Victoria Legal Aid

Lawyers And Legal Services

SUBMISSION TO THE SENTENCING ADVISORY COUNCIL ON BASELINE SENTENCING

INTRODUCTION

The model of baseline sentencing we propose aims to enhance consistency in sentencing in Victoria while minimising the extent to which its implementation fuels delay in the courts.

In summary, baselines would be set on an objective offence seriousness model by reference to neutral examples of the offence in question. The head sentence and non-parole period would be set using the baseline as an indication of the appropriate starting point for all baseline offences where imprisonment is appropriate. Aggravating and mitigating factors allow for a departure from the baseline to either increase or moderate the sentence, at the judge's discretion.

For matters that are objectively more serious than a neutral example of the offence, a departure above the baseline would be appropriate, moderated by mitigating subjective factors. Offending would be considered objectively less serious than a neutral example of the offence when circumstances that go to the objective and subjective seriousness of the offence are considered. For example, if an offender is severely intellectually disabled, an otherwise neutral (or even offending with aggravating features) would be considered objectively less serious, permitting a departure below the baseline.

This model can and should co-exist with current sentencing practice in terms of setting the non-parole period with reference to the head sentence. Head sentences reflect the overall criminality of the offending behaviour and decades of jurisprudence guides the relationship between head sentence and non-parole period.

While VLA opposes the introduction of baseline sentencing in Victoria, we recommend that if implemented, a trial be adopted in order to evaluate the impact of baseline sentencing. Baseline sentences could be introduced for a selection of offences which give rise to a significant disparity in the circumstances of offending such as intentionally causing serious injury and rape. These offences are particularly perceived to attract sentences that cause community concern. This trial would enable an evaluation of the consistency of sentencing imposed for these offences.

SUMMARY OF RECOMMENDATIONS

That if baseline sentences are to be introduced:

1. **An initial trial be conducted with the following offences:**
   - **Intentionally causing serious injury;**
   - **Recklessly causing serious injury;**
   - **Rape; and**
   - **Persistent sexual Abuse With A Child Under 16**
2. **If baseline sentences are continued beyond the initial trial, the following offences be included:**
   - **Culpable driving causing death;**
   - **Cultivation of narcotic plants – large commercial quantity; and**
   - **Cultivation of narcotic plants – commercial quantity**
3. **There be no multiple baselines and no re-defining of offences**
4. **A single baseline apply to each baseline offence**
5. **Baseline sentences be set according to a neutral example of the objective seriousness of an offence;**
6. **Departure from a baseline is permissible taking into account objective and subjective factors.**
7. **Baseline sentencing should not apply to children whether sentenced in the Children's Court or in the higher courts.**
8. **Any legislation introduced should explicitly provide that baseline sentences only apply where a sentencing judge has already decided that a custodial sentence is appropriate.**

MERITS OF THE PROPOSAL

Introduction

The Government's proposal to introduce baseline sentences of imprisonment for 'serious' and 'significant' offences, represents a departure from long-standing sentencing principles in Victoria.

Judicial discretion allows for proportionate sentences taking into account individual circumstances of not just the offender, but of all the factors relevant to a case. It allows for the important principle that a person only be imprisoned as a last resort to be upheld.

Parliament traditionally expresses its intention in relation to sentencing through the setting of maximum penalties or changes to the parole system. While these traditional mechanisms retain the ability of courts to carefully weigh competing factors to determine appropriate outcomes in individual cases, baseline sentencing puts at risk the achievement of just and appropriately tailored sentences.

Not a mandatory minimum

There is a risk that an articulated statutory baseline will have the effect of creating mandatory or presumptive imprisonment. We assume that this is not intended. Indeed, the fact that the baseline will relate to the minimum non-parole period appears to assume that court will already have decided that imprisonment is appropriate. If it were otherwise then he important and longstanding sentencing principle of parsimony is at risk. It is important that there be no doubt that section 5 of the *Sentencing Act* 1991continues to govern the exercise of the sentencing discretion. There is a risk in the current proposal that some judicial officers may treat imprisonment as a de facto starting point. Such an approach would be counterproductive, increase cost for no benefit, and will reduce rather than improve community safety and ultimately confidence in the community. We recommend that any legislation explicitly retain the custody threshold as a precondition for entry into the baseline sentencing regime.

