Sentencing Advisory Council

Sentencing Guidance Reference: Consultation Paper

Contents

Call for submissions

The Sentencing Advisory Council (the Council) invites you to make a submission based on the questions in this document, or any issues arising from the terms of reference, by **Friday 29 January 2016**.

Please forward submissions to:

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or by email to:

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Terms of reference

The Court of Appeal found in *DPP v Walters* [2015] VSCA 303 that the baseline sentencing provisions in the *Sentencing Act 1991* (Vic) were 'incapable of being given any practical operation'.

In comparable jurisdictions, legislation providing sentencing guidance has withstood court challenge. In New South Wales, for example, legislation providing for standard non-parole periods has operated for some time.

The Council is asked to advise the Attorney-General on the most effective legislative mechanism to provide sentencing guidance to the courts in a way that:

- promotes consistency of approach in sentencing offenders; and
- promotes public confidence in the criminal justice system.

The Council may have regard to mechanisms in existence in other comparable jurisdictions and other sentencing advisory regimes the Council considers appropriate to examine.

In its report and recommendations, the Council should advise the Attorney-General on the following:

- the type of sentencing guidance that should feature in a new sentencing scheme;
- which offences should be subject to such a scheme; and
- the levels at which sentencing guidance should be set for such offences.

The Council is asked to report back to the Attorney-General no later than 15 April 2016.

Part A – Offences of concern

The terms of reference require the Council to consider the most effective legislative mechanism to provide sentencing guidance to the courts in a way that:

- promotes consistency of approach in sentencing offenders; and
- promotes public confidence in the criminal justice system.

In addition to requesting advice on the type of guidance that should feature in a new sentencing scheme, the terms of reference ask for advice on which offences should be subject to such a scheme.

A threshold issue for including particular offences within any proposed scheme is therefore a demonstrated need to promote consistency in the approach to sentencing those offences, and/or to promote public confidence in sentencing outcomes for those offences. The promotion of both of these objectives is likely to further public confidence in the criminal justice system. Further, identification of problematic offences, or 'offences of concern', may assist with the Council's consideration of the most effective legislative mechanism to provide sentencing guidance. Several sources of evidence that may assist in identifying offences of concern are discussed below.

Tasmanian Jury Study

The 2011 Tasmanian Jury Study surveyed jurors about the sentences that were imposed for the particular cases on which they deliberated. The study found that most jurors (52%) chose a more lenient sentence than the judge, 4% chose the same sentence, and only 44% chose a more severe sentence than the judge. When asked to rate the appropriateness of the judge's sentence on a four-point scale ('very appropriate', 'fairly appropriate', 'fairly inappropriate', or 'very inappropriate') 90% of jurors said that the sentence was appropriate. Jurors were least satisfied with the sentences for sex and drugs offences: for example, they were less likely to say that sentences for sex and drug offences were 'very appropriate' and more likely to say that sentences for these offences were 'inappropriate' when compared with other offence categories (violence, property, culpable driving, and 'other').[1]

A similar jury study, based on the Tasmanian Jury Study, is currently underway in Victoria.[2]

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1 Kate Warner, et al., 'Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study', *Trends & Issues in Crime and Criminal Justice*, no. 407, February 2011.

2 See University of Tasmania, Faculty of Law, *Victorian Jury Project* (University of Tasmania, 2015) <http://www.utas.edu.au/law/research/jury-study/victorian-jury-project> at 14 December 2015.

Community attitudes to offence seriousness

In 2012 the Council released a report on community attitudes to offence seriousness. The findings of that report showed that, in a seriousness ranking of 1 to 10 (with 10 being the most serious) a sample of the Victorian community ranked the offence of sexual penetration with a child under 12 as equal to the offence of intentional murder, at 10. The offences of rape, intentionally causing serious injury, and reckless murder were ranked as equally serious at 9. Further, the category of 'sexual offences' showed the highest level of agreement between those people surveyed as to the seriousness of the offences.[3]

Court of Appeal commentary on current sentencing practices

Section 5(2)(b) of the *Sentencing Act 1991* (Vic) requires a sentencing court to have regard to 'current sentencing practices'. The Court of Appeal has found that the current sentencing practices for 'confrontational' aggravated burglary (*Hogarth v The Queen*[4]) and 'glassing' forms of recklessly causing serious injury (*Winch v The Queen*[5]) were inadequate, and declared that sentencing judges should no longer regard themselves as constrained to follow earlier sentencing practice for those subcategories of offences.

Judges of the Victorian Court of Appeal have also made comments as to the adequacy of current sentencing practices for a number of other offences, including:

- sexual penetration with a child under 10 (*DPP v CPD*[6]);
- rape (*Leeder v The Queen*[7]; *DPP v Werry*[8]);
- cultivating a commercial quantity of cannabis (*Nguyen v The Queen*[9]);
- cultivating a large commercial quantity of cannabis (*Spiteri v The Queen*[10]);
- intentionally causing serious injury (*Kane v The Queen*[11]*)*;

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3 Sentencing Advisory Council, *Community Attitudes to Offence Seriousness* (2012).

4 *Hogarth v The Queen* [2012] VSCA 302.

5 *Winch v The Queen* (2010) 27 VR 658.

6 *DPP v CPD* (2009) 22 VR 533.

7 *Leeder v The Queen* [2010] VSCA 98.

8 *DPP v Werry* (2012) 37 VR 524.

9 *Nguyen v The Queen* (2010) 208 A Crim R 464.

10 *Spiteri v The Queen* (2011) 206 A Crim R 528.

11 *Kane v The Queen* [2010] VSCA 199.

- persistent sexual abuse of a child under 16 (*DPP v DDJ*[12]); and
- incest (*R v Bellerby*[13]; *DPP v DJ*[14]; *DPP v CJA*[15]; *Reid v The Queen*[16]).

In *Ashdown v The Queen*, Justice Redlich (with Ashley JA agreeing) listed circumstances where an intermediate appellate court may propose to uplift current sentencing practices:

1. Where there has been an increase in the statutory maximum penalty and current sentencing practice has failed to reflect the increase.
2. Where there is evidence that an offence has become more prevalent.
3. Where community expectations have altered.
4. Where there has been increased community disquiet over the offence.
5. Where there has emerged a better understanding of the consequences for the victim of the offending conduct.
6. Where there has been a persistent error in the manner in which a category of offenders has been treated.
7. Where the objective seriousness of particular conduct has been wrongly categorised or a particular type of sentencing disposition is not ordinarily appropriate.[17]

This list may assist in identifying those offences for which there is concern regarding the adequacy of current sentencing practices, thus reflecting a need for greater consistency in the approach to sentencing.

It is arguable that consistency in the *approach* to sentencing also includes consistent consideration of the appropriate relativity of seriousness between different types of offences, and that this consideration should be reflected in sentencing *outcomes*.

Question 1

For which offences, or offence categories, in Victoria is there:

- evidence of inconsistency of approach in sentencing offenders? And/or
- evidence of a lack of public confidence in the criminal justice system? And/or
- concern regarding the current sentencing practices for the offence, or a subcategory of the offence?

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12 *DPP v DDJ* (2009) 22 VR 444.

