



THE VICTORIAN BAR INCORPORATED

**SUBMISSION TO THE
SENTENCING ADVISORY
COUNCIL**

A SENTENCING GUIDELINES COUNCIL FOR
VICTORIA

INTRODUCTION

1. This submission is made by the Victorian Bar (the **Bar**) in response to the Sentencing Advisory Council's Issues Paper, *A Sentencing Guidelines Council for Victoria*. The Bar's submission responds to each of the stipulated consultation questions outlined in the Issues Paper.

SUMMARY OF POSITION

2. The Bar's primary position is that it is important that any model adopted in establishing a sentencing guidelines council (**SGC**) in Victoria supports and encourages the utilisation of the considerable knowledge and experience that legal and community members possess. Engaging with the community in the sentencing process through the composition of the SGC is a constructive step towards better informing the public about the mechanics of judicial sentencing.
3. However, it is imperative that this does not come at the expense of the preservation of judicial independence and discretion.

RESPONSES TO CONSULTATION QUESTIONS

GUIDING PURPOSES OF THE SENTENCING GUIDELINES COUNCIL

Question 1: Are the proposed purposes of the sentencing guidelines council appropriate?

4. The proposed purposes of the SGC, that is:
 - (a) to promote consistency of approach in sentencing; and
 - (b) to promote public confidence in the criminal justice systemare appropriate and supported by the Bar.
5. To the extent that the establishment of a SGC has, in other jurisdictions such as England and Wales, been aimed at maintaining the independence of the judiciary,¹ and in Scotland aimed at ensuring greater consistency, fairness and transparency in sentencing,² the Bar is supportive of the preservation of similar foundations for the proposed SGC for Victoria. The Bar has always been an advocate for judicial independence and has opposed laws that seek to constrain it.³ A SGC must not abrogate judicial independence. To that end, adding a further purpose to the SGC should be considered, that is, "to preserve judicial independence and judicial discretion".⁴
6. The Bar agrees with the submission of Victoria Legal Aid that the SGC must not be established "on the basis that public confidence in the criminal justice system will be increased by increasing 'starting point' sentences".⁵ Adding to other research on this point, a study by the Australian Institute of

¹ Sentencing Advisory Council, Issues Paper: *A Sentencing Guidelines Council for Victoria*, November 2017 [2.3] ('Issues Paper').

² Ibid [2.6].

³ See, for example, media releases from the Bar opposing proposed mandatory sentencing regimes dated 13 December 2012 and 1 September 2014, and more recently, a media release dated 19 January 2018 calling for politically motivated attacks on the judiciary to end.

⁴ Issues Paper [2.14].

⁵ Victoria Legal Aid, Submission to the Sentencing Advisory Council, 15 January 2018, 3 ('VLA submission').

Criminology found that when members of the public are fully informed about the circumstances of a case and the offender, 90% view judges' sentences as appropriate and believe that judges are in touch with public opinion.⁶ The report concluded that it was vital that we distinguish between community perceptions of inadequacy and circumstances of actual inadequacy, and that portrayals of a punitive public and calls for harsher punishment may be uninformed.⁷ Research suggests that if the public are provided with context about the structure of sentencing, they are more likely to have higher levels of confidence in the sentencing process.⁸

7. Finally, the Bar is of the view that the purposes of the SGC should be expressly outlined in any enacting legislation.

COMPOSITION OF THE SENTENCING GUIDELINES COUNCIL

Question 2: Is the proposed composition of the sentencing guidelines council appropriate? If not, what alternative composition should the sentencing guidelines council have?

8. A SGC comprised of a judicial majority is, in the Bar's view, an appropriate course to take.
9. The Bar notes that whilst equal membership between judicial officers and legal and community members with expertise or experience in relevant areas may provide the community with a greater say in sentencing, it is of at least equally vital importance that the judiciary and users of the criminal justice system have confidence in the guidelines of the SGC and its independence.⁹ This is best achieved by a judicial majority. In any event, an SGC comprised of six legal and community members, as is proposed, adequately allows for community representation on the SGC.
10. The proposal that the seven judicial officers be two justices of the Supreme Court of Victoria (including one justice from the Court of Appeal); 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 is, on its face, satisfactory. However, it may be considered that in circumstances where the Court of Appeal is currently vested with sole power to make guideline judgments under the *Sentencing Act 1991* (the **Act**), and the proposed purposes of the SGC mirror the factors that the Court of Appeal must have regard in deciding whether to give or review a guideline judgment,¹⁰ it is appropriate for the SGC to be comprised of a higher number of justices of the Court of Appeal. On this point, a SGC comprised of three justices of the Supreme Court of Victoria, of whom two are from the Court of Appeal, is worthy of consideration. To that end, it may be appropriate for the SGC to be comprised of eight judicial members and six legal and community members. This is the current composition of the Sentencing Council in England and Wales.