Non-parole periods

The models discussed in the Sentencing Advisory Council Issue Paper assumes that baseline sentences guide the fixing of non-parole periods as opposed to head sentences. This reverses a long tradition of jurisprudence that takes the opposite approach. This approach shifts the focus away from a consideration of the appropriate length of imprisonment, taking into account that parole may not be granted at the earliest opportunity. A focus on the fixing of the non-parole period with less regard to the appropriate head sentence, wrongly presumes that an offender will be permitted release on parole at the earliest opportunity.

Children

We also assume that baseline sentencing will not apply to the Magistrates' and Children's Courts, but it will apply to children sentenced for baseline offences in the higher courts. It is our firm view that baseline sentences should not apply to children in any jurisdiction given that the baseline sentencing proposal runs counter to the sentencing priorities set out in sections 361 and 362 of the *Children, Youth and Families Act* 2005.

We note in addition that incarceration of children engages with rights under the *Victorian Charter of Human Rights and Responsibilities* (2006)[1], directing specific attention to children based on their vulnerability and providing for the nurture and protection as a paramount consideration.

Key international instruments[2] which inform the content of these rights, make clear the following principles which appear inconsistent with baseline sentencing:

- Imprisonment of a child shall only be used as a measure of last resort, for the shortest appropriate period of time and should be limited to exceptional cases;
- The desirability of promoting the child's reintegration into society and the well-being, present and future, of the child should be the guiding factors in the consideration of his or her case;
- The use of deprivation of liberty has negative consequences for a child's harmonious development and seriously hampers his/her reintegration in to society.

Complexity

Baseline sentencing will add a layer of complexity across the whole of the criminal justice system, not just sentencing hearings. Whichever model of baseline sentencing is introduced will create a highly technical process that discards much of the time honoured jurisprudence that currently guides sentencing practice.

Delay

Baseline sentencing represents a significant risk to achieving a more efficient system. A greater number of contested matters can be expected, given the consequences in sentencing where aggravating factors are alleged. will compound existing delay in criminal cases proceeding to conclusion. Longer delays cut across the public interest in having people charged with a criminal offences brought before the court expeditiously and impacts negatively on the public perception of the administration of justice. Longer

[1] Specifically: sections 17(2) Protection of a child's best interests without discrimination, 25(3) Rights in criminal proceedings, and 23(3) Children in the criminal process.
[2] The Convention on the Rights of the Child (1989); UN Rules for the Protection of Juveniles deprived of their Liberty (1990); Committee on the Rights of the Child General comment 10 – Children's Rights in Juvenile Justice (2007); UN Standard Minimum Rules on administration of Juvenile Justice – Beijing Rules (1985))

delays, and more costly matters, will invariably flow from the introduction of baseline sentences for a range of reasons including:

- A reduction in the number of pleas of guilty, due to the high likelihood of a sentence of imprisonment even on a guilty plea, and a consequent increase in lengthier, more complex trials;
- Greater numbers of contested pleas of guilty, i.e., where the facts are disputed (particularly allegations of aggravating factors) to determine the objective seriousness of the offence;
- Longer pleas of guilty given the greater complexity of the sentencing process;
- More and longer committal hearings being run purely to settle the factual basis for a plea of guilty;
- More appeals against sentence as the system of baseline sentencing settles.

By way of example in reference to the categories set out on page 13 of the Baseline Sentences Issues Paper, it is not hard to conceive of lengthy committals or contested pleas being run to clarify issues including whether an offender was involved in the planning of the crime, or whether they were an active participant in group offending.

Already Victoria has the worst trial delays in Australia. County Court data for the last three years shows two concerning facts:

1. The County Court's clearance rate is consistently less that 100%. The backlog is therefore growing; and
2. Time to trial is trending upwards with it taking an average 4.1 months longer to reach a trial now than it did in 2008 – 09.

Despite the recent gains achieved by improvement in justice system efficiencies, the introduction of baseline sentences will overwhelm the current suite of thoughtful and creative delay reduction initiatives being undertaken cooperatively by criminal justice agencies in Victoria.

Lack of Flexibility

VLA supports judicial discretion in sentencing. Our experience is that every criminal case is different and requires a tailored response to carefully balance the competing interests. In some cases lengthy terms of imprisonment are plainly required to do justice while in others the right outcome is a merciful one. Those who practice in criminal law both as prosecutors and defence lawyers learn quickly that it is very hard to put cases and offenders into strict categories and that attempts to do so lead to injustice. We are concerned that the baseline sentencing approach will unhelpfully fetter judicial discretions such that a nuanced and individualised approach to victims, offenders and the community may be sacrificed to the objective of consistency in sentencing.

RESPONSE TO QUESTIONS

Determining the baseline sentence that will apply

Which model, the Objective Offence Seriousness Model or the Combined Model, is best suited to implementing a baseline or are there other models that should be considered?

