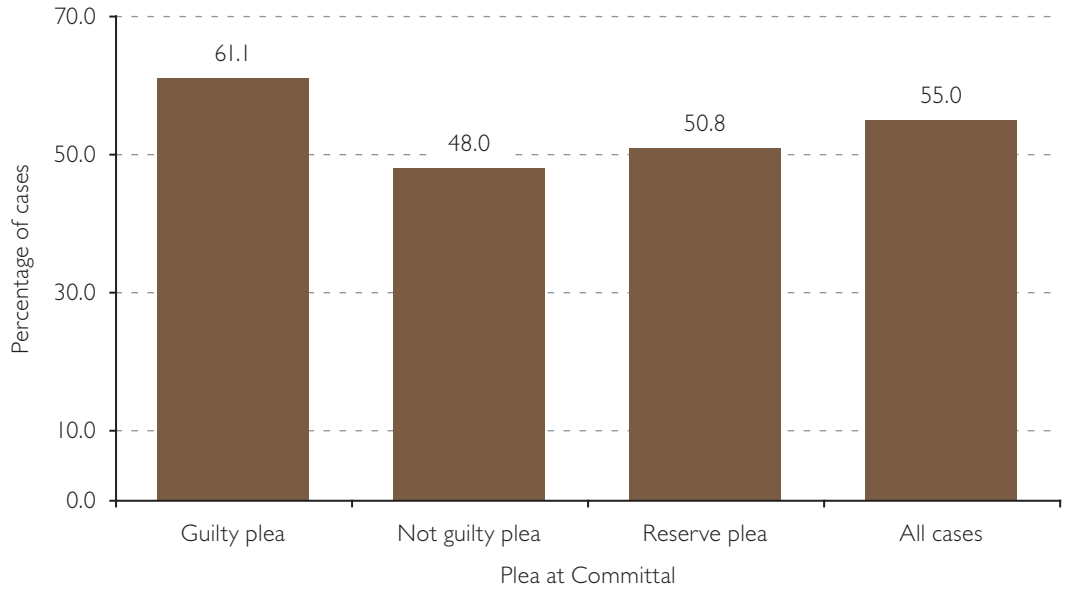
318 Meeting with Director of Public Prosecutions (Victoria) (27 October 2009).

Usefulness of limited indications

4.77 Some defence practitioners suggested that there was little use for a sentence indication that is limited to whether or not the defendant will receive an immediate custodial sentence. This is because of the large proportion of people sentenced in the higher courts who receive immediate terms of imprisonment.[319]

4.78 While this may be the perception, 48.0% of defendants who pleaded not guilty at committal and 50.8% who reserved their plea received sentences of imprisonment where the matter ultimately resolved as a plea of guilty (see Figure 15).[320] While this will vary depending on the type of offence,[321] in general this would suggest that there is sufficient likelihood of a defendant not receiving a term of imprisonment in the County Court to make the distinction between 'jail or no jail' useful.[322]

Figure 15: Percentage of defendants who received an immediate custodial sentence by plea type at committal, County Court, 2008–09



319 Meeting with defence practitioner 6 (5 October 2009).

320 Of the 1,869 cases disposed of in the County Court in 2008–09, 75.4% were able to be identified in the higher courts sentencing database using a County Court case number. The remainder either did not receive a sentence (due to acquittal or other reason) or were unable to be identified due to missing or incomplete identifying information.

321 Over 90% of convictions for rape in the County Court result in a sentence of imprisonment. See Sentencing Advisory Council (2009) above n 111, 12.

322 This analysis relates to the County Court. The likelihood of imprisonment in the Supreme Court is much higher. See [2.9].

4.79 Case Study 13 is an example of where the limited indication of 'in or out' was sufficient to assist the defendant in deciding to enter a plea of guilty prior to the commencement of the trial.

Case Study 13

The defendant asked for a sentence indication on a number of cause injury offences. The matter was listed for trial and the indication was sought five days before the trial was scheduled to commence. The defence practitioner advised the Council that the main reason for asking for the indication was that the 'accused was terrified of going to jail … it was borderline'. The Crown consented to the application and conceded that a non–immediate custodial sentence would be in range.

At the sentence indication hearing, defence counsel tendered a document outlining the mitigating circumstances that would have been presented on the plea. The judge indicated that an immediate custodial sentence would be unlikely. The defendant immediately indicated he would accept the sentence indication and the matter was adjourned for plea in a month's time.

At the plea, defence submitted that a community-based order was within range. The Crown submitted that a term of imprisonment was required but how it would be served was a matter for the court.

No victim impact statements were tendered. Two of the victims were contacted and expressed no interest in being involved in the matter, and the third was overseas and could not be contacted. In sentencing the defendant, the judge took into account the plea of guilty (although this was not entered at the first available opportunity), the defendant's contrition, the lack of relevant priors, the defendant's age and prospects of rehabilitation and general and specific deterrence. The judge imposed a wholly suspended sentence.

Raising awareness

4.80 The majority of those consulted by the Council were positive about the sentence indication scheme and supported its continuation. However, there was a view that more needs to be done to ensure that defence practitioners are aware of sentence indication as an option to be discussed with their clients and that prosecutors are able to respond to the request for an indication.