⁶ K Warner et al, 'Public Judgement on Sentencing: Final results of the Tasmanian Jury Study', *Australian Institute of Criminology*, February 2011, 3, 5.

⁷ Ibid 1, 5.

⁸ Roberts J et al, 'Public Attitudes toward the lay Magistracy and the Sentencing Council Guidelines' (2012) *British Journal of Criminology*, 52(6), pp 1072-1091.

⁹ Issues Paper, [3.25].

¹⁰ *Sentencing Act 1991*, s 6AE.

11. As is noted in the Issues Paper, ensuring that the six legal and community members are from a diverse range of backgrounds, and have relevant expertise, knowledge and skills, is crucial to promoting public confidence in the SGC and the criminal justice system it serves.
12. The Bar does not offer any view as to exactly whom the six legal and community members may be. However, it considers that people with expertise in the following areas should be strongly considered: mental health and drug addiction, the experience of Aboriginal and Torres Strait Islander people within the criminal justice system, the promotion of the welfare of victims of crime, rehabilitation of offenders, the media, the prison system (i.e. academics) and young offenders.

NOMINATION AND APPOINTMENT OF MEMBERS TO THE SENTENCING GUIDELINES COUNCIL

Question 3: Is the proposed process for the nomination and appointment of members to the sentencing guidelines council, and of the Chair, appropriate? If not, what process would you suggest?

13. The proposal that the Governor in Council appoint judicial members on the recommendations of the respective heads of jurisdiction, following their consultation with the Attorney-General, is appropriate.
14. The proposal that the Governor in Council appoint legal and community members on the recommendation of the Attorney-General is also supported. The Bar does not take issue with the proposal that the Attorney-General need not consult with the heads of jurisdiction before making a recommendation. However, the recommendations of the Attorney-General to the Governor in Council should only take place once open competition (i.e. advertisement and a selection process) has occurred.

FUNCTIONS OF THE SENTENCING GUIDELINES COUNCIL

Question 4: Are the proposed functions of the sentencing guidelines council appropriate? If not, what alternative or additional functions should the sentencing guidelines council have?

15. The proposed functions of the SGC, that is:
 - (a) To develop and issue sentencing guidelines for use by the judiciary when sentencing;
 - (b) To consult with the general community, the courts, government departments and other interested persons or bodies when developing and issuing sentencing guidelines; and
 - (c) To perform related functions, such as publishing and publicising sentencing guidelinesare consistent with the proposed purposes of the SGC. As such, the Bar is of the view that the proposed functions are appropriate.

INITIATION OF SENTENCING GUIDELINES

Question 5: Is the proposed process for initiating a sentencing guideline appropriate? If not, what other process should the sentencing guidelines council have for initiating a sentencing guideline?

16. The proposal that would see guidelines initiated on the SGC's own motion, or, at the request of the Attorney-General (provided that the SGC is not required to comply with the request due to constitutional reasons), is appropriate.
17. Further, the Bar would be supportive of a process whereby the proposed SGC would be able to receive informal correspondence and submissions made directly to the SGC from interested organisations, such as the Bar, on the need for the creation of certain guidelines. This would further promote and encourage the involvement of legal and community members in the sentencing process, and in the Bar's case, provide a vehicle for barristers to highlight sentencing principles or standards where, from their experience, more comprehensive guidance from the SGC is desirable.

CONSULTATION ON SENTENCING GUIDELINES

Question 6: Are the proposed consultation requirements for the sentencing guidelines council in Victoria appropriate? If not, what alternative consultation requirements should the sentencing guidelines council have?

Should the sentencing guidelines council be required to consult with any additional persons or organisations (including parliament) in relation to any draft or final guideline? Why/why not?

Should the sentencing guidelines council be required to publish an impact or resource assessment alongside any draft or final guideline? Why/why not?

18. Consistent with the proposed purposes of the SGC, the Bar submits that engagement with the community during the consultation process is vital to the consultation process.
19. The Bar supports the publishing of draft guidelines for public consultation with key stakeholders, including the Bar. The Bar does not believe that an exhaustive list (or any list at all) of consultees needs to be prescribed. Consultation should, as the Sentencing Advisory Council is currently obliged when engaging in consultation on sentencing matters, be broad-based and include the general community. However, the SGC should have the discretion to identify persons or organisations that are relevant to consult with in the circumstances.
20. If consultation with Parliament on draft guidelines would threaten the SGC's appearance as an independent source of guidance, it should not occur.
21. The Bar notes that in England and Wales the consultation process has occurred over a 12-week period. The Bar submits that requiring the SGC to consult for a similar period would be appropriate.
22. In respect of the question posed at paragraph 4.27 of the Issues Paper, that is, whether the SGC should be required to consult if a guideline needs to be developed or revised urgently, the Bar submits that the SGC should not be empowered to dispense with consultation requirements in such circumstances. As already noted, legal and community consultation is a vital cog in ensuring that a

key purpose of the SGC, that is, to promote public confidence in the criminal justice system, is preserved. From the Bar's point of view, it is confident that should it be consulted on an urgent guideline, it will be able to respond, if a response is deemed necessary, in the timeline prescribed by the SGC. Legislation should stipulate that should a guideline need to be developed or revised urgently, the mandatory period prescribed for consultation may be dispensed with.

