SUBMISSION OF THE CRIMINAL BAR ASSOCIATION ON THE PROPOSAL FOR BASELINE SENTENCING

1. The position of the Criminal Bar Association of Victoria

1.1. The *Criminal Bar Association* (CBA) opposes the introduction of any model of "baseline" minimum sentencing in Victoria.

1.2. As the High Court has stated, the discretion which the law gives to sentencing judges is vital to the proper administration of criminal justice.[1] When a term of imprisonment is imposed (as the sentence of last resort) and a minimum term is fixed, the fixing of an appropriate minimum term should be entirely a matter for the discretion of sentencing judges or Magistrates. Each case is unique.

1.3. We do not consider that the implementation of such a significant change to sentencing law and practice is required. Furthermore, apart from the media release of 23 November 2010, we are uncertain of the bases which underpin the drive for the introduction of baseline sentencing in this State.

1.4. The introduction of baseline minimum sentencing would give rise to a number of real problems in the administration of criminal justice and run counter to other objectives as discussed below.

2. Scope of the terms of reference

2.1. The terms of reference provided to the *Sentencing Advisory Council* (SAC) do not expressly require examination of the merits of a baseline sentencing scheme. This is surprising and disappointing. The CBA submits that the SAC should consider and report on the merits of baseline sentencing. The SAC should subject the said justifications for such a scheme to careful analysis and consider the experience of other jurisdictions where various forms of baseline sentencing operate. This is consistent with the statutory power and functions of the SAC[2] and clearly falls within the scope of " (g) any other matters the

[1] *Lowndes v R* (1999) 195 CLR 665 at [15] (the Court).
[2] Sentencing Act, ss108C and 108D.

Council considers relevant…"[3] If the SAC disagrees with this interpretation, in our submission it ought seek expanded terms of reference. The proposed change is potentially a radical one and should not occur without a rigorous examination of the merits and purported justifications.

2.2. The very recent report of the *Queensland Sentencing Advisory Council* is instructive in this regard.[4] The majority of that body reported that they were against the introduction of any form of standard non-parole period.[5] This was despite the fact that the terms of reference did not require it to consider the merits of the proposal. The report also contains detailed criticisms of the need for baseline sentencing that are relevant to the Victorian debate.[6] In particular, the Qld SAC noted an absence of evidence that baseline sentencing schemes have been effective.[7]

3. Basic principles placed at risk by baseline sentencing

3.1. Non-parole periods in Victoria are currently set by reference to the principles laid down in the High Court decisions in *Power v R*[8], *Deakin v R*[9] and *Bugmy v R*[10]. The guiding principle, stated in *Power* and repeated with approval in *Deakin* and *Bugmy*, is as follows:

> The intention of the legislature in providing for the fixing of minimum terms is to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence.

3.2. A minimum term can only be set by reference to a head term. The adoption of "starting point" minimum terms would unsettle settled principle in relation to the fixing of minimum terms through the apparent prominence to be given to the baseline minimum.

---

[3] Issues Paper, p 4.
[4] Sentencing Advisory Council, Qld, *Minimum standard non-parole periods* Final Report September 2011.
[5] Ibid, preface at p 10.
[6] Ibid, pp 16-21.
[7] Ibid, p x.
[8] (1974) 131 CLR 623.
[9] (1984) 58 ALJR 367.
[10] (1990) 169 CLR 525. See also *Hili v The Queen; Jones v The Queen* (2010) 85 ALJR 195 at [44].

3.3. Baseline minimum sentences could place in jeopardy the "instinctive synthesis" approach to sentencing, which has been consistently endorsed by the High Court [11] and applied by the Victorian Court of Appeal.[12]

3.4. It is important to bring to mind what the High Court has explained is meant by the shorthand expression "instinctive synthesis" and why the High Court has held that "two stage" sentencing is wrong in principle. In *Wong*, Gaudron Gummow and Hayne JJ stated:

> …the reasons of the Court of Criminal Appeal suggest a mathematical approach to sentencing in which there are to be 'increment[s] to, or decrements from, a predetermined range of sentences. That kind of approach, usually referred to as a 'two-stage approach to sentencing, not only is apt to give rise to error, it is an approach that departs from principle. It should not be adopted.
>
> It departs from principle because it does not take account of the fact that there are many conflicting and contradictory elements which bear upon sentencing and offender. Attributing a particular weight to some factors, while leaving the significance of all other factors substantially unaltered, may be quite wrong….because the task of the sentencer is to take account of all the relevant factors and to arrive at a single result which takes due account of them all. This is what is meant by saying the task is to arrive at an 'instinctive synthesis'. This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which, in the case of an offence like the one now under discussion, balances many different and conflicting features.[13]