4.81 The scheme received some publicity when the legislation was originally introduced. However, it appears that some practitioners were unaware of the process and how it operated under the *Crimes (Criminal Trials) Act 1999* (Vic).

4.82 Some people suggested that it may be useful to run continuing legal education sessions on sentence indication in order to raise its profile.[323] This may be particularly useful for defence solicitors who have carriage of the matter at the early stages before counsel is briefed and who may not be aware of the scheme or how it can assist in an early resolution.[324]

4.83 Sentence indication has been incorporated into the new *Criminal Procedure Act 2009* (Vic), which came into operation on 1 January 2010. There will be significant training to assist legal professionals in familiarising themselves with the Act, and this would be a good opportunity to also raise awareness of sentence indication. Victoria Legal Aid has already begun this process.[325] In addition, the County Court has produced a Practice Note to provide some guidance as to the practical operation of the Act, including the procedure to be followed when applying for a sentence indication.[326]

4.84 A defence practitioner consulted by the Council suggested that one way of ensuring that the parties are aware of the scheme and reminded of it early in the process is for listing judges to ask the defence at the first hearing in the higher courts whether an application for sentence indication has been considered.

4.85 This proposal was supported by a number of other defence lawyers, the Law Institute of Victoria, Victoria Legal Aid, the Criminal Bar Association, the Director of Public Prosecutions and solicitors from the Office of Public Prosecutions.[327] A County Court judge agreed that sentence indication is the sort of issue that should be raised in this way early in the process.[328]

4.86 Victoria Legal Aid noted that a checklist for judges is useful, but it is more important that both sides actually do something meaningful to resolve the matter. This may be facilitated by having consistency of counsel from committal to the hearings in the County Court.[329]

4.87 The Law Institute of Victoria was of the view that having the judge mention sentence indication at the first listing hearing would be useful. However, it also suggested that it may be appropriate for parties to be reminded of the availability of sentence indication more than once in each case. The rationale for this is that:

> parties who would not consider seeking a sentence indication early in a proceeding may have a different perspective on the likely success of their case as the matter approaches the trial date. This might be because of the unavailability or perceived unreliability of witnesses or other factors which might affect the outcome of the trial.[330]

323 Meeting with the Criminal Bar Association (11 November 2009).

324 Meeting with County Court judge 2 (20 October 2009).

325 Meeting with Victoria Legal Aid (27 October 2009).

326 County Court of Victoria (2010) above n 5, 18.

327 Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009); Meeting with Victoria Legal Aid (27 October 2009); Meeting with Director of Public Prosecutions (Victoria) (27 October 2009); Meeting with the Criminal Bar Association (11 November 2009); Submission 1 (Law Institute of Victoria).

328 Meeting with County Court judge 1 (13 October 2009).

329 Meeting with Victoria Legal Aid (27 October 2009).

330 Submission 1 (Law Institute of Victoria).

The Council's view

4.88 A recurring theme in the Council's consultations was that while sentence indication will never solve the problem of delay on its own, it is a useful tool when used in conjunction with other mechanisms designed to reduce delay.

4.89 While the Council's monitoring has been limited in terms of both time and access to information, those involved in the scheme, whom the Council was able to speak with, have reported minimal impact on case flow and workload across the system as a whole.

4.90 However, there have been encouraging signs of the ability of sentence indications to assist in resolving matters on a case-by-case basis. While generally it would be almost impossible to say with any certainty whether a case would have settled in the absence of the sentence indication scheme, 85.2% of cases in which a sentence indication was given resolved by way of a guilty plea.[331] Anecdotally, some of the lawyers the Council met with were of the view that, in the cases they were involved in, the plea following a sentence indication avoided the difficulties inherent in running a long trial.

4.91 Furthermore, while current experience is limited, it would seem that these resolutions have been achieved without any substantial negative impact on defendants or victims involved in cases in which there were sentence indication hearings, based on the Council's discussions with legal practitioners.

4.92 As sentence indication has the potential to assist in resolving cases and reduce delay, albeit in a limited way, all of the people consulted by the Council were of the view that it would be premature to abolish the scheme without allowing it time to fulfil at least some of that potential.

4.93 Therefore, the Council supports the continuation of the sentence indication scheme in the County and Supreme Courts.

4.94 The Council also carefully considered the issues raised by stakeholders about possible amendments to the scheme, such as removing the requirement for prosecution consent to applications and allowing the courts to give more specific indications.

4.95 The Council acknowledges that it is possible that these reforms could lead to greater usage of the scheme. However, due to the limited time that the scheme has been in operation and the low number of cases in which sentence indication has been applied for and used, the Council is of the view that it would be premature to recommend any changes to the scheme.

4.96 While noting the limitations of the data, there is insufficient information to suggest that the prosecution is exercising its veto in an unreasonable manner. Further, the Council is of the view that, at present, the prosecution veto can act to ensure that applications for sentence indication are not made in cases where the court would be unable to determine whether the defendant should receive a non–immediate custodial sentence without a victim impact statement.

