A Sentencing Guidelines Council for Victoria

Victims of Crime Commissioner
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1 Introduction


The Sentencing Advisory Council has invited submissions on the issues raised in the paper, with submissions due by 22 December 2017.

2 Document purpose

In this document, the Victims of Crime Commissioner has addressed the 14 questions posed in the Sentencing Guidelines Council for Victoria Issues Paper. In addition, the Commissioner has further provided his views on the legitimacy and usefulness of a sentencing guidelines council for Victoria, in sections 4 and 5.

3 Questions for consideration

3.1 Question 1: Guiding purposes of the sentencing guideline council

Are the proposed purposes of the sentencing guidelines council appropriate? If not, what other purpose (or purposes) should the sentencing guidelines council have?

The proposed purposes of the sentencing guidelines (to produce guidelines that promote consistency of approach in sentencing and promote public confidence in the criminal justice system) ought to be expanded to include principles of transparency in sentencing.

It is noted that if there is a consistent approach (and application) in sentencing, then this should translate into fairly consistent sentences. Of course there will be lower and higher end cases, but in the main, sentences for common serious offences (such as murder, manslaughter, aggravated burglary, intentionally causing serious injury and rape) should be consistent.

3.2 Question 2: Composition of the sentencing guidelines council

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

The current proposal is based on the England and Wales model, which has a judicial majority. It has been proposed that the Victorian council follow the same structure and have 7 judicial members and 6 legal and community members.

While it is important to have senior key judicial officers on the council, the current proposal is extremely 'legal' heavy. The proposal only permits a combined six legal and community members. Assuming that these six members will include representatives from the DPP, VLA, Victoria Police, Corrections and a Victim’s Representative, there will only be one possible position available for a member of the public to occupy.

Given the current public disquiet regarding sentencing and the perception that insufficient weight is given to the long term effects of crime on victims, it would be advantageous for not only a victim of crime to be a member of the council, but also an ordinary member of the community. In addition, consideration ought be given to having a victim support representative (for example, someone from CASA or a psychologist who specialises in counselling victims of crime) on the council.
3.3 Question 3: Nomination and appointment of members to the sentencing guidelines council

Is the proposed process for the nomination and appointment of members to the sentencing guidelines council and of the Chair, appropriate?

The proposed process for the nomination and appointment of members to the sentencing guidelines council is appropriate, notwithstanding the concerns raised in 3.2 above. The Chair of the sentencing guidelines council should be a senior judicial officer and retired judicial officers should be eligible to hold the position.

While the consistency in approach should also promote transparency, in order to promote public confidence in sentencing, the public ought to be able to have a representative on the council, during the developmental stage of the guideline, rather than just being able to have their say via public submissions.

In addition, every single member of the public should have the opportunity of applying for a position on the council. It should not be limited to only those with specialised experience in criminal justice or victims of crime issues.

3.4 Question 4: Functions of the sentencing guidelines council

Are the proposed functions of the sentencing guidelines council appropriate?

The primary function of the council should be to draft and develop sentencing guidelines. Within this function, the sentencing council should be required to consult with the general community, the courts, government departments and other interested persons. The sentencing guidelines council should also publish and publicise both draft and final sentencing guidelines.

An affiliated function could also be to monitor the operation, effect and application of the sentencing guidelines. While the sentencing advisory council could undertake this function, given that the sentencing guidelines council will, presumably, have the responsibility of continually drafting guidelines for other offences or principals of law and therefore, close monitoring of the use of and application of finalised sentencing guidelines has a role to play in the drafting of future guidelines.

Further functions, such as publishing or preparing impact or resource assessments in relation to guidelines should not be permitted.

3.5 Question 5: Initiation of sentencing guidelines

Is the proposed process for initiating a sentencing guideline appropriate?

The proposed process allows for a sentencing guideline to be initiated either on the sentencing guidelines council’s own motion or at the request of the Attorney-General. Assuming that members of the community are able to contact the sentencing guidelines council to request that a sentencing guideline be drafted for a specific offence, then the proposed process of ‘own motion’ should be adopted.

3.6 Question 6: Consultation of sentencing guidelines

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

Wide consultation in the development of the sentencing guidelines is absolutely critical.