13 *R v Bellerby* [2009] VSCA 59.

14 *DPP v DJ* [2011] VSCA 250.

15 *DPP v CJA* [2013] VSCA 18.

16 *Reid (A Pseudonym) v The Queen* (2014) 42 VR 295.

17 *Ashdown v The Queen* (2011) 37 VR 341.

Part B – Models for sentencing guidance

1. Offence penalties

(a) Maximum penalties

Maximum penalties are set by parliament and are found in the Act creating a particular offence. The maximum penalty for an offence is the highest sentence a court can impose on a person who has been found guilty of the offence. Judges or magistrates may impose a sentence less than the prescribed maximum penalty.

For example, the maximum penalty for murder is life imprisonment, which is the highest maximum penalty that can be set in Victoria. The *Sentencing Act 1991* (Vic) contains a scale of statutory maximum penalties of imprisonment, ranging from Level 1 (life imprisonment) to Level 9 (6 months' imprisonment).

Parliament's view of the gravity of an offence is primarily expressed through the maximum penalty. Section 5(2)(a) of the *Sentencing Act 1991* (Vic) states that: 'In sentencing an offender a court must have regard to … the maximum penalty prescribed for the offence'. Therefore, the maximum penalty is an important consideration in determining sentence.

In *DPP v Aydin & Kirsch*,[18] the Victorian Court of Appeal stated:

> It is sometimes said that a judge, in obedience to s.5(2)(a), "steers by the maximum". It is a helpful metaphor, but two things should be said of it. One is that there is a difference between steering *by* the maximum and aiming *at* the maximum. The penalty prescribed for the worst class of case is like a lighthouse or a beacon. The ship is not sailed towards it, but rather it is used as a navigational aid. The other is that steering by the maximum may decrease the sentence that might otherwise be imposed as well as increase it.[19]

Maximum penalties are only one component of the Victorian sentencing framework. The *Sentencing Act 1991* (Vic) sets out a number of purposes for which a sentence may be imposed in a particular case. It also lists a broad range of sentencing factors – one of which is the maximum penalty for the offence that has been committed, another of which is the current sentencing

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[18] *DPP v Aydin & Kirsch* [2005] VSCA 86 (3 May 2005).

[19] *DPP v Aydin & Kirsch* [2005] VSCA 86 (3 May 2005) [12].

practices for the offence – that must be considered in determining what sentencing purposes should take priority in a case, and what sentence should be imposed to achieve those purposes.

There can be a disparity between the maximum penalty for a particular offence and the current sentencing practices with regard to that offence, and the guidance provided by current sentencing practices for a particular offence may conflict with the guidance provided by the statutory maximum.

The statutory requirement to have regard to current sentencing practices does not foreclose the possibility of an increase in the level of sentences when due regard is given to the maximum sentence and other considerations.[20] There is no requirement that where current sentencing practices are out of step with the maximum penalty fixed by parliament, the current sentencing practices must prevail.

Where a person has pleaded guilty to an offence, fairness generally requires that they are entitled to be sentenced in line with current sentencing practices for the offence in question, at the time of pleading guilty.[21] Where there has been an increase in the maximum penalty for an offence, however, it is expected that sentences will also increase, which will require a change to current sentencing practices.[22]

Question 2

Are there any issues with the current maximum penalties for any offences of concern, or any other offences?

- If so, how should those maximum penalties be amended?

Should the way in which a court must have regard to the maximum penalty for an offence and/or to current sentencing practices be amended?

- If so, how?
- Should a court be required to give greater regard to the maximum penalty for an offence than to current sentencing practices, where current sentencing practices are considered to be inadequate?

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20 *DPP v CPD* (2009) 22 VR 533.

21 *Ashdown v The Queen* (2011) 37 VR 341.

22 *R v AB (No 2)* (2008) 18 VR 391.

(b) Mandatory and statutory sentencing schemes

Mandatory minimum sentences are fixed minimum penalties prescribed by parliament for committing a particular criminal offence. Mandatory minimum sentencing can refer to the requirement to impose a particular sentencing order in response to a criminal offence (mandatory penalty types) or the requirement to impose a sentence of imprisonment of a minimum length (minimum penalty length). Mandatory minimum sentences of imprisonment leave the court with a discretion to impose a more severe sentence in a particular case, but little or limited ability to impose a lesser sentence where the court considers it appropriate to do so.

Mandatory sentencing removes the judicial discretion to impose a sentence tailored to the circumstances of the offence and the offender. However, the degree to which discretion is removed varies according to the legislation in question. In some jurisdictions, there are 'statutory' minimum sentencing schemes, which allow the court to depart from the statutory minimum sentence in particular circumstances (for example, where the court finds there are 'exceptional circumstances' of the offence or offender).

Mandatory and statutory sentencing schemes have been implemented in Australia and around the world in various forms, including 'three strikes' legislation and, in a less rigid form, statutory minimum sentences and standard non-parole periods.

The different forms of mandatory sentencing have included:

- mandatory head sentences;
- mandatory head sentences and mandatory minimum non-parole periods;
- mandatory sentences that are cumulative upon other sentences;
- mandatory minimum head sentences and mandatory minimum non-parole periods;
- mandatory head sentences and presumptive or discretionary non-parole periods;
- discretionary head sentences and mandatory non-parole periods;
- mandatory minimum sentences fixed in relation to the prison term imposed;
- mandatory minimum sentences of imprisonment;
- presumptive non-parole periods;
- mandatory imprisonment; and
- mandatory non-custodial sentences.

Mandatory sentencing schemes

The aim of mandatory sentencing is to provide consistency both between the offence and its sanction (so that the punishment fits the crime), and between punishments imposed on different offenders. Indeed, consistency in sentencing is the first purpose of the *Sentencing Act 1991* (Vic).

At the same time, the desire for consistency must be balanced with the well-established principle that sentences should be proportionate to the gravity of the offence and the culpability of the offender. Mandatory sentences have the potential of treating unlike cases alike, which may amount to an inappropriate form of consistency.

Mandatory sentencing laws for various offences are in force in a number of Australian jurisdictions. The degree to which there remains some scope for judicial discretion varies according to the particular legislation in question.

The kinds of offences that attract mandatory sentences vary across jurisdictions. For example, mandatory sentencing applies in:

- Western Australia for repeat adult and juvenile offenders convicted of residential burglary, grievous bodily harm, or serious assault to a police officer (among other offences); [23]
- the Northern Territory for sexual offences, where the court must record a conviction and must order that the offender serve a term of actual imprisonment or a term of imprisonment that is suspended partly but not wholly;[24]
- New South Wales for murder of a police officer, or the offence of assault causing death (if committed by an adult when intoxicated);[25]
- Queensland for certain child sex offences, murder, and offences involving multiple murders[26] (however 'exceptional circumstances parole' can be sought);[27]
- the Commonwealth, where section 236B of the *Migration Act 1958* (Cth) prescribes mandatory minimum sentences and mandatory non-parole periods for particular people-smuggling offences, without provision for exceptions.[28]

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[23] See *Sentencing Act 1995* (WA); *Criminal Code Act Compilation Act 1913* (WA).