331 This percentage is in reference to 23 cases.

4.97 Expanding the sentence indication scheme to allow the court to give a sentencing range may make it more attractive to a larger number of defendants. At present, there are some issues that mean that the scheme should not be extended beyond its current scope, particularly the lack of information before the court at the sentence indication stage and the potential to delay guilty pleas. However, the Court of Appeal case of *MacNeil-Brown*[332] now requires explicit consideration of sentencing ranges at the time of the plea. Once sentencing ranges for particular types of offences develop and become entrenched, it may be that there is a greater willingness to consider ranges prior to the defendant entering a plea of guilty. Courts would still be able to take into account all relevant considerations in sentencing as a range provides enough scope for the sentence ultimately imposed to reflect material put at the plea.

4.98 It would be premature to recommend changing the scheme to include ranges at this stage, as sentence indication, in its current, limited form, has yet to be bedded down in practice. However, once the sentence indication process and the provision of sentencing ranges become more entrenched as common practice, this may pave the way for the scheme to evolve and allow the court to give an indication as to the sentencing range. Such an extension of the scheme is something that should be considered in the future.

4.99 The Council is also of the view that no legislative changes should be made in relation to judges raising sentence indication at listing hearings, although listing judges may wish to adopt this practice.

4.100 Therefore, the Council recommends the continuation of the scheme without any changes to the legislative framework in the *Criminal Procedure Act 2009* (Vic).

RECOMMENDATION

The sentence indication scheme in the County and Supreme Courts should be continued indefinitely, consistent with the legislative framework in Part 5.6 of the *Criminal Procedure Act 2009* (Vic).

332 *R v MacNeil-Brown* (2008) 20 VR 677.

Data collection

4.101 As with any change to the law, it would be useful to consider how the scheme is working once it has been in operation for a further period of time, including consideration of any reforms. It was suggested in consultations that the scheme was only really beginning to settle after one year,[333] and it is anticipated that, as people within the profession become more aware of the potential benefits of the scheme, it will be used in more cases.

4.102 The Council has recommended that the pilot sentence indication scheme should be continued. It is also of the view that there should be procedures in place to ensure that accurate information is gathered about sentence indication applications to the prosecution and the courts and sentence indication hearings in order to allow for its review in the future. As discussed previously in this report, there have been significant difficulties in obtaining consistent information about how many sentence indication applications and/or hearings have taken place.

4.103 As the Council has not recommended removing the requirement for prosecution consent, the Office of Public Prosecutions will still need to be the collection point in relation to applications for sentence indication. One mechanism that may encourage the OPP to collect and report on the number of applications for sentence indication (and the number of applications for which consent was refused) would be if the OPP were to include this information in its annual report, alongside information already presented, such as how many matters its staff had prepared briefings for or appeared in.

4.104 In relation to sentence indication hearings, the County Court is already able to identify hearings in which a separate sentence indication hearing was listed (for example, if the application for a sentence indication was made at the case conference and the matter is adjourned to another date for the sentence indication hearing). This was the case in the majority of the sentence indication hearings. However, the County Court is currently unable to capture sentence indications that are given at another hearing, such as the case conference or directions hearing.

4.105 The introduction of the Integrated Case Management System in the County and Supreme Courts may provide some opportunity to ensure that information about sentence indications, regardless of the hearing type at which they are given, can be captured in the future. This would facilitate any further review of the sentence indication scheme.

333 Meeting with the Policy and Advice Directorate of the Office of Public Prosecutions (22 October 2009).

Appendix 1
Consultation

Meetings, telephone communications and submissions

Date	Meeting/Telephone Communications/Submissions
7 July 2009	Meeting with solicitors from the Office of Public Prosecutions
9 July 2009	Meeting with solicitors from the Office of Public Prosecutions
19 August 2009	Meeting with defence practitioner 1
21 August 2009	Meeting with defence practitioner 2
21 August 2009	Meeting with defence practitioner 3
3 September 2009	Meeting with defence practitioner 4
5 October 2009	Telephone conversation with defence practitioner 5
5 October 2009	Meeting with defence practitioner 6
7 October 2009	Meeting with defence practitioner 7
13 October 2009	Letter from defence practitioner
13 October 2009	Meeting with County Court judge 1
14 October 2009	Law Institute of Victoria (Submission 1)
20 October 2009	Meeting with County Court judge 2
22 October 2009	Meeting with Policy and Advice Directorate of the Office of Public Prosecutions
22 October 2009	Meeting with Chief Crown Prosecutor
22 October 2009	Meeting with Charlene Micallef, Directorate Manager, Victims Strategy and Services
23 October 2009	Meeting with Justice Coghlan, Supreme Court of Victoria
27 October 2009	Meeting with Director of Public Prosecutions (Victoria)
27 October 2009	Meeting with Victoria Legal Aid
28 October 2009	Telephone conversation with defence practitioner 8
29 October 2009	Meeting with Witness Assistance Service, Office of Public Prosecutions
4 November 2009	Meeting with the Human Rights Legal Resource Centre
5 November 2009	Meeting with the Commonwealth Deputy Director for Public Prosecutions (Victoria)
11 November 2009	Meeting with Criminal Bar Association

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