The Objective Offence Seriousness Model is preferred to the Combined model as it maintains appropriate judicial discretion, presuming the baseline would be determined by reference only to matters relevant to the conduct of the offending which constitute the essential elements of the offence. This model is:

- More likely to produce a system of baseline sentencing where only one baseline is to be considered, as opposed to multiple baseline, for each offence;
- Less likely to result in arbitrary and inflexible sentencing outcomes that hinge on the objective classification of offence seriousness and placement of the offences in one of multiple categories that have set sentencing ranges attached;
- Less likely to result in contested committal hearings and contested pleas to determine which of a number of objective categories of offence seriousness should apply; and
- Less likely to result in the same aggravating or mitigating factors being taken into account more than once.

The amending legislation should explicitly state that if, and only if, the threshold decision is made that a term of imprisonment is warranted, does the baseline sentence become a relevant consideration and is the starting point for the sentencing judge to determine the appropriate length of non-parole period. Although this conclusion appears to be implicit in the regime, we cannot stress enough the importance of making it clear.

If the Objective Offence Seriousness Model is adopted how should courts apply the baseline to offences that do not fit within the specified range (that is, if mid-range, those offences that do not come within the mid-range of objective offence seriousness)?

The baseline should reflect a 'neutral' example of the offence, that is an example that takes in, to the greatest extent possible, only the bare elements constituting that offence. The objective seriousness of the offending before the court should be compared to the this neutral example of the offence. In this way, the baseline can truly be treated as a starting point in matters where imprisonment is deemed to be appropriate.

The baseline should be applied, in all cases whether in the mid-range or not, as an indicative starting point so as to allow judges to depart from the baseline on the basis that the offending is objectively more or less serious than the neutral example of the offence.

The sentencing judge would also consider aspects of the offending that constitute both objective and subjective factors, and those factors particular to the offender.

For example, for the offence of Intentionally Causing Serious Injury, a single punch that causes a broken nose and a lost tooth may be considered a neutral example of the offence, as opposed to a glassing or a stabbing which would be objectively more serious, given the use of a weapon.

Similarly, a neutral example of rape might be one involving so-called 'date rape' where in the context of some alcohol use and some sexual or quasi-sexual activity the offender refuses to take no for an answer. To put it another way, a neutral example of rape might be considered to be penetration without consent in the absence of any aggravating features such as threats or violence (beyond the violence inherent in all examples of rape).

The neutral example of different offences will reflect different points on the spectrum of seriousness. That is, there should be no expectation that each neutral example will reflect, for example, the median sentence, the halfway point or any other consistent measure. It will depend wholly on an assessment of the particular offence. This approach will avoid the risks associated with being too rigid about what the baseline represents.

In either model, what factors should be excluded and left to apply as aggravating or mitigating factors in moving up or down from the baseline?

The baseline should represent the bare elements of the offence and departure from that starting point should be proportionate to the objective and subjective seriousness of the offence. The baseline should not represent any factors that go beyond the elements of the offence. That is, in determining the baseline, only factors that will be present in all offences of that type should be considered.

The baseline should not be determined by those elements of the offence that are dependent on an assessment of who the offender is, or positional factors relevant to a specific accused such as those in a position of trust. Factors relevant to the particular accused should be excluded from the determination of the baseline. As these factors will apply differently in every case, broad judicial discretion is critical to ensuring these factors are considered in the most appropriate way in departing from the baseline.

While there are difficulties with the objective seriousness model, in that it is often difficult to separate the offence itself from the offender, it is preferred to the combined model. The difficulty in untangling what is a purely objective or subjective factor will never be clear as many features of offending behaviour go to both objective offence seriousness and offender culpability. Further the greater the level of specificity in the baseline the greater the potential for error and unjust consequences unintended by the legislature.

In any system of baseline sentencing, use of aggravating or mitigating features of an offence should not be permitted to be taken into account twice. In order to avoid

aggravating factors being taken into account more than once, the baseline should represent only objective factors that are not related to the specific accused.

According to this model, all objective factors would be considered in departing from the baseline. This would only allow departure below the baseline on the basis that the offending is objectively less serious because of factors specific to the offender. For example, severe intellectual disability of an offender would allow a sentence below the baseline as this makes the offence objectively, as well as subjectively, less serious.