[24] *Sentencing Act 1995* (NT) s 78F.

[25] *Crimes Act 1900* (NSW) ss 19B, 25B.

[26] See *Penalties and Sentences Act 1992* (Qld) s 161E; *Criminal Code Act 1899* (Qld) sch 1 ('Criminal Code').

[27] *Criminal Code Act 1899* (Qld) sch 1 ('Criminal Code') s 305.

[28] *Migration Act 1958* (Cth) s 236B.

Concerns with mandatory sentencing

There are a number of issues with mandatory sentencing schemes, including:

- concern around the inappropriate erosion of the separation of powers through the fettering of judicial discretion by the legislature;
- the compelling of judges to impose sentences that they believe to be unjust;[29]
- the existence of vast differences in the degree of culpability of particular offenders who may be convicted of the same crime, such that imposition of the mandatory penalty may lead to unjust results;
- potential systemic pressures, as mandatory sentences remove the incentive for an offender to plead guilty to an offence, thereby increasing the numbers of contested charges and increasing court delays;
- the disproportionate effect mandatory sentences have on disadvantage marginalised social groups;[30]
- transferring the sentencing discretion to prosecutors and law enforcement agencies, who decide whether to charge an alleged offender. An offence attracting a mandatory penalty can lead to plea-bargaining negotiation whereby an offender agrees to plead to a lesser charge in order to avoid a mandatory penalty;
- creating discrepancies in the offence hierarchy;[31] and
- conflicting with the promotion of rehabilitation as the core purpose of sentencing children where mandatory sentences are applied to juvenile offenders.

Those in support of mandatory sentences argue that mandatory sentences promote consistency in sentencing outcomes, prevent crime as they incapacitate offenders for the period of mandatory detention, and have a deterrent effect.

In its 2008 research paper on mandatory sentencing, the Council concluded that the disadvantages of implementing a mandatory sentencing regime weigh strongly against the establishment of such a scheme, and that mandatory sentencing is likely to be unsuccessful in achieving its aims of deterrence and consistency in sentencing.[32] Furthermore, several Justices of

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29 See, for example, *R v Edward Nafi* (Unreported, Supreme Court of the Northern Territory, Kelly J, 19 May 2011).

30 An example is the disproportionate impact of the (since repealed) mandatory sentencing laws for property offences on Indigenous people in the Northern Territory.

31 For example, in New South Wales, the offence of 'assault causing death when intoxicated' carries a mandatory minimum sentence of not less than 8 years, yet where the offence of assault causing death is committed in the absence of intoxication, the minimum sentence does not apply.

32 Sentencing Advisory Council, *Mandatory Sentencing: Research Paper* (2008) 21.

the High Court, as well as the Law Council of Australia, the Law Institute of Victoria, and numerous other prominent organisations, have in various contexts cautioned against the use of mandatory sentencing.[33]

Question 3

Should mandatory sentences be introduced in Victoria?

If so:

- What form of mandatory sentencing scheme or schemes should apply?
- To which offences should mandatory sentencing schemes apply?
- What should the mandatory sentence levels be for those offences?

Exceptions to mandatory sentences

A key issue with mandatory sentencing schemes is that judicial discretion is fettered to the extent that disproportionate or otherwise unjust sentences may be imposed on offenders guilty of an offence subject to the scheme. In some jurisdictions the legislation allows for exceptions in certain circumstances in order to avoid unjust outcomes.

Statutory minimum sentencing schemes, for example, are similar to mandatory sentencing schemes in that they assign particular penalties or sentence types to particular offences. However, statutory minimum sentences leave some scope for the sentencing court to impose a sentence other than the statutory minimum sentence. The degree of remaining judicial discretion varies according to the particulars of the legislative provision in question.

There is a range of ways in which the legislature accommodates exceptions to the prescribed minimum sentence.

For example, in South Australia, statutory minimum non-parole periods exist for the offence of murder and serious offences against the person. However, a court can fix a shorter non-parole period if it believes that a special reason exists. In determining whether such a reason exists, the statute sets out several factors to which the court can have regard. The court is not at large to take into account any factors it considers relevant.[34]

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[33] See, for example, Law Council of Australia, *Mandatory Sentencing: Policy Discussion Paper* (2014); Law Institute of Victoria, *Mandatory Minimum Sentencing* (2011).

[34] *Criminal Law (Sentencing) Act 1988* (SA) s 32A.

In Tasmania, for the offence of causing serious bodily harm to a police officer, the court must order a person to serve a term of not less than six months' imprisonment, unless the court finds that there are exceptional circumstances present in the case.[35]

In the Northern Territory, there are mandatory penalties for violent offences, which escalate according to offence level and whether the offence is a subsequent violent offence. However, there are exceptional circumstances that may be enlivened. In considering whether the circumstances of the case are exceptional, the court may have regard to 'any other matter the court considers relevant'. Even if exceptional circumstances are established, the court must still impose a sentence of imprisonment. Alcohol and drug intoxication is not considered an exceptional circumstance.[36]

In Victoria, statutory minimum non-parole periods were first introduced for 'gross violence' offences.[37] The scheme was subsequently expanded to include manslaughter in circumstances of gross violence and manslaughter by a single punch or strike (in certain circumstances).[38] For the offences of causing serious injury (either intentionally or recklessly) in circumstances of gross violence, a non-parole period of not less than four years must be imposed unless a special reason exists. The non-parole period for single punch or gross violence manslaughter must be not less than 10 years, unless the court finds that a 'special reason' exists.[39] Among other factors, the court may declare that a 'special reason' exists 'if there are substantial and compelling circumstances that justify doing so'. This allows for unforeseen offence or offender circumstances that may require a penalty other than the statutory minimum.[40]

Proponents argue that statutory minimum sentencing schemes are an approach that can be tailored to allow for appropriate exceptions and residual judicial discretion, while increasing sentences for particular offences of concern. Criticisms of statutory minimum sentences include that they unnecessarily constrain judicial discretion, and that offenders sentenced for the kind of offending to which statutory minimum sentences would apply already receive substantial prison sentences.

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35 *Sentencing Act 1997* (Tas) s 16A(1).

36 *Sentencing Act 1995* (NT) ss 78D–78DI.

37 *Crimes Act 1958* (Vic) ss 15A, 15B.

38 *Sentencing Act 1991* (Vic) ss 9A, 9B, 9C.

39 *Sentencing Act 1991* (Vic) s 9B(2).

40 *Sentencing Act 1991* (Vic) ss 10, 10A.

Question 4

If a mandatory sentencing scheme were to be introduced in Victoria, should there be provision for exceptions from the scheme in special or exceptional circumstances?

If so:

- Should the 'special reasons' exceptions from statutory minimum sentences in section 10A of the *Sentencing Act 1991* (Vic) apply? Or should different reasons or circumstances apply?

2. Sentencing guidelines and guideline judgments

(a) Guideline judgments – Victoria

Guideline judgments are a mechanism for the courts to provide broad sentencing guidance beyond the specific facts of a case. The ability for the Victorian Court of Appeal to deliver guideline judgments is provided for in Part 2AA of the *Sentencing Act 1991* (Vic). A guideline judgment provides for 'guidelines to be taken into account by courts in sentencing offenders' and can apply generally; to a particular or class of court, offence or penalty; or to a particular class of offender.