23. The Bar submits that the SGC should be required to publish an impact or resource assessment alongside any draft or final guideline. Such a requirement would enable interested stakeholders to obtain further insight into how the guideline, once released, may affect the mechanics of the criminal justice system, for example, sentencing trends or increases/decreases in the prison population.

FINALISATION, APPROVAL AND COMMENCEMENT OF SENTENCING GUIDELINES

Question 7: Should sentencing guidelines come into effect:

- (a) after approval by the sentencing guidelines council itself; or**
- (b) after approval by the Court of Appeal?**

Alternatively, what process of finalisation and approval would you suggest?

Should a sentencing guideline commence on a date specified by the body that ultimately approves the finalised sentencing guidelines? If not, what alternative approach would you suggest?

24. The Bar agrees with the Sentencing Advisory Council's preliminary view that it would be undesirable to grant the legislature a power to modify or disallow sentencing guidelines. The finalisation and approval process should not be politicised.
25. Sentencing guidelines should come into effect after approval by the SGC itself. The Bar submits that if the SGC is comprised of a judicial majority, including at least one justice of the Court of Appeal, or as has been suggested, two justices of the Court of Appeal, it is not necessary for a guideline to be approved by the Court of Appeal. In any event, as has happened in other jurisdictions, the Court of Appeal would be free to comment on released guidelines.
26. Finally, the Bar submits that sentencing guidelines should commence on a date specified by the SGC in any guideline it releases.

NOTICE REQUIREMENTS FOR SENTENCING GUIDELINES

Question 8: Is the proposal for publishing draft and final guidelines by the sentencing guidelines council sufficient? If not, what additional or alternative notice requirements would be appropriate?

27. Publicising the publication of draft and final sentencing guidelines by sending a copy to all heads of jurisdiction and the Judicial College of Victoria, informing the judiciary, the profession (including the Bar) and all interested stakeholders through email and issuing a media release would be sufficient. In

addition, the Bar submits that consideration should be given to publishing notice of any final guideline in the *Government Gazette*.

FORM AND CONTENT OF SENTENCING GUIDELINES

Question 9: Is the proposed scope of form and content for a sentencing guideline developed by the sentencing guidelines council in Victoria appropriate? If not, what other form(s) or content should a sentencing guideline have?

28. The Bar agrees with the Sentencing Advisory Council's sentiments expressed in paragraphs 4.96 to 4.99 of the *Issues Paper*. That is, maintenance of one of the essential characteristics of a court, that is, to make decisions premised on the interpretation and application of identifiable and explicable principles, must be ensured. Sentencing guidelines in the form of a sentencing grid, with sentencing starting points or ranges determined according to a single factor or a limited set of considerations is undesirable. All the relevant circumstances of each accused must be allowed to be considered by a court. To that end, the Bar submits that it is necessary that any guideline prepared by the SGC be consistent with the existing provisions and principles of the Act.
29. The Bar also supports the SGC having discretion, in addition to releasing offence-based guidelines, to releasing more general principle only based guidelines. Such guidelines would serve to better inform the profession and the community about offenders with particular needs. As the Sentencing Council in England and Wales did last year with its guideline on *Sentencing Children and Young People*, definitive approaches and principles to sentencing offenders with mental health issues, drug addiction issues, offenders with terminal illnesses, offenders of very advanced age and Aboriginal and Torres Strait Islander offenders, to name just a few, could be provided.
30. In any event, guidelines released by the SGC must be in a form that is readily understandable by the general public. Plain English, where possible, is encouraged.

THE EFFECT OF A SENTENCING GUIDELINE

Question 10: How binding should a sentencing guideline be?

Should a court be required to 'have regard to', 'follow', or 'sentence in a manner consistent with' a sentencing guideline? If you do not agree with any of these requirements, what requirement would be appropriate?

Should a court be permitted to depart from a sentencing guideline when doing so would be 'in the interests of justice'? If not, what test should permit a court to depart from a sentencing guideline?

Irrespective of the particular requirement for a court to follow, or the test permitting departure from, a sentencing guideline, should inconsistent current sentencing practices be overruled by a relevant sentencing guideline?

