Victorian Council for Civil Liberties Inc
Reg No: A0026497L
GPO Box 3161
Melbourne, VIC 3001
t 03 9670 6422
info@libertyvictoria.org.au

PRESIDENT
Jessie E Taylor

SENIOR VICE-PRESIDENT
Michael Stanton

VICE-PRESIDENTS
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PATRON
The Hon. Michael Kirby AC CMG

libertyvictoria.org.au

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Sentencing Advisory Council
3/333 Queen Street
Melbourne VIC 3000

Email: contact@sentencingcouncil.vic.gov.au

SUBMISSION ON THE SENTENCING ADVISORY COUNCIL'S ISSUES PAPER:

A SENTENCING GUIDELINES COUNCIL FOR VICTORIA

1. Liberty Victoria is grateful for the opportunity to make this submission to the Sentencing Advisory Council ('SAC') in response to the Issues Paper: A Sentencing Guidelines Council for Victoria, released in November 2017.

2. Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. We seek to promote Australia's compliance with the rights recognised by international law and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). We are a frequent contributor to federal and state committees of inquiry, and we campaign extensively for better protection of human rights in the community. Further information may be found at www.libertyvictoria.org.au.

3. The members and office holders of Liberty Victoria include persons from all walks of life, including legal practitioners who appear in criminal proceedings for the prosecution and the defence.

4. As an organisation Liberty Victoria is deeply concerned about the gradual erosion of judicial discretion in sentencing and the move towards mandatory and/or more prescriptive models of sentencing. Part of that concern stems from the need for the legislature to carefully protect the separation of powers so that a strong and independent judiciary is able to ensure that justice is done in the individual case.

Terms of Reference

5. As noted in the SAC issues paper, the Victorian Government announced in May 2017 that it would introduce legislation in 2018 to establish a sentencing guidelines council in Victoria. In July 2017, the Attorney-General requested the SAC to advise him on the most suitable model, following broad stakeholder and community consultation. The issues paper has been designed to facilitate that consultation.

6. In doing so, the issues paper provides information about examples from other jurisdictions and discusses key issues that will need to be addressed in establishing a sentencing guidelines council in Victoria. Further, preliminary proposals are offered in relation to some of these issues. SAC seeks comment and invites stakeholders to submit their views.

7. Significantly, the SAC is <u>not</u> seeking views about the threshold issue of the appropriateness or desirability of a sentencing guidelines council of Victoria.

8. As argued in our submission on the SAC sentencing guidance reference,[1] Liberty Victoria opposes the introduction of a sentencing guidelines council on the basis that there is no evidentiary basis to suggest that such an approach is necessary. Liberty

[1] Accessible here: <https://libertyvictoria.org.au/sites/default/files/Liberty%20Victoria%20%28SAC%20Submission%29%20Web%2020160208.pdf>

Victoria remains steadfast in our rejection of reforms that appear to be founded upon an incorrect premise; that the Victorian criminal justice system has failed to promote consistency in sentencing, and therefore the public has lost confidence in it.

9. The Victorian criminal justice system has significant and sufficient mechanisms to promote consistency in sentencing. Parliament should be proactive and take a lead in the public arena in explaining the need for there to be a strong and independent judiciary, and to assist the community to understand that we all have a significant and inviolable interest in a criminal justice system that gives due weight to the rehabilitation of offenders.

10. We repeat that the need for such reform has not been demonstrated and we will continue to oppose any model that further erodes the separation of powers, and seeks to fetter the discretion of judicial officers to do justice in the case at hand.

Proposed purposes of the sentencing guidelines council

11. The proposed purposes of the sentencing guidelines council for Victoria are as follows:

    To produce sentencing guidelines that:

    a. Promote consistency of approach in sentencing; and

    b. Promote public confidence in the criminal justice system.

12. We have a criminal justice system that intends for individual judicial officers to be independent from the will of the executive. Victorian judges and magistrates are vested with the responsibility of fixing appropriate sentences in individual cases in accordance with the 'instinctive synthesis' approach upheld by *Markarian v The Queen*[2] and other relevant sentencing principles. In order to impose a just sentence, that accounts for all of the circumstances of a particular case, the courts are given the power to exercise discretion to ensure the sentence is proportionate to the offence and the offender. Judicial discretion is fundamental in avoiding injustice.