3.5. In *Markarian* Gleeson CJ, Gummow, Hayne and Callinan JJ, having referred to the above statement of principle, said

> Following the decision of this Court in *Wong* it cannot now be doubted that sentencing courts may not add and subtract item by item from some apparently subliminally derived figure, passages of time in order to fix the time which an offender must serve in prison. That is not to say that in a simple case…indulgence in arithmetical deduction by the sentencing judges should be absolutely forbidden. An invitation to a sentencing judge to engage in a process of "instinctive synthesis", as useful as shorthand terminology may on occasions be, is not desirable if no more is said about what that means. The expression "instinctive synthesis" may then be understood to suggest an arcane process into the mysteries of which only judges can be initiated. The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public.[14]

---

[11] *Wong v The Queen* (2001) 207 CLR 584 at 611 - 612 [74] – [78] (Gaudron, Gummow and Hayne JJ): *Markarian v The Queen* (2005) 228 CLR 357, 373 [35] – 375 [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ), 377 [50] – 380 [56]. (Mc Hugh J); *Muldrock v The Queen* (2011) 85 ALJR 1154.at [26] (the Court).

[12] See, for example, *DPP v OJA* (2007) 172 A Crim R 181 at 195-6 [29] (Nettle JA), [71] (Ashley JA), [72] (Redlich JA) and *Hudson v The Queen; DPP v Hudson* [2010] VSCA 332 at [27] (the Court).

[13] *Wong*, op cit at 611 [74].

[14] *Markarian,* op cit at 375 [39].

3.6. McHugh J, in his separate judgment in *Markarian*, defined the clash between "instinctive synthesis" and "two tier" sentencing as follows:

> By two-tier sentencing, I mean the method of sentencing by which a judge first determines a sentence by reference to the "objective circumstances" of the case. That is the first tier of the process. The judge then increases or reduces this hypothetical sentence incrementally or decrementally by reference to other factors, usually, but not always, personal to the accused. This is the second tier. By instinctive synthesis, I mean the method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only as the end of the process does the judge determine the sentence.[15]

3.7. McHugh J in *Markarian* identified a fundamental defect to "two tier" sentencing:

> …by concentrating on the objective circumstances of a crime, the judge is giving effect, and ultimately greater weight, to the retributive or deterrent theory of sentencing…Consciously or unconsciously, the judge who commences with a notional sentence downplays the importance of mitigation, reformation and rehabilitation in the sentencing process.[16]

4. <u>Rationale for the reform</u>

4.1. The Issues Paper contains no analysis of what is said to justify the introduction of baseline sentencing. The Issues Paper identifies the origin of the Attorney-General's reference to the SAC as an announcement made days before the last State election by the then Opposition leader, Mr Baillieu.[17] The press release containing this announcement warrants close attention as it is the only document to our knowledge that expands on *why* it is that a baseline minimum sentence scheme is being contemplated. It is annexed to this submission. It does not, in our view, disclose a defensible rationale for the introduction of baseline sentencing.

4.2. First, it was asserted by Mr Baillieu that "Victorians are sick and tired of seeing offenders receive hopelessly inadequate sentences…" We are uncertain of the basis for this statement. In fact, there is a growing amount of empirical research that demonstrates that when the community is informed of the host of factors relevant to sentencing for a particular crime, they do not call for longer

---

[15] ibid at 377 [51].
[16] Ibid, 379 [54].
[17] Issues Paper, page 5, footnote 8.

sentences. We refer in particular to the research of Karen Gelb on behalf of the SAC[18], to the research of Dr Austin Lovegrove[19] and to the recent results of the Tasmanian Jury Sentencing Study.[20]

4.3. The above (and other) research was referred to by Warren CJ and Redlich JA in the reasons for judgment in *WCB v R* [2010] VSCA 230 at [10] – [29]. As their Honours explained, it is selective media reporting – rather than an informed understanding of particular sentencing issues – that feeds a skewed perception that sentences are generally inadequate. This skewed perception and its causes were noted in the SAC's latest annual report.[21]