By way of example referring to Case Study 2 on page 11 of the Baseline Sentencing Issues Paper, the offence of rape was committed during a home invasion. This presents a dilemma for the sentencing judge: is it a rape that is more serious because it occurs in the victim's home, or is it a serious home invasion because of the intent to rape? The preferred approach is that the rape (which represents the base sentence) is assessed against an example of a rape that occurs in the absence of a home invasion. Accordingly, this aggravating factor of the rape is taken into account at the point of determining the objective seriousness of the offence, with reference to the baseline, but not again taken into account as a factor of aggravation when determining the subjective factors that apply.

Those subjective factors would include, for instance, actual victim harm. That the rape caused significant physical and psychological injury are aggravating features that are to be considered in departing from the baseline.

To what extent should the courts have to state expressly the aggravating and mitigating factors they have taken into account in departing from the baseline?

If the baseline is to represent the elements of the offence and the objective offence seriousness is to be determined compared to that baseline, courts would give reasons for departing from the baseline on the basis of aggravating and mitigating factors in the ordinary way.

The aggravating and mitigating factors, however, that allow departure from the baseline should not be proscribed. Rather, these should apply as dictated by current sentencing practices.

Multiple baselines for an offence, or redefined offences?

Should some offences have multiple baselines and why?

A system of single baseline sentence is preferable to multiple baselines.

The concept of multiple baselines for single offences is superficially attractive, particularly for offences that have commonly arising circumstances that are divergent in objective seriousness.

Multiple baselines will lead to greater numbers of contested committals and pleas, and greater numbers of trials. This will have significant implications for court delays and system efficiency.

What problems would be associated with having multiple baselines for some offences but not for others?

While we do not support multiple baselines, *if* multiple baselines were introduced, consistency would dictate that multiple baselines should apply for all offences. A system that incorporated single and multiple baselines would suffer for reasons of complexity.

If some offences but not others have multiple baselines, the risk is that judges will use the rationale behind multiple baselines as a guide when departing from a single baseline offence.

For example, if a multiple baseline offence contains baselines at three, six and nine years for low, mid and high rage offending, a court may extrapolate this reasoning to single baseline offences with the same maximum penalty, i.e., that three years should mark the difference between low, mid and high range offending. This exercise will be artificial and unhelpful because multiple baselines will presumably be set for the specific offences for which they are imposed and not aimed at providing a guide to other offences where single baselines are considered warranted.

Does having baseline levels with prescribed factors result in the court having less scope to determine the appropriateness of a penalty having reference to the individual circumstances of the case?

The setting of the baseline cannot be arbitrary. While the factors should not be prescribed, it should be clear that the number arrived at for each baseline reflects a specific neutral example or examples, based on current sentencing practices.

This approach will promote transparency and avoid the counting of aggravating factors more than once. It will make it clear to everyone, what factors remain relevant to the 'individual circumstances of the case' and maintain appropriate discretion for the sentencing judge.

What should not be proscribed are the factors that a judge can take into account in *departing* from the baseline. The individual matters that see variations on the baseline should remain in the province of the judge. That will produce appropriate and tailored outcomes.

Is redefining offences preferable to creating multiple baselines and if so, why?

Neither re-defining offences or creating multiple baselines will result in greater consistency in sentencing.

The creation of new offences will not necessarily encourage prosecuting authorities to make considered charging decisions. It is likely that people will increasingly be charged with alternatives and increasing numbers of contested matters will be the result.

Multiple baselines will likewise stimulate greater litigation at committal hearings, trials and pleas around the classification of offending as discussed above.

Does the creation of multiple baselines or the redefining of offences result in the creation of 'new offences'?

Creation of multiple baselines and redefining offences on the basis of aggravating factors will not necessarily criminalise conduct that is not already criminal. However, it is likely to create new offences with aggravating circumstances as elements of the offence. It is also likely to result in stratification of offences according to ways in which the offences are committed and the different penalties that apply. This would mean that applying a baseline to such offences would have to be done in a way that avoids a double-counting of aggravating factors. For example, if a new offence was created for intentionally causing serious injury *with a weapon*, it should be impermissible to consider the use of a weapon as an aggravating factor that allows for a sentence above the baseline.

Would having multiple baselines or redefining offences impact on charging practices and plea negotiations? If so, what impact will this have on resources?

Multiple baselines and redefined offences will have a significant impact on charging practices and plea negotiations.,

If either of these changes are introduced it is expected that police will increasingly charge with alternatives that include the aggravated version of the office, or will allege aggravating factual circumstances that will attract a higher baseline. This will result in an increased number of contested matters, either trials that dispute the aggravated offence or pleas that dispute the facts. We expect that these changes will cause negotiations to be more protracted, pleas to be longer, and an increased number of lengthier trials.