[2] (2005) 228 CLR 357.

13. The introduction of a sentencing guidelines council is a significant departure from the current sentencing landscape in Victoria. A guideline issued by the council will interfere with the 'instinctive synthesis approach' by re-structuring the sentencing framework for a particular offence or class of offences. Further reform will be required to address the High Court's sustained rejection of prescriptive and numerical sentencing guidelines. In *Wong v The Queen*,[3] Gaudron, Gummow and Hayne JJ stated that:

> To focus on the result of the sentencing task, to the exclusion of the reasons which support the result, is to depart from fundamental principles of equal justice. Equal justice requires identity of outcome in cases that are relevantly identical. It requires different outcomes in cases that are different in some relevant respect. Publishing a table of predicted or intended outcomes masks the task of identifying what are relevant differences.[4]

14. The High Court has held that two-stage or sequential approaches to sentencing are likely to lead to error because, unlike instinctive synthesis, it does not allow all relevant elements to be simultaneously and intuitively balanced.[5]

15. The preservation of judicial discretion and more broadly judicial independence should be explicitly listed as one of the Victorian sentencing council's purposes, as is the case in England and Wales. For this reason, Liberty Victoria proposes that the following additional purpose be included and enshrined within the sentencing guideline councils guiding purposes:

> To produce sentencing guidelines that:
>
> a. Promote consistency of approach in sentencing;
>
> b. Promote public confidence in the criminal justice system; and
>
> c. <u>Preserve judicial independence and judicial discretion.</u>

[3] (2001) 207 CLR 584.
[4] Ibid, 608.
[5] Krasnostein, Sarah, 'Boulton v the Queen: the Resurrection of Guideline Judgments in Australia?' [2015] CICrimJust 10; (2015) 27(1) Current Issues in Criminal Justice 41.

Promoting consistency of approach in sentencing

16. The High Court held in *Hili v The Queen*:[6]

> Consistency is not demonstrated by, and does not require, numerical equivalence. Presentation of the sentences that have been passed on federal offenders in numerical tables, bar charts or graphs is not useful to a sentencing judge. It is not useful because referring only to the lengths of sentences passed says nothing about why sentences were fixed as they were. Presentation in any of these forms suggests, wrongly, that the task of a sentencing judge is to interpolate the result of the instant case on a graph that depicts the available outcomes.[7]

17. Notwithstanding the above passage, the High Court also emphasised that in seeking consistency in sentencing, "…sentencing judges must have regard to what has been done in other cases".[8]

Promoting public confidence in the criminal justice system

18. As argued in previous submissions, Liberty Victoria considers that over the previous decade there has been a significant increase in sensationalised reporting coupled with a failure by the legislature to defend the judiciary in the public arena. Past changes, introduced by Governments under the guise of promoting consistency and public confidence, has not remedied this situation. However, the research as set out in the SAC sentencing guidance reference demonstrates that when informed of the facts relevant to sentencing, members of the public do not generally consider that the sentences imposed upon offenders by judicial officers are too lenient.

19. To promote public confidence, the executive has a significant role to play in educating and engaging with the community in a responsible and meaningful way. A 2012 study of public perceptions of sentencing guidelines in England and Wales (referenced in the SAC Sentencing Guidance in Victoria Report) found that the general population were largely unaware of the ways in which the public are involved in sentencing guidelines,

[6] (2010) 242 CLR 520.
[7] Ibid, [48] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[8] Ibid, [53] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

and had essentially no awareness of the existence of guidelines. It would appear that without significant public engagement, the mere existence of a sentencing guidelines council and sentencing guidelines will do little, if anything, for public confidence in the criminal justice system.

20. Parliament should be proactive and take a lead in the public arena in explaining the need for there to be a strong and independent judiciary, and to assist the community to understand that we all have a significant and inviolable interest in a criminal justice system that gives due weight to the rehabilitation of offenders.

