

**CONSTITUTIONAL VALIDITY OF PROPOSED SENTENCING
GUIDELINES COUNCIL**

MEMORANDUM OF ADVICE

1. We are briefed to advise the Sentencing Advisory Council (the **Advisory Council**) on the constitutional validity of a proposal to establish a Sentencing Guidelines Council in Victoria (a **Guidelines Council**).

Summary of advice

2. In summary, we advise as follows:
 - 2.1 It should be possible to implement the essential features set out in paragraph 12 below, and the proposed features set out in paragraph 13 below, under either of the “Council-approval” model or the “Court-approval” model described in paragraphs 8-9 below.
 - 2.2 The key aspects of the proposal that support those conclusions are:
 - (a) the Guidelines Council will be established to be independent of the executive and legislature, and its functions will be confined to preparing sentencing guidelines (and incidental functions);
 - (b) the process for making a sentencing guideline will be open and fair (in the sense that the Guidelines Council will provide an opportunity to interested persons to make submissions, but will not be bound to follow any of those submissions);
 - (c) although a sentencing guideline may contain numerical guidance, the guideline will attempt to set out as comprehensively as possible the factors that go into setting the starting point and the sentencing range;
 - (d) further, a sentencing court will retain the discretion to reach a sentencing decision that takes account of all relevant factors, and is just and proportionate in all the circumstances of the case;

- (e) in addition, the court will retain a real discretion to depart from a guideline in appropriate circumstances.

2.3 Both the “Council-approval” and the “Court-approval” model have constitutional risks, although those risks are different.

- (a) The main risk with the “Council-approval” model is that a sentencing guideline might be seen as attempting to direct a sentencing court in the exercise of its jurisdiction. However, that risk can be addressed through controlling the content of a sentencing guideline, as outlined in paragraphs 2.2(c)-2.2(e) above.

- (b) In our view, the proper characterisation of a sentencing guideline as “legislative” or “executive” does not, in itself, bear on constitutional validity: see paragraphs 55-57 below.

- (c) The “Court-approval” model reduces (but does not remove) the risk that a sentencing guideline would be seen as an impermissible direction. However, there is a countervailing risk that the function of the Court of Appeal approving a guideline would itself be invalid.

2.4 A sentencing court could validly apply a State sentencing guideline for a State offence when exercising federal jurisdiction (such as when an offender is prosecuted for both federal and State offences).

- 3. We have made some minor drafting comments at paragraphs 67, and 78-79 below.

BACKGROUND

Proposal

- 4. On 25 May 2017, the Premier announced that the Government will move to create a Guidelines Council in Victoria. The proposed Guidelines Council would engage with the community and provide guidance to the courts on sentencing for specific crimes, and would be based on the sentencing councils now functioning in the United Kingdom. The Premier stated that the Government intended to introduce legislation to establish the Guidelines Council in 2018.

5. We are instructed that, in July 2017, the Attorney-General asked the Advisory Council to conduct consultation and then advise on the appropriate features of a Guidelines Council in Victoria by 29 March 2018. The Advisory Council was specifically asked to consider the features of the sentencing guidelines councils in England and Wales, and Scotland.
6. The Advisory Council had previously set out an “aspirational model” for a Guidelines Council in Ch 8 of the report *Sentencing Guidance in Victoria* (June 2016).
 - 6.1 The Advisory Council stated that its preferred model was a “dialogue model”, based on the Scottish system. Under that model, sentencing guidelines would be prepared by an independent council, but those guidelines would not come into effect until they were approved by the Victorian Court of Appeal: p 215 (figure 9).
 - 6.2 The Advisory Council set out some obstacles that would need to be overcome (such as the need for significant resources): paragraphs 8.78-8.81, and discussed the constitutional issues raised by that proposal: paragraphs 8.111-8.126.
 - 6.3 The Advisory Council stated that a Guidelines Council could address some of the issues identified with the combined guideline judgments and standard sentence scheme reforms. However, that model represented a significant departure from the current sentencing framework and would require further development: paragraph 8.2.

Three models

7. In outline, there are three possible models for how sentencing guidelines might be given effect.
8. The first model (the **Council-approval model**) is that sentencing guidelines come into operation when they are issued by the Guidelines Council, without the need for approval by any other body. That is the model in England and Wales.
9. The second model (the **Court-approval model**) is that the sentencing guidelines only come into operation once they are approved by the lead court of the

jurisdiction (in Victoria, the Court of Appeal). The court has power to approve, modify or reject a proposed sentencing guideline. That is the model in Scotland.

10. The third model (the **Legislative-approval model**) is that sentencing guidelines only come into operation after they have been tabled in Parliament for a specified period. The Parliament would have power to disallow, but not to modify, a proposed sentencing guideline. That is the model in New Zealand.
11. We are instructed that the Attorney-General does not seek advice on the Legislative approval model.

Essential features

12. The Advisory Council considers that the following five features would be essential to achieving the objectives of a Guidelines Council:
 - 12.1 the membership of the Guidelines Council would need to include non-judicial (that is, legal and community) members;
 - 12.2 the Guidelines Council would need to include sitting judicial members, and preferably a judicial majority;
 - 12.3 the process of creating sentencing guidelines would need to involve broad-based consultation with criminal justice stakeholders, the judiciary and the general community;
 - 12.4 the Guidelines Council would need to be able to produce comprehensive sentencing guidelines in a form similar to a sentencing guideline produced by the Sentencing Council for England and Wales;
 - 12.5 sentencing guidelines created by the Guidelines Council would need to be capable of having some legal effect (and could not be merely advisory), and must have the capacity to affect sentencing practices (including by changing the common law).

Proposed features

13. The Advisory Council also proposes (and will seek stakeholders' views on) the following features of the Guidelines Council:

- 13.1 The purposes of the Guidelines Council would be to promote public confidence in the criminal justice system, and to promote consistency in courts' approach to sentencing. Those are also the objectives of guideline judgments: see *Sentencing Act 1991* (Vic) (the **Sentencing Act**), s 6AE(a)-(b).
- 13.2 The functions of the Guidelines Council would be limited to the following:
- (a) the creation of sentencing guidelines;
 - (b) consultation relating to the creation of those guidelines; and
 - (c) any associated functions, such as publishing and publicising those guidelines.
- 13.3 The Guidelines Council would consist of a majority of judicial members (7 members), as well as legal and community members with knowledge and expertise in criminal justice (6 members), such as the Director of Public Prosecutions.
- 13.4 The Guidelines Council would not be required to provide advice to, or receive direction from, the judiciary, the legislature or the executive.
- 13.5 The Attorney-General would be able to request the Guidelines Council to create a sentencing guideline on a topic. The Guidelines Council would not be required to comply with such a request, but would possibly be required to provide reasons for a refusal. The Victorian Court of Appeal would not be able to make a formal request for the creation of a guideline, but could indicate in obiter dicta that a certain offence or category of offences would benefit from guidance.¹
- 13.6 The Guidelines Council would be required to publish draft sentencing guidelines as part of the process of consultation.