Guideline judgments may include guidance on:

- sentencing criteria to assist in selecting various alternatives;
- the weight that specific sentencing purposes should have in sentences;
- criteria for the determination of the gravity of an offence;
- criteria that may reduce sentences for an offence;
- the weight to be given to relevant criteria; and
- any other matter consistent with the principles of the *Sentencing Act 1991* (Vic).

In addition, factors that the court must have regard to when making a guideline judgment include the need to promote consistency of approach and public confidence in the system.

Unlike in other jurisdictions in which such schemes exist, in Victoria legislation does not permit a guideline judgment to set out the appropriate level or range of sentences for a particular offence or class of offence.

There are procedural requirements for giving or reviewing guideline judgments in Victoria. The Court of Appeal may consider whether to give a guideline judgment when hearing and considering an appeal against sentence, either on its own initiative or on an application by one of the parties to the appeal. It may also review and confirm, vary, revoke, or substitute guideline judgments in the

same manner. The court therefore retains the discretion as to whether to give or review a guideline judgment.

The guideline judgment need not be necessary for determining the appeal being heard, and it can either be part of the judgment in the appeal or be delivered separately. The court must notify the Council and consider any views submitted in writing by the Council, as well as give the Director of Public Prosecutions and Victoria Legal Aid the opportunity to appear before the court to make submissions, and the court must have regard to those views and submissions. The major threshold for the delivery of a guideline judgment is that a decision to do so must be reached unanimously by all judges constituting the court.

In *Pathways to Justice*, the precursor report to the introduction of guideline judgments in Victoria, a number of benefits of guideline judgments were highlighted, including that they:

- provide clear and authoritative articulation of principles and penalties that assist judges in exercising discretion;
- allow the incremental development of the law;
- are protected from short-term political pressures but can take into account public policy concerns;
- can reduce appeals against sentence; and
- may improve deterrence as the transparency of sentencing is increased.

The report also noted, however, that these benefits only accrue if the court can find a balance between sentencing ranges that are too broad to be useful and those that are too narrow to be applicable to the majority of cases.

While most Australian jurisdictions can deliver guideline judgments (including Victoria, New South Wales, Queensland, Western Australia, and South Australia), few exercise this power. In Victoria, the Court of Appeal has had this power since 2003, although it has only delivered one guideline judgment. *Boulton & Ors v The Queen* [2014] VSCA 342 was concerned with a sentencing option, the community correction order.

Guideline judgments have been more popular in New South Wales, where seven guideline judgments have been delivered by the Court of Criminal Appeal since 1998.[41] Guideline judgments are provided for in Division 4 of Part 3 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and

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[41] See Judicial Commission of New South Wales, 'Sentencing Guidelines', *Sentencing Bench Book* (Judicial Commission of NSW, 2014) <http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/sentencing_guidelines.html#p13-620> at 8 December 2015, [13-620].

include the ability for the Attorney-General to apply for a guideline judgment, separate to proceedings before the court. Such an application may include submissions on the framing of the proposed guidelines. The Attorney-General has applied for three guideline judgments, with one of those declined by the court. The Attorney-General may also intervene and make submissions in any guideline judgment proceedings.

Question 5

Should Victoria's guideline judgment scheme be reformed?
If so:

- Should the Court of Appeal be able to give guidance on appropriate sentence levels and ranges?
- Should the Attorney-General be able to request a guideline judgment?
- Should the Court of Appeal be able to initiate the guideline judgment process without an appeal?
- Should the guideline judgment scheme be reformed in any other way?

(b) Sentencing Council guidelines (England and Wales/NZ)

In England and Wales, sentencing guidelines are prepared by an external body. The Sentencing Council of England and Wales ('Sentencing Council') prepares sentencing guidelines with an aim to 'promote greater transparency and consistency in sentencing, whilst maintaining the independence of the judiciary'.[42] The Sentencing Council was established in April 2010 under the *Coroners and Justice Act 2009* (UK). It consists of eight judicial members and six non-judicial members. The Lord Chief Justice of England and Wales is the president of the Council, and a judicial member must also chair the Sentencing Council.

[42] Sentencing Council, *About Us* (Sentencing Council, 2015) <https://www.sentencingcouncil.org.uk/about-us/> at 8 December 2015.

Every court in England and Wales must follow any relevant guidelines when sentencing an offender unless it would be 'contrary to the interests of justice to do so'.[43] The guidelines take a staged approach to sentencing, and generally involve a nine-step process: [44]

1. Determine the offence category.
2. Identify the starting point and sentence range for that offence category.
3. Consider any other factors that indicate a reduction.
4. Apply a guilty plea reduction.
5. Consider the dangerousness of the offence and the appropriateness of an extended sentence.
6. Apply the totality principle (for offenders being sentenced to more than one offence).
7. Make any compensation or ancillary orders.
8. Give reasons for, and explain the effect of, the sentence.
9. Take into consideration any time served on remand or bail.

At the first stage, the category of offence being sentenced is determined through a combination of culpability and harm factors. Examples of objective factors that point to greater or lesser harm and higher or lower culpability are set out in the guidelines for each offence, and usually identify three categories of low, mid and high level offences. For each category of offence, an appropriate sentencing range and 'starting point' are provided. Also detailed is a non-exhaustive list of subjective aggravating and mitigating factors that may then be considered by the court in order to reach a sentence above or below the relevant starting point. When imposing a sentence, the court is not required to stay within the limited category range, but is expected to stay within the range available for the offence. Thus, while the process of decision-making is clearly laid out, the court retains discretion as to the sentence finally imposed.

The Sentencing Council publishes draft guidelines and, following consultation, definitive guidelines. For example, the draft guideline for sexual offences was first published in December 2012 as part of consultation open until March 2013. This consultation also included an analysis and research bulletin and a 'draft equality impact assessment'. The definitive guidelines, published in December 2013, set out the separate sentencing processes for 49 offences ranging from rape to exposure.

The Sentencing Council has selectively and progressively prepared guidelines for offence types that cover a range of offences, informed by wide consultation, monitoring, and public education

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[43] *Coroners and Justice Act 2009* (UK) s 125(1).

[44] See Sentencing Council, *Publications: Definitive Guideline* (Sentencing Council, 2015) <https://www.sentencingcouncil.org.uk/publications/?cat=definitive-guideline&s> at 8 December 2015.

functions. The first definitive guidelines prepared by the Sentencing Council were published in March 2011 for assault, and the most recent offence consultation was for dangerous dog offences, which closed in June 2015.

When preparing guidelines, the Sentencing Council has regard to a variety of factors including current sentencing practices, the need to promote consistency and public confidence, the impact of sentencing on victims of crime, the cost of sentencing options and their effectiveness in preventing reoffending, and any results from ongoing monitoring of the guidelines. Guidelines are published on offence types and broader sentencing issues, including how to apply the principle of totality and reductions for guilty pleas.