4.4. Second – and allied to the first matter – was the contention that because current sentencing laws give no guidance about what the minimum sentence should be, "…the minimum sentences given by the courts are usually only a small fraction of the maximum set by Parliament." This highlights an erroneous view of the purpose of maximum penalties. As explained by Gleeson CJ, Gummow, Hayne and Callinan JJ in *Markarian*, maximum penalties are reserved for the worst possible cases and are frequently set at "catch-all" levels.[22] Further, in serious cases the non-parole period will often represent a very substantial proportion of the head sentence. The Victorian Court of Appeal has made it clear that non-parole periods should be proportionately higher for serious offences. In such cases, non-parole periods in excess of 75% of the head sentence are often imposed and regarded as appropriate to the gravity of the offending.[23]

4.5. Third, it is apparent that the call for longer sentences of imprisonment across the board assumes that general deterrence is not only a legitimate goal of sentencing, but that it is effective in reducing offending rates.[24] Recent work

---

[18] Gelb K *More Myths and Misconceptions*, Research Paper, Sentencing Advisory Council, 2008. We note that in the Issues Paper at p 5 reference is made to a "perception" that sentences are too lenient.
[19] Lovegrove A *Public Opinion, Sentencing and Lenience: An Empirical Study Involving Judges Consulting the Community* (2007) Criminal Law Review 769
[20] Warner K et al *Public Judgment on sentencing: Final Results from the Tasmanian Jury Sentencing Study*, Research Paper, Trends & Issues in crime and criminal justice, Australian Institute of Criminology, February 2011.
[21] Sentencing Advisory Council Annual Report 2010-2011, Chair's Foreword, p 2.
[22] (2005) 228 CLR 357 at 372 [30] – [31].
[23] See *R v Romero* [2011] VSCA 45 at [25]-[27].
[24] Mr Baillieu states "Too often, current sentencing laws fail to result in penalties for offenders that protect the community *and deter would be offenders*." (emphasis added).

undertaken by the SAC raises real doubts as to efficacy of these assumptions.[25]

4.6. Fourth, the Issues Paper (p 5) refers to a "perception" that sentences are not being applied "consistently across courts". As the High Court recently explained in *Hili v The Queen; Jones v The Queen*[26], it is consistency of the application of sentencing *principle* that is important. It is not at all apparent how the introduction of baseline minimum sentences would promote this objective.

4.7. Finally, there already exists a powerful mechanism for the correction of sentences which are too low. Since the introduction of appeals by the Director of Public Prosecutions, they have been an effective means of redressing inadequate sentences. Recently introduced reforms which have removed the constraints imposed by principles of double jeopardy[27] have made Director's appeals an even more robust mechanism for the correction of sentences which are too light. Unconstrained by the principles of double jeopardy, the Court of Appeal is now free to set sentencing standards it deems appropriate for serious and significant offences.[28] The CBA is not clear as to why the availability of Director's appeals is not regarded as a sufficient safeguard against the imposition of inadequate sentences for serious offences.

5. Problems and issues

5.1. The CBA suggests that a baseline minimum sentence scheme would give rise to at least the following problems and issues:-

- greater complexity and thus length to plea hearings due to attention being deflected by submissions as to where on the range of, for example, objective seriousness an offence fell;

[25] Ritchie D *Does Imprisonment Deter? A Review of the Evidence* Sentencing Advisory Council April 2001

[26] (2010) 272 ALR 464 at [49] ff. The case dealt with Federal sentencing, but the observations have been applied to consideration of the objective of consistency in State sentencing: see *Hudson* (note 11 above).

[27] Sections 289-290 *Criminal Procedure Act 2009*.

[28] See *DPP v Karazisis* [2010] VSCA 350.

- as a consequence, greater strain on the already stressed resources of the Courts, the Office of Public Prosecutions and Victoria Legal Aid;
- a further increase in delays;
- increased prison population;
- disincentives to plead guilty through predictably high and arbitrarily selected baseline minimum sentences;
- there is a concurrent proposal to introduce a statutory minimum terms for aspects of the offences of intentionally and recklessly cause serious injury. There is a potential for great complexity if two new sentencing models are introduced more or less simultaneously for the same offences; and
- if applied as contemplated to offences that can be heard summarily in the Magistrates' Court (threat to kill, recklessly causing serious injury) a potential tension between the jurisdictional limit of that Court and the baseline minimum.