¹ Cf *Director of Public Prosecutions v Rapid Roller Co Pty Ltd* [2011] VSCA 17 at [15], where Nettle JA stated that, but for the form of the appeal, that case “may well have provided an opportunity for this court to give some guidance to sentencing judges as to the adequacy of the current sentencing practices.”

Draft Issues Paper

14. The proposal is set out in more detail in the Advisory Council’s draft Issues Paper titled *A Sentencing Guidelines Council for Victoria* (November 2017) (the **draft Issues Paper**). The draft Issues Paper includes some observations on the constitutional issues raised by the proposed Guidelines Council, which are included in the summary of the draft Issues Paper in paragraphs 15-39 below.

Guidelines Council: purposes, composition and functions

15. It is proposed that the Guidelines Council would be guided by two overarching purposes:
- 15.1 promoting consistency of approach in sentencing; and
 - 15.2 promoting public confidence in the criminal justice system.²
16. The purposes of the Guidelines Council should reflect constitutional limitations arising from the fact that Council members will include sitting judicial officers. Consequently, the Guidelines Council could not conduct any activity that:
- 16.1 is an integral part of, or closely connected with, the functions of the legislature or the executive;
 - 16.2 involves giving advice to the government; or
 - 16.3 is at the behest or direction of the government.³
17. The proposed composition of the Guidelines Council is as follows:⁴
- 17.1 seven judicial members, comprising two justices of the Supreme Court (including at least one justice of the Court of Appeal); two judges of the County Court; the President or a magistrate of the Children’s Court; and two magistrates of the Magistrates’ Court;
 - 17.2 six legal and community members who, in the opinion of the Attorney-General, would have expertise, knowledge or skills relevant to

² Draft Issues Paper, paragraph 2.20.

³ Draft Issues Paper, paragraphs 2.12-2.13.

⁴ Draft Issues Paper, paragraph 3.28.

sentencing and criminal justice and the work of the Guidelines Council;
and

- 17.3 one of the two Supreme Court justices would be the Chairperson.
18. It is not proposed that the heads of a court be appointed automatically as members; however, the heads of a relevant court may be appointed as members of the Guidelines Council.⁵
19. The judicial members of the Guidelines Council would be appointed by the Governor in Council, on the recommendation of the head of the relevant court. The head of the court would be required to consult with the Attorney-General before recommending the appointment of a judicial officer.⁶ The Chairperson of the Guidelines Council (the senior judicial member) would be appointed by the Governor in Council on the recommendation of the Chief Justice.⁷
20. As the members of the Guidelines Council will include sitting judicial officers, there will be constitutional limits on the types of functions that the Council can perform. The Guidelines Council cannot act as a mere instrument of government policy. Two key factors are the precise functions required of judicial members, and the independence of the Guidelines Council from government direction.⁸
21. The proposed functions of the Guidelines Council are as follows:
- 21.1 to develop and issue sentencing guidelines for use by the judiciary when sentencing;
- 21.2 to consult with the general community, the courts, government departments and other interested persons or bodies when developing and issuing sentencing guidelines; and
- 21.3 to perform related functions, such as publishing or publicising sentencing guidelines.⁹

⁵ Draft Issues Paper, paragraphs 3.19-3.20.

⁶ Draft Issues Paper, paragraphs 3.33, 3.36.

⁷ Draft Issues Paper, paragraph 3.39.

⁸ Draft Issues Paper, paragraphs 3.12-3.13.

⁹ Draft Issues Paper, paragraph 3.47.

22. There are constitutional limits on the functions that the Guidelines Council can perform. In particular, the Council cannot perform any function that:
- 22.1 is an integral part of, or closely connected with, the functions of the legislature or the executive;
 - 22.2 involves the giving of advice to the government; or
 - 22.3 is at the behest or direction of the government.¹⁰

Process for developing sentencing guidelines

23. It is proposed that a sentencing guideline would be initiated on the Guideline Council's own motion, or at the request of the Attorney-General (although the Council would not be required to comply with the Attorney-General's request). The Guidelines Council would decide whether to initiate the development of a guideline by reference to the purposes of the Council.¹¹
24. The preliminary view is that, at a minimum, the required consultation is that the Guidelines Council: publish draft guidelines; and be required to consult with the general community, the courts, government departments, and other interested persons or bodies. The preliminary view is there should not be any facility by which the Guidelines Council could bypass consultation in order to publish an urgent sentencing guideline.¹²
25. An important issue is how and when guidelines come into operation, particularly the choice between the Court-Approval and the Council-Approval models referred to in paragraphs 8-9 above.
- 25.1 The Advisory Council notes that there are constitutional risks associated with the Court-Approval model, including that:
 - (a) the approval process might be contrary to the essential characteristics of a court;

¹⁰ Draft Issues Paper, paragraph 3.45.

¹¹ Draft Issues Paper, paragraphs 4.15-4.16.

¹² Draft Issues Paper, paragraphs 4.36-4.37.

- (b) the criteria by which the court would determine whether to approve, reject or modify a sentencing guideline might not give the court sufficient discretion; and
- (c) the court could therefore end up “making”, rather than “applying”, the law.¹³

25.2 On the other hand, the Advisory Council notes that, if sentencing guidelines are intended to have legal effect and bind courts in Victoria, the Court-Approval model might carry less risk than the council approval model.¹⁴

- 26. The Advisory Council does not give a preliminary view on whether it would be more appropriate for sentencing guidelines to be approved by the Guidelines Council or by the Court of Appeal. Both options carry unique risks.¹⁵
- 27. The preliminary view is that sentencing guidelines should come into effect on a date determined by whichever body approves the guidelines, rather than taking effect immediately on publication.¹⁶

Content of sentencing guidelines

- 28. It is proposed that the Guidelines Council would have power to prepare sentencing guidelines, consistent with the Sentencing Act,¹⁷ that set out:
 - 28.1 the appropriate level or range of sentences for a particular offence or class of offence;
 - 28.2 criteria to be applied in selecting from various sentencing alternatives;

¹³ Draft Issues Paper, paragraph 4.43.

¹⁴ Draft Issues Paper, paragraph 4.44.

¹⁵ Draft Issues Paper, paragraphs 4.50-4.51.

¹⁶ Draft Issues Paper, paragraph 4.53.