Composition of the sentencing guidelines council

21. Liberty Victoria is concerned that sentencing council bodies are far more susceptible to being politicised than the judiciary. Whether through issues of funding, appointment or replacement of key office holders, the legislature is much more easily able to exert political pressure on executive bodies. The strength of a robust criminal justice system is that the judiciary operates at arm's length from the legislature – that itself is a vital protection for the individual against the State.

22. The SAC proposes the following composition of the sentencing guidelines council:

    a. *Seven judicial members, who would comprise:*

        - *two justices of the Supreme Court (including at least one justice of the Court of Appeal), one of whom would be appointed to act as Chair;*
        - *two judges of the County Court of Victoria;*
        - *the President or a magistrate of the Children's Court of Victoria; and*
        - *two magistrates of the Magistrates' Court of Victoria.*

    b. *Six legal and community members who, in the opinion of the Attorney-General, have expertise, knowledge or skills relevant to sentencing and criminal justice and the work of the sentencing guidelines council.*

23. A sentencing guidelines council constituted by a judicial majority is a key factor in ensuring independence from government and politicisation. The success of the model

relies upon the council being a judicially led body, with judicial ownership and leadership of the process. Without this, there is unlikely to be support from the broader judiciary whose task it will be to apply the guidelines and other criminal justice stakeholders.

24. The development of sentencing principles and the formation of sentencing guidelines should be done by those who have the real-life experience of sentencing offenders. Members of the judiciary have the expertise and practical knowledge of the sentencing process, and the unintended consequences of legislative reform, and so are best placed to guide the council and play a determinative role in shaping the guidelines. Sentencing guidelines should be developed by those who have had to endure what it is to sentence an offender to prison and to hear from victims and their families.

25. Members of the legal community, those working in prosecution and defence, barristers and solicitors, should also be afforded a number of fixed positions to reflect their knowledge and expertise. For example, the Scottish Sentencing Council comprises six judicial members (seven including the Lord Justice Clerk who sits as chair), three legal members and three lay members.

26. The remaining positions for community members should be selected based on their expertise, knowledge and skills relevant to sentencing and criminal justice. The voices of members of the police force, victim advocates, experts in sentencing policy and academics could be heard and considered in this way.

27. Further, the nomination and appointment of members to the sentencing guidelines council should follow a process that puts in place sufficient safeguards to protect it from politicisation. Appointments made by governments of the day would be particularly vulnerable to ‘tough on crime’ electioneering. The nomination procedure should be cognisant of these issues and take steps to reduce the associated risk.

Initiation of sentencing guidelines

28. The SAC proposes that a Victorian sentencing guideline would be initiated:

    a. on the sentencing guidelines council's own motion; or

    b. at the request of the Attorney-General, provided that the sentencing guidelines council is not required to comply with that request.

29. Liberty Victoria is of the view that the Court of Appeal should retain its authority in guiding sentencing principles in Victoria. In our submission, the Court of Appeal should also have the authority to initiate sentencing guidelines where considered appropriate. This would complement the existing guideline judgment scheme.

30. Liberty Victoria is greatly concerned about the potential for the Attorney-General to make politicised initiations. The politicisation of the council and the guidelines it produces should be avoided at all costs. Should the Attorney-General be granted the power to initiate sentencing guidelines, further limitations upon this power should be required.

31. In addition to the proposal by the SAC that the sentencing guidelines council is not required to comply with any request made by the Attorney-General, the Attorney-General should also have to demonstrate, prior to the making of any request, that sentencing guidelines are:

    a. required in order to address a systemic issue; and

    b. in the public interest.

Consultation on sentencing guidelines

32. Liberty Victoria shares the SAC's view that consultation in the development of sentencing guidelines is critical, and that the sentencing guidelines council in Victoria should therefore not be permitted to bypass consultation requirements in order to publish an urgent sentencing guideline.

33. The consultation process should be extensive and, in line with the England and Wales model, should be for a reasonable period time to allow for the process to be meaningful. Required consultations should include the Court of Appeal and the Trial Division of the Supreme Court, the County Court, the Magistrates' Court, the Director of Public Prosecutions, the Victorian Bar, the Law Institute of Victoria and Victoria Legal Aid at a minimum.

34. In addition to the legal community, the general community including any interested persons, organisations or bodies should be provided an opportunity to participate in the process.

