A Sentencing Guidelines Council for Victoria

Submission to the Sentencing Advisory Council

15 January 2018
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About Victoria Legal Aid

Victoria Legal Aid (VLA) is an independent statutory authority established under the *Legal Aid Act 1978* (Vic) to provide the community with legal assistance and improved access to justice. We promote a fair and just society where rights and responsibilities are upheld, providing legal representation, advice and assistance to socially and economically disadvantaged Victorians in areas including criminal law, child protection, family breakdown, family violence, crime compensation, mental health, guardianship and administration, immigration, social security, discrimination, tenancy, fines and debt. Many of VLA’s clients face multiple and intersecting legal problems across the criminal, civil and family jurisdictions.

As the largest criminal defence practice in the State, VLA provides duty lawyer services, advice, and representation to eligible persons charged with a criminal offence through our in-house criminal legal practice. VLA also funds eligible criminal law services provided by private practitioners, delivers community legal education and provides a free telephone advice service. In 2016-17, VLA assisted 51,502 clients with a criminal law problem, many of whom are socially and economically isolated, have a disability or mental illness and/or are from culturally and linguistically diverse backgrounds.

In addition to helping individuals resolve their legal problems, VLA works to address the barriers that prevent people from accessing the justice system. By participating in law reform, we influence the efficient running of the justice system and ensure that the actions of government agencies are held to account. We take on important cases and campaigns that aim to improve the law and make it fairer for all Victorians.

VLA is committed to encouraging a fair and transparent justice system and to using evidence and its experience to improve legal service delivery.²

Given our significant presence in both summary and indictable jurisdictions, VLA is in a unique position to comment on the questions raised by the issues paper prepared by the Sentencing Advisory Council. VLA has also been directly involved in two cases of particular relevance to this reference – *DPP v Walters (a pseudonym)*³ and *Boulton v The Queen*.⁴

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Executive Summary

VLA welcomes the opportunity to contribute to the Sentencing Advisory Council’s (SAC) consultation on A Sentencing Guidelines Council for Victoria.

We welcome the introduction of a Sentencing Guidelines Council in Victoria and the positive outcomes that it can achieve, including greater public confidence in the criminal justice system through better understanding of sentencing processes, and more consistent approaches to sentencing.

A Sentencing Guidelines Council is a way to increase public confidence in the sentencing process and the criminal justice system as a whole. Public education, greater transparency, and measures to promote community “buy-in”—all of which can be achieved through a Sentencing Guidelines Council—are critical to greater public acceptance and understanding of sentencing practice.

Conversely, research indicates that public dissatisfaction with sentencing practice is tied to a lack of community understanding about sentencing, rather than with sentencing practice itself. We believe that a properly developed and constituted Sentencing Guidelines Council can fill this void in community understanding on an ongoing, long-term basis.

VLA supports the removal of unnecessary complexity in sentencing and the introduction of a simplified and better integrated sentencing framework. Our practice experience is that judicial discretion in sentencing is central to the administration of justice and to just outcomes for all involved in the criminal justice system. We support a model for a Sentencing Guidelines Council that assists with the difficult task of sentencing by providing guidance and structure, without interfering with judicial discretion.

VLA’s submission prioritises the need for an open and fair process during the development of sentencing guidelines. We support judicial majority membership on the Council but note that community representation is integral to ensure that a range of experiences are taken into account and to ensure public confidence in the body. We support representation on the Council that takes into account the experiences of vulnerable and over-represented groups in our criminal justice system. We draw particular attention to the need to reflect the unique experience of Aboriginal and Torres Strait Islander people (ATSI) and women in the criminal justice system.

VLA’s institutional role means that it has both statutory and legal practice expertise relating to the administration of the criminal justice system and vulnerable and over-represented groups in our criminal justice system. VLA would be able to provide quantitative and qualitative evidence to support the work of the proposed Sentencing Guidelines Council, and we recommend that VLA be represented on the Council alongside the DPP or OPP. This reflects the current role and standing of both institutions in the Sentencing Act guideline judgment provisions.