¹⁷ The Sentencing Act sets out the purposes for which a sentence may be imposed: s 5(1); and a range of factors, such as the maximum penalty: s 5(2)(a); and the circumstances in which the court may take account of matters such as the totality of the offending that constitutes the course of conduct: s 5(2F). The Sentencing Act contains other provisions, such as serious offender provisions: Pt 2A, and continuing criminal enterprise provisions: Pt 2B.

- 28.3 the weight to be given to the various purposes specified in the Sentencing Act for which a sentence may be imposed;
 - 28.4 the criteria by which a sentencing court is to determine the gravity of an offence;
 - 28.5 the criteria that a sentencing court may use to reduce the sentence for an offence;
 - 28.6 the weight to be given to relevant criteria;
 - 28.7 any other matter consistent with the principles of the Sentencing Act; and/or
 - 28.8 a non-exhaustive list of permissible reasons to depart from a sentencing guideline.¹⁸
29. It is also proposed that the Guidelines Council could prepare offence-based guidelines, setting out the appropriate level or range of sentences for a particular offence or class of offence. An offence-based guideline would:
- 29.1 be structured in a form similar to an offence-based guideline produced by the Sentencing Council for England and Wales;
 - 29.2 preserve judicial discretion; and
 - 29.3 explain the principles on which the numerical guidance is based, such that any sentencing ranges are linked to factors that lead to the imposition of sentences within that range.¹⁹
30. An offence-based guideline may create a staged decision-making process. For example, a sentencing guideline in England and Wales dealing with rape offences²⁰ creates an 9-stage process, as follows:
- 30.1 Offence category: the court determines the offence category of harm and culpability into which the offence falls by reference to a table of factors.

¹⁸ Draft Issues Paper, paragraph 4.107.

¹⁹ Draft Issues Paper, paragraph 4.108.

²⁰ See draft Issues Paper, Appendix 2.

- 30.2 Starting point and category range: having determined the offence category, the court uses the corresponding starting points to reach a sentence within the category range. That step involves identifying the starting point, and adjusting for aggravating and mitigating features of the offending.
- 30.3 Factors that indicate a reduction: the court considers any factors that indicate a reduction, such as assistance to the prosecution.
- 30.4 Reduction for guilty pleas: the court determines the appropriate reduction in sentence (where relevant) according to a separate guideline relating to guilty pleas.
- 30.5 Dangerousness: the court considers whether, according to the statutory scheme relating to dangerous offenders, a life sentence is appropriate.
- 30.6 Totality: when sentencing an offender for more than one offence, or where an offender is already serving a sentence, the court considers whether the total sentence is just and proportionate to the offending behaviour.
- 30.7 Ancillary orders: the court must consider making ancillary orders (including those that automatically apply).
- 30.8 Reasons: the court must give reasons and explain the effect of the sentence.
- 30.9 Time spent on bail: the court must consider whether to give credit for time spent on bail.²¹
31. The Advisory Council considers that those nine steps (except for the specification of ranges and starting points at step 2) essentially codify a set of considerations already used by judicial officers in Victoria, and in the order in which most courts already apply those considerations.²²
32. The Advisory Council considers that a sentencing guideline that is numerically prescriptive might be constitutionally permissible, provided that a court applying

²¹ Draft Issues Paper, paragraph 4.71.

²² Draft Issues Paper, paragraph 4.72.

the guideline retains a discretion to reach an appropriate sentence that takes account of all the relevant circumstances of each individual case. A sentencing guideline would comprehensively articulate factors that must be considered by a court when determining a sentencing range and starting point.²³

33. The sentencing guidelines would be likely to override the current “instinctive synthesis” approach to sentencing in Victoria.²⁴

Applying sentencing guidelines

34. One issue in the application of sentencing guidelines is the effect that a sentencing court is required to give to a guideline. There are three possibilities:

34.1 the courts would be required to “have regard” to a sentencing guideline;

34.2 the courts would be required to “follow” a guideline; or

34.3 the courts would be required to sentence in a manner “consistent with” a sentencing guideline.²⁵

35. The Advisory Council notes that a legislative requirement for courts to “have regard to”, “follow” or sentence “consistently with” a sentencing guideline creates a constitutional risk that the court might be seen to be acting at the

²³ Draft Issues Paper, paragraphs 4.98, 4.101.

²⁴ Draft Issues Paper, paragraph 4.102.

²⁵ Draft Issues Paper, paragraph 5.2.

dictation of the executive.²⁶ A question is raised whether the following elements would minimise that constitutional risk:

- 35.1 sentencing guidelines should contain sufficient detail about the kinds of cases for which the guideline is appropriate (including the range of factors relevant to the offending and the offender that must be considered and that lead to the particular sentence being imposed);
 - 35.2 sentencing guidelines that contain a reference to starting points or category ranges should link that numerical guidance to the factors for consideration by the court that suggest the use of that starting point, or the imposition of a sentence within those ranges;
 - 35.3 a court, in applying a sentencing guideline, should retain the discretion to reach a sentencing decision that: takes into account all the relevant features of the offending and the offender; and is just and proportionate in all the circumstances of the case; and
 - 35.4 a court must retain a discretion to depart from a sentencing guideline.²⁷
36. It is likely that a sentencing court would be found to have not followed a sentencing guideline (so as to amount to appellable error) in three circumstances:
- 36.1 a misapplication of the guideline (including applying the steps out of order, or applying a step incorrectly, in a way that affects the sentencing exercise and that is not in the interests of justice);
 - 36.2 using a starting point outside the offence range, when it is not in the interests of justice to do so;
 - 36.3 failing to explain how the court applied the sentencing guideline.²⁸

²⁶ Draft Issues Paper, paragraph 5.36.

²⁷ Draft Issues Paper, paragraph 5.39.

²⁸ Draft Issues Paper, paragraph 5.17.

37. A second issue is specifying the circumstances in which the court may legitimately depart from a guideline.

37.1 In England and Wales, a court must follow any relevant sentencing guideline unless the court is satisfied that it is “contrary to the interests of justice” to do so.²⁹

37.2 An alternative possibility is that courts might be required to follow a relevant guideline unless there were “substantial and compelling reasons” or “exceptional circumstances” not to do so. However, the Advisory Council would caution against a test that was more restrictive of judicial discretion than “the interests of justice” test.³⁰

38. A third issue is specifying the effect of a sentencing guideline on existing sentencing practices.

38.1 It is proposed that sentencing guidelines would supplant existing common law precedents. For certainty, the legislation would state expressly that, if a sentencing guideline has been published, “past common law purporting to address the same issue(s) would no longer apply”.³¹

38.2 The Advisory Council is considering whether a sentencing guideline would apply to offences committed before, as well as after, the guideline came into operation. If a sentencing guideline is to operate on offences committed before the guideline came into operation, the legislation would need to express that intention unambiguously.³²

38.3 However, if a person was sentenced before the commencement of a sentencing guideline, the legislation would expressly prohibit appeals by either party on the ground that the original sentence had been rendered either manifestly excessive or manifestly inadequate by the

²⁹ Draft Issues Paper, paragraph 5.22, referring to *Coroners and Justice Act 2009* (UK), s 125(1).