31. Guidelines should remain guidelines, not become tramlines. Courts must still be able to impose sentences that are individualised and tailored to the circumstances of the individual. Consistent with this, courts should be required to 'have regard to' sentencing guidelines, but should not be required to 'follow' them. Judicial discretion, wherever possible, should be promoted. This approach is consistent with the language currently used in s5(2) of the Act, and as noted in the Issues Paper, is the approach previously adopted in England and Wales, and is the approach currently adopted in Scotland.¹¹ This approach is also preferred whilst the SGC begins releasing its first guidelines and the legal profession and the community adjust to applying the guidelines and provide feedback on their workability.
32. As noted in the Issues Paper, it may be the case that a requirement that a court 'have regard to' a sentencing guideline would render an appeal on a specific error ground for failing to adhere to a guideline arguably unmeritorious.¹² However, in the Bar's view, it would not seem to preclude a sentence appeal being made, for example, on a ground of manifest excess (or manifest inadequacy) on the basis that the sentencing judge gave insufficient weight or too much weight to a sentencing guideline, depending on the substance of the guideline provided.
33. This leads to the last part of this question: how would sentencing guidelines and current sentencing practice sit alongside one another? The Sentencing Advisory Council's suggested amendment to the Act requiring a court to have regard to current sentencing practices, except where those practices are inconsistent with a sentencing guideline, is worthy of consideration.

APPLICATION OF SENTENCING GUIDELINES (AT FIRST INSTANCE)

Question 11: Should a sentencing guideline apply to relevant offences:

- (a) sentenced after its commencement (including offences committed before its commencement); or**
- (b) committed after its commencement only?**

34. The Bar submits that sentencing guidelines should apply to relevant offences *sentenced* after guideline commencement.
35. This would be consistent with the reasoning in *Stalio v R*,¹³ where it was held by the Court of Appeal that current sentencing practice, as it appears in section 5(2) of the Act, means sentencing practices that applied at the time of sentencing, not at the date of the commission of the offence. However, in that case, it was also held that there was still a need to have regard to the concept of equal justice and that meant sentencing practices in existence at the time of the offending were not to be ignored.

¹¹ Issues paper, [5.7].

¹² Ibid [5.5].

¹³ (2012) 46 VR 426.

36. The Bar submits that the same principles should apply in respect of sentencing guidelines. That is, guidelines should apply to relevant offences *sentenced* after guideline commencement, but regard must still be had to prevailing sentencing practice at the time of the offending.

APPLICATION OF A NEW SENTENCING GUIDELINE WHEN RESENTENCING

Question 12: Do you agree that any sentencing guideline that is issued after an offender is sentenced should not be applicable to resentencing that offender following a successful sentence appeal? If not, what approach would you suggest?

Should parties be expressly prohibited from raising a new guideline as a ground of appeal of a past sentence?

37. Consistent with the principles outlined by the High Court in *Radenkovic v The Queen*,¹⁴ and the Victorian Court of Appeal in *R v Jennings*,¹⁵ the Bar agrees with the suggested approach that sentencing guidelines issued after an offender is sentenced should not be applicable to resentencing that offender following a successful sentence appeal.
38. The Bar submits that the question as to whether parties should be able to raise a new guideline as a ground of appeal of a past sentence is most appropriately left to the Court of Appeal, upon the filing of an appropriate application, as it was in England and Wales.¹⁶

EFFECT OF A SENTENCING GUIDELINE ON COMMON LAW PRECEDENTS

Question 13: Should a sentencing guideline overrule common law precedents? If not, why not? Should legislation expressly provide that, where inconsistent with a sentencing guideline, the common law should not apply? If not, why not?

39. The Bar contends that sentencing guidelines should not overrule common law precedents. The two can co-exist. For example, it would be undesirable for a guideline to be produced in respect of how community correction orders may be deployed as a sentencing option, and for such a guideline to render the Court of Appeal's recent guideline judgment in *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen*¹⁷ inapplicable. In anyone's language, the Court of Appeal's analysis of this issue was extremely thorough. It has been relied on by legal practitioners an infinite amount of times since. For it to be feasible that it be cast aside following the release of a sentencing guideline is problematic.

RETENTION OF GUIDELINE JUDGMENT POWERS

¹⁴ (1990) 170 CLR 623.

¹⁵ (1999) 1 VR 352, 396.

¹⁶ Issues Paper [5.63]; *R v Boakye and Others* [2012] EWCA Crim 838 (3 April 2012) [13].

¹⁷ (2014) 46 VR 308.

Question 14: Should the Court of Appeal retain its powers to give guideline judgments after the establishment of the Victorian sentencing guidelines council, which issues definitive guidelines? If not, why not?

40. The Bar submits that the Court of Appeal should retain its powers to give guideline judgments after the establishment of the SGC.
41. Despite the power to issue a guideline judgment having only been enlivened once, the ability to issue a guideline judgment is an important and necessary recognition of the court's traditional role in providing assistance to sentencing courts in the application of the law.