We believe that, when consulting other stakeholders and members of the community on the development of guidelines, consideration should be given to inequality of resources and the ability of all parties to be involved in the consultation process. If stakeholders do not have adequate resources to provide genuine input in the consultation process, then the end result may be skewed to those that do have such resources.

If we are serious about improving public confidence, non-legislative measures such as community education, research and evaluation should also be prioritised and properly resourced.

We hope the information we provide is of assistance, look forward to future close collaboration, and would be pleased to provide any further information as required.
Our recommendations

Guiding purposes of the sentencing guidelines council

The proposed purposes of the Sentencing Guidelines Council are to produce sentencing guidelines that:

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

VLA supports these purposes. Promoting a consistent and easily understood approach to sentencing has significant benefits for those involved in the criminal justice system and for the public at large. These benefits include increased transparency and the dispelling of myths around the decision-making process in sentencing.

We know that with increased education and understanding of the system comes increased confidence by the public, both in the sentencing process and the criminal justice system as a whole.

Research in both Victoria and England demonstrates that if members of the community are provided with the same information as the sentencing judge (for example programs such as ‘Virtual You Be The Judge’), most users imposed sentences that were roughly consistent with that imposed by the judicial official.\(^5\) The studies suggest there is a gap between the views of informed and uninformed members of the community, with “informed members of the public overwhelmingly appro[ving] of the sentences given by our judges”.\(^6\) This and other evidence suggests that harsher sentencing measures will not necessarily lead to greater public confidence in the system. It is therefore very important the Sentencing Guidelines Council not be established on the basis that public confidence in the criminal justice system will be increased by increasing ‘starting point’ sentences.

VLA notes that it has an educative role to play in these reforms, alongside its role in challenging uninformed public perceptions as part of our legislative mandate to perform its functions in a way that “dispels fear and distrust”.\(^7\) We look forward to collaborative work in support of these reforms as work progresses. Indeed, to create more meaningful engagement with and understanding of the criminal justice system amongst the public, it has been noted that more needs to be done to “deal the public in” in the debate about sentencing and punishment”.\(^8\) VLA believes that the Sentencing Guidelines Council is an important step in this direction.

Finally, VLA notes that the separation of powers is a vital ingredient of our justice system. We agree with the suggestion in the issues paper (at 2.14) that one of the purposes of the establishing legislation for the Sentencing Guidelines Council should be to preserve judicial independence and judicial discretion.

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7 ABC Radio National’s Law Report, broadcast on 26 April 2016, Her Excellency Professor the Honourable Kate Warner AM.
8 Sentencing Advisory Council (Tasmania), Sex Offence Sentencing: Research Paper, April 2013, 38 (quoting David Indermaur).
Composition of the sentencing guidelines council

The issues paper proposes that the Sentencing Guidelines Council be composed of:

- seven judicial members (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), and

- six legal and community members who, in the opinion of the Attorney-General, have expertise, knowledge or skills relevant to sentencing and criminal justice and the work of the sentencing guidelines council. One of the two justices of the Supreme Court appointed as a member of the sentencing guidelines council would also be appointed to act as Chair.

VLA supports the proposed composition of the Sentencing Guidelines Council. We highlight the importance of judicial majority membership and representation from all court levels. We also agree that there should be flexibility in the appointment of judicial officers, for the reasons identified in paragraph 3.19 of the issues paper.