A similar model was provided for in New Zealand in 2007, with guidelines drafted by the NZ Law Commission for a wide range of offences. However, a sentencing council was never established. In lieu of the implementation of these guidelines, the NZ Court of Appeal continues to give guideline judgments.[45]

The Tasmanian Sentencing Advisory Council's 2015 inquiry into sex offence sentencing made the following comments in regard to sentencing guidelines:

> Sentencing guidelines have the benefit of creating a framework for sentencing decisions, consolidating principles of sentencing for a particular offence, and providing a vehicle for consideration of 'interrelationships of sentences for the different forms of an offence'.[46]

Other benefits highlighted by the report include 'a significant effect on penalty levels', increased transparency of the sentencing system and the relative severity of offences, improved public confidence in sentencing processes, maintenance of judicial discretion, and greater consistency without the need for mandatory sentences.[47] However, there are some practical difficulties given the complexity of some offences (particularly sexual offences).[48]

Guidelines of the complexity and detail provided for in England and Wales are not currently prepared in Australia. Furthermore, the staged process of decision-making set out by these guidelines is in direct contrast to the 'instinctive synthesis' approach taken by Australian courts.

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45 Courts of New Zealand, *Sentencing* (Courts of New Zealand, 2015) <http://www.courtsofnz.govt.nz/about/system/role/sentencing/#appeal> at 8 December 2015.

46 Sentencing Advisory Council (Tas), *Sex Offence Sentencing: Final Report* (2015) 84, quoting Andrew Ashworth, 'Techniques of Guidance on Sentencing' (1984) *Criminal Law Review* 519, 521.

47 Sentencing Advisory Council (Tas), *Sex Offence Sentencing: Final Report* (2015) 84.

48 Ibid 85.

Reforms in this area would need to address the High Court's current concerns about staged sentencing and prescriptive numerical guidance.

Question 6

Should an external body develop sentencing guidelines for use by courts in Victoria?

- If so, should the scope and membership of the Victorian Sentencing Advisory Council be amended to allow for the development of sentencing guidelines?

(c) Grid sentencing schemes (US)

Grid sentencing schemes (sometimes known as 'matrix' sentencing schemes) are a very prescriptive form of sentencing guidelines that leaves little judicial discretion. They are most common in the United States, where sentencing grids have been introduced for offenders sentenced under federal law and in a number of states. They are generally prepared by sentencing commissions, primarily comprising judicial and legal members. A sentencing matrix scheme was introduced in Western Australia in 2000, but the Act never commenced following a change of government.[49]

The United States Sentencing Commission prepares the *Guidelines Manual*, which sets out all factors to be considered when sentencing an offender under federal jurisdiction, and the methods for calculating a numerical 'offence level' and 'criminal history category'.[50] With reference to a sentencing table or grid, the offence level is combined with the criminal history category of the offender to identify an applicable sentence range, expressed in months. To reach the appropriate offence level, a number of steps are taken. Each offence carries a base offence level, which is then increased by predetermined amounts to account for specific offence characteristics. Mandatory increases to the offence level are then made in relation to the victim, the role of the offender in the offence, and whether the offender has obstructed the administration of justice. For multiple counts, offences can be grouped and an appropriate offence level determined for that group of charges. A numerical discount to the offence level can then be applied to accord with the offender's acceptance of responsibility. Departures from the federal grid have been historically limited,

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[49] See Sentencing Amendment Bill 2000 (WA); Legislative Council Standing Committee on Legislation, Parliament of Western Australia, *Sentencing Matrix Bill 1999* (2001).

[50] See, United States Sentencing Commission, *Guidelines Manual* (USSC, 2015) <http://www.ussc.gov/guidelines-manual/2015/2015-ussc-guidelines-manual>at 9 December 2015.

although following a series of US Supreme Court challenges, the guidelines now operate in an advisory capacity.[51]

Other US jurisdictions that operate sentencing grids include Minnesota, North Carolina, Oregon, and Washington.[52] The Minnesota Sentencing Guidelines Commission, established in 1978, prepares guidelines to promote 'uniform and proportional sentences' and 'ensure that sentencing decisions are not influenced by factors such as race, gender, or the exercise of constitutional rights by the defendant'.[53] The Minnesota felony grid provides presumptive and fixed sentences for a typical offender, with two-thirds of a sentence of imprisonment served in prison and the remaining third served on supervised release. Rather than setting an offence level, felony offences are ranked with a severity level from one to 11. This is then combined with the offender's criminal history score to reach a presumptive sentence and sentencing range. A separate grid operates in a similar manner for sex offenders. Courts must sentence within the grid unless there are 'identifiable, substantial and compelling circumstances to support a departure', and any departure from the grid must be accompanied by reasons.[54]

Similarly, the North Carolina Sentencing and Policy Advisory Commission prepares mandatory sentencing grids (for felonies and misdemeanours), ranked by class of offence. The North Carolina grid also prescribes aggravating and mitigating factors, and if these are utilised the judge must provide written justification. The Oregon Criminal Justice Commission prepares a mandatory felony grid, which has allowable upwards departures built into the grid, and some discretion in regard to custodial and non-custodial sentences. A judge can further depart from the grid for 'substantial and compelling reasons', with those reasons stated on the record, although many offences are coupled with separate statutory minimum sentences. Since 2011, the Washington grid has been prepared by the Caseload Forecast Council. Departures from the Washington matrix are known as 'exceptional sentences' and must be explained in writing, be due to 'substantial and compelling reasons justifying an exceptional sentence', and comply with any separate statutory minimum/maximum terms of confinement. Common features of these state schemes are that they are mandatory, they replace parole schemes in their jurisdictions, and sentencing appeals are only allowed if there has been a departure from the grid.

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51 See, *United States v Booker*, 543 US 220 (2005); *Gall v United States*, 128 S Ct 586 (2007).

52 See, National Center for State Courts, *State Sentencing Guidelines: Profiles and Continuum* (NCSC, 2008).

53 Minnesota Sentencing Guidelines Commission, *About the Guidelines* (MSGC, 2015) <http://mn.gov/sentencing-guidelines/guidelines/about/> at 9 December 2015.

54 Minnesota Sentencing Guidelines Commission, *Minnesota Sentencing Guidelines and Commentary* (MSGC, 1 August 2015) 39.

There are many concerns about these sentencing matrix schemes, in line with those raised in regard to other mandatory sentencing schemes.[55] As the weight given to offence seriousness and personal factors is set out prescriptively in these guidelines, there is substantial evidence to suggest that they have influenced defendants to plead guilty to avoid more severe guideline sentences. This also lends weight to arguments that grids transfer the discretion traditionally exercised by judges to prosecutorial decisions through plea bargaining. While grids can achieve greater sentencing consistency, critics of uniformity emphasise the negative effects associated with the difficulty in adapting sentences to the specific facts of a case, and caution against 'unjustifiable parity' that sees two offenders receive the same sentence but with 'unjust' outcomes.

Question 7

Should a sentencing grid scheme or matrix scheme be introduced in Victoria?

- If so, what model should be introduced?
- If a sentencing grid or matrix scheme was introduced in Victoria, should judges be given the discretion to depart from the sentencing grid or matrix?