I strongly agree that the sentencing guidelines council should consult with the general community, the courts, government departments and other interested persons and bodies.
It will be crucial for the sentencing guidelines council to widely advertise the draft guideline in order to ascertain public sentiment and opinion. For example, the existence of and where to find the draft guidelines should be advertised on mainstream and social media, as a start.

Should the sentencing guidelines council be required to consult with any additional persons or organisations (including parliament) in relation to any draft for final guideline?

I believe that the sentencing guidelines council should also consult with victims of crime who have been affected by the particular offence for which the guideline is being drafted.

Due to the political nature of law and order issues, it is my view that the sentencing guidelines council should not be required to consult with a committee of parliament. The sentencing guideline council should be (and should be seen to be) fully independent of government.

On too many occasions, a newly elected government has repealed legislation introduced by the previous government, diminishing public confidence in the legislative process.

Should the sentencing guidelines council be required to publish an impact or resource assessment alongside any draft or final guideline?

No. This should have no bearing on the guideline. The resourcing issue should be a completely separate consideration to the legal issue. For example, concerns about the housing of prisoners is a matter for Corrections Victoria and for government to consider, not the courts. The difficulty in housing prisoners should not play any part in the determination of an appropriate sentencing range of specific offences.

3.7 Question 7: Finalisation, approval and commencement of sentencing guidelines

Should sentencing guidelines come into effect:

After approval by the sentencing guidelines council itself; or

After approval by the Court of Appeal?

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

Sentencing guidelines should be approved by the sentencing guidelines council. This is because the council will most likely have a judicial majority and therefore due judicial consideration will have already been given.

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

The sentencing guideline should commence on a date specified by sentencing guidelines council.

3.8 Question 8: Notice requirements for sentencing guidelines

Is the proposal for publishing draft and final guidelines by the sentencing guidelines council sufficient?

As mentioned in 3.6 above, the sentencing guidelines council should ensure that draft guidelines are widely advertised, in order to ensure that as many people as possible are made aware of the existence of the draft guideline. The draft and final guidelines should be posted on the sentencing guidelines council's website, along with the sentencing advisory council's website.

If not, what additional or alternative notice requirements

It may be that advertisements can be made in the main Victorian newspapers, such as the Herald Sun, The Age, The Sunday Herald Sun, The Sunday Age and The Australian. This would ensure that as many members of the public as possible are made aware of the existence of (in the first instance), the draft guideline and the final guideline.
Further to that, the sentencing guidelines council should advertise the existence of the draft guidelines on any social media accounts that they may have.

In addition, information together with a link to the draft guidelines could be posted on other stakeholder websites, such as the Victims Support Agency, Victoria Police, this Office, the Bar Council and the Victorian Law Institute.

3.9 Question 9: Form and content of sentencing guidelines

Is the proposed scope of form and content for a sentencing guideline developed by the sentencing guidelines council in Victoria appropriate?

The proposed scope of form and content of a sentencing guideline as put forward by the sentencing advisory council is primarily based on the England and Wales format. It is agreed that the nine steps contained in the example sentencing guideline contained within the Issues Paper essentially codify the considerations that judicial officers in Victoria are currently required to consider.

However, by outlining the nine steps in a formal sentencing guideline, it becomes an unambiguous and transparent process.

The concern this Office has with a sentencing guideline is that it would make no real difference to sentencing tariffs in Victoria, which, as I understand, is one of the main concerns the general public has in relation to Victoria’s legal system.

This is because the weight that a judicial officer can attribute to either an aggravating or mitigating factor is still completely discretionary.

The main concern with the proposed format, based on the England and Wales example, is that, presumably, the sentencing ranges will apply to the head or total effective sentence and not the non-parole period. In usual cases in England and Wales, an offender is released on parole automatically after serving 50% of the sentence imposed. Using the rape example contained in the paper, and assuming that the same sentencing ranges are considered appropriate in Victoria, it would be ‘within range’ for a category 3B rape to attract a sentence of 4 years imprisonment with a non-parole period of 18 months.