35. Further, it is submitted that the sentencing guidelines council should be required to publish an impact or resource assessment alongside any draft or final guideline, so that policy makers can understand the implications of the guideline.

Finalisation, approval and commencement of the sentencing guidelines

36. Liberty Victoria is strongly of the view that the sentencing guidelines should only come into effect once approved by the Court of Appeal, as opposed to by the sentencing guidelines council itself.

37. The Court of Appeal should also then be responsible for setting a date for the sentencing guidelines to come into effect, rather than taking effect immediately upon publication.

Form and content of sentencing guidelines

38. In our view, the sentencing guidelines should be informed by the *Sentencing Act 1991* (Vic) ('*Sentencing Act*') and should elucidate and consolidate, rather than seek to alter or override, the common law.

39. Liberty Victoria's submission to the SACs Sentencing Guidance Reference of 8 February 2016 included the following comments[9]:

> …[T]he development of sentencing principles and the formation of sentencing guidelines should be done by those who have the real life experience of sentencing offenders. It is difficult to imagine a more difficult task than sentencing an offender and weighing the competing sentencing considerations in the austere environment of a courtroom, often before the devastated families and friends of both the offender and the victim. To have an external body develop sentencing guidelines in the abstract, removed from the actual practice of hearing trials and pleas in mitigation, is too far removed from the concrete reality of the courtroom. Sentencing guidelines should be developed by those who have had to endure what it is to sentence an offender to prison and to hear from victims and their families.
>
> Further, the criminal justice system works by having parties who, when issues of fact or law are in dispute, provide competing submissions. Where possible those submissions are made in public and recorded so there is transparency. That process is vitally important because it allows for judicial officers to assess the merit of such submissions in reasoning towards an outcome. It is also important that such a process occurs where possible in public so that people can witness the criminal justice system in operation. It is that process that should lead to the development of sentencing guidelines and principles, and not the consideration of such matters in the abstract.

40. We reiterate these remarks. Should a sentencing guidelines council be established in Victoria, the guidelines it produces must be designed to facilitate and strengthen, not supplant or undermine, the role of sentencing judges. Specifically, the content and effect of guidelines must be such as to minimise interference with judicial independence and judicial discretion.

41. The sentencing principles which exist at common law in Victoria represent a distillation of the sustained, rigorous consideration of judicial officers across many cases. In each case, the judicial officer must apply finely balanced sentencing factors, including punishment, denunciation, deterrence, community protection and rehabilitation, to the unique factual matrix of a given case, which will include the relevant circumstances of the offender and the impact of his her or her crimes upon the victim/s. The offender's circumstances might include, for example, intellectual, physical or mental health disability; drug or alcohol dependency; or extraordinary

[9] Ibid n 1, [49], [53]-[54].

hardship, including a history of abuse, neglect, trauma or poverty. These matters may be subject to voluminous expert evidence and other supporting materials. And as well as considering the facts of the case, the judicial officer must consider comparable cases, assessing their relevant similarities and differences and arriving at a sentence which is both appropriate in the given case and consonant with current sentencing practice.

42. It is not by accident that the rules and principles forged, over time, in that context have a unique and long-standing status as the common law. It is reflective of our collective recognition that 'the concrete reality of the courtroom', with its limitless variation and messy complexities, is an ideal setting for developing fair, workable guidelines for the imposition of sentences. Even then, the complexity and variety of that setting is such that rules and principles must be able to be adapted and interpreted in light of the interests of justice in particular cases.

43. Accordingly, the guidelines could present an opportunity to provide a overview (consistent with the SAC's current work) of operative principles, criteria, ranges and other matters that apply in the context of a particular offence or range of offences.

Effect of a sentencing guideline on common law precedents

44. Unlike the common law, the utility and efficacy of a sentencing guidelines council where guidelines would be developed in the abstract, without the benefit of competing submissions and, presumably, in a setting not open to the public, remains largely untested. That is to say nothing about the constitutional validity of the sentencing guidelines council, which, as the Issues Paper acknowledges, remains a serious and pervasive question in the Victorian context.

45. In such circumstances, it would be reckless and premature, as well as unnecessary, to empower the council to override the common law, or to impinge to any great extent on the current role of the judiciary.