VLA considers that the Sentencing Guidelines Council should include a judicial representative from the County Koori Court and/or the Koori Court, and that consideration be given to including an Aboriginal Elder or Respected Person as a member of the Council. The rate of imprisonment for Aboriginal and Torres Strait Islander (ATSI) people in Victoria is 12.6 times higher than for non-ATSI people. While ATSI Australians make up 0.7% of Victoria’s total population, they represent 7.7% of the prison population.9 This constitutes an increase of 29.9% from July 2015.10

Guidelines produced by the Sentencing Guidelines Council will only promote public confidence in the criminal justice system if there is balanced representation amongst the non-judicial members. VLA recommends that:

- The unique experience of women in the criminal justice system be recognised through representation on the Sentencing Guidelines Council. From 2006 to 2016 Victoria’s female prison population increased by 75%, compared with the male prison population which increased by 66%.11 VLA provides legal assistance to women via our criminal law program and our Prisoner Legal Help telephone service. Our lawyers see first-hand the complex and interconnected problems that women who come into contact with the criminal justice system experience, including mental illness, substance abuse, homelessness, poverty, low levels of education and poor employment history. An overwhelming majority of women in custody (estimated at 87%) have been victims of violence and abuse.12

- The Council should also include professional legal expertise relating to vulnerable and over represented groups in our criminal justice system (for example, young people, low-income earners, the homeless, people affected by family violence or other trauma, people with an acquired brain injury or cognitive impairment, and those with alcohol, drug and/or mental health problems). Given the unique position and knowledge of VLA in advocating for some of the most

vulnerable and marginalized in our community, we therefore recommend that a seat on the Sentencing Guidelines Council be reserved for a VLA representative.

VLA supports the inclusion of a representative of the Children’s Court on the Council. However, VLA would be concerned if a Sentencing Guidelines Council with only one Children’s Court representative were responsible for creating guidelines for use in the Children’s Court. Children and young people in the criminal justice system have very specific needs, and the Children’s Court is a highly specialised jurisdiction. VLA would therefore support further consultation on:

- the need for sentencing guidelines in the Children’s Court, and
- if there is such a need, the inclusion on the Sentencing Guidelines Council of additional judicial and non-judicial members with Children’s Court knowledge and expertise, for the purpose of developing guidelines for sentencing children and young people.

Nomination and appointment of members to the sentencing guidelines council

VLA highlights the need for an open, transparent and fair process for nomination and appointment, and has no specific comment in relation to the proposed process.

Functions of the sentencing guidelines council

VLA supports the proposed functions of the Sentencing Guidelines Council, namely to:

- develop sentencing guidelines for use by the judiciary when sentencing
- consult with the general community, the courts, government departments and other interested persons or bodies when developing and issuing sentencing guidelines, and
- perform related functions, such as publishing and publicising sentencing guidelines.

The Sentencing Guidelines Council is uniquely placed to develop guidelines to assist the judiciary with the difficult task of sentencing. Sentencing guidelines that are prepared by a body separate from the legislature and the judiciary can provide a comprehensive, methodical and independent framework for sentencing courts.13 This open and transparent process of consultation and public submissions will inform the Council in a way that the traditional court system is unable to access. The availability of publicly accessible guidelines to an accused, victims, and the broader community will clarify and build public confidence in the sentencing process.

Initiation of sentencing guidelines

VLA supports the approach proposed in the issues paper—namely, that a Victorian sentencing guideline could be initiated on the Sentencing Guidelines Council’s own motion (by reference to its legislatively prescribed purposes), or at the request of the Attorney-General.

It is important that the Sentencing Guidelines Council be able to initiate sentencing guidelines as it sees fit, based on views informed by its expert members and the community.

VLA agrees that the Sentencing Guidelines Council should not be required to comply with a request by the Attorney-General to initiate a sentencing guideline, in order to maintain the independence of the Council and to avoid any suggestion that it is acting at the behest of the government.

Consultation on sentencing guidelines

VLA supports the approach proposed in the issues paper, namely that the Sentencing Guidelines Council should be required to publish draft guidelines and to consult with the general community, the courts, government departments and other interested persons or bodies. This should include:

• the Attorney-General and other relevant ministers
• the Court of Appeal
• the Supreme Court
• the County Court, including the County Koori Court
• the Magistrates’ Court, including the Koori Court
• the Director of Public Prosecutions
• Victoria Legal Aid
• the Victorian Aboriginal Legal Service
• the Victims of Crime Commissioner
• the Victorian Bar Association
• the Law Institute of Victoria
• Victoria Police
• other relevant advocacy and policy groups.