In addition, it is unlikely that the Victorian sentencing guidelines council would significantly depart from the sentencing ranges provided in the England and Wales examples, which is concerning and would not address the problems sought to be removed by the creation of this Council.

Using the rape example contained in the paper, a ‘stranger rape’ which occurs in circumstances where there is one offender, no planning, with a weapon and where the offender shows remorse may only have a starting point of 8 years (being a category 2B rape). Where there is a maximum penalty of 25 years, this starting point seems far too low.

However, it is noted that the ‘standard sentencing scheme’ is due to commence in Victoria on 1 April 2018. Presumably, the sentencing guidelines produced will need to take into account the standard sentencing scheme provisions. The standard sentencing figures ideally will be applicable to essentially what is a category 2B offence.

If not, what other form(s) or content should a sentencing guideline have?

See concern about standard sentencing scheme figures above.
3.10 Question 10: The effect of a sentencing guideline

How binding should a sentencing guideline be?

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

A court should be required to ‘follow’ the sentencing guideline, unless there are exceptional circumstances to depart from its application. It is considered that a higher test than ‘in the interests of justice’ is required.

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

As above, the test for departing from a sentencing guideline should be more onerous than ‘in the interests of justice,’ and it is proposed that an ‘exceptional circumstances’ test be imposed.

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

Yes. Current sentencing practices for offences such as murder, manslaughter, aggravated burglary, armed robbery, rape, incest, sexual penetration of a child under 16, culpable driving, dangerous driving causing death, intentionally causing serious injury, recklessly causing serious injury and failing to stop are all too low. Median sentence for the most serious crimes need to be increased. The recent High Court decision of Dalgliesh\(^1\) essentially chastised the Victorian Court of Appeal for placing too much weight and emphasis on current sentencing practices, when considering an appeal against sentence.

Of note, in the Court of Appeal judgment of Dalgliesh\(^2\), the Court acknowledged that the current sentencing practices for incest in Victoria "are demonstrably inadequate,"\(^3\) and further, "In our view, current sentencing for incest reveals error in principle. The sentencing practice which has developed is not a proportionate response to the objective gravity of the offence, nor does it sufficiently reflect the moral culpability of the offender. Sentences for incest offences of mid-range seriousness must be adjusted upwards. That is a task for sentencing judges and, on appeal, for this Court. The criminal justice system can be — and should be — self-correcting.\(^4\)

Notwithstanding the fact that the Court of Appeal found significant deficiencies in the sentencing for incest, the court felt constrained by current sentencing practices, stating, "To that end, we have concluded that sentencing courts must, by increments, increase the sentences for mid-range incest offences, so that the range of sentences is uplifted and substantially expanded. The maximum penalty provides sentencing courts with ample latitude to fix sentences which properly reflect the degree of criminality involved. But for the constraints of current sentencing which — as we have said — reflect the requirements of consistency, we would have had no hesitation in concluding that the sentence imposed on CD was manifestly inadequate.\(^5\)

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\(^1\) DPP v Dalgliesh (a pseudonym) [2017] HCA 41
\(^2\) DPP v Dalgliesh (a pseudonym) [2016] VSCA 148
\(^3\) DPP v Dalgliesh (a pseudonym) [2016] VSCA 148 at [123]
\(^4\) DPP v Dalgliesh (a pseudonym) [2016] VSCA 148 at [126]
\(^5\) DPP v Dalgliesh (a pseudonym) [2016] VSCA 148 at [131-132]
3.11 Question 11: Application of sentencing guidelines (at first instance)

Should a sentencing guideline apply to relevant offences:
Sentenced after its commencement (including offences committed before its commencement); or
Committed after its commencement only?

Sentencing guidelines should apply to relevant offences once the guideline comes into force, regardless of when those offences are committed.

Whilst it is common practice for an offender to be sentenced according to current sentencing practices at the time of the offence, the simple fact is the penalties imposed for most crimes in Victoria are only a fraction of the available maximum term specified by legislation.

If Victorian sentencing guidelines are modelled on those in effect in England and Wales, then there is sufficient range within each category within which the sentence can fall. Given that some matters can take over two years to finalise, it would arguably be more unjust for an offender who pleads guilty early and is sentenced only months after the offending to be subject to the sentencing guideline, than one who committed their offence prior to the sentencing guideline, but delays the finalisation of the matter.