(d) Guidance from juries

The jury's traditional role in a criminal trial is to determine questions of fact and to apply the law, as stated by the judge, to those facts to determine guilt or otherwise. If a jury finds the accused guilty, it is the judge that determines sentence. There is no formally defined role for the jury in the sentencing process in Victoria, or any other Australian jurisdiction.

Juries, however, do have an indirect role. The High Court has recognised a jury's right to recommend leniency but also has recognised that the judge remains the ultimate arbiter of the appropriate sentence.[56] Juries also play an indirect role through special verdicts.

Jury trials make up a very small proportion of court cases in Victoria. In 2013–14, there were 1,966 cases sentenced in the County and Supreme Courts. Of those, only 219 (11.1%) were sentenced following a trial.

The 2014 Victorian ALP Platform committed to introducing jury sentencing for serious indictable offences to 'ensure that penalties for convicted offenders reflect community standards and expectations'.

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55 See, for example, Kate Stith, 'The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion' (2008) 117 *Yale Law Journal* 1420, 1424.

56 *Whittaker v The King* [1928] HCA 28 (1928) 41 CLR 230.

The key features of the commitment were that[57]:

- the jury would, after hearing the submissions of counsel on the plea, and having access to any exhibits on the plea, give the judge their view of the appropriate range for the non-parole period; and
- the sentencing judge would be free to depart from that recommended range, but would be required to give reasons for doing so.

The commitment provided that sentencing recommendations would be made by the jury where it returned a finding of guilt for a 'serious indictable offence'.

In August 2007, the New South Wales Law Reform Commission published its report, *Role of Juries in Sentencing* (the NSWLRC Report). The NSWLRC Report provides a comprehensive discussion of the issues raised by involving the jury in the sentencing process. These issues are equally applicable to Victoria. Having canvassed a number of jurisdictions where the jury plays some role in sentencing, the NSWLRC Report concluded:

> there is little or no evidence from the jurisdictions we have studied to suggest that juror involvement in sentencing decisions produces fairer, or more reasoned and consistent, sentencing outcomes. There is, however, a plethora of academic commentary highlighting the drawbacks of jury sentencing. Consequently, we are of the view that overseas experiences of jury sentencing offer no support for the proposal to involve NSW juries in sentencing to any greater degree than at present.

The NSWLRC Report notes that of the 22 submissions received in response to the issues paper, all but one opposed the suggestion that juries should play a direct role in determining sentence following the conviction of an offender. Involving the jury in the sentencing process was widely criticised on the basis that:

- public confidence in sentencing was not faltering, and so the rationale for the proposal was flawed;
- the proposal gives rise to serious natural justice considerations;
- it would be unlikely to produce any positive effects on sentencing or public confidence; and
- the practical and procedural difficulties in implementing the proposal are so significant as to render it unworkable in any event.

The New South Wales Law Reform Commission recommended that jurors should not be involved in the sentencing process to any greater extent than they are at present.

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[57] Victorian Labor, 'Juries to Have a Say in Sentencing under Labor', Media Release (4 February 2013) <http://www.viclabor.com.au/media-releases/juries-to-have-a-say-in-sentencing-under-labor/>.

The model considered by the New South Wales Law Reform Commission was different from the model proposed by the Victorian Labor Party as outlined above, but both models raise similar concerns.[58] Others[59] suggest that jury sentencing is ideally suited to a deliberative democracy and that it:

- transforms preference to advance common interests;
- legitimates the final result; and
- revitalises and improves political life as a whole.

Question 8

Should the jury in Victorian criminal trials be involved in the sentencing process?

- If so, how should they be involved, and how could the concerns raised about jury sentencing, as outlined above, be addressed?

[58] Kate Warner and Julia Davis, 'Involving Juries in Sentencing: Insights from the Tasmanian Jury Study' (2013) 37 *Crim LJ* 246.

[59] See, for example, J. Iontchev, 'Jury Sentencing and Democratic Practice' (2003) 89 *Virginia Law Review* 311.

3. Presumptive or standard sentence schemes

(a) Baseline sentencing

The baseline sentencing scheme was introduced by the *Sentencing Amendment (Baseline Sentencing) Amendment Act 2014* (Vic).

A detailed description of the baseline sentencing scheme is contained in the Council's 2014 report *Calculating the Baseline Offence Median*.[60]

In summary, under the baseline sentencing scheme, the baseline sentence represents 'the sentence that parliament intends to be the median sentence for sentences imposed for that offence'[61] and courts must consider the baseline sentence set out for baseline offences. The 'median' is a statistical midpoint, and in the context of sentencing, it means that half the sentences are below the median and half the sentences are above the median.

There are seven offences for which baseline sentences are imposed: murder; trafficking in a large commercial quantity of a drug of dependence; persistent sexual abuse of a child under 16; incest with a child, step-child, or lineal descendant (under 18); incest with the child, step-child, or lineal descendant of a *de facto* spouse; sexual penetration of a child under 12; and culpable driving causing death.

A majority of the Court of Appeal in *DPP v Walters (a pseudonym)* [2015] VSCA 303 found that the baseline sentencing scheme was 'incapable of being given any practical operation'.[62]

Their Honours held that there was a legislative gap, consisting in the failure to provide any mechanism for the achievement of the intended future median, and that it was beyond the judicial function to fill this gap. They said:

> the defect in the legislation is incurable. Parliament did not provide any mechanism for the achievement of the intended future median, and the Court has no authority to create one, as the Director of Public Prosecutions properly conceded. To do so would be to legislate, not to interpret.[63]

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60 Sentencing Advisory Council, *Calculating the Baseline Offence Median: Report* (2014).

61 *Sentencing Act 1991* (Vic) s 5A(1)(b).

62 *DPP v Walters (a pseudonym)* [2015] VSCA 303 [8] (Maxwell P, Redlich, Tate and Priest JJA).

63 *DPP v Walters (a pseudonym)* [2015] VSCA 303 [8] (Maxwell P, Redlich, Tate and Priest JJA).

A particular issue with the scheme was the difficulty for a court in determining the features of a 'median' sentence case in order to compare the case before the court with either a historical or a hypothetical future median case.

Question 9

Should the baseline sentencing scheme be repealed in its entirety?

- If so, are there elements of the baseline sentencing scheme that should be replicated in any new sentencing guidance model?
- If not, how should the scheme be amended?

(b) Standard non-parole period schemes

Standard non-parole period (SNPP) schemes establish a 'legislated non-parole period intended to provide guidance to the courts on the length of time an offender found guilty of an offence should spend in prison before being eligible to apply for release on parole'.[64] The 'standard' or 'presumptive' non-parole period applies to custodial sentences (where a non-parole period is fixed) and not to non-custodial sentences.

SNPP schemes operate in New South Wales and in South Australia. In New South Wales, the standard non-parole period is a **defined term** scheme, that is, a prescribed level represents the standard non-parole period for an offence in the middle of the range of objective seriousness. In South Australia, the standard non-parole period is a **defined percentage** scheme, whereby for cases involving particular offences, the court must impose a non-parole period that is a defined proportion of the total effective/head sentence.