Community consultation is a vital part of the establishment of a Sentencing Guidelines Council, and must be rigorous and broad reaching. This an opportunity for community guidance to be provided for the way the criminal justice system deals with complex matters where a range of issues are present (such as family violence, sexual abuse, and backgrounds of trauma amongst both victims and accused persons). There is significant benefit to community-driven consultation about how the law should grapple with these complexities.

VLA does not believe that the Sentencing Guidelines Council should be required to consult with a parliamentary committee, as such a requirement risks undermining the Council’s independence and unduly politicising the process.

In England and Wales the community consultation phase is lengthy and allows sufficient time for in-depth consultation through public submissions, forums, roundtables and community surveys. It also allows time for testing of levels and ranges. VLA supports a similarly rigorous consultation process which will facilitate the development of guidelines following a genuine, open and transparent consultation process.

VLA agrees with the SAC’s preliminary view that the Sentencing Guidelines Council should not be permitted to bypass consultation requirements in order to publish an urgent sentencing guideline. Consultation is vital for the fair and transparent development of guidelines. Failure to engage in genuine consultation would undermine the Council’s guiding purpose to promote public confidence in the criminal justice system.

VLA also supports the requirement for the Sentencing Guidelines Council to publish an impact or resource assessment alongside any draft or final guideline. Such assessments would contribute to the public’s understanding of the impact of sentencing on the broader criminal justice system.
Finalisation, approval and commencement of sentencing guidelines

Finalisation and approval
VLA supports a streamlined process for finalisation of guidelines. Given the judicial majority membership on the Sentencing Guidelines Council (including Court of Appeal membership), it is appropriate that the Sentencing Guidelines Council should be able to approve and finalise guidelines without the need for further approval by the Court of Appeal.

The practical implications of guidelines will be discussed and determined through the guidelines development process within the Sentencing Guidelines Council. Once guidelines are approved by the Sentencing Guidelines Council, the Court of Appeal will be able to provide guidance as necessary if there are areas that require further interpretation. To add an additional requirement that guidelines need to be approved by the Court of Appeal would undermine the efficacy of the Sentencing Guidelines Council, and, consistent with advice provided to the SAC, may carry greater constitutional risks.14

Commencement
VLA considers that a sentencing guideline should commence on a date set by the Sentencing Guidelines Council. A period of time should be allowed between the date of publication of a sentencing guideline and its commencement. This is necessary to allow relevant stakeholders and the wider community to become familiar with the new sentencing guideline before it comes into operation. It will also be important for members of the judiciary, the prosecution and the legal profession to have sufficient time to understand the impact of the sentencing guideline. Individuals who may be subject to sentencing decisions pursuant to a new guideline will need the opportunity to be advised of the possible impact of the guideline on the outcome of their case.

Notice requirements for sentencing guidelines
VLA agrees that all draft and final sentencing guidelines should be readily accessible and free of charge to the community and the profession. VLA supports the proposed notice requirements set out in the issues paper.

In addition, as the largest criminal law practice in Victoria, and a centre for quality and training, we recommend that the Sentencing Guidelines Council be required to formally notify VLA of a new sentencing guideline, in order to ensure that this information can be disseminated as widely as possible.

Form and content of sentencing guidelines
VLA supports the proposed scope of form and content for a sentencing guideline set out in the issues paper. All sentencing guidelines would need to be consistent with the Sentencing Act 1991 and should preserve judicial discretion.