3.12 Question 12: Application of a new sentencing guideline when resentencing

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

Yes, sentencing guidelines issued after an offender is sentenced should not be applicable to the resentencing of the offender following a successful sentencing appeal.

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

Yes.

3.13 Question 13: Effect of a sentencing guideline on common law precedents

Should a sentencing guideline overrule existing common law precedents? If not, why not?

Yes. There would simply be no useful purpose for sentencing guidelines if they did not override common law precedents.

Should legislation expressly provide that, where inconsistent with a sentencing guideline, the common law should not apply?

Yes. There should be no question that a sentencing guideline overrides common law precedents. The only way to ensure this is certain is to specify as much in legislation.

3.14 Question 14: Retention of guideline judgment powers

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

No. If the Court of Appeal is of the view that a guideline judgment is necessary for a specific offence or a principle of law, then it should be required to refer the task to the Sentencing Guidelines Council for consideration.

The difficulty with allowing the Court of Appeal to retain its power to give a guideline judgment is that it may well result in inconsistencies in application and principle. Further, the Court of
Appeal has had the power to make guideline judgments since 2002 and has, to date, made one. In addition, arguably, the result of the sole guideline judgment (Boulton) achieved the exact opposite of what the abolition of suspended sentences was meant to achieve (i.e. gaol meaning gaol for serious offences).

4 Other Comments/Observations

Sentencing outcomes in the state of Victoria have been a source of much community angst for many years. Studies and resulting publications by the Sentencing Advisory Council seem to suggest that the more the public knows about a case and about sentencing principles, the more accepting they are of the sentences imposed. I submit that the selection of the examples provided for comment guides the public response.

In recent times, there has (in my view, rightly and understandably), been significant public concern about sentences imposed in cases where victims have died. Surveying the following matters might elicit responses at odds with the idea of an accepting “educated public.”

DPP v Peter Chilcott, sentenced on 28 May 2015 (County Court) – convicted of failing to stop, failing to render assistance, as well as attempting to pervert the course of justice. Mr Tom Kelly, a highly respected member of the community, was hit by the car Chilcott was driving and left to die, over a period of 12 hours, in a gutter. Chilcott pleaded guilty and was convicted and sentenced to a mere 4 months imprisonment, together with a CCO with a special condition to perform 200 hours of unpaid community work.

Chilcott, who was in the car with his female partner, hit 82 year old Tom, with no other person around. He did not stop. He did not render assistance. He did not anonymously call 000 to seek medical attention for Tom. He left Tom in the gutter to die. It is difficult to think of a worse example of the offence of failing to stop, which carries a maximum penalty of 10 years imprisonment. Chilcott was ordered to serve less than 4% of the available maximum term.

DPP v Brandon Osborn [2017] VSC 535 – convicted of manslaughter. He held a gun to Ms Karen Belej’s head and pulled the trigger. He argued that he didn’t think the bullet would fire, because he thought the barrel turned the opposite way that it did. So therefore, he said he didn’t intend to kill Ms Belej – it was an accident. He was sentenced to a meagre 9 years imprisonment, but with a non-parole period of just 6 years to serve. It is to the DPP’s credit that this sentence is being appealed to the Court of Appeal, but the inadequate sentence may generate interesting survey responses.

DPP v Dylan Closter [2014] VSC 484 – convicted of manslaughter. Closter killed young, talented David Cassai with a single punch. An unlawful and dangerous act, engaged in by Closter took the life of David. He was sentenced to 9 years and 3 months imprisonment, with a non-parole period of 6 years imposed.

The Queen v Andrew Lee [2017] VSC 678 – convicted of manslaughter. Lee killed teenage Patrick Cronin with a single punch to the head. Again, an unlawful and dangerous act that resulted in the death of a completely innocent young man, who had his whole life ahead of him. This time, despite the increase in awareness of the potential catastrophic consequences of one punch (headed by David Cassai’s mother, Caterina Politi), the offender was sentenced to only 8 years imprisonment, with a non-parole period of 5 years to serve. In what is another slap in the face to Patrick’s family, friends and the whole community, the offender has filed an appeal against sentence, arguing that it is manifestly excessive.