5.2. Given these problems, the introduction of baseline sentencing could only be justified by powerful empirical evidence demonstrating significant net benefits in jurisdictions where a form of baseline sentencing has been introduced. The CBA is unaware of any such evidence.

5.3. It is under cover of the above stated opposition to the introduction of baseline sentencing that the CBA makes the submissions set out below as to the specific questions raised in the Issues Paper.

6. The determination of the baseline

6.1. If a baseline sentencing scheme is to be introduced in Victoria, the CBA would prefer an "objective offence seriousness" model whereby the standard non-parole period represents the non-parole period for an offence in the "mid-range" of objective offence seriousness.

6.2. Consistent with the decision of the High Court in *Muldrock v The Queen* ('*Muldrock*')[29] the standard non-parole period should represent

> the non-parole period for an hypothetical offence in the middle of the range of objective seriousness without regard to the range of factors, both aggravating and mitigating, that bear relevantly on sentencing in an individual case.[30]

6.3. We are opposed to the introduction of a combined model, whereby both objective and subjective factors are relevant to determining the baseline. Such a model cannot ably reflect the multiplicity of circumstances and considerations that may arise in individual cases, and therefore inevitably gives unjustified prominence to some subjective factors (and combinations thereof) over others. A combined model also lends itself to having multiple baseline levels for each offence, which creates further difficulties and complexities, as discussed below.

6.4. If the objective seriousness model is adopted, the standard non-parole period should apply as a guide in sentencing for all offences where imprisonment is deemed appropriate. That is, an offence need not be classified as a 'mid-range' offence for the baseline to be relevant. On this approach, which accords with the High Court's interpretation of the NSW scheme,[31] the baseline is also relevant to offending which falls within the low, middle and high range of seriousness.

6.5. In *Muldrock* the High Court said that the NSW legislative scheme obliges sentencing courts to take into account the full range of factors that are relevant to the sentence, whilst being mindful of "two legislative guideposts", namely the maximum penalty and the standard non-parole period. The Court stated that the NSW legislation does not require a sentencing judge to ask whether there are reasons for not imposing the standard non-parole period, nor to proceed to an assessment of whether or not the offence is within the midrange of objective seriousness.[32]

---

[29] (2011) 85 ALJR 1154.
[30] Ibid at 1163 [31].
[31] Ibid.
[32] Ibid at 1162 [25]-[27].

6.6. The objective seriousness of an offence should be assessed wholly by reference to the nature of the offending, and without reference to matters personal to a particular offender or class of offenders. All other factors should be excluded from the baseline and left to the court to apply in aggravation or mitigation in accordance with current sentencing practices. As was said by the High Court in *Muldrock* "meaningful content cannot be given to the concept [of the non-parole period for an offence in the middle of the range of objective seriousness] by taking into account characteristics of the offender."[33]

6.7. To the extent that the NSW Court of Criminal Appeal in *R v Way*[34] broadly construed the notion of "objective seriousness" so as to include circumstances of the offender that are causally connected to the commission of the offence (such as duress, provocation, robbery to feed a drug addiction, mental state and mental illness or disability related to the commission of the offence), *Way* must now be considered to have been wrongly decided in light of the High Court's decision in *Muldrock*.[35]

6.8. As to the legislative requirement for Courts to state the factors they have taken into account in departing from the baseline, we note that sentencing judges are already required by common law to give reasons for a particular sentence being imposed, including any relevant findings of fact made and principles of law applied.[36] There are good public policy reasons why courts should express the aggravating and mitigating factors they have taken into account in sentencing, including:

- the accused's right to know the reasons why a particular sentence has been imposed;
- increased public awareness of the sentencing process;
- to assist appellate review and promote consistency in sentencing; and
- for the assistance of the executive authorities involved in administering the sentence and any parole.

---

[33] Ibid at 1163-4 [27].
[34] *R v. Way* (2004) 60 NSWLR 168.
[35] *Muldrock v The Queen* (2011) 85 ALJR 1154 at 1161 [21]-[32].
[36] *O'Connor* [1987] VR 496; *Smith* (1993) 69 A Crim R 47.