³⁰ Draft Issues Paper, paragraphs 5.23-5.24.

³¹ Draft Issues Paper, paragraph 5.75.

³² Draft Issues Paper, paragraphs 5.42ff, in particular paragraph 5.51.

issuing of the new sentencing guideline.³³ Further, if a sentencing guideline were issued after a person was sentenced, that guideline would not be applicable to the re-sentencing of that offender following a successful appeal.³⁴

39. It is proposed that the Court of Appeal may retain the power to issue guideline judgments. The Court of Appeal could also issue guidance on the appropriate interpretation of a sentencing guideline.³⁵

Example: England and Wales Theft Guideline

40. As noted in paragraph 29.1 above, it is intended that the Guidelines Council would have power to make an offence-based guideline, similar to those types of guideline made in England and Wales. We have been provided with the *Theft Offences: Definitive Guideline* (2015) (the **Theft Guideline**).

40.1 The Theft Guideline deals separately with general theft; theft from a shop or stall; handling stolen goods; going equipped for theft or burglary; abstracting electricity; and making off without payment.

40.2 The Theft Guideline applies to all offenders aged 18 or older, who are sentenced on or after 1 February 2016, regardless of the date of the offence: p 2.

41. In the case of general theft, the Theft Guideline provides that those offences are triable either on indictment or summarily, that the maximum is 7 years' custody, and that the offence range is discharge to 6 years' custody: p 3. The Theft Guideline sets out an 8-step decision making process for those offences.

42. Step 1 involves determining the offence category, by culpability and harm: p 4.

42.1 The Theft Guideline divides culpability into three categories (A to C), depending on specified characteristics: p 4. For example:

- (a) category A (high culpability) includes breach of a high degree of trust or responsibility, intimidation or use of threat or force;

³³ Draft Issues Paper, paragraph 5.64.

³⁴ Draft Issues Paper, paragraph 5.65.

³⁵ Draft Issues Paper, paragraphs 5.92-5.93.

- (b) category B (medium culpability) includes breach of some degree of trust or responsibility, and all other cases where characteristics for Categories A and C are not present;
- (c) category C (lesser culpability) includes where an offender was involved in the offence through coercion, intimidation or exploitation, or where there is limited awareness or understanding of the offence.

The Theft Guideline states that, where there are characteristics present that fall under different levels of culpability, the court should balance those characteristics to reach a fair assessment of the offender's culpability: p 4.

- 42.2 The Theft Guideline divides harm into 4 categories (1 to 4), by reference to financial loss and any significant harm suffered by the victim (including matters such as emotional distress, or the impact of the theft on a business): p 5.

43. Step 2 is determining a starting point and category range.

- 43.1 The Theft Guideline sets out a table, plotting the different levels of harm (categories 1 to 4) against the different levels of culpability (categories A to C): p 6. The table sets out a starting point and category range for each item in the table. For example:

- (a) in the most serious case (category 1 harm, category A culpability), the starting point is 3 years 6 months' custody, with a category range of 2 years 6 months' to 6 years' custody;
- (b) in the least serious case (category 4 harm, category C culpability), the starting point is a "Band B fine", with a category range of discharge to Band C fine.

- 43.2 The table refers to single offences. Where there are multiple offences, consecutive sentences may be appropriate (which is determined by a separate guideline relating to totality). If there are consecutive sentences, then an aggregate sentence in excess of 7 years may be appropriate: p 6.

- 43.3 If the offender is dependent or has a propensity to misuse drugs or alcohol, then a community order with drug rehabilitation requirement (under specific statutory provisions) may be a proper alternative to a short or moderate custodial sentence. If the offender suffers from a medical condition that is susceptible to treatment but does not warrant detention, then a community order with a mental health treatment requirement (under specific statutory provisions) may be a proper alternative to a short or moderate custodial sentence: p 6.
- 43.4 The court is then to consider further adjustment for any aggravating or mitigating factors. The Theft Guideline sets out a non-exhaustive list of aggravating and mitigating factors: p 7. There may be exceptional local circumstances that arise, which may lead a court to decide that prevalence should influence sentencing levels, by reference to harm caused to the community: p 7.
44. The remaining steps are described relatively briefly: p 8.
- 44.1 step 3 involves considering any factors, which indicate a reduction, such as assistance to the prosecution (in accordance with separate statutory provisions);
- 44.2 step 4 involves a reduction for any guilty plea (in accordance with a separate statutory provision and guideline);
- 44.3 step 5 is the totality principle (in accordance with a separate guideline);
- 44.4 step 6 involves considering confiscation, compensation and ancillary orders (in accordance with separate statutory provisions);
- 44.5 step 7 involves providing reasons (as required by statute);
- 44.6 step 8 involves considering whether to give credit for time spent on bail (in accordance with a separate statutory provision).

ANALYSIS

45. The proposal for a Guidelines Council raises constitutional issues at two stages:

- 45.1 first, the involvement of sitting judicial officers in the making of sentencing guidelines; and
- 45.2 secondly, the application by courts of a sentencing guideline when sentencing an offender.
46. The constitutional issue at each stage is whether the legislation will be consistent with the principle in *Kable v Director of Public Prosecutions (NSW)*³⁶ (the ***Kable* principle**). Relevantly, the *Kable* principle prevents a State from conferring a function on a State court that “substantially impairs the court’s institutional integrity, and which is therefore incompatible with that court’s role as a repository of federal jurisdiction”.³⁷

Making a sentencing guideline

47. The first constitutional issue concerns the involvement of sitting judicial officers in the making of sentencing guidelines. It is proposed that the Sentencing Guidelines council would contain a majority of members who are sitting judicial officers: see paragraphs 12.2, 13.3 and 17 above.
- 47.1 Under each model, sitting judicial officers would participate in a body that makes sentencing guidelines.
- 47.2 Under the Court-approval model, the Court of Appeal would have an additional role of deciding whether to approve or reject (or approve with modifications) a sentencing guideline.

State judges exercising functions in a personal capacity

48. When sitting as a member of the Guidelines Council, a judicial officer would be acting in a personal capacity, rather than as a member of the relevant court. Although holding office as a judicial officer would be a qualification for being appointed as a member of the Guidelines Council, the judicial officer would sit

³⁶ (1996) 189 CLR 1.