Perhaps the above sentences for manslaughter are so low because of the flow on effect of the current trend to such manifestly short sentences for murder.

If a man who breaks into a 90 year old war veteran’s house, ties him up, beats him over a period of 4 hours and then stabs him 13 times in the back only has to serve a maximum 16 years, but can be out in only 13 years, then how can sentences for any offence less serious than murder every be punished appropriately? Ken Handford died a brutal, horrific and tragic death, which has left his family shattered. How is it that his killer can be back out in the community in only 13 years, particularly when the maximum sentence is life imprisonment?
While it is acknowledged that each offence and each offender is unique, the above cases are prime examples of why there is such public dissatisfaction with sentencing standards in Victoria.

5 Conclusion
The notion of a Sentencing Guidelines Council was born, in Victoria, as a result of widespread public dissatisfaction with (what the public hold to be) the lenient sentencing of criminals by our courts.

The heavy reliance by the courts on "current sentencing practices" seems to have created a disregard, or at least diminished regard, for the "impact of the offence on any victim of the offence." It seems that a combination of "current sentencing practices" and the Sentencing Guideline "to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated" have achieved a primacy above all other Sentencing Guidelines, including the protection of the community, the punishment of the offender, individual and general deterrence and, certainly, the manifest denunciation of the court.

The success or otherwise of rehabilitation, in Victoria, is a critical issue in sentencing considerations. At present, the rates of recidivism in Victoria are almost 44%. In Singapore, based on the same criterion, recidivism rates are 26%. I submit that our reliance on the likelihood for rehabilitation is not based on the available factual evidence; it is, in reality, educated guesswork.

It is, I submit, therefore reasonable to presume that the work of the proposed Council is to provide impetus for our courts – our judicial officers – to increase the minimum terms of imprisonment dispensed to (particularly violent) criminals.

In principle, such a Council may have merit. For example, there is the well-known and understood precedent in England and Wales, where some headway has been made, yet is not without its flaws and compatibility issues.

However, in Victoria we already operate under a system where senior judicial officers provide sentencing guidance to all other subordinate judicial officers. That 'system' is the Victorian Court of Appeal.

The decision of the High Court of Australia (in Dalgliesh) regarding the lenient sentencing for incest crimes in Victoria, over the past thirty (30) years will not, of its own, rectify the general trend in Victoria to sentence as leniently as possible – as certainly appears to be the case.

The composition of the proposed Council is seven (7) judicial officers with additional legal representatives (DPP, VLA) one from Victoria Police, one from Corrections Victoria, one victim's representative and one public representative, making a total of thirteen (13) members.

It is not unreasonable to anticipate that the legal representatives will be generally supportive of the views of the judicial officers, yet even if they are not, the judicial view must always prevail by virtue of it being a solid majority. Inevitably, this means we must remain with a 'system' of judicial officers providing sentencing guidance to other judicial officers.

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6 Sentencing Act 1991 (Vic) s5(2)(b)
7 Sentencing Act 1991 (Vic) s5(2)(daa)
8 Sentencing Act 1991 (Vic) s5(1)(c)
9 Department of Justice and Regulation (Vic) Annual Report 2016-17, pg 37
The irony of this situation is that our current system, where sentencing 'boundaries' are determined by judicial officers, is seen as the problem to be resolved, yet we propose arriving at the resolution of that problem through the simple expedient of asking more judicial officers to rectify the ongoing errors of judicial officers. As pertinent to the point is that the Council judicial membership is likely to be of significantly junior standing to those whose erroneous directions are sought to be modified by the creation of the proposed Council.

Finally, given the Sentencing Advisory Council's public statement supporting the idea that "sentencing guidance is best provided by the courts"\(^\text{[1]}\) there may be need to further explore who should provide secretarial and research support for the proposed Council.

It seems, to me, that there are many unresolved questions surrounding this proposal and it is my genuine belief that we are heading towards yet another bureaucratic layer of cogitation and delay, additional cost to the tax payers, earnest discussion and very little, if any at all, real change.

Greg Davies APM
Victims of Crime Commissioner