6.9. The legislative scheme could therefore require judges to identify the facts, matters and circumstances that bear upon the decision reached by the court regarding the appropriate sentence to be imposed, although arguably such a provision is not necessary. However, courts should not be required to classify the objective seriousness of the offending by reference to the hypothetical mid-range, nor attribute mathematical values to matters regarded as significant in differentiating the sentence from the standard non-parole period.[37]

Scope of the proposed reform

6.10. The CBA does not support the application of baseline sentencing to other offences beyond those defined by the *Sentencing Act* 1991 as "serious" and "significant" offences.

6.11. To the contrary, if a baseline sentencing scheme is to be introduced in Victoria, we would suggest a trial of a more limited list of offences occur first to determine the impact of baseline sentencing on sentencing outcomes and the criminal justice system generally, before baseline sentencing is introduced in relation to all "serious" and "significant" offences. For example, a baseline sentencing scheme could initially be trialled in Victoria in relation to the offence of murder, and its impact monitored and evaluated prior to further offences being added to the scheme.

6.12. If a baseline sentencing scheme is introduced in Victoria, it should not apply to children and young offenders. It is well accepted that in sentencing young offenders, primacy must be given to their rehabilitation. The application of a baseline sentencing scheme in the sentencing of young offenders would compromise the ability of the Courts to give proper effect to this principle. Further, the application of a baseline sentence may also compromise the ability of Courts to pass sentences on children and young offenders which take proper account of their cognitive and emotional immaturity.

[37] *Muldrock v. The Queen* (2011) 85 ALJR 1154 at 1163 [29].

7. Factors relevant to the setting of a baseline

7.1. Given the importance of the baseline levels, it is critical that the basis on which they are set is made completely transparent. Baselines should be set based on thorough research and detailed analysis, rather than on assumptions about the circumstances in which certain offences tend to be committed or assumptions about community attitudes to certain crimes.

7.2. The last point is an important one. As discussed above, proper empirical studies have demonstrated that the notion that the community demands heavier sentences than those being imposed by the Courts for certain crimes is simply a common misconception[38] If baselines are to be informed in part by 'community attitudes', these need to be measured by properly designed empirical studies in which participants are given full information, which enables them to understand and respond to the sentencing task in all its complexity.

7.3. Logically, the maximum penalty must be considered an important factor in the determination of a baseline for an offence. It should be borne in mind however that the maximum penalty is reserved for the worst possible example of an offence.[39] The worst possible case in this sense would embrace subjective considerations. For example, the worst case would generally involve an offender with serious prior convictions for cognate offending, who can rely on little or nothing in mitigation. For offences against the person, cases which would attract a penalty close to the maximum might be expected to involve the gratuitous infliction of violence with calculated cruelty. As discussed below, one would expect an analysis of cases coming before the Court to show that for many types of offence, the most common examples will fall within the lower end of the range of seriousness.

7.4. It follows from these considerations that, however the baseline is defined, it should be set at a fraction of the maximum.

---

[38] See above at [4.2]-[4.3] and the materials there cited.
[39] *R v Markarian* (2005) 228 CLR 357 at [31].

8. Relationship between the baseline and the median

8.1. The CBA endorses the SAC's comment that the relationship between the median sentence and the baseline sentence is an issue requiring careful and detailed consideration.

8.2. The issues paper correctly observes that, where a baseline represents the mid-range of seriousness for a particular offence, it will not necessarily reflect the statistical median of sentences for that offence. We would go further and suggest that it is likely that the statistical median sentence for an offence will *in most cases* be lower than the mid-range of seriousness. This is because, firstly, the most common examples of offences will tend to fall within the lower end of objective seriousness. Secondly, the statistical median will reflect subjective factors which may be powerfully mitigating and relatively common such as a plea of guilty, remorse and youth. By contrast, the baseline on the model we are discussing will only reflect the objective criminality of an offender's conduct.

8.3. The issues paper uses the example of the offence of sexual penetration of a child under 16. Another example would be aggravated burglary. This offence embraces a great range of conduct, including at the lower end of seriousness opportunistic thefts by drug addicts; and at the higher end forced entry by armed offenders with intent to assault, rape or even kill.[40] One would expect the majority of aggravated burglaries to involve an intent to steal, minimal planning, and probably the need to feed a drug addiction as the underlying motive. Similarly, one would expect a large number of armed robberies to involve the same motive and minimal forethought. Armed robberies involving the co-ordination of multiple offenders, extensive planning and the use of loaded firearms in public places would be relatively rare.