³⁷ See, for example, *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 (***Emmerson***) at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Kuczborski v Queensland* (2014) 254 CLR 51 (***Kuczborski***) at [139] (Crennan, Kiefel, Gageler and Keane JJ), [265] (Bell J).

on the Council detached from the Court, of which he or she is otherwise a member.³⁸

49. A State law that confers a function on State judges in their personal capacity is capable of infringing the *Kable* principle.³⁹ However, a function conferred on a judge in a personal capacity is less likely to undermine the integrity of the judge’s court as an institution, and to be invalid for that reason. That said, when the function is conferred on a State judge by reason of his or her judicial office (as in the proposal here), the fact that the function is conferred on the judge in a personal capacity will not determine whether there is incompatibility.⁴⁰
50. The functions that can validly be conferred on federal judges in their personal capacity provide guidance on what functions can be conferred on State judges in their personal capacity.⁴¹ The following principles apply to functions conferred on federal judges acting in a personal capacity:⁴²

50.1 The function must be performed “independently of any instruction, advice or wish of the Legislature or Executive Government, other than a law or instrument made under a law”.⁴³

³⁸ See, in relation to the Adult Parole Board, *Kotzmann v Adult Parole Board* [2008] VSC 356 (*Kotzmann*) at [32]-[33] (Judd J). See also *Drake v Minister for Immigration* (1979) 46 FLR 409 at 413 (Bowen CJ and Deane J); *Hilton v Wells* (1985) 157 CLR 70 at 72 (Gibbs CJ, Wilson and Dawson JJ), 80-81 (Mason and Deane JJ).

³⁹ *Wainohu v New South Wales* (2011) 243 CLR 181 (*Wainohu*) at [47] (French CJ and Kiefel J), [105] (Gummow, Hayne, Crennan and Bell JJ). A function cannot be conferred on a State judge in a personal capacity that is “substantially incompatible with the functions of the court of which the judge is a member”: *North Australian Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569 at 595 [39] (point 7) (French CJ, Kiefel and Bell JJ).

⁴⁰ See *Wainohu* (2011) 243 CLR 181 at [50] (French CJ and Kiefel J).

⁴¹ The federal doctrine of incompatibility and the *Kable* principle share a “common foundation” of preserving the institutional integrity of courts: *Wainohu* (2011) 243 CLR 181 at [105] (Gummow, Hayne, Crennan and Bell JJ).

⁴² See *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 (*Wilson*).

⁴³ *Wilson* (1996) 189 CLR 1 at 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ). See, in relation to State functions, *Wainohu* (2011) 243 CLR 181 at [160] (Heydon J, dissenting in the result).

- 50.2 A function cannot be conferred on a federal judge that is to be exercised on “political grounds”; that is, grounds that are not prescribed by law.⁴⁴ Accordingly, the fact that a function is performed pursuant to a detailed statutory framework can assist validity.⁴⁵
- 50.3 A federal judge cannot be given the function of providing a purely advisory opinion on a question of law to the executive.⁴⁶
- 50.4 Other relevant factors include: whether the judge is liable to removal by the Minister before the function is completed;⁴⁷ whether the function is one that judges have historically performed;⁴⁸ and whether the function is to be performed consistently with essential judicial attributes of openness, impartiality and fairness.⁴⁹

Participating in making a sentencing guideline

51. Two key factors are:
- 51.1 the grounds, on which the Guidelines Council perform their functions; and
- 51.2 the independence the Council enjoys from the executive when performing those functions.
52. A sentencing guideline is closely related to the function that courts routinely perform; namely, determining the appropriate punishment for an offence.

⁴⁴ *Wilson* (1996) 189 CLR 1 at 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); see also *Wainohu* (2011) 243 CLR 181 at [161] (Heydon J, dissenting in the result).

⁴⁵ Fiona Wheeler, “Constitutional Limits on Extra-Judicial Activity by State Judges: *Wainohu* and Conundrums of Incompatibility” (2015) 37 *Sydney Law Review* 301 (**Wheeler (2015)**) at 317.

⁴⁶ See *Wilson* (1996) 189 CLR 1 at 19-20 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *Wainohu* (2011) 243 CLR 181 at [162] (Heydon J, dissenting in the result); *Momcilovic v The Queen* (2011) 245 CLR 1 at [183] (Gummow J) (**Momcilovic**).

⁴⁷ See *Wilson* (1996) 189 CLR 1 at 18-19 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

⁴⁸ See *Wilson* (1996) 189 CLR 1 at 25 (Gaudron J). A striking example is the practice of State judges being appointed as acting Governor: Wheeler (2015) at 312.

⁴⁹ *Wainohu* (2011) 243 CLR 181 at [94] (Gummow, Hayne, Crennan and Bell JJ), quoting *Wilson* (1996) 189 CLR 1 at 22 (Gaudron J); Wheeler (2015) at 313.

- 52.1 It is true that a sentencing guideline makes that assessment at a general level, rather than by reference to the facts of a specific case. However, that is also true of the function already conferred of permitting the Court of Appeal to issue a guideline judgment under Pt 2AA of the Sentencing Act.
- 52.2 In our view, making a sentencing guideline would not involve an exercise on “political” grounds in the sense described in the cases. The policy judgments involved in developing such a guideline are of the same sort as those involved in sentencing an offender and developing common law sentencing principles.
53. The Guidelines Council will be independent from the executive government.
- 53.1 The Attorney-General will be able to request that the Guidelines Council develop a guideline, but the Council will have power to refuse the request: see paragraph 13.5 above.
- 53.2 The Guidelines Council will not be subject to direction from the courts, or the executive or the legislature: see paragraph 13.4 above.
- 53.3 The Guidelines Council’s functions will be circumscribed, to avoid the Council being in the position of providing (non-binding) advice to the executive: see paragraphs 21-22 above.
54. However, it is also necessary to consider the relationship between the judicial members of the Guidelines Council and the other members. There is no necessary objection to sitting judicial officers performing functions with non-judicial officers in multi-member bodies; for example, sitting judicial officers sit with non-judicial officers on the Adult Parole Board.⁵⁰ However, there may be constitutional concerns if sitting judicial officers’ views on sentencing could be outvoted on the Guidelines Council. For that reason, it assists validity that there will be a majority of judicial members, and that the Chairperson will be the senior judicial member on the Guidelines Council.

⁵⁰ See *Kotzmann* [2008] VSC 356 at [48] (Judd J): “While a judge of the Supreme Court is the chairperson, he or she does not constitute the Board. Decisions are made collectively.”