(i) Defined term standard non-parole period schemes (NSW)

A defined term SNPP scheme operates in New South Wales. The scheme applies to the sentencing of 33 serious offences; for some offences there are multiple standard non-parole periods depending on the circumstances in which the offence was committed. The offences included in the scheme carry maximum penalties ranging from seven years imprisonment to imprisonment for life, and the standard non-parole periods range from three years to 25 years.

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64 Sentencing Advisory Council (Qld), *Minimum Standard Non-Parole Periods: Final Report* (2011) xiv.

The standard non-parole period represents:

> the non-parole period for [a prescribed offence] that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness.[65]

There has been considerable debate in New South Wales as to what constitutes an 'objective' factor, as opposed to a factor personal to the offender. For example, premeditation, or pre-planning of an offence could be considered an aspect of the offending, or an aspect personal to the offender, as could provocation.

Sentencing process

In New South Wales a court sentences a charge of an offence by imposing a non-parole period and then a sentence on each charge of an offence (described as a 'bottom up' process), before considering cumulation and concurrency (or imposing an aggregate sentence) in order to arrive at a total effective/head sentence and non-parole period for the case as a whole. The non-parole period for either a single sentence or an aggregate sentence must not fall below three-quarters of the term of the sentence unless there is a finding of 'special circumstances'.

In Victoria, a court imposes a sentence on each charge of an offence, and, in a case with multiple charges, makes orders in relation to cumulation, before fixing a single non-parole period for the case as a whole (described as a 'top down' approach). For cases involving one charge of a prescribed offence (and no other charges), a Victorian court would be able to have regard to a standard non-parole period when fixing the non-parole period for that case. In light of the current process for fixing a non-parole period, however, there would be difficulty in applying this approach to cases involving multiple charges (approximately 72% of all cases sentenced in the higher courts in Victoria in 2014–15 contained more than one charge).

Compatibility with instinctive synthesis

The New South Wales Court of Criminal Appeal initially determined[66] that a court, when sentencing for an SNPP offence, was to determine whether the offence was in the middle of the range of objective seriousness and then, if the offence was, to consider the reasons for not imposing the SNPP.

In *Muldrock v The Queen*, the High Court held that this approach was incorrect. The way in which the New South Wales Court of Criminal Appeal had applied an SNPP was held to be inconsistent with the 'instinctive' or 'intuitive' synthesis approach to sentencing, whereby the sentencing judge

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65 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(2).

66 *R v Way* [2004] NSWCCA 131; 60 NSWLR 168.

weighs all the competing factors and arrives at one final sentence. This is in contrast with an approach whereby the judge quantifies the individual factors leading to a final determination.

Consistent with the former approach, the High Court held that a court in New South Wales is not required to explain the extent to which the seriousness of the case before it differs from a hypothetical offence in the middle of the range of seriousness represented by the SNPP. Instead, a court must have regard to the standard non-parole period in the same way it has regard to the maximum penalty, as a 'guidepost' or 'yardstick' to sentencing, and not a starting point.[67]

The New South Wales sentencing legislation was subsequently amended following *Muldrock*, and now provides that:

> The standard non-parole period for an offence is a matter to be taken into account by a court in determining the appropriate sentence for an offender, without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender.[68]

Question 10

Should a defined term standard non-parole period scheme be introduced in Victoria?
If so:

- To which offences should the scheme apply?
- Should the defined term standard non-parole period scheme exclude:
    - offences determined summarily?
    - offenders aged under 18 at the time of offending?
    - offenders sentenced to life imprisonment or an indefinite sentence?
- Should the standard non-parole period represent a non-parole period for a charge of an offence in the middle of the range of objective seriousness? If not, what should the standard non-parole period represent?
- How would a requirement for the court to have regard to a standard non-parole period for an offence be reconciled with the requirement in Victoria for the court to impose a single non-parole period on a case, rather than separately on each charge of an offence?

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67 *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120.

68 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(2).

- Should the sentencing process in Victoria be changed to require the fixing of individual non-parole periods on each charge of an offence?
- Should the standard non-parole period represent the presumptive non-parole period for a case involving at least one charge of an offence for which a standard non-parole period has been prescribed?

(ii) Defined percentage standard non-parole period schemes (SA; recommended for QLD)

Rather than requiring a court to have regard to a standard non-parole period when fixing the non-parole period for a charge of an offence, a defined percentage scheme requires a court to impose a minimum proportion of the total effective/head sentence for the case as the non-parole period.

One element of the existing baseline sentencing scheme acts as a form of defined percentage non-parole period scheme. Section 11A of the *Sentencing Act 1991* (Vic) requires a court, when sentencing any case involving at least one charge of a baseline offence, to impose a minimum non-parole period, expressed as 30 years (for a life sentence), or 70% of the total effective/head sentence (where 20 years or more), or 60% of the total effective/head sentence (where less than 20 years).

South Australia

In South Australia, if an offender is sentenced for a fatal offence, or an offence where the victim suffers total and permanent physical or mental incapacity, the court is required to fix a minimum non-parole period. That period is 20 years for murder and 80% (or four-fifths) of the sentence for any other major indictable offence.[69]

The court may depart from the minimum non-parole period after having regard to the following 'special circumstances':

- the victim's conduct or condition substantially mitigating the offender's conduct;
- the offender's plea of guilty and the facts and circumstances surrounding the plea; and
- the offender's degree of cooperation in the investigation or prosecution.[70]

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69 *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(ab), (ba).

70 *Criminal Law (Sentencing) Act 1988* (SA) s 32A(2)(b), (3).

Queensland

In 2011, the final report of the Queensland Sentencing Council, *Minimum Standard Non-Parole Periods,* recommended that a defined percentage scheme, rather than a defined term scheme, should be introduced in Queensland.

This recommendation was made on the basis that it would:

> deliver a number of the intended outcomes of a defined term scheme, including the minimum term an offender must spend in prison for a given offence, while preserving the current approach to sentencing in Queensland. It would also largely avoid many of the problems that have arisen in NSW, including the additional complexity such a scheme has introduced to sentencing in that State, increasing the risks of sentencing errors and appeals, and the need for detailed and broad grounds of departure, which compromise the ability of the scheme to operate as a 'standard' non-parole period scheme.[71]

Question 11

Should a defined percentage standard non-parole period scheme be introduced in Victoria? If so:

- To which offences should the scheme apply?
- Should the defined percentage standard non-parole period scheme exclude:
    - offences determined summarily?
    - offenders aged under 18 at the time of offending?
    - offenders sentenced to life imprisonment or an indefinite sentence?
- What should be the minimum proportions of the total effective/head sentence required to be imposed as a non-parole period?
- Should there be defined special or exceptional circumstances, where a court may depart from imposing a minimum proportion of the total effective/head sentence as the non-parole period? If so, what should those circumstances be?

[71] Sentencing Advisory Council (Qld), *Minimum Standard Non-Parole Periods, Final Report*, 2011, xvi.

(c) A presumptive standard sentence scheme

In New South Wales the court fixes a non-parole period and a head sentence in respect of each charge (unless an aggregate sentence is being imposed).[72] In sentencing under the SNPP scheme, the court may still fix an aggregate sentence, but must specify the non-parole period and sentence for each charge that is subject to a standard non-parole period.[73]

This 'bottom up' approach to sentencing, involving fixing a non-parole period before a sentence on a charge, is different from the sentencing process in Victoria, where the court first imposes a sentence for each charge in a case. The court then makes any orders as to cumulation in order to reach a total effective/head sentence for the case, and then fixes a single non-parole period for the case as a whole (a 'top down' approach).