8.4. There is every reason to expect that a careful and detailed statistical analysis of sentences imposed for serious and significant offences would support the view that a baseline reflecting the mid-point of objective seriousness of the offences would generally be set well above the statistical median sentence for

[40] Entry with intent to commit violence on the occupants would generally be considered a more serious form of aggravated burglary: *R v Brooks* [2008] VSCA 253 at [22].

those offences. We see no inherent difficulty with this in practice or in principle. Rather, this relationship between the baseline and the median sentence would reflect the existing relationship between median head sentences and maximum penalties. A baseline sentence could then function, much like the maximum sentence functions now, as a legislative guidepost.[41] This would be the least arbitrary and most principled way in which a baseline sentencing scheme might function.

8.5. Part of the Government's proposal appears to be to on confer on the Court of Appeal a role in assessing whether minimum sentences are, over time, properly 'aligned' with baseline sentences. The nature of this role and the meaning of the 'alignment' which is contemplated is unclear. However, given the matters discussed above, a proper alignment would generally involve a significant discrepancy between the baseline sentence (reflecting a mid-point of objective seriousness) and the median (reflecting the statistical average). For this reason we submit that the 'alignment' which is to be assessed by the Court of Appeal should not be interpreted to refer to a match. Rather, it should be interpreted to refer to a proper ratio. Again, this would reflect the current practice of the Court of Appeal in assessing current sentencing practices where a factor that is taken into account is the maximum penalty prescribed by Parliament.

9. Multiple baselines

9.1. The CBA considers multiple baselines for single offences should not be introduced. A regime involving multiple baselines of the kind discussed in the SAC's issues paper[42] would be too prescriptive and complex. Plea hearings would tend to become focussed on the correct categorisation of an offence. This would ultimately distract the Court from the essential sentencing task, which must ultimately be to synthesise a number of factors and considerations, which are largely incommensurable.[43]

---

[41] See *Muldrock* (2011) 85 ALJR 1154 at [27].
[42] At pages 12-13 and 16-17.
[43] *R v MacNeil-Brown* (2008) 20 VR 677 at [124].

9.2. We do not consider it is possible to define with precision different levels of culpability based on selected objective features, which are only defined in the abstract, and then link these levels with prescribed sentences in a principled way. As we have said, every case is unique. The introduction of multiple baselines would only further constrain the ability of Courts to determine sentences in a way which is sensitive to all of the relevant facts.

9.3. The use of multiple baselines would also create greater technicality in the sentencing process. As a consequence, the length and cost of sentencing hearings will increase. It could be expected that an incorrect categorisation of an offence would often be relied upon as a ground of appeal against sentence.

9.4. The availability of multiple baselines would also affect the plea bargaining process. Before agreeing to resolve a case to a plea of guilty, the defence may seek an indication from the Crown as to what baseline category the offence will be alleged to fall into. Negotiations over this question would delay the resolution of cases.

10. <u>Sentencing for multiple offences</u>

10.1. Where a Court imposes individual sentences for multiple offences, the selection of a 'base count' in respect of which orders for cumulation may be made is an aspect of the sentencing discretion. The base count need not be the offence which carries the greatest maximum penalty. Rather, the selection base count will generally reflect the sentencing judge's assessment of the gravamen of the offending having regard to all of the circumstances of the case. This aspect of the sentencing discretion should be preserved.

10.2. It follows that where an offender falls to be sentenced in respect of multiple baseline offences, it should be open to a sentencing judge to apply the baseline for the offence which would otherwise be selected as the base count, even where that baseline is lower than that for another offence.

10.3. The sentencing process should be substantially the same where an aggregate sentence is imposed. It is still necessary in determining an aggregate sentence for the sentencing judge to consider what head sentences and orders for

cumulation would have been appropriate for individual counts.[44] Accordingly it should be open to the sentencing judge to determine a non-parole period by reference to the baseline of what would have been the base sentence, if individual sentences had been imposed. Again, a sentencing judge should not be compelled to treat as the base count the offence which carries the highest baseline.

10.4. If sentencing judges were constrained in every case to use the highest baseline applicable, the resolution of cases would likely be adversely affected. If a charge with the highest baseline did not reflect the gravamen of their criminal conduct, an accused would be reluctant to plead guilty to that charge if by doing so they would automatically expose themselves to the application of that baseline. The defence in such cases would press the prosecution to proceed only on lesser offences. The prosecution would then be under pressure to withdraw the charge, despite evidence capable of sustaining it. Ultimately, cases may be contested where otherwise they would have settled.