55. We have been asked to consider the legal nature of a sentencing guideline; for example, whether it is properly characterised as “legislative” or “executive” or some other category. However, in our view, that characterisation does not, of itself, have any bearing on constitutional validity.

55.1 As we understand it, the concern is that the making of delegated legislation is a function closely connected with the legislature and the executive government, and therefore incompatible with the role of a sitting judicial officer.⁵¹

55.2 Although that proposition is true at a general level, courts do exercise particular types of legislative power: for example, making court rules.⁵² Moreover, courts create rights and apply policy considerations of certain sorts when developing the common law.⁵³ Therefore, the characterisation of a sentencing guideline as “legislative” cannot, in itself, determine whether sitting judges can validly be involved in performing the function of making a sentencing guideline.

56. Consistently with the above analysis, a leading commentator has stated that the fact that a function is quasi-legislative does not necessarily render the function unsuitable for a judge in her or his personal capacity. However, a function which is intended to be responsive to public opinion is at odds with judicial power.⁵⁴

57. In our view, the making of a sentencing guideline is not a function that is responsive to public opinion, in any way that would suggest an incompatibility of function. As noted in paragraph 52 above, the subject-matter of sentencing guidelines is something that the courts deal with routinely.

⁵¹ Cf draft Issues Paper, paragraph 1.33.

⁵² *R v Davison* (1953) 90 CLR 353. Making court rules is “incidental” to the exercise of judicial power and therefore can be done by federal courts. A sentencing guideline is not “incidental” to the same extent, although it is connected and relevant to the judicial function of sentencing offenders.

⁵³ In relation to creating rights, see *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 191 (the Court); *Fisher v Fisher* (1986) 161 CLR 438 at 453 (Mason and Deane JJ), discussing s 79 of the *Family Law Act 1975* (Cth). In relation to policy, see *Thomas v Mowbray* (2007) 233 CLR 307 at [80]-[82], [88]-[91] (Gummow and Crennan JJ); *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at [5] (Gleeson CJ), [14] (Gummow J), [168] (Crennan and Kiefel JJ); see also [40] (Kirby J).

⁵⁴ Wheeler (2015) at 317, discussing a State judge acting as an Electoral District Commissioner.

- 57.1 It is true that the process for making sentencing guidelines is intended to bring in different perspectives from persons who are not judges, with the involvement of non-judicial members on the Guidelines Council, and the process of consultation. However, we consider that those processes are intended to assist in ascertaining prevailing community standards, which is a relevant factor in determining the appropriate sentence.⁵⁵ Judges comprise a majority of members, and are not bound by any of the views expressed to the Guidelines Council in the consultation process.
- 57.2 A guideline is set in advance, and applies to sentencing an offence generally (or deals with a sentencing issue generally). The guideline is not intended to respond to community expectations about a particular offender.
58. The process of making a sentencing guideline is, of course, different from the usual process of making judicial decisions. However, a procedure that may be repugnant if required of a court “will not necessarily be unacceptable if required of an administrative body or tribunal”.⁵⁶ That is particularly the case when a judge performs the function in a personal capacity as part of a multi-member body.⁵⁷ In addition, the process for making sentencing guidelines will be both open and fair (in the sense that interested persons will have an opportunity to comment on a draft guideline). Those features promote validity.
59. For those reasons, we consider that the involvement of sitting judicial officers in making sentencing guidelines (as described in the draft Issues Paper) does not involve the conferral of an incompatible function on those judicial officers.

⁵⁵ See, for example, *Stalio v The Queen* (2012) 46 VR 426 at [77] (the Court): “it fell to the judge to impose a sentence which was, by current community standards, just in all the circumstances, sufficient to reflect considerations of general and specific deterrence and which embodied an appropriate denunciation of the offender’s conduct.” (emphasis added)

⁵⁶ *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241 at [163], [171] (the Court), concerning the functions of federal judges acting in their personal capacity.

⁵⁷ *Kotzmann* [2008] VSC 356 at [48] (Judd J).

Council-approval compared to Court-approval

60. The next issue is the means by which a sentencing guideline is given effect: whether it comes into force without any further step (the Council-approval model); or whether it only comes into force when approved by the Court of Appeal (the Court-approval model).
61. Two possible concerns with the Council-approval model are that such a feature increases the possibility that the Guidelines Council is exercising a legislative function; and increases the possibility that a sentencing guideline would be analysed as an impermissible dictation of the courts by the executive branch. In our view, neither of those concerns needs be a barrier to adopting the Council-approval model.
 - 61.1 In relation to the first concern, we consider that the characterisation of the sentencing guideline as “legislative” or otherwise is not significant, in itself, in determining constitutional validity: see paragraphs 55-57 above.
 - 61.2 In relation to the second concern, we consider that the risk of a sentencing guideline being regarded as an impermissible dictation addressed to the courts can be sufficiently addressed through the content of the guideline. That issue is considered at paragraphs 69-77 below.
62. The constitutional concern with the Court-approval process is whether the Court of Appeal can validly perform the approval function. We agree with the Advisory Council that the proposal for Court-approval raises the following potential constitutional difficulties:
 - 62.1 the approval process might be contrary to the essential characteristics of a court (particularly as the function would be exercised by the Court of Appeal itself, not by judges in a personal capacity);
 - 62.2 the criteria by which the Court of Appeal would determine whether to approve, reject or modify a sentencing guideline may not give the Court sufficient discretion; and
 - 62.3 the Court of Appeal could therefore end up “making”, rather than “applying”, the law.

See paragraph 25.1 above.

63. In theory, the approval function could be made to resemble the ordinary court processes; however, the usual judicial procedures would seem to be unwieldy and unsuited to the approval process. The second and third concerns set out in paragraphs 62.2 and 62.3 above are inter-related – the greater the role given to the Court of Appeal, the more likely that the Court would be seen as performing a legislative function. Although we consider that a sitting judge may participate in certain types of legislative functions in a personal capacity, we consider that the constitutional risks are greater if the Court of Appeal itself were to perform a legislative function.

Summary of conclusions and drafting comment

64. The preceding discussion concerns the first three essential features of the Guidelines Council set out in paragraph 12.1-12.3 above, and all of the proposed features in paragraph 13 above.
65. We consider that it should be possible to maintain those essential features (and proposed features) under either the Council-approval model or the Court-approval model. Those two models raise different constitutional risks: we consider that the principal risk with the Council-approval model is that it could be taken to be an impermissible dictation of the judicial branch (discussed in paragraphs 69-77 below), whereas the Court-approval model has the countervailing constitutional risk that the approval function could be invalid.
66. We have not considered the Legislative-approval model in any detail. However, we would recommend against that model, because of the constitutional risk that a disallowable guideline could be seen as merely advisory, and that the Guidelines Council would be seen as becoming enmeshed with the political process.
67. We make one drafting comment: we recommend against a head of jurisdiction being required to consult with the Attorney-General before recommending to the Governor in Council a judicial member for appointment to the Guidelines Council: cf paragraph 19 above. We are not aware of any other legislation that requires a head of jurisdiction to consult a Minister on a recommendation by the

head of jurisdiction,⁵⁸ and requiring a judge to consult with a Minister could be seen as affecting the independence of the recommendation.