46. Liberty Victoria's view is that, if a sentence guidelines council is to be established, judicial officers should not be required to do more than 'have regard to' its guidelines. Sentencing judges must be permitted to depart from guidelines in the interests of justice, in light of the case before them, and guidelines should be devised and used to clarify and consolidate, rather than alter, the common law or current sentencing practices.

47. Such an approach would not prevent the guidelines from being an influential and useful tool for Victorian judges. Sentencing reasons in the higher Victorian courts are replete with references to the Sentencing Advisory Council's existing resources, including its 'Sentencing Snapshots'.

Application of sentencing guidelines

48. Liberty Victoria has long opposed the retrospective application of the criminal law. Retrospective laws undermine clarity and certainty about the reach of the law, and the consequences likely to follow from certain conduct. Changes to the law must be managed to avoid unfair and arbitrary inequalities, and as far as possible, ensure that criminal conduct is punished according to the law as it stands when that conduct occurs.

49. Broadly speaking, such considerations apply to the enactment of new sentencing measures as much as new offences. As the Issues Paper points out, in limited instances, such as cases of historical sexual offending, countervailing considerations, including contemporary community views, will need to be taken into account. However, such considerations can have little weight when considering the broad, untested powers of a sentencing guidelines council to fashion guidelines in relation to any number of offences or offence categories.

50. Accordingly, our strong view is that sentencing guidelines should apply to offences committed after their commencement, and that sentencing guidelines issued after an offender is sentenced should not be used in resentencing that offender following a successful appeal against sentence.

Retention of guideline judgment powers

51. Liberty Victoria is firmly of the view that the Court of Appeal's guideline judgment powers should be retained, and that the Guidelines Council should not be established until the measures introduced by the *Sentencing Amendment (Sentencing Standards) Act 2017* ('*Sentencing Standards Act*') have had an opportunity to take effect.

52. Guideline judgments have substantial untapped potential. The guideline judgement mechanism in the *Sentencing Act* provides a unique path to the systemic development of sentencing practices through, rather than outside, the common law process. Many of the intended benefits of a sentencing guidelines council are achievable through the wider use of that mechanism.

53. As the SAC notes, the guideline judgment provisions have been exercised only once, in *Boulton v The Queen*.[10] Nevertheless, that case bears out the benefits of the guideline judgment process. Aided by detailed submissions from the Attorney-General for the State of Victoria, the Director of Public Prosecutions, Victoria Legal Aid, the SAC and counsel for each defendant, the Court was able to provide authoritative, comprehensive and influential guidance on the use of community correction orders, at that time a relatively new and under-utilised sentencing option.

54. The Issues Paper notes that the *Sentencing Standards Act*, which has been passed but is yet to come into force, will introduce measures to increase the use, and usefulness, of guideline judgments. These include providing for the SAC to conduct research, statistical analysis and consultation (including community consultation) to inform its contribution to the guideline judgments, and permitting the Court of Appeal to issue guidance as to the appropriate level or range of sentences for particular offences or classes of offences.

55. It would obviously be discordant with the recent passage of these measures to permit the sentencing guidelines council scheme to supplant the guideline judgment mechanism. Further, the need for a sentencing guidelines council may be largely obviated should the measures introduced by the *Sentencing Standards Act* prove

[10] (2014) 46 VR 308.

effective. Accordingly, the appropriate course is not only to retain the guideline judgment provisions in the *Sentencing Act*, but to suspend plans for the introduction of a sentencing guidelines council until the efficacy of these new measures has been properly considered.

Conclusion

56. Thank you for the opportunity to make this submission. If the SAC has any questions with regard to this submission, or if we can provide any further information or assistance, please do not hesitate to contact Liberty Victoria President Jessie Taylor, Liberty Victoria Senior Vice President, Michael Stanton, or the Liberty Victoria office on 9670 6422 or info@libertyvictoria.org.au.

57. This is a public submission and is not confidential.

Jessie Taylor
President, Liberty Victoria
president@libertyvictoria.org.au

Michael Stanton
Senior Vice-President, Liberty Victoria
michael.stanton@vicbar.com.au