The effect of a sentencing guideline
VLA recommends that courts should be required to ‘follow’ the proposed Victorian guidelines, subject to a discretion to depart from those guidelines in the interests of justice. We make this

14 Peter Hanks QC and Graeme Hill, Constitutional validity of proposed sentencing guidelines council, memorandum of advice, (November 2017), 25.
recommendation as we believe that binding guidelines will ultimately lead to a greater long-term cultural shift, as the binding nature of the guidelines will oblige courts and the profession to engage with (rather than disregard) the guidelines. While we acknowledge that there may be some initial resistance to this position, we believe that binding guidelines subject to judicial discretion is the best way to overcome this resistance—the experience in England and Wales appears to suggest that a greater cultural shift is achieved with binding guidelines. We also believe that this position will lead to greater consistency and public confidence in the sentencing process.

VLA agrees with the reasons set out in paragraph 5.24 that sentencing guidelines in Victoria should not be overly prescriptive; rather, they should structure the exercise of judicial discretion, promoting consistency of approach while allowing individualised sentences to be imposed. For this reason, VLA strongly submits that the test for judicial discretion not be more restrictive than the ‘interests of justice’ test. If a court failed to follow a guideline, this would be a matter for appeal if the sentence imposed was manifestly inadequate or manifestly excessive (in the Superior Courts). There should not be any change to appeals de novo from the Magistrates’ Court.

**Application of sentencing guidelines (at first instance)**

At present, Victorian courts are required to take into account current sentencing practices, but may also take into account sentencing practices that were current at the time of the offending in order to promote equal justice. VLA considers that this practice should continue so as to minimise disruption to the current process.

Accordingly, VLA considers that sentencing guidelines should apply to relevant offences which are sentenced after commencement of the guideline, subject to the sentencing court’s discretion to depart from the guideline in the interests of justice. This may include, for example, where an accused enters a plea prior to the commencement of a sentencing guideline but before the date of sentencing a guideline comes into effect that may impacts on the sentence outcome for the accused.

**Application of a new sentencing guideline when resentencing**

VLA agrees with the proposal that sentencing guidelines issued before a successful sentence appeal (but after the original sentence) would not apply during resentencing, and that any sentencing guideline that is issued after an offender is sentenced would not be applicable to the resentencing of that offender following a successful appeal. This would maintain the current sentencing principles that operate in Victoria.

We also agree that, in order to promote finality, legislation should expressly prohibit an appeal based on a new guideline which has come into operation since the date of sentence.

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17 *Bradley v The Queen* [2017] VSCA 69 (30 March 2017) [111 – 122] cf. *DPP v Dalgliesh (a pseudonym)* (2017) HCA 41, regarding retrospectivity and the role of current sentencing practices, we await application vis a vis standard sentence scheme and sentencing guidelines.

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Effect of a sentencing guideline on common law precedents

VLA agrees with the proposal that sentencing guidelines are produced and approved by the Sentencing Guidelines Council. Once approved, sentencing guidelines should in the vast majority of cases overrule existing common law precedents, recognising that where it is not in the interests of justice to apply a guideline, there may be a need to refer to the common law.

Retention of guideline judgment powers

VLA considers that the Court of Appeal should retain its power to issue guideline judgments after the establishment of the Victorian Sentencing Guidelines Council.18 This power is very much an extension of the Court’s traditional role and powers. It gives the Court the ability to provide guidance to lower courts on particular sentencing issues that arise.

Although, to date, the Court of Appeal has only issued one guideline judgment, the establishment of a Sentencing Guidelines Council and recent reforms to the existing guideline judgment provisions may promote greater use of the Court of Appeal’s power to issue a guideline judgment.

It is also important that the Court retain this power, as the Sentencing Guidelines Council may not have the resources or capacity to respond to all of the issues that arise. There may be instances where guidance is best delivered from the Court of Appeal. For example, an unforeseen issue may arise with a guideline or legislative change that the Court of Appeal can nimbly and quickly respond to through the creation of a new guideline judgment. In contrast, the Sentencing Guidelines Council will need to go through a lengthy process of consultation and development in order to issue a sentencing guideline.

18 Sentencing Act 1991 (Vic) pt 2AA.