Applying a sentencing guideline

68. The second constitutional issue concerns the application of a sentencing guideline by a court when sentencing an offender. Two key features of the proposal are:

68.1 the Guidelines Council could produce a comprehensive guideline of the sort produced in England and Wales (thus including numerical guidance);

68.2 sentencing guidelines would have legal effect, and would alter existing sentencing practices.

See paragraphs 12.4-12.5 above.

69. The issue here is whether a prescriptive guideline might be seen as impermissibly dictating to a court how to exercise its jurisdiction. Speaking generally, a State law will be invalid if it would require a State court to act as the instrument of the executive.⁵⁹ Thus a function will be invalid if the State court is essentially directed or required to implement a political decision or government policy without following ordinary judicial processes.⁶⁰ Similarly, as a general

⁵⁸ One model is that judicial members are appointed by the Governor in Council on the recommendation of the relevant head of jurisdiction: see, for example, *Corrections Act 1986* (Vic), s 61(2)(a)-(c). An alternative model is that a judicial member is appointed by a Minister after consultation with the head of jurisdiction: see for example *Victorian Civil and Administrative Tribunal Act 1998* (Vic), ss 10(1) and 11(2).

We note that judges are appointed to courts by the political branches of government, not the judicial branch, consistently with the independence of the judiciary: see *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 (*Forge*) at [19] (Gleeson CJ).

⁵⁹ See *Forge* (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ).

⁶⁰ *Emmerson* (2014) 253 CLR 393 at [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). Cf *Kuczborski* (2014) 254 CLR 51, [140] (Crennan, Kiefel, Gageler and Keane JJ): the institutional integrity of a court is taken to be impaired by legislation that enlists the court in the implementation of the legislative or executive policies of the relevant State or Territory or which requires the court to depart, to a significant degree, from the processes that characterise the exercise of judicial power.

proposition, legislation that purports to direct the courts as to the manner and exercise of their jurisdiction will be invalid.⁶¹

70. We address two preliminary points.
71. First, those statements of general principle refer to the courts being independent of the “legislature” and the “executive”. The Guidelines Council will be established to be independent of the elected branches of government – it will not be subject to direction, and (as we understand it) its members will not include Ministers or departmental officers. However, the independence of the Guidelines Council is not a complete answer to a *Kable* argument that a sentencing guideline interferes with judicial discretion – the need for the sentencing court to retain its decisional independence requires that the court be free from influences external to proceedings in the court, “including, but not limited to, the influence of the executive government and its authorities”.⁶²
72. Secondly, we note that Parliament has an undoubted power to alter sentencing principles, and can set mandatory minimum sentences and even a mandatory sentence.⁶³ However, that does not suggest that Parliament can therefore delegate a power to a body such as the Guidelines Council to set minimum and mandatory penalties in any and all circumstances – sentencing guidelines issued by the Council are qualitatively different from laws enacted by the Parliament (even putting aside whether the guidelines are “legislative” in character or not). A court applying a mandatory sentence is simply applying the law, which is an essential part of the judicial function. By contrast, a sentencing guideline issued by a non-judicial body that purported to direct a court would be seen as interfering with the court’s ability to apply the law.

⁶¹. *Gypsy Jokers Motorcycle Club v Commissioner of Police* (2008) 234 CLR 532 at [39] (Gummow, Hayne, Heydon and Kiefel JJ).

⁶² *South Australia v Totani* (2010) 242 CLR 1 at [62] (French CJ), emphasis added.

⁶³ See *Magaming v The Queen* (2013) 252 CLR 381, upholding the mandatory minimum sentences in ss 233C and 236B of the *Migration Act 1958* (Cth). See also *Palling v Corfield* (1970) 123 CLR 52 at 58 (Barwick CJ): although mandatory sentences are undesirable, the court must obey a mandatory penalty “assuming its validity in other respects”. At common law, the two-stage sentencing process (setting an objective sentence, and then adjusting for personal factors) is considered to be wrong in principle: *Wong v The Queen* (2001) 207 CLR 584 at [76] (Gaudron, Gummow and Hayne JJ).

73. *South Australia v Totani*⁶⁴ is an example of a State law constraining the function given to a court.

73.1 Section 10 of the *Serious and Organised Crime (Control) Act 2008* (SA) provided for the Attorney-General to declare that an organisation was a “declared organisation”, if satisfied that its members were involved in serious criminal activities and that it represented a risk to public safety. Section 14 of that Act provided that the Magistrates Court must, on application by the Police Commissioner, make a control order against a person if the Court was satisfied that the defendant is a member of a declared organisation.

73.2 The High Court held (with Heydon J dissenting) that the function given to the Magistrates Court was invalid, principally because the confined role given to the Court was inconsistent with its independence from the executive government.⁶⁵ The magistrate’s order restricted the liberty of the subject, but the magistrate was not given any role of inquiring into any past or threatened contraventions of the law by the person, or whether the restrictions were appropriate to the individual subjected to the order. Rather, that restriction on liberty followed entirely from a determination by the executive that the organisation was to be a “declared organisation”.⁶⁶

74. Those general principles support the preliminary views of the Advisory Council set out in paragraphs 35 and 37.2 above.

74.1 A sentencing guideline should explain as fully as possible the factors that go into setting the starting point and the offence range.

74.2 The court should retain the discretion to reach a sentencing decision that takes account of all relevant factors, and is just and proportionate in all the circumstances of the case.

⁶⁴. (2010) 242 CLR 1 (*Totani*).

⁶⁵. See *Totani* (2010) 242 CLR 1 at [81] (French CJ), [142] (Gummow J), [436] (Crennan and Bell JJ); see also [236] (Hayne J); and see the discussion of *Totani* in *Condon v Pompano Pty Ltd* (2013) 252 CLR 88 at [133] (Hayne, Crennan, Kiefel and Bell JJ).

⁶⁶. See the analysis of *Totani* in *Kuczborski* (2014) 254 CLR 51 at [223]-[224] (Crennan, Kiefel, Gageler and Keane JJ); see also [40] (French CJ): the court in *Totani* was treated as a “rubber stamp”.