10.5. If sentencing for serious and significant offences tends to become more severe as a result of the introduction of baselines, this may have consequences for the sentences imposed on non-baseline offences. A Court dealing with multiple offences is required to moderate the total effective sentence to avoid breaching the principle of totality and to avoid a crushing sentence. Where one of the offences in a group is a baseline sentence, a sentencing judge may tend to reduce the sentences and orders for cumulation imposed in respect of non-baseline offences in order to achieve proper moderation. This practice would risk distorting sentencing statistics, and risks giving rise to that perception that separate offences may be committed with minimal consequence.

Gregory Lyon,
Chair
Criminal Bar Association
3 November 2011

[44] *R v Bardsley* [2008] VSCA 174 at [10].

APPENDIX A

(Press Release referred to in Issues Paper at page 5, footnote 8)

COALITION TO SET MINIMUM SENTENCE STANDARDS FOR SERIOUS CRIMES, Tuesday 23 November 2010

A Victorian Coalition Government will reform sentencing laws to set standard minimum sentences for serious crimes, Coalition Leader Ted Baillieu said today.

The Coalition will legislate to set a new "baseline" minimum sentence for each offence, which will be the minimum non-parole period that Parliament expects the courts to apply to the typical, or median, case involving that offence.

The courts will be required to make the baseline sentence the starting point for every minimum non-parole period they set.

"At present, sentencing laws specify only the maximum sentence that can apply to the worst examples of an offence; they give no direct guidance at all about what the minimum sentence should be," Mr Baillieu said.

"As a result, the minimum sentences given by the courts are usually only a small fraction of the maximum set by Parliament.

"Victorians are sick and tired of seeing offenders receive hopelessly inadequate sentences time and time again when they destroy the lives of young people with drugs, or commit the most horrific of murders.

"Too often, current sentencing laws fail to result in penalties for offenders that protect the community and deter would-be offenders.

"Labor's soft on crime approach has allowed this problem to get to the point where Victorians no longer have confidence in the sentencing regime in this state.

"For example, the average minimum sentence given to drug king-pins is less than four and a half years and the median sentence for murder is only 15 years.

"The Coalition believes that the starting point for an offender who has trafficked in a large commercial quantity of drugs should be 10 years behind bars, and the starting point for murder should be 20 years behind bars.

"The community, through Parliament is entitled to – and needs to – set out in legislation what levels of penalties it expects to apply for various crimes. The courts then apply the law to individual cases.

The reforms we are announcing today will strengthen sentences across the board for serious crimes, while still leaving courts the flexibility to adjust for individual cases.

"However, crucially, courts will be required to adjust sentences upwards just as much as downwards, instead of sentences being skewed in favour of criminals as they are at present," Mr Baillieu said.

Baseline minimum sentences will serve two purposes. They will provide a starting point for judges in determining the minimum sentence to be imposed in each case, and they will indicate the sentence that Parliament expects will be the median or mid-point of minimum sentences imposed for cases involving that offence.

In determining the minimum non-parole period to be served by the offender, the sentencing judge will be required to start from the baseline minimum sentence before applying aggravating or mitigating factors that would alter the minimum non-parole period up or down from the baseline.

Baseline minimum sentences will apply for serious offences as defined in the Sentencing Act 1991, which include murder, manslaughter, intentionally causing serious injury, armed robbery and serious sexual offences, and for additional offences such as arson, recklessly causing serious injury, aggravated burglary and major drug trafficking.

Baseline sentences for the full range of offences to be covered will be set after obtaining the advice of the Sentencing Advisory Council and other experts, and the views of the community.

Over time, the Court of Appeal will be able to determine whether or not the median levels of minimum sentences being handed down in practice are in fact aligned with the baseline minimum sentences specified by Parliament and, if not, to require a change accordingly in courts' sentencing practices.

Both New South Wales and Queensland have moved to introduce standard minimum sentences to give their courts a clearer indication of what the community expects. The Coalition's legislation will also make clear that over time the median minimum sentence for an offence as handed down by the courts should match the baseline set by the Parliament.

These changes will further strengthen Victoria's legal system alongside other reforms previously announced by the Coalition, such as abolishing suspended sentences for all offences, abolishing home detention, reforming bail laws and double-jeopardy laws and allowing the Supreme Court to outlaw criminal bikie gangs and other gangs.