In light of this difference, a presumptive sentence scheme that would more readily align with current sentencing processes in Victoria is one that would prescribe a standard *sentence*, rather than a standard *non-parole period*.

The baseline sentencing scheme prescribed a form of standard sentence; however, the baseline sentence represented the intended future median sentence for the relevant offence. Such a model was considered 'incapable of being given any practical operation'. A particular issue with the scheme was determining the features of a 'median' sentence case in order to compare the case before the court with either a historical or a hypothetical future median case.

Rather than representing a future median, a presumptive standard sentence could adopt a model similar to that in New South Wales, with the difference being that the presumptive sentence would represent the *sentence* for a charge of an offence in the middle of the range of objective seriousness (where an offender has not pleaded guilty), rather than a *non-parole period* for that hypothetical charge.

In this way, a Victorian court could have regard to the presumptive standard sentence as a 'guidepost', or 'yardstick', in a similar manner to the way in which the court currently considers the maximum penalty. Further, the court would not use the presumptive standard sentence as a starting point, and having regard to the presumptive standard sentence would not require the court to engage in a process of 'two-stage sentencing'. Instead, the presumptive standard sentence could become another consideration for the judge to include within an instinctive synthesis approach.

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72 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(1).

73 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(4).

As a result, including a presumptive sentence as a factor to be considered in the judge's synthesis of factors would not prevent a court from imposing a non-custodial sentence.

The presumptive standard sentence would need to represent the sentence for the hypothetical 'middle of the range offence' where an offender has not pleaded guilty. If the presumptive standard sentence were framed on the basis that it already incorporated a discount in sentence for a guilty plea, then in cases where an offender did not plead guilty, the court would effectively be required to treat a not guilty plea as an aggravating factor when having regard to the presumptive standard sentence. Consequently, this may be viewed as punishing an offender for exercising the right to plead not guilty.

A possible criticism of a presumptive sentence scheme that focuses on the sentence rather than the non-parole period is that the effect of such a scheme would be diminished if the proportion of the total effective/head sentence represented by the non-parole period were to decline for offences subject to the scheme. In those circumstances, a standard presumptive sentence scheme could be combined with a required minimum percentage non-parole scheme, similar to the existing provisions in section 11A of the *Sentencing Act 1991* (Vic).

To avoid injustice for those offenders for whom a longer parole period is required, the required minimum percentage non-parole period scheme accompanying a presumptive standard sentence scheme could provide for the court to depart from the minimum percentage in defined 'special' or 'exceptional' circumstances.

In New South Wales, the non-parole period for either a single sentence or an aggregate sentence (regardless of whether or not a standard non-parole period applies) must not be less than three-quarters of the total effective/head sentence, unless the court finds that there are 'special circumstances'.[74]

Similarly, in Victoria, section 10A of the *Sentencing Act 1991* (Vic) provides that a court may depart from the required statutory minimum non-parole period for 'gross violence' offences in particular specified mitigating circumstances described as 'special reasons'.[75]

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[74] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2B).

[75] *Sentencing Act 1991* (Vic) ss 10, 10A.

Question 12

Should a presumptive standard sentence scheme be introduced in Victoria?

If so:

- Should the presumptive standard sentence represent the sentence for a charge of an offence in the middle of the range of objective seriousness (where an offender has not pleaded guilty)? If not, what should the presumptive standard sentence represent?
- To which offences should the presumptive standard sentence scheme apply?
- Should the presumptive standard sentence scheme exclude:
    - offences determined summarily?
    - offenders aged under 18 at the time of offending?
    - offenders sentenced to life imprisonment or an indefinite sentence?
- Should the presumptive standard sentence scheme also require a court to impose a minimum proportion of the total effective/head sentence as the non-parole period?
- If so, should there be defined special or exceptional circumstances, where a court may depart from imposing a minimum proportion of the total effective/head sentence as the non-parole period?
- If so, what should those circumstances be? Should they be the same as the 'special reasons' in section 10A of the *Sentencing Act 1991* (Vic).

Part C – Levels in a standard non-parole period or presumptive standard sentence scheme

In addition to providing advice on the type of guidance and the offences that should feature in a new sentencing scheme, the terms of reference ask for advice on the levels at which sentencing guidance should be set for such offences.

This request presupposes a scheme of sentencing guidance that would involve the setting of sentence levels. Two possible models for such a scheme are a standard non-parole period scheme (SNPP) and a presumptive standard sentence scheme.

In each scheme the level could represent either the sentence or the non-parole period, for a charge in the middle of the range of objective offence seriousness for an offender who has not pleaded guilty.

In light of the answers to Question 1 in Part A, identifying the offences of concern, the Council seeks views on the appropriate standard non-parole period, or alternatively the appropriate standard sentence, for those offences of concern.

Question 13

If a standard non-parole period (SNPP) scheme were to be introduced in Victoria, what should be the standard non-parole periods for the offences to which the scheme should apply?

If a presumptive standard sentence scheme were to be introduced in Victoria, what should be the presumptive standard sentences for the offences to which the scheme should apply?

Part D – Further considerations

1. Other sentencing guidance schemes

While the Council has identified a number of sentencing guidance schemes in operation in other comparable jurisdictions, there may be other schemes that stakeholders consider worthy of adoption in Victoria.

Question 14

Are there any other sentencing guidance schemes, from comparable jurisdictions, that should be introduced in Victoria?

- If so, what are those schemes, and how would they operate in Victoria?

2. Complexity of sentencing inhibits consistency and confidence

The *Sentencing Act 1991* (Vic) has been progressively amended since its introduction to incorporate a substantial number of schemes for various purposes. Among other schemes, the Act currently contains:

- serious offender provisions;
- continuing criminal enterprise provisions;
- statutory minimum sentences;
- indefinite sentences; and
- baseline sentencing.

Regardless of their effect on sentencing outcomes (which has not been separately measured), it has been argued that the net effect of such schemes has been a marked increase in the complexity of the sentencing exercise,[76] particularly (but not exclusively) for sentencing judges in the higher courts.

[76] See, for example, *R v Koumis & Ors* [2008] VSCA 84 (22 May 2008), where the court said: 'The requirements of the *Sentencing Act 1991* and the range and complexity of sentencing principles make the role of sentencing a very demanding one'.

Any increase in the complexity of sentencing is likely to contribute to inconsistency in the approach to sentencing and to a lack of community confidence in the criminal justice system, given that complexity generates a lack of transparency and clarity around the sentencing exercise.

Further, any increase in the complexity of sentencing is likely to lead to delay, and a need for both more court time for submissions on sentence and more judicial time for proper consideration of the appropriate sentence.

Question 15

Should any new sentencing guidance scheme in Victoria replace (as far as is practicable) any sentencing schemes currently in the *Sentencing Act 1991* (Vic)?

- If so, which sentencing schemes should be replaced?