- 74.3 The court should retain a real discretion to depart from a guideline in appropriate circumstances.
75. Accordingly, we consider that any of the proposed requirements as to when the sentencing guidelines are to apply would be valid – that is, whether the sentencing court is required to “have regard to”, “follow”, or “sentence consistently” with those guidelines: see paragraph 34 above. The key requirement is the criterion used to determine whether the sentencing court can depart from a guideline. A criterion that the court must apply a guideline unless satisfied that doing so would be “contrary to the interests of justice” has a very good chance of being valid, because that criterion engages the overriding objective of the sentencing function and indeed the exercise of judicial power.⁶⁷
76. If that position is implemented, then there will be very good arguments that a sentencing guideline is valid, and does not impermissibly purport to dictate the outcome of the sentencing court’s jurisdiction. That is so, whether the sentencing guideline is given effect under the Council-approval model or the Court-approval model. We note that the arguments for validity on this point are even stronger with the Court-approval model, because it can be argued that the guidelines only operate with the approval of the Court of Appeal, and so any confining of judicial discretion occurs consistently with the judicial hierarchy.
77. However, there is some tension between the core objectives of the proposal set out in paragraph 12.4-12.5 above and constitutional validity: on the one hand, validity is promoted by increasing the discretion left to the sentencing court; on the other hand, the whole purpose of the guidelines is to have legal effect and to change sentencing practices. It will be necessary to consider carefully the form of draft legislation.

Drafting comments

78. We make two comments on this aspect of the proposal. The first is that any sentencing guideline must be consistent with other legislative requirements for sentencing (mainly those contained in the Sentencing Act), as recognised in the draft Issues Paper: see paragraph 28 above. The complexity of the factors already

⁶⁷ In England and Wales, a statutory requirement to “follow” sentencing guidelines does not require “slavish adherence” to them, and does not sacrifice the obligation to do justice in the individual and specific case: *R v Blackshaw* [2012] 1 WLR 1126 at [13]-[14].

prescribed by legislation may in practice impinge on the simplicity and effectiveness of a guideline.

79. The second comment is that, if the Court of Appeal is to retain the power to issue a guideline judgment,⁶⁸ it may be advisable for the legislation establishing the Guidelines Council to make express provision for the priority as between a sentencing guideline and a guideline judgment, in cases where there is conflict.

Application of sentencing guideline in the exercise of federal jurisdiction

80. The final question we have been asked to consider is whether a sentencing guideline made by the Guidelines Council could be validly applied when a State court is exercising federal jurisdiction.

81. Federal jurisdiction is conferred on State courts by Commonwealth law and is exercised “within the limits of their several jurisdictions [under State law], whether such limits are as to locality, subject-matter, or otherwise”.⁶⁹

81.1 A State court would most commonly be exercising federal jurisdiction if an offender were being tried for a combination of federal and State offences.⁷⁰

- (a) Federal criminal offences are generally prosecuted in the courts of the State or Territory where the offence occurred.⁷¹
- (b) If the federal and State offences form a single “matter”, the court will be exercising federal jurisdiction throughout the entire proceeding, including the prosecution of the State offences.⁷² The federal and State offences will form part of a

⁶⁸ See paragraph 39 above.

⁶⁹ See s 39(2) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**); see also the “like jurisdiction” conferred in federal criminal matters by s 68(2).

⁷⁰ See recently *DPP (Cth) and DPP v Swingler* [2017] VSCA 305, on the approach to sentencing an offender who has been convicted of both federal and State offences.

⁷¹ See s 68 of the *Judiciary Act*; *R v Gee* (2012) 212 CLR 230 at [3], [7] (Gleeson CJ).

⁷² See *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at [7] (Gleeson CJ, Gaudron and Gummow JJ); *Felton v Mulligan* (1971) 124 CLR 367.

single “matter” if they arise out of a common substratum of facts.⁷³

- 81.2 A State court would also be exercising federal jurisdiction if the offender being prosecuted for a State offence was a resident of another State,⁷⁴ or if the prosecution of a State offence raised an issue under the Commonwealth Constitution.⁷⁵
82. If a Victorian court is exercising federal jurisdiction, then Victorian laws that regulate the exercise of jurisdiction do not apply of their own force. Rather, those laws are applied as federal law by s 79 of the Judiciary Act.⁷⁶ A State sentencing law (including a law providing for a sentencing guideline) would be a law regulating the exercise of jurisdiction, and would therefore only apply if picked up by s 79 of the Judiciary Act.
83. Section 79 of the Judiciary Act does not pick up a State law if the Constitution “otherwise provides”; relevantly here, if the State law (applied as federal law) would be contrary to constitutional limitations under Ch III of the Constitution that apply to Commonwealth laws. The relevant Ch III limitation is that a Commonwealth law cannot direct the courts as to the manner and the outcome of the exercise of those courts’ jurisdiction.⁷⁷
84. The Ch III limit for Commonwealth laws is in substance very similar to the aspect of the *Kable* doctrine discussed in paragraphs 69-79 above. For the reasons given in those paragraphs, there are very good arguments that a sentencing guideline would not impermissibly dictate the manner and outcome of the sentencing court’s jurisdiction. Accordingly, a sentencing guideline could be validly applied

⁷³ See, for example, *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 512 (Mason J); *Fencott v Muller* (1983) 152 CLR 570 at 604-605 (Mason, Murphy, Brennan and Deane JJ), both considering civil proceedings.

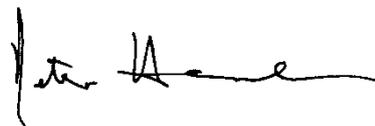
⁷⁴ *Rizeq v Western Australia* (2017) 344 ALR 421 (**Rizeq**). See Constitution, s 75(iv).

⁷⁵ See Constitution, s 76(ii).

⁷⁶ *Solomons v District Court (NSW)* (2002) 211 CLR 119 at [21] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ). *Rizeq* held that s 79 does not operate on State laws creating a criminal offence, but does operate on State laws providing for procedures (in that case, majority verdicts).

⁷⁷ *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 37 (Brennan, Deane and Dawson JJ).

when sentencing an offender for a State offence or offences in the exercise of federal jurisdiction.⁷⁸



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⁷⁸ To be clear, a State sentencing guideline would not apply to sentencing an offender for a Commonwealth offence, both because the guideline would be expressed to apply to State offences, and also because a State sentencing guideline may well be inconsistent with the provisions for sentencing contained in the *Crimes Act 1914* (Cth): see *Wong v The Queen* (2001) 207 CLR 584 at [71]-[72] (Gaudron, Gummow and Hayne JJ).

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