How should baseline sentences apply in cases involving multiple offences?

Which baseline should apply in multiple cases:

(a) the baseline of the base sentence; or

(b) the baseline of the offence with the highest baseline?

The baseline of the base sentence should apply in cases involving multiple offences. For the reasons set out in the Issues Paper, this is most consistent with current sentencing practices and enables a sentence to be more suitably tailored to the most relevant offence.

How would the baseline operate in situations where an aggregate sentence is normally appropriate?

In imposing an aggregate sentence for multiple offences where more than one offence involves a baseline, a sentence would first be imposed for the base offence, and additional sentences would be layered on top for the additional offences, to determine an aggregate non-parole period.

Where there are multiple offences, but only one baseline offence, a sentence would first be imposed for the baseline offence, then additional sentences are layered on top for additional offences to determine an aggregate sentence.

While this approach is counter-intuitive in the sense that the non-parole period will be arrived at before the head sentence, an aggregate sentence can still be imposed where appropriate. The customary approaches to totality would be taken into account and judicial reasoning as to each step would need to be made explicit.

What is the likely impact on non-baseline offences that are co-sentenced with baseline sentences?

Confusion will result from situations where a non-baseline offence is the central offence around which other baseline offences revolve. For example, an offence of intentionally causing injury for causing a broken nose (non-baseline) may be accompanied by a minor arson (baseline) for, say, burning a letterbox. The assault is the more objectively serious offence around which the arson sentence should revolve, but the system of baseline sentences would make this difficult to achieve.

The above example also shows that sentences for associated non-baseline offences may be pulled towards baseline sentences in accordance with their relative seriousness. Arson has a maximum penalty of 15 years and intentionally causing injury has a maximum penalty of 10 years. If, for example, arson had a baseline set at five years (one third of the maximum) it might be tempting logic to extrapolate that intentionally causing injury would also have a 'de facto baseline' of one third of the maximum, being three years and four months.

Relationship between the median and the baseline

What should be the relationship between the median and the baseline?

There should be no requirement that there be a mathematical relationship between the baseline and the median non-parole period actually imposed over time. It is overly simplistic to view the baseline as representing the median sentence and to do so risks perverse sentencing outcomes, particularly for those offences, involving distinct patterns of offending behaviour across a spectrum of seriousness.

Which offences should have a baseline?

Should there be other offences, other than 'serious' and 'significant offences', that should be subject to a baseline?

We recommend that threatening to kill should be removed entirely from any proposed scheme. This offence is commonly prosecuted either in the Magistrates' Court or alongside other significant offences in the higher courts. Prescribing baseline sentences to this relatively minor offence will place a significant burden on the higher courts and make a serious contribution to court delays.

We also recommend that the following offences also be subject to a baseline (should the scheme be expanded beyond an initial trial):

- Culpable driving causing death
- Cultivation of narcotic plants – large commercial quantity
- Cultivation of narcotic plants – commercial quantity

On what basis should these additional offences be subject to a baseline?

We recommend that the above additional offences be included in a baseline sentencing scheme should it proceed beyond an initial trial because these offences are*:*

- Sufficiently serious, yet not scheduled
- Exclusively dealt with on indictment
- Suffer from a perception that the community's view is sentencing for these offences are inconsistent or too lenient.

If additional offences are being considered, is it better to suggest a trial of the proposed offences first to determine their impact on the justice system.

Given the departure from current sentencing practice that baseline sentencing represents, its introduction should be limited to a trial for the following offences only:

- intentionally cause serious injury;
- recklessly cause serious injury;
- rape; and
- persistent sexual abuse with a child under 16.

While charging decisions, committal proceedings, application for summary jurisdiction, and plea negotiations will all take on additional significance for these offences if a baseline sentence is to apply, there are already processes in place that will allow these matters to be considered at an early stage.

CONCLUSION

If the Government introduces a system of baseline sentences, those baselines should be determined for each offence based on an objective offence seriousness model with reference to neutral examples of the offence in question. The head sentence and non-parole period would be set using the baseline as an indication of the appropriate starting point for all baseline offences where imprisonment is appropriate. Such a system would allow aggravating and mitigating factors to guide any departure from the baseline to either increase or moderate the sentence, at the judge's discretion.

For matters that are objectively more serious than a neutral example of the offence, a departure above the baseline would be appropriate, subject to subjective factors. Offending would be considered objectively less serious than a neutral example of the offence when circumstances that go to the objective and subjective seriousness of